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It is important to highlight especially the multinational dimension of the yearbook. 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

A Competition for Talents – 15 Years of EC – and EU-Directives Fostering the Immigration of Highly Qualified and Skilled Third-Country Nationals

Michael Griesbeck*

Summary: Beginning with the Tampere summit and the Lisbon Council conclusions and the Directives starting with the Students Directive and the Researchers Directive the European Union took significant steps to create a modern legal framework for the management of legal migration that makes the European Union attractive for highly qualified and skilled third country nationals. Also the introduction of the EU-Blue-Card was an important step on this way. The initiatives show that the Union is well aware of the demographic development and the global competition for highly qualified and skilled migrants.

However changing laws and regulations is not enough. It also requires accompanying measures and the perception and visibility of the new regulations. Also a fast and simple visa procedure is required as well as a mechanism for recognition of qualification. Language training abroad and after arrival and integration politics are also indispensable for success.

Keywords: Immigration of Third-Country nationals – Researchers Directive – EU-Blue Card – accompanying measures – language training – integration policy

1. Introduction

Since the year 2000 the EU undertook a lot of initiatives to join the international competition for highly qualified and skilled migrants. The management of legal migration more and more played a significant role not least because of an aging society.[1] In the beginning the conclusions and programmes of Tampere, Lisbon, Hague

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1 KOTZUR, M. TFEU Article 79, p. 434, MN 5. In: Geiger, R., Khan, D. E., Kotzur, M. *European Union Treaties.* München: C. H. Beck / Hart, 2015.

and Stockholm described the aims, later the importance of programmes declined and more and more legislative instruments, especially Directives, gained weight.[2]

2. The EU competition for highly qualified and skilled migrants and the competences of the Member States

Already the Tampere summit in October 1999, which aimed at the development of an area of freedom, security and justice,[3] underlined a more efficient management of migration flows, information campaigns and the actual possibilities for legal migration. The European council acknowledged "the need for approximation of national legislations on the conditions for admission and residence of third-country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin."[4] But at this time the discussion was more about asylum than about attracting highly qualified.

The precedency conclusions of the Lisbon European council on 23 and 24 March 2000[5] start with the announcement, that "the European Union is confronted with a quantum shift resulting from globalization and the challenges of a new knowledge driven economy." In nr. 5 it states: "The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."[6]

In 2001 the Commission presented a proposal for a "Directive on the conditions of entry and residence of third-country-residents for the purpose of paid employment and self-employed economic activity".[7] In 2005 the proposal was withdrawn, because of the resistance of the Member States[8].

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2 HAILBRONNER, K., THYM, D. *EU Immigration and Asylum Law. A Commentary*, *Second Edition*. C. H. Beck / Hart / Nomos, 2016, Part A, MN 8, 9, p. 5.

3 Presidency Conclusions of Tampere European Council on 15 and 16 October 1999. Available at: europarl.europa.eu/summits/ lis 11 en .html

4 Presidency Conclusions of Tampere European Council on 15 and 16 October 1999, nr. 20.

5 Presidency Conclusions of Lisbon European Council on 22 and 23 March 2000. Available at: europarl.europa.eu/summits/ lis 11 en .html

6 For the significance of the Lisbon council see also PORTO, M. The Path Towards European Integration: the Challenge of Globalisation. *European Studies Volume 1,* 2014, p. 41–55, 48.

7 Com 2001/ 386 final; nr. 2 of the proposal showsthat the main aim of the proposal was to harmonize "the highly complex national administrative rules and procedures".

8 Com 2005/0462 final; HAILBRONNER, K., THYM, D. (sub 2) Part C VI Art 1, MN 9, p. 623, for the proposal see also HERZOG-SCHMIDT, J. *Zuwanderung Hochqualifizierter*. Nomos, Baden-Baden: 2013, p. 30 ff.

In the Hague Program of 2005[9] it was stated, that "legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy." But at the same time it was said, that the European Council emphasizes that the determination of volumes of admission of labour migrants is a competence of the Member States."[10]

With the Treaty of Lisbon[11]and the Treaty of the Functioning of the European Union (TFEU) a new basis for migration law was established. Article 79 TFEU established a competence for the EU to adopt legal rules on economic migration. But at the same time it restricted this competence in Article 79 para. 5 TFEU in the way, that "the Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed".[12]

Also the Stockholm Program of 2009[13] expressed, that "the Union should encourage the creation of flexible admission systems that are responsive to the priorities, needs, numbers and volumes determined by each Member State and enable migrants to take full advantage of their skills and competence".[14]

On 15 July 2014 Jean-Claude Juncker, at that time still candidate for president of the European Council and later president, announced in his political guidelines, that he intends to promote a new European policy on legal migration. Such a policy could help "to address shortages of specific skills and attract talent to better cope with the demographic challenges of the European Union". He

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9 The Hague Programme Strengthening Freedom, Security and Justice in the European Union, Official Journal 3 March 2005 C 53/1; PEERS, S., GUILD, E. et al. *EU Immigration and Asylum Law.* Volume 2, second edition, Nijhoff, Leiden, Bosten, 2012, p. 4.

10 The Hague Programme Strengthening Freedom, Security and Justice in the European Union, Official Journal 3 March 2005 C 53/1, p. 4 (legal migration and the fight against illegal employment).

11 Official Journal C 306/1, 17 December 2007.

12 HAILBRONNER, K., THYM, D. (sub 2) Part C I, MN 12 and 26, p. 278, 283; see also KOTZUR, M. TFEU Article 79, p. 436, MN 12. In: Geiger, R., Khan, D. E., Kotzur, M. (sub 1), who addresses Article 79 p. 5 as an "ordre public for the labour market. The core area of legal immigration is left within the competence of the Member States. … As the Member States, however, regard the permanent migration as central element of their sovereignty, a more comprehensive regime was not possible"; for the genesis of Article 79 p. 5 and the significance of labour migration in the area of freedom, securuty and justice see: THYM, D. *Migrationsverwaltungsrecht*, Mohr, Tübingen, 2010, p. 95 ff.

13 The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens, adopted by the European Council on 11 December 2009, Official Journal 2010 C 115/1.

14 For the importance of the programmes see HAILBRONNER, K., THYM, D. (sub 2), Part A, MN 8 and 9, p. 5.

emphasized, that he wanted Europe to become at least as attractive as the favorite migration destinations such as Australia, Canada and the USA.[15]

3. The sectoral Directives

3.1. The Researchers Directive

The researchers Directive from 12 December 2005[16] refers to the goals of Lisbon in recital 2 of the preamble. In recital 3 it states, that the globalization of the economy calls for greater mobility of researchers, something which was recognized by the sixth framework program of the European Community, when it opened up its programs further to researchers from outside the European Union. One of the measures to achieve the goal of 700.000 researchers, who are needed to meet the target of 3% of the GDP invested in research is – besides making scientific careers more attractive and promoting womens involvement in scientific research – to open up the community to third-country nationals, who might be admitted for the purposes of research. (recital 4).

The Researchers Directive determines the conditions of admission of third-country nationals for the purpose of research and establishes a fast track procedure: To be eligible for a residence permit the researcher only has to conclude an effective admission agreement for the purpose of carrying out a research project with a research institution accredited by the authority in charge of.[17] It also aimed at a uniform status in all aliens laws for the purpose of carrying out scientific research.[18] The researchers Directive wasn`t a great success, which was underlined by low numbers of researchers admitted under the Directive. The evaluation report of the commission identified as reasons unclear definitions and the fact that the privileged status for researchers granted by the Directive

[15] JUNCKER, J. C. A new start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission, policy area 8. Towards a new Policy on Migration.

[16] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research, Official Journal L 283, 3. 11. 2005, p. 15–22.

[17] PEERS, S., GUILD, E. et al. (sub 9), p. 129; KLUTH, W. Der Aufenthalt von Forschern nach § 20 AufenthG, *Zeitschrift für Ausländerrecht und Ausländerrecht – ZAR* 2008, p. 234–237; GRIESBECK, M. Erfahrungen mit der Forscherzuwanderung nach § 20 AufenthG und ihre Bedeutung für eine erfolgreiche Migrationssteuerung. In: Jochum, G., Fritzemeyer, W., Kau, M. (Hrsg.). *Grenzüberschreitendes Recht – Crossing Frontiers, Festschrift für Kay Hailbronner*, 2013, p. 61–74.

[18] HAILBRONNER, K., THYM, D. (sub 2) Part C VI, Art. 1, MN 5, p. 622.

was and – despite many efforts to publicize it – remained little known.[19] Another reason given for the low demand was that even the employers, i.e. the research institutions, considered the two-stage procedure defined in the Directive to be too complex and bureaucratic.

3.2. The Students Directive

Also the students Directive of 2004[20] referred to the opening of the Community for third- country nationals. In recital 6 and 7 of the Directive it reads: "(6) One of the objectives of Community action in the field of education is to promote Europa as a whole as a world centre of excellence for studies and vocational training. Promoting the mobility of of third-country nationals to the Community for the purpose of studies is a key factor in that strategy. The approximation of Member States' national legislation on conditions of entry and residence is part of it. (7) Migration for the purpose set out in that Directive, which is by definition temporary and does not depend on the labour market situation in the host country, constitutes a form of mutual enrichment for the migrants concerned, their country of origin and the host Member State and helps to promote better familiarity among cultures." In this time the goal still was to make the students fit for a profession in their home country, and not to keep some of them in the EU and make them stay. Economic activities were permitted to cover part of the costs of their studies (recital 18), but the situation of the labour market had to be taken into account and each Member State had to determine himself the amount of hours per week (Article 17).[21] But the conclusion of the evaluation report[22] 7 years later made already clear, that "the issue of access to work for third-country national students at the end of the studies could be specifically addressed, as this seems to be a decisive factor in the students choice for a destination country and an issue of common interest in the context of a declining working-age population and a global need for highly-qualified workers."[23] Indeed students and graduates are an attractive potential of migrants for the labour market. They are young and highly qualified, have already language skills and are acquainted with the

[19] Commissions report (COM (2011) 901 final).

[20] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service, Official Journal L 375, 23/12/2004, p. 12–18; PEERS, S., GUILD, E. et al. (sub 9), p. 195.

[21] For the differences between the Students Directive and the researchers Directive regarding the temporary stay see HAILBRONNER, K., THYM, D. (sub 2) Part C VI, Art. 1 MN 4, p. 621.

[22] COM/2011/0587 final from September 2011.

[23] PEERS, S., GUILD, E. et al. (sub 9), p. 208.

country they will work in, because they already studied there. Moreover they don't needrecognition of a foreign qualification.[24]

3.3. The REST-Directive

More than a decade later this approach has changed. It was no longer "study and go" but "study and stay"[25]. The new REST (Researchers and Students)-Directive of May 2016[26], which should respond to the need identified in the evaluation reports on the researchers Directive and the students Directive, to remedy the identified weaknesses, explicitelly says in recital (3): "This Directive should contribute to the Stockholm Programme's aim of approximating national legislation on the conditions for entry and residence of third-country nationals. Immigration from outside the Union is one source of highly skilled people, and students and researchers are in particular increasingly sought after. They play an important role in forming the union's key asset, human capital and in ensuring smart, sustainable and inclusive growth, and therefor contribute to the achievement of the objectives of the Europe 2020 strategy." In recital 8 it is explained, that the Directive "should promote the Union as an attractive location for research and innovation and advance it in the global competition for talent and, in doing so, lead to an increase in the Union's overall competiveness and growth rates while creating jobs that make greater contribution to GDP growth."[27]

The REST Directive improves the intra-EU mobility of international students. It also gives researchers three options for a legal stay in a Member State. With the REST Directive a new residence title for mobile researchers, who already hold a residence permit for researchers of another Member State was

[24] Sachverständigenrat für Migration/ The Expert Council of German Foundations on Integration and Migration/SVR: *Mobile Talente? Ein Vergleich der Bleibeabsichten internationaler Studierender in 5 Staaten der EU,* Berlin: 2012, p. 6; Sachverständigenrat für Migration: *Zugangstor Hochschule, Internationale Fachkräfte als Fachkräfte von morgen gewinnen,* Berlin: 2015, p. 7.

[25] OECD, International Migration Outlook 2016, p. 51; GRIESBECK, M., HESS, B. "Study and stay" – Entwicklungen und aktuelle Fragestellungen der rechtlichen Grundlagen der Zuwanderung und des Aufenthalts von Studenten und Absolventen. In: *Recht der Jugend und des Bildungswesens– RdJB*, 2016, p. 43–55.

[26] Directive (EU) 2016/801 of the European Parliament and the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purpose of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au-pairing, Official Journal L 21. 5. 2016, 132, p. 22–52.

[27] Already the Global Approach to Migration and Mobility (COM (2011) 743 final), p. 14 stated, that "greater mobility for students and researchers from third countries could also be a path towards catering for labour marked needs in Europe if some students were to be able to work after completing their studies".

introduced. The REST Directive had to be implemented in all Member States by May 2018.[28]

3.4. The ICT Directive

Another legal framework that shows that the European Union wants to improve the conditions for third-country nationals is the ICT-Directive of 2014[29]. It not only refers to the Commissions Communication of 3 March 2010 entiteled "Europe 2020: A strategy for smart, sustainable and inclusive growth" and its objective of an economy based on knowledge and innovation (recital 3), but also refers to the important demographic challenge, that will face the Union (recital 4). The ICT Directive intends to simplify intercorporate transfer and facilitate the immigration of managers and specialists in EU Member States. It offers a uniform admission procedure based on harmonized criteria and creates two new residence titles (the ICT-Card and the Mobile ICT-Card) that supplement the residence permits already in existence.[30] The ICT Directive is now transposed in almost all Member States.[31]

4. The council Directive 2009/50/EC (Blue Card Directive) as the main Directive

As turning point on the way from a possibly somewhat hesitant or even reluctant policy concentrating on researchers to fulfill the Lisbon goals to an active policy of attracting high skilled professionals is the so-called Blue Card Directive[32]. It directly aimed at attracting highly qualified third-country workers and created the "Blue Card" to compete with the well-known American "Green Card."[33]

The Directive establishes a fast track admission procedure. It implements a special residence permit, the so-called EU Blue Card, for highly qualified

[28] Federal Office for Migration and Asylum/ European Migration Network, Migration, Integration, Asylum, Political Developments in Germany 2017, Annual policy report by the German National Contact Point for the European Migration network (EMN), Nürnberg 2018, p. 32.

[29] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, L 157/2.

[30] Federal Office for Migration and Asylum/EMN, Nürnberg, 2018, p. 29.

[31] EMN annual report on migration and asylum 2017, Bruxelles, 2018, p. 11 f.

[32] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, Official Journal L 155, 18/06/2009, p. 17–29.

[33] PEERS, S., GUILD, E. et al. (sub 9), p. 47, 65.

workers[34]. The Blue Card is subject to special requirements (e.g. occupational qualification and a minimum salary to be defined) and provides special rights concerning mobility, family reunification and permanent residence. But the Member States were still able to issue residents permits other than Blue Cards for any purpose of employment.[35]

The proposal for this Directive came from Vice President Fratini. In a speech in a conference in Lisbon on 13 September 2007 and one week later in a speech in the European Parliament he explained the initiative. One month later the Commission presented the first draft of the Directive and in May 2009 the Directive was adopted by the Council.[36]

The initiative clearly aimed at fostering economic growth and mitigating demographic problems resulting from an aging population.[37] The Directive explicitly refers to the objective of the Lisbon European council in March 2000 to become the most competitive and dynamic knowledge-based economy in the world (recital 3) and to the Hague Programme of 2004 and its statement, that legal migration will play an important role in enhancing the knowledge-based economy in Europe (recital 4).

In recital 7 of the preamble of the Directive it is explained, that the intention is to foster the admission and mobility of third country nationals in order to make the Community more attractive for high skilled workers from around the world and sustain its competitiveness and economic growth. However it is repeated also in recital 7 that it is also necessary to take into account the priorities, labour market needs and reception capacities of the Member States. The Directive should be without prejudice to the competence of the Member States to maintain or to introduce new national residence permits for any purpose of employment. The third country nationals should have the possibility to apply for

[34] Article 2 c), article 7 of the Directive.

[35] Article 3 (4) of the Directive.

[36] PEERS, S. Legislative Update: EC Immigration and asylum Law, Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directive, *European Journal of Migration and Law – EJML* 2009, p. 387–426, p. 389; KUCZYNSKI, A., SOLKA, S. Die Hochqualifiziertenrichtlinie. *Zeitschrift für Ausländerrecht und Ausländerpolitik – ZAR*, 2009, p. 219, 220 f.; HERZOG-SCMIDT (sub 8), p. 35 ff.; referring to the differences of the first proposal and the final version and the aims of the member states see: WIND, M., ADAMO, S. Is green better than Blue? The Danisch JHA Opt-out and the Unilateral Attempt to Attract Highly Skilled Labour. *European Journal of Migration and Law – EJML*, 2015, p. 329–360, p. 345 ff.

[37] See ÜMÜS, Y. K. EU Blue Card Scheme: The Right Step in the Right Direction? *European Journal of Migration and Law – EJML*, 2010, p. 435–453 with a quotation of President Baroso. Also the impact assessment refers to the expected decline of working age population in the EU member states. PEERS, S. Legislative Update: EC Immigration and asylum Law, Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directive, *European Journal of Migration and Law – EJML*, 2009, p. 387–426, p. 409.

an EU Blue Card or for a national resident permit. The Directive should also be without prejudice to the right of the Member States to determine the volumes of admission of third country nationals entering their territory for purpose of highly qualified employment (recital 8).

5. The German Act on the Transposition of the Directive on Highly Qualified as example for the competition for highly skilled migrants in a Member State

In Germany the Act on the Transposition of the Blue Card Directive of 1 June 2012 entered into force on 1 August 2012.[38] The act not only transposed the Directive on Highly Qualified Workers of 25 May 2009 and introduced the EU Blue Card into national law; it also significantly modified the law on residence and the employment of foreigners to make Germany more attractive for highly qualified workers.

The legislator also took advantage of the opportunities posed by the transposition law to simplify the regulations on residence and employment for university students, graduates, and skilled labour.[39] For students and graduates the act implemented the right to stay for another 18 month after the examination in order to seek for a job commensurate with their qualification. Before that time the period was only twelve month.[40] If they are successful they may apply for a residence title for the purpose of employment.

The EU Blue Card (section 19a Residence Act) introduced a new type of residence title for thirdcountry nationals holding an academic degree who have received a specific job offer. The EU Blue Card is the only residence permit with an income limit for highly qualified workers. The EU Blue Card's attractiveness is enhanced by entitling its holder to a(not only temporary) settlement permit

[38] German Federal Law Gazette / BGBl I 2012, p. 1224.

[39] See also the explanatory memorandum in Bundestagsdrucksache/German Parlamentary doc 17/8682, p. 1: "The bill also intends to make Germany more attractive for well-trained immigrants. This facilitates the permanent immigration of highly skilled labour and improves the legal requirements for taking up employment by foreign nationals after graduating from a German university."

[40] Sachverständigenrat für Migration/ The Expert Council of German Foundations on Integration and Migration/SVR: *Mobile Talente? Ein Vergleich der Bleibeabsichten internationaler Studierender in 5 Staaten der EU*, 2012; Sachverständigenrat für Migration/ The Expert Council of German Foundations on Integration and Migration / SVR, *Zugangstor Hochschule – Internationale Studierende als Fachkräfte von morgen gewinnen*, 2015.

already after 33 months, if the employment contract continues and mandatory or voluntary contributions were paid into the statutory pension fund or comparable arrangements. For EU Blue Card holders with German language skills of level B1 of the "Common European Framework of Reference for Languages" the term is shortened to 21 months. The members of the EU Blue Card holder's family must not provide any proof of German language skills prior to entering the country and may work without any restrictions immediately upon entry. Furthermore EU Blue Card holders and their family members may stay abroad up to twelve months without losing their residence permit, while the regular time limitis six months.

Next to the introduction of the Blue Card, the most significant change was the creation of a new type of residence permit for highly qualified third-country nationals for the purpose of seeking employment (section 18c of the Residence Act). The most extraordinary aspect of this introduction is that it marks a break with the principle that had ruled the law on foreigners in Germany for decades, i.e. the link between a job and the residence permit. A residence permit had always been subject to an employment or a job offer. Section 18c of the Residence Act for the first time permits access for the purpose of employment without having to prove that employment or an offer for it are already in place. Although this is limited for six month and only available for highly qualified, whose subsistence is secure, the literature heralds this modification as a fundamental change of paradigma in German foreigners policy.[41] It is also confirmed by the OECD, that Germany has developed one of the most modern migration systems with the lowest barriers for the migration of highly qualified workers.[42]

In Germany the Blue Card was a great success compared to other EU Member States. Already in 2013 4.651 third country nationals immigrated on the basis of a blue card. Since then there was a continuing increase up to 9.652 in 2017.[43] On the other hand, Germany was the only Member State with a remarkable number of Blue Cards. In 2016 Germany was Nr. 1 of the Member States regarding the issued Blue Cards with 17 630. Nr 2 was France with 750 and all other Member States were below.[44] In 2015 there were 14.620 Blue Cards issued by Germany,

[41] LANGENFELD, Ch., WAIBEL, S. Von der Begrenzung zur Steuerung: Deutschlands Abkehr vom "widerstrebenden" Einwanderungsland. In: Jochum, G., Fritzemeyer, W., Kau, M. (Hrsg.). *Grenzüberschreitendes Recht – Crossing Frontiers, Festschrift für Kay Hailbronner*, 2013, p. 169 et seq. 176 f.; OECD, International Labour Migration: Germany, 2013, p. 27; SVR /The Expert Council of German Foundations on Integration and Migration, 2015 Annual Report, p.13, 32 ff.

[42] OECD, *Zuwanderung ausländischer Fachkräfte: Deutschland (German version).* Paris, 2013, p. 15.

[43] Bundesamt für Migration und Flüchtlinge, Das Bundesamt in Zahlen 2017: Nürnberg, 2018, p. 90.

[44] Ifo schnelldienst 6/218.

659 by France and less than that by all other Member States. All in all more than 85 % of all Blue Cards were issued by Germany.[45]

Already 2014 Jean-Claude Juncker made the revision of the Blue Card one of his priorities.[46] A new proposal was presented on 7 June 2016. The first trilogy meeting took place 12 September 2017. The trilogy is still going on.[47]

6. The necessity of accompanying measures

6.1. Better information about the new immigration options

So it might seem that a lot was done by these new regulations. But managing migration does not only depend on legislative changes, it also requires accompanying measures and the perception and visibility of these new regulations.[48] This is confirmed by the experience made with the low demand for the privileged migration of researchers according to section 20 of the Residence Act as a transposition of the Researchers Directive.[49] All of these new regulations and their consequences for third-country nationals and their families must also be known.

Often it is not easy to discern the appropriate residence title. In Germany the Residence Act of 2005 only recognized three residence titles (visa, residence permit, settlement permit). Meanwhile there are four more because of EU regulations (EU long-term residence permit, Blue Card, ICT-card, mobile ICT-card). The legal aspects differ markedly in respect to the purposes of stay. Major distinctions exist, or recently existed, particularly in regard to get approval by the Federal Employment Agency, to shorten the time frame it takes to get a settlement permit, the possibility of family reunification with or without a language test, and to provide entitlement for economic activity for spouses. Thus a scientist in Germany for example, had six options for applying for a residence title.[50]

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45 Briefing: EU Legislation in progress 12. 12. 2017, SVR 2015, p. 15.

46 Guidelines 15. 7. 2014, see above FN 8.

47 Briefing: EU legislation in progress 12. 12. 2017

48 SVR/The Expert Council of German Foundations on Integration and Migration/ 2015 Annual Report, p. 13.

49 See Commission Report Com (2011) 901 final.

50 The residency permit for highly qualified foreigners (Section 19 Residence Act), the EU Blue Card (Section 19a, Residence Act), the residence permit for purposes of research (Section 20, Residence Act), the residence permit for the purpose of self-employment (Section 21, Residence Act) or for the purpose of attaining further education, e.g. PhD (Section 16, Residence Act) or to apply for a residence permit the standard way (Section 18, Residence Act). Many foreigners did so because they, or their employers, were too unfamiliar with the other possibilities or they found them to be too complicated.

That demonstrates that potentially highly-specialized immigrants must receive information already in their home countries about the different options of immigration and the consequences for them and their families. The best way is that embassies as well as other contact agencies abroad (e.g. the Goethe Institute) can upon request point people in the right direction.[51] Also the key point paper of the German government from October 2018[52] for a new skilled workers immigration Act underlines the importance of improved marketing together with the business sector.

Beyond that, it is desirable that small and mid-sized companies also have the opportunity to recruit highly-skilled personnel and that they know the various options. Universities should also be able to give accurate advice to graduates wanting to stay in Germany. They should be able to point out, for example, the possibility of extending residence permits for up to 18 months for the purpose of seeking a job commensurate with their qualification after having successfully completed their studies (Section 16, sub-section 4, Residence Act).[53]

Information portals are a positive first step: The multilingual welcoming portal "Make it in Germany" directed at foreign skilled labour informs about job opportunities in Germany, the legal requirements for employment, and first insights into living and accommodation in Germany.[54] The key point paper for the planned skilled workers immigration law recommend to make this portal the central portal for the acquisition of skilled labour forces of the Federal Government.[55] Another multilingual portal "Welcome to Germany" offers more detailed information, e.g. on integration.[56] However, any such information portal can be no more than merely a first step; there is always a need to talk to someone. A suitable tool for dealing with the first questions is a hotline. A successful example is the hotline "working and living in Germany". In 2017, 13.736 consultations were provided. Between the establishment of the hotline in April 2012 and December 2017 71.444 consultation calls have been answered.[57]

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[51] SVR/The Expert Council of German Foundations on Integration and Migration 2015. Annual Report, p. 13; KOTZUR, M. TFEU Article 79, p. 434, MN 5. In: Geiger, R., Khan, D. E., Kotzur, M. (sub 1): "a practical and adequate infrastructure is necessary". Kotzur refers i.e. to the network of immigration liason officers and to the European Migration Network.

[52] Key point paper nr. 3; the key point paper was agreed upon by the coalition partners in fulfilling an agreement of the coalition treaty. The key point paper provides guidelines for the preparation of the „skilled workers immigration law"; Available at: www.bmi.bund.de

[53] SVR The Expert Council of German Foundations on Integration and Migration 2015. Annual Report, p. 15 f.

[54] www.make-it-in-germany.com

[55] Key point paper of the German Government of 2 October 2018, Nr. 3.

[56] Available at: http://www.bamf.de/DE/Willkommen/willkommennode.html

[57] Emn-report Germany 2017, p. 29 and 64.

6.2. Easy family reunification and labour market access for family members

Furthermore it is obvious that highly qualified workers are not only looking for good working and integration perspectives for themselves, but also for easy family reunification rules and a quick access to the labour market for the partner.[58] Already the Blue Card Directive was well aware of the importance of attractive conditions for partners. In recital 22 it is recommended: "Favourable conditions for family reunification and for access to work for spouses should be a fundamental element of this Directive which aims to attract highly qualified third country workers." In article 15 of the Blue Card Directive there are laid down special derogations from the Family Reunion Directive.[59] It was even supposed, that this might induce persons to apply for a Blue Card only because of the privileges of family reunification.[60] Also the REST Directive refers to good working possibilities for family members.[61]

In Germany by an amendment of the Residence Act in 2013 the possibility for spouses to work without any restrictions immediately after immigration on behalf of family unification has been extended to all family members holding a residence permit under section 5 (section 27 subsection 5 of the Residence Act).

6.3. Recognition of Qualification

When a high qualified or skilled worker decides to immigrate into the EU for work it must be clear, that his qualification is recognized, that means that it is commensurable to a qualification of an EU Member State citizen. Indeed the recognition of qualifications achieved abroad was a great obstacle in the past. Often high qualified and skilled workers had to work below their qualification and could not contribute to economic growth according to their qualification. A lot of initiatives were launched in the EU Member States[62].

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[58] MAYER, M. *Attracting highly qualified and qualified third country nationals*. Nürnberg: 2013, p. 19; HESS, B. *Zuwanderung von Fachkräften nach § 18 AufenthaltsG aus Drittstaaten nach Deutschland,* working paper 44 der Forschungsgruppe des Bundesamts für Migration und Flüchtlinge, Nürnberg: 2013; for the importance of good family reunification regulations see PEERS, S., GUILD, E. et al. (sub 9), p. 149, where the miserly attitude of theresearchers Directive is seen as a main problem for the success of the directive.

[59] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003, p. 12–18.

[60] PEERS, S., GUILD, E. et al. (sub 9), p. 68.

[61] Recital 11 "… Those family members should have access to the labour market".

[62] OECD International migration outlook, Paris, 2017, p. 82 f.

Germany already in 2012 passed the "Law to improve the Assessment and Recognition of Foreign Professional Qualifications" (the so-called Federal Recognition Act) of 1 April 2012. The Federal Government for the first time established a general legal entitlement to apply for the examination of the equivalence of a foreign professional qualification.[63]

The law's purpose was to simplify and promote the economic integration of skilled labour with foreign qualifications with regard to Germany's demographic development and the growing shortage of skilled labour.[64]

The law covers more than 600 professions for which the qualifications are regulated at the federal level. All German federal states (Länder) have adopted laws for the professions regulated at the Länder level (e.g. teachers, educators, engineers, social workers, etc.).[65]

The Recognition Law has been a great success. The recognition Act report shows, that nine out of ten professionals, who have acquired their qualification abroad are working after the recognition. The employment rate has risen considerably. From 2012 to 2015 more than 40.700 applications were accepted as fully equivalent, only 1.900 were rejected.[66]

That there is a demand for information about the recognition of qualification shows the hotline for the Recognition Act. Experience with the hotline for the Recognition Act proves that this tool really meets a demand. Information on the Recognition Act is available on the online portal „www.anerkennung-in-deutschland.de".[67]

This experience also showed that questions on the recognition of the inquirer's qualification are often combined with questions on whether this qualification will serve to find employment and to obtain a Residence permit in Germany. It seems that the best way is to establish a single contact point for all issues related to migration. Also the key point paper of the German government from October 2018 recommends a fast and simple recognition procedure.[68]

6.4. A fast and simple visa procedure

Another barrier is a long waiting period for visa. Sometimes because of capacity shortages diplomatic missions are not capable to process all visa applications

[63] German Federal Law Gazette/BGBl I 2011, p. 2515.

[64] The full explanatory memorandum for the government's bill submitted on 22 June 2011 can be found in Bundestags-Drucksache/German Parlamentary doc. 17/6260, p. 39.

[65] Emn-report 2017, p. 64.

[66] Bundesministerium für Bildung und Forschung – BMBF, Bericht zum Anerkennungsgesetz 2017, Berlin, 2017.

[67] Available in English ("Recognition in Germany") and nine other languages.

[68] Key point paper of the German Government of 2 October 2018, Nr. 2.

within an adequate timeframe. In some diplomatic missions an applicant has to wait eight months or more.[69] Also the key point paper of the German government from October 2018 recommends a quicker procedure and a better communication between the participating authorities. E-government solutions are planned, especially the digitalization of the visa procedure.[70]

6.5. Language training abroad and after arrival and integration policies

Next to making the new regulations better known it is also necessary to devise policies facilitating integration into the labour market and society. These specifically include possibilities to overcome language barriers (as is also confirmed in the OECD study[71]), options for family members to participate in education, take up employment and to integrate as well as a culture of welcoming and acceptance by the host society.[72]

In Germany integration courses were introduced in 2005 for all newly arrived immigrants, but are also available for foreigners who have lived in Germany for some time already. An integration course consists of a language course and an orientation course. The language course comprises 600 to 900 lessons, the orientation course 60 lessons. The orientation course covers topics like Germany's legal system, history and culture and provides knowledge about rights and obligations as well as about values considered important for living in Germany. It ends with a final exam. The language course also covers important aspects of life like work and career, health, education and media in Germany. The participants learn how to write letters and e-mails, make phone calls and apply for a job. There are full-time and part-time courses.

Integration courses have been a great success: Until 31 December 2017 1.95 million people attended an integration courses of one of the 1.736 providers.[73]

But also the providing of language skills in the country of origin before emigration is important. Pre-integration courses are well known as a precondition for family reunification[74] to prepare for the immigration in a new and perhaps unknown country, but language training and transmitting of knowledge before

[69] Federal Office for Migration and Asylum/ European Migration Network, Nürnberg: 2018, p. 29.
[70] Key point paper of the German Government of 2 October 2018, Nr. 5.
[71] OECD, *Zuwanderung ausländischer Fachkräfte: Deutschland (German version*), 2013, p. 26.
[72] See also Article 79, p. 4, TEUF, and KOTZUR, M., TFEU Article 79, p. 435, MN 11. In: Geiger, R., Khan, D. E., Kotzur, M. (sub 1).
[73] Federal Office for Migration and Asylum/EMN, Germany 2017, (2018), p. 66.
[74] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003, p. 12–18, Article 7, p. 2.

leaving is also of value for highly qualified and skilled workers. Also the OECD study and the key point paper of the German government of October 2018 recommend language training abroad, for example with the support of the Goethe Institute.[75]

Also the courses of the ESF-BAMF program for the enhancement of technical language skills help with linguistic integration. This is a nationwide program to upgrade German language skills related to different occupations supported by the European Social Fund. More than 228,000 participants have been enrolled from 2009 until the end of 2017.[76]

Highly qualified and skilled migrants also should have the impression, that they are accepted and required. For some time already some municipalities have established Welcome Centers to help international skilled workers to their bearings in Germany. The best known among them is the Welcome Center Hamburg.[77] But also universities have taken the initiative by establishing Welcome Centers to guide and accompany students and professors from abroad when they come to Germany and support students to find a job after the examination[78].

7. Conclusion

Beginning with the Tampere summit in October 1999 and the Lisbon Council Conclusions in March 2000 and the Directives starting with the Students Directive in 2004 the European Union took significant steps to create a modern legal framework for the management of legal migration that makes the European Union attractive for highly qualified and skilled third-country nationals. Even with the restriction, that Member States have the competence to define priorities and volumes, the programmes and Directives show that the Union is well aware of the demographic development and the global competition for highly qualified and skilled migrants.

However changing laws and regulations is not enough. Successfully attracting highly qualified and skilled migrants has to go beyond. It is indispensable that the options for legal migration for the purpose of economic activity are known abroad and accepted by the persons concerned and that their practical implementation by the authorities works. It also means that the people affected

[75] OECD, *Zuwanderung ausländischer Fachkräfte: Deutschland (German version)*, 2013, p. 25, key point paper of the German Government of 2 October 2018, Nr. 4.

[76] Federal Office for Migration and Asylum/EMN, Germany 2017, (2018), p. 66.

[77] OECD, *Zuwanderung ausländischer Fachkräfte: Deutschland (German version*), 2013, p. 110.

[78] Some universities have established special Career Services and International Offices, Sachverständigenrat für Migration. *Zugangstor Hochschule*, Berlin: 2015, p. 26 ff.

are aware of the new rules for easier immigration of skilled labour or for the options for students and graduates. Counseling is needed abroad and after arrival as well as language training and knowledge about the rules and habits of the country they are coming to. When arrived they have to have the impression, that they are welcome and required with their qualification. Recognition of qualifications is as important as quick and easy visa procedures. Accompanying integration policies are required as well, specifically for the acquisition of language skills to enable the newly arrived migrants to get their bearings in the new environment fast and to bring the full benefits of their skills and talents to the labour market without delay.

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Neutrality as Tax Justice: The Case of Common Consolidated Corporate Tax Base under the EU law*

Shu-Chien Jennifer Chen**

Summary: The tax neutrality principle was defined as a tax system not influencing the taxpayers' business decisions. Economists usually use 'the no tax world' as the baseline to decide if a specific tax measure is 'neutral. If a taxpayer's reaction to a specific tax is the same as if there is no such tax, then it is neutral. Such formulation of tax neutrality is inappropriate to evaluate taxation in a regional market as European Union. This paper establishes a new normative framework for evaluating the EU corporate tax law reform project, the Common Consolidated Corporate Tax Base (CCCTB) Proposal, that aims to properly tax MNE taxpayers' cross-border income by a pre-decided formula. The tax neutrality principle should be not based on the no-tax baseline but interpreted as 'faithfully reflecting the taxpayers' economic activities throughout EU'. EU Member States should maintain proper fiscal autonomy to decide their actual administration inputs (the public benefit provided) and their own method to implement the EU level corporate group taxation (the subsidiarity principle). This trio-formulated neutrality concept falls between Rawls' liberalism theory and Nozick's libertarianism theory, closer to Liam Murphy and Thomas Nagel's tax justice theory. Such trio-combination also better regulates the interactions of the three actors in the EU internal market: EU, Member States and MNE taxpayers. This reformed neutrality is a more appropriate norm than one single economic or legal principle for the EU corporate tax reform.

Keywords: European Union – Common Consolidated Corporate Tax Base (CCCTB) – the tax neutrality – the benefit principle – liberalism – libertarianism – the subsidiarity principle – Formulary Apportionment – tax justice

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1. Introduction

What criterion is desirable to evaluate a corporate taxation system, especially in the context of regional integration, such as European Union, is a difficult puzzle. The puzzling points are multiple-folded. First, a corporate income tax system itself as such is disputed for resulting in economic double taxation to shareholders. Corporations can conduct economic activities much more extensively than individuals, but they are legal fictions and still owned and managed by natural persons. It has been long argued that corporate income tax is redundant or unnecessary double taxation in relation to shareholders' personal income tax. Second, in the European Union context, corporate income tax is the sensitive area and is rarely harmonized. Member States' fiscal autonomy on corporate tax is still quite extensive, even subject to the internal market mandate. The consequence of maintaining such fiscal autonomy is tricky: on the one hand, Member States compete with each other to attract corporations' economic activities and capital into their jurisdictions so there is a concern of 'racing to the bottom'; on the other hand, disparities of national tax laws have resulted in enormous compliance costs and provided aggressive tax planning opportunities for multinational enterprises (MNEs). OECD's Base Erosion and Profit Shifting (BEPS) project has revealed many problems caused by MNEs. Third, corporate income tax on MNEs' cross-border economic activities, will directly involve allocating taxing powers between Member States. In other words, EU tax law will have to deal with the relation between EU and its Member States; the relation between MNE taxpayers and involved Member States; and the relation between Member States with each other.

To seek a desirable normative framework to evaluate a corporate taxation system under the EU law, a reformed framework or principle would be needed. This is why I decide to review critically one of the most accepted[1] norms for the tax law and policy: 'tax neutrality'. Tax neutrality has been discussed widely in the context of international tax law and policy as well as EU tax harmonization. Since the mid-20th century, Economists and tax academics have developed various different meanings of neutrality: Capital Export Neutrality (CEN), Capital Import Neutrality (CIN), Capital Ownership Neutrality (CON), Market Neutrality (MN). Each type of 'neutrality' represents a specific policy goal, and therefore there is no hierarchy between them. When it comes to corporate group taxation at EU level, i.e. CCCTB, it has been argued that CEN, CIN and MN should all be achieved at the same time. In this regard, it is not crystal clear how and what

[1] WEISBACH, D. A The Use of Neutralities in International Tax Policy, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 697 (2014) [online]. Available at: http://ssrn.com/abstract=2482624, accessed 14 March 2019.

'neutrality' should be as the normative framework to design a fair tax formulary apportionment system for EU and Member States.

The research question of this paper is: what does and should neutrality mean to the Common Consolidated Corporate Tax Base (CCCTB) under the EU tax law and how political philosophical ideas of 'justice' evaluate CCCTB and lead to similar or different policy options. In the field of tax law and policy, economics have played an active role as the analytical tool, whereas the political philosophy has not influenced quite much. When it comes to ideas such as 'justice' or 'legitimacy' or 'fairness', the design of a tax policy or system can be comprehensively and convincing when we also incorporate the discipline of philosophy.[2] Therefore I also explore the justice ideas developed by representative political philosophers and focus on these philosophers' (possible) responses to the options of the CCCTB Directive.

This paper is structured as follows. Section 2 discusses the different definition of 'neutrality' in the different contexts and the neutrality derived from the CCCTB Directive Proposal. There are quite a few neutrality principles and each principle is related to a specific policy goal, including capital import, capital export, capital ownership or market participants' competition; in many cases, neutrality is the synonym of non-discrimination, such as the 'fiscal neutrality' in the VAT discussions. It seems that none of these formulations can demonstrate the neutrality norm that pursued by EU harmonization on direct taxation. Under the discussion of establishing an EU internal market, the tax neutrality principle should not only be understood as pursuing the goal of efficiency but also taking into account the subsidiarity principle and the benefits principle. The Common Consolidated Corporate Tax Base (CCCTB) Proposal is an example that the neutrality principle should be understood broadly as 'not causing distortions to taxpayers' economic decisions' and 'reflecting economic reality'. CCCTB has a broad scope of harmonization in order to pursue a more integrated internal market, and at the same time it also aims to tax multinationals' pan-EU cross-border activities in a predictable and less manipulative manner; CCCTB is also expected to allocate Member States' taxing powers fairly. Such tax neutrality principle under CCCTB, is not limited to any international tax neutrality principle in the narrow-sense, and it is inevitably overlapping with inter-nation equity.

Section 3 will discuss justice ideas of three schools of thoughts: John Rawls' liberalism and Nozick's libertarianism and Liam Murphy& Thomas Nagel's tax justice theory and examine CCCTB against these theories. Generally speaking, these three schools of thoughts all justify adopting CCCTB. The neutrality that

[2] The research approach of this paper is inspired by two books: MURPHY, L., NAGEL, T. *The Myth of Ownership: Taxes and Justice*. Oxford: Oxford University Press, 2002, p. 1–228; BHANDARI, M. (ed.). *Philosophical Foundations of Tax Law*, 2017, Oxford: Oxford University Press, p.1–320.

CCCTB pursues, however, falls between Nozick and Rawls and also matches Murphy& Nagel's idea.

Section 4 further discusses two specific policy options that CCCTB chooses: un-harmonized tax rate/free tax rate competition and the three-factor sharing formula. In the specific option level, these three schools of thoughts would lead to different choices. I will explain these differences and argue that, a broad definition of the neutrality principle that uses the well-maintained market environment as the baseline (not the no-tax world), will support the healthy tax rate competition and the sharing formula consisting of production and customers' market side of the market. Section 5 concludes that, abroad-sense neutrality is necessary for EU corporate tax law, and it falls between the schools of liberalism and libertarianism as it might be close to the tax justice in Murphy& Nagel's idea, though Murphy& Nagel's has excluded corporation tax and international tax from their discussions. There is still an unsolved puzzle regarding the tax incidence (i.e. the actual tax burden) but it should be ancillary.

2. The Tax Neutrality Principle Revisited

2.1. The Varied Meaning Of The "Neutrality" Norm

In the development of international tax law, the prominent economist Musgrave proposed the concept 'neutrality' as a norm, and he distinguishes two types of "neutrality": the capital import neutrality (CIN) and capital export neutrality (CEN).[3] The neutrality principle mandates that the ideal relation should be between taxation-imposing sovereign states and capital flow of private businesses, as taxpayers. Therefore, in this context the neutrality principle is a negative norm for sates: the effect of taxation should 'not' discourage taxpayers from conducting capital import (i.e. inbound investment) under the capital import neutrality principle; taxation should not discourage taxpayers from conducting capital export (i.e. outbound investment). The baseline to decide whether a taxation system is neutral is to compare with the situation as if there is no-tax levied.[4]

[3] Two aspects of neutrality see MUSGRAVE, R. A. Criteria for Foreign Tax Credit. In: Baker, R. *Taxation and Operations Abroad*. Princeton: Tax Institute, 1960, p. 83–93. Later Peggy Musgrave also further writes about the distinction of CEN and CIN. See MUSGRAVE, P. B. *Taxation of Foreign Investment Income, An Economic Analysis*. Johns Hopkins Press, 1963, p.1–140, reprinted in MUSGRAVE, P. R. *Tax Policy in the Global Economy: Selected Essays of Peggy R. Musgrave*, Cheltenham: Edward Elgar, 2002, p. 1–470.

[4] The no-tax as the base line is widely accepted by a lot of scholars, such as SHAHEEN, F. International Tax Neutrality: Reconsiderations. *Virginia Tax Review*, 2007, vol. 27, no. 1, p. 203–239.

Peggy Musgrave clearly has the preference of CEN over CIN, because she sees conducting outbound investment as a measure to maximize the global welfare. Musgrave's neutrality principle has become a well-accepted norm to evaluate international tax policies and laws. Both CEN and CIN are adopted by different states, out of different policy concerns. Some states have the policy of encouraging outbound investment whereas some states have the policy of encouraging inbound investment. Conceptually speaking, CEN and CIN are mutual exclusive and cannot be achieved simultaneously, unless different sovereign states decide to have the identical tax rate.[5] This conclusion is actually quite obvious, because CEN and CIN describe the different demands for the state: to encourage inbound or outbound investment. CEN and CIN are 'mirror images'[6] to each other; they are interrelated but describe two opposite demands.

Later on, other economists also developed other broader neutrality concepts, such as market neutrality (MN), which demands that taxation should let the individual participants to compete freely in the market.[7] Capital Ownership Neutrality (CON), which is derived from CIN, also developed. MN addresses a tax system not hindering market participants' competition and CON focuses on the effect of a tax system on capital owners.[8]

These different neutrality principles do not have hierarchy or superiority, but merely describe different policy directions. What these neutrality principles are in common is that 'neutrality' should be read as the synonym of 'not negatively influence', and the concept 'neutrality' has to be combined with an item that should not be negatively influenced by taxation. In other words, the neutrality concept in these principles all refers to a narrow meaning, not a broad one.[9] We

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5 Different opinion, see Id. Shaheen argues that CEN and CIN can be achieved simultaneously even when the tax systems of different sovereign states are not uniformed, as long as the demand of CIN is interpreted as capital ownership neutrality, which demands the tax law not to negatively influence capital ownership by domestic or foreign owners. For example, Knoll disagrees with him and argues that the terminology of CEN and CIN should be re-considered, see KNOLL, M. S. Reconsidering International Tax Neutrality*, Tax Law Review*, 2011, vol. 64, no. 2, p. 99–129.

6 Maarten de Wilde, *Sharing the Pie: Taxing Multinationals in a Global Market* (IBFD 2017) at 3.2.4.4.

7 This concept of MN is developed and elaborated by Michael P. Devereux, see DEVEREUX, M. P., LORETZ, S. *Evaluating Neutrality Properties of Corporate Tax Reforms, Oxford University Centre for Business Taxation Working Papers no. 1007 (2010).* [online]. Available at: https://EconPapers.repec.org/RePEc:btx:wpaper:1007, accessed 25 March 2019. They argue that, the CCCTB proposal could move toward CEN or MN, but adoption of such formulary apportionment system while maintaining the differential tax rates, can introduce new distortions and thus still deviate from MN.

8 Capital Ownership Neutrality explanations, see HINES, J. R. Jr. Reconsidering the Taxation of Foreign Income. *Tax Law Review*, 2009, vol. 62, no. 2, p. 269–298.

9 Weisbach observes the variety of 'neutrality' principles and indicates that each neutrality concept represents a different policy objective. He also argues that these neutralities (in the narrow sense) are not useful to establish the criterion of 'optimal tax'. See Weisbach (n1).

can also see the similar pattern in the non-discrimination principle: the non-discrimination principle needs to be embodied by including a 'non-discrimination ground' such as nationality, gender, race, etc. The neutrality principle in the economic literature also has to be combined with a 'neutrality ground', such as capital import, capital export, capital ownership market competition, etc. Therefore it is quite interesting to show that, these neutrality principles are not 'neutral' themselves, because each of them has a distinct policy direction. Not negatively influencing 'capital export' will inevitably influence 'capital import'; and thus a pure neutrality principle does not seem to exist in these discussions. Rothbard even proactively argues that neutral taxation is really a **myth**, and it is just like the case that it is impossible to claim 'money' is neutral.[10] From formulations of these tax scholars, the terminology of 'neutrality' has multiple meanings in each different context. When we need to use the neutrality principle as the norm to evaluate a large-scale tax policy which covers more than one objective, it would be wise to take a broader definition, not a narrow one.[11]

In the context of EU tax law development, the neutrality principle has different meanings. We can see such variety in the primary law level, the secondary law level and Court of Justice's jurisprudence. In the primary law, the neutrality principle, not being mentioned directly but well-recognized by prominent EU tax law experts, can be derived from EU's purpose of pursuing economic efficiency and establishing the internal market.[12] The rationale of the neutrality principle in the internal market is that, Member States' legislation (as well as EU harmonization), should pursue the market economy and its efficiency, and so EU law, including tax law, should eliminate distortions in the internal market and not to give rise to distortions either. Pre-existing distortions might result from disparities of national law and thus eliminating such distortions would require harmonization. When adopting a new piece of EU law, it should be cautious not to create distortions to make the internal market 'not neutral'.

As to the secondary law, either Directives on direct taxation or indirect taxation can provide a comprehensive idea of 'neutrality'. There are only few Directives harmonizing direct taxation. Among these Directives regarding direct taxation, CEN and CIN are both accepted and sometimes co-exist as equal options. For example, Parent

[10] ROTHBARD, M. N. The Myth of Neutral Taxation. *Cato Journal*, 1981, vol. 1, no. 2, p. 519–564.

[11] Kahn also observes the two meanings of 'tax neutrality' co-exist but should both be re-considered. He argues that, the narrow meaning of tax neutrality that is against a specific bias due to the tax law might not be very useful to have a picture of 'the ideal tax system'. See KAHN, D. A. The Two Faces of Tax Neutrality: Do They Interact or are They Mutually Exclusive? *Northern Kentucky Law Review*, 1990, vol. 18, no. 1, p. 1–18.

[12] See discussions on neutrality derived from TFEU Article 110 and Article 120, SCHÖN, W. Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law? *Bulletin for International Taxation*, 2015, Vol. 69, no. 4/5, p. 271–293.

Subsidiary Directive allows Member States to choose the exemption method or the deduction method to implement the Directive, so both CEN and CIN are acceptable.[13]

In the filed of VAT of EU law, VAT fiscal neutrality has another different meaning: it is synonym of non-discrimination. The normative content of the fiscal neutrality of EU VAT rules, refers to two sub-concepts: (1) VAT should be neutral for competition of similar goods and services; (2) VAT levied upon similar goods and similar services should not be different whatever the length of he production and distribution chain.Fiscal neutrality in VAT especially focuses on ensuring non-discrimination between similar goods and services.[14]

Jurisprudence of Court of Justice of European Union (CJEU) does not provide a more clear idea regarding tax neutrality either. Court of Justice of European Union seems to have an ambition to pursue both CEN and CIN under the EU law[15], though sometimes the Court randomly turns down CIN or CEN in difference cases.[16] To achieve both CEN and CIN might look illogical, because CEN and CIN are two distinctive demands and it is impossible to eliminate all the disparities of Member States' tax laws. However, if we step back to the fundamental purpose of 'establishing' an internal market in European Union, inbound and outbound flow of trade and capital, are equally important. Four fundamental economic freedoms under the EU law encourage cross-border activities 'between' Member States, and thus the distinction between CEN and CIN will naturally disappear, because EU law aims to create an internal market. In this regard, a broader sense of neutrality that can encompass both CEN and CIN, will be necessary for evaluating EU tax law and policy, though the jurisprudence of the Court of Justice European Union does not contribute much to the substantial contents of the neutrality principle.[17]

Being different from economists who create different 'types' of neutrality, legal scholars have argued that the concept tax neutrality has to be reformed especially for evaluating EU law. For example, Vogel has analyzed that tax neutrality should not be limited to capital import or capital export, but should be interpreted as taxation should not alter the business decisions and should not cause distortions. He described this as 'cross-border neutrality'.[18] As another example,

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[13] CERIONI, L. The *European Union and Direct Taxation: A Solution for a Difficult Relationship*. 2015, New York: Routledge, p. 1–254, at p. 56.

[14] See the general introduction of the concept of VAT neutrality, HERBAIN, A. H. *VAT Neutrality*. Cork: Primento Digital Publishing, 2015, p. 1–235; DE LA FERIA, R. *The EU VAT System and the Internal Market*. Amsterdam: IBFD, 2009, p. 1–382, Ch. 4; OECD VAT/GST Guidelines, 2017.

[15] DE WILDE, M. *Sharing the Pie: Taxing Multinationals in a Global Market.* Amsterdam: IBFD 2017, p.1–798, at 3.2.2.4, (IBFD 2017).

[16] Ibid., a comparison of CJEU's inconsistent case law on CEN and CIN at 3.2.4.3.

[17] Ibid., at 3.2.4.3 (IBFD 2017).

[18] Klaus Vogel used 'cross-border neutrality' to describe this status. See VOGEL, K. *Taxation of Cross-border Income, Harmonization, and Tax Neutrality Under European Community Law: An Institutional Approach*. Alphen aan de Rijn: Kluwer, 1994, p. 1–50.

Smit also adopts a broader definition: neutrality under EU tax law should mean 'being absent from company tax distortions and business decisions are based on economic conditions, not on tax law conditions.[19] In the context of EU corporate tax law, their concepts of neutrality are more general than traditional concepts of CEN, CIN or MN. At the end of the day, economists also evaluate a piece of legislative proposal by taking into account different types of neutrality principles at the same time,[20] and legal scholars aim to reform the normative content of the neutrality principle.

In addition to pursuing economic efficiency in the market, other fundamental principles of EU law, will also play a role to formulate the idea of neutrality. European Union has the fundamental purpose to establish an internal market as if there are no borders or obstacles. Member States will implement the creation and integration process of EU internal market altogether, but Member States should not give up their diversity completely. EU law has long recognized 'subsidiarity principle' that regulates the issues that Member States and EU share legislative competence. The internal market is the shared competence of EU and Member States, and therefore all EU legislation regarding the internal market, should comply with the subsidiarity principle. The subsidiarity principle requires that an issue should be left to Member States to decide in case it is still more efficient for Member States to implement. It is EU that bears the burden of proof to show that the EU harmonization measure is really necessary (the EU added-value test) and proportional (i.e. in the least intrusive way, the proportionality test).[21] In other words, a EU harmonization measure that aims to eliminate completely the disparities is not allowed not only from the perspective of political reality but also from the perspective of the general principle of EU law. If a harmonization eliminates all the diversities from EU Member States for the issues that EU Member States still enjoy competences, such harmonization would be contrary to the subsidiarity principle and thus unconstitutional under the EU law. From the procedural perspective, since 2009 EU law provides the yellow card procedure[22] for national parliaments to review and submit

[19] SMIT, D. EU *Freedoms, Non-EU Countries and Company Taxation*. Alphen aan de Rijn: Kluwer Law International, 2012, p. 1–898., Ch. 2.

[20] For example note 7, Devereux & Loretz adopt and analyze MN and CEN respectively to the CCCTB proposal discussions.

[21] There are enormous discussions on the subsidiarity principle under the EU law. In the context of discussing the subsidiarity principle regarding creating the internal market, I find Portuese' work useful because he analyzes it from the economic efficiency perspective. See PORTUESE, A. Principle of Subsidiarity as Principle of Economic Efficiency. *Columbia Journal of European Law*, 2011, vol. 17, no. 2, p. 231–262.

[22] For example. In: 2011 national parliaments have submitted their opinion about the CCCTB Directive Proposal, and negative opinions are not qualified to precede the yellow-card procedure.

their opinion on whether a specific EU legislative proposal is compatible with the subsidiarity principle. Therefore, from both the substantial and procedural perspectives, the subsidiarity principle is the fundamental principle of EU law that both Member States and EU institutions should comply with from the very beginning of the legislative process.

Last but not the least, EU tax laws also involve allocating taxing powers between Member States. Therefore, the fairness or inter-nation equity[23] between Member States is also necessary and imperative. Inter-nation equity will also play a role the meaning of neutrality. Inter-nation equity means that, the fair relationship between national gain or loss capture between two (or more nations), each of which has a connection to a particular gain.' In the field of international tax law, the core issue of inter-nation equity is how taxable income from cross-border economic activities should be taxed and how different countries involved should share such tax. The conflict between the residence taxation and the source taxation in the field of international tax law, also belongs to the discussion of inter-nation equity. EU tax harmonization has addressed the same issue, i.e. dividing taxing powers between EU Member States reasonably and fairly. Therefore, the neutrality under the EU tax law would inevitably overlap with the concept of inter-nation equity. The following section will demonstrate this overlapping by using the CCCTB Directive Proposal as an example.

2.2. The Neutrality In The Case Of The CCCTB Directive Proposal

The CCCTB Directive Proposal aims to harmonize corporate tax and the way of allocating the taxing powers of Member States. Therefore it will provide a new set of mandatory corporate tax law for MNEs taxpayers above a certain size, and replace the current bilateral tax treaties between EU Member States.

See SZUDOCZKY, R. Is the CCCTB Proposal in line with the Principle of Subsidiarity? In: Weber, D. (ed.). *CCCTB: Selected Issues,* Alphen aan de Rijn: Kluwer, 2012. As Szudoczky analyzes, the 13 negative reasoned opinions submitted by parliaments of the Member States, have a common feature: these reasoned opinions are formulated as being more similar to discuss the proportionality of the element of consolidation of CCCTB Directive Proposal, instead of arguing the two tests indicated in the impact assessment. Member States are arguing the same objectives, including eliminating compliance costs from national tax law disparities and lowering high transfer-pricing costs, should be achieved in a less intrusive way for Member States.

[23] Reviews of Musgrave's idea about intra-nation equity, BROOKS, K. Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value. In: Krever, R., Head, J. G. (eds.). *Tax Reform In The 21st Century: A Volume in Memory of Richard Musgrave*. Alphen aan de Rijn: Kluwer Law International, 2009, p. 471–498.

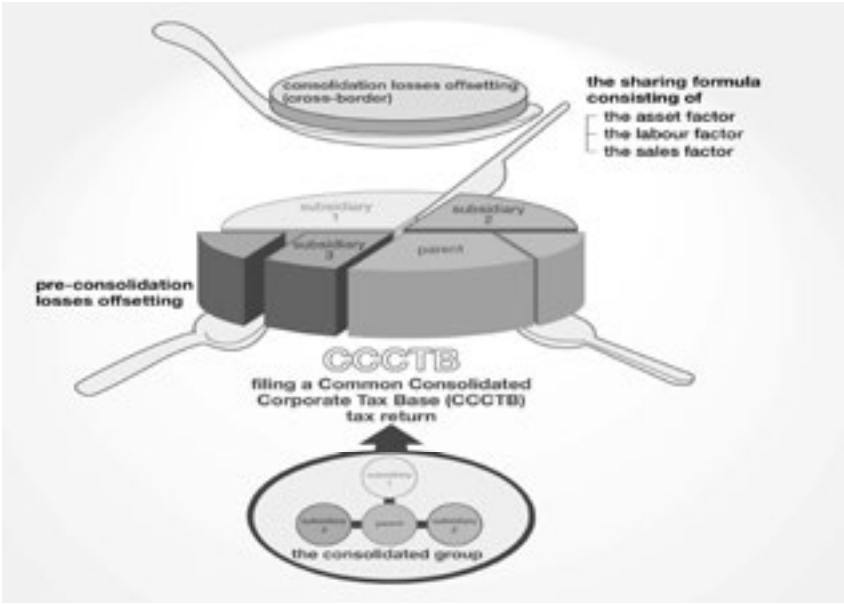
By a metaphor of 'a pie and a knife', a multinational enterprise (MNE) group active in different EU Member States can file their harmonized consolidated tax base from all qualifying group members from different EU Member States, and such consolidated tax base is like a big pie, jointly contributed by all group members; and the formula is like a knife to decide the share/a piece of the pie which is apportioned to each group member.

Therefore, each group member's apportioned share of the taxable pie of the whole group, would be calculated as:

$$\text{the consolidated tax base} \times \left(\frac{1}{3} \times \frac{the\ member's\ sales}{group\ sales} + \frac{1}{3} \times \frac{the\ member's\ assets}{group\ assets} + \frac{1}{3} \times \frac{the\ member's\ labour}{group\ labour}\right)$$

The overview of the CCCTB is illustrated in Figure 1.

Figure 1: The Common Consolidated Corporate Tax Base Directive Overview



Source: the author

This Directive proposal uses a pre-determined "formula" to apportion taxable income of MNE taxpayers, and therefore it is abbreviated as Formulary Apportionment (FA). This legislative proposal is a tax reform effort at the EU level to provide all EU Member States a uniform consolidated (i.e. group) corporate tax base and a formula to divide their taxing powers on multinational enterprise (MNE) taxpayers' income. It would replace the bilateral tax treaties between these EU Member States when being adopted. It should be noted that, although EU has more than 50 years history, corporate taxation is still rarely harmonized by EU legislations. When the CCCTB Directive Proposal is adopted unanimously by EU Member States, it would be a milestone also for the EU law development as a whole.

Here comes the core question: what should be the normative content of the tax neutrality principle in the CCCTB Directive?

As indicated above, different EU law instruments provide different formulations of 'neutrality', and it is because each instrument serves its own specific purpose and addresses a specific distortion. Therefore, since the CCCTB system is a larger-scale harmonization for corporate income tax and has two purposes at the same time (eliminating tax obstacles due to national law disparities and combating tax avoidance), will need a broad neutrality principle that covers not only CIN[24] or CEN or cross-border activities' neutrality and 'market/competitive' neutrality' between MNE taxpayers, but also achieving "inter-nation equity/fairness" between Member States in the end. To achieve this fairness, it is essential that the CCCTB Directive faithfully represent eligible taxpayers' "economic activities" from the supply/input side (the labour and the asset) as well as the demand/output side (the sales), i.e. throughout the supply-consumption chain. A tax system that can reflect different types of economic activities conducted by MNE taxpayers can also ensure the fairness between different Member States, which have different resources and provide different public services. In other words, a neutral CCCTB system should especially be reflect and focus on 'economic activities', not focus on any formal qualification, which can easily deviate from the economic reality.[25]

[24] Some scholar advocates CIN as the fundamental rationale for the CCCTB Directive, ANDERSSON, K. An Optional Common Consolidated Corporate Tax Base in the European Union. In: Andersson, K., Eberhartinger, E., Oxelheim, L. (eds.). *National Tax Policy in Europe: To Be or Not to Be?* Berlin: Springer, 2007, p. 86–90.

[25] As to focusing on the reality instead of form in the company law, this has been long recognized by EU legislators. For example, in 1992 the European Commission's Ruding Report on the direction of European company tax reform, also refers this as "neutrality of legal form", to require equal treatment between subsidiaries and permanent establishment. Ruding report uses the term 'neutrality' also in a narrow sense. The full text of Ruding report, see the archive:

To take into account the fairness/inter-nation equity between EU Member States in the context of the EU law, the neutrality principle should incorporate the benefit principle and the subsidiarity principle. The benefit principle[26] and the subsidiarity principle are both important principles that support and reserve Member States' fiscal autonomy and diversity. The benefit principle plays an important role in the development of tax law although it does not seem to have a status the general principle of EU law. As Brooks analyzes, corporations enjoy two sets of benefits that justify levying corporate income tax: the first type of benefit for shareholders, is the legal personality and limited liability of a corporation.[27] Such legal privilege would enable shareholders to invest more freely, via a corporation. The second type of benefit is various 'legal, social, and economic infrastructure to earn profits' that that a corporation receives from the state, including health and qualified workforce, transportation and communication infrastructures, etc. Despite of theoretical objections, it is undeniable that these two types of benefits are actually enjoyed and provided to corporations in the modern market economy.

In the EU law regarding the field of personal direct taxation, the Court of Justice of European Union does not view personal direct tax as the price for a bundle of public goods, in the case *Schumacker* (Case C-279/93).[28] However, the doctrine from the case *Schumacker* does not preclude the benefit principle from applying to the corporate income tax. In fact, the Court of Justice seems to decide its cases regarding Member States' treaty laws in line with the benefit principle: the Court rejects the most favorable treatment principle applied in the field of tax law, and recognizes the disparity of withholding tax rate of different Member States. In other words, EU Member States have no obligation to adopt the minimum withholding tax rate among all Member States. As Englisch's analysis on the case law *Schumacker* demonstrates, the benefit principle is the cornerstone supporting Member States' fiscal autonomy and thus this principle is indirectly reflected in CJEU's jurisprudence.[29]

https://publications.europa.eu/en/publication-detail/-/publication/0044caf0-58ff-4be6-bc06-be2af6610870/language-en, accessed 8 August 8 2018

[26] Discussions regarding the origin of the benefit theory, see COOPER, G. The Benefit Theory of Taxation. *Australian Tax Forum,* 1994, vol. 11, no. 4, p. 397–509. A more recent discussion, see STEWART, M. *The Tax State, Benefit and Legitimacy, The Tax State, Benefit and Legitimacy, Tax and Transfer Working Paper No. 1/2015, (2015)* [online]. Available at: https://taxpolicy.crawford.anu.edu.au/publication/ttpi-working-papers/7567/tax-state-benefit-and-legitimacy

[27] BROOKS, K. Learning to Live with an Imperfect Tax: A Defence of the Corporate Tax, 36, *University of British Columbia Law Review,* 2003, vol. 36, no. 3, p. 621–672.

[28] Case C-279/93, Finanzamt Köln-Altstadt v Roland Schumacker, European Court Reports 1995 I-00225, ECLI identifier: ECLI:EU:C:1995:31.

[29] ENGLISCH, J. Tax Coordination between Member States in the EU – Role of the ECJ. In: LANG, M. et al. (eds.). *Horizontal Tax Coordination,* Amsterdam: IBFD, 2012, p. 3–22.

The rationale of the benefit principle is clear: in order to provide public benefits, levying taxation is justified, including corporate tax.[30] In the field of international tax law, the (reformed) benefit principle justifies the allocation of a taxable income between the source state and residence state.[31]The benefits are no longer understood as a specific public service, but a more general idea as 'public goods', including education, health and even 're-distribution' can be seen as a type of 'public good'.[32] In the formulary apportionment discussions, the benefit principle is adopted as a reason to justify the sales factor, labour factor, and the asset factor, because the benefit principle also describe the 'relation' between these factors and the involved states, because these factors are the indicators of public benefits being provided.[33]

By taking into account the benefit principle, the neutrality principle will not use a 'no-tax world' as the optimal or perfect world. Instead, the tax neutrality principle for EU Member States should make the "market" functioning well, which also includes the tax levied for the costs of providing the good public services. Tax levied to provide public service that can enhance taxpayers' productivity, is not 'neutral' from the no-tax baseline; however, from the perspective of efficiency, the very origin of neutrality principle, levying tax to provide sufficient public service, is desirable and even closer to the ideal status of neutrality. For example, Hasen reconsiders[34] the presumption of no-tax baseline for the neutrality

[30] The opposite argument that the benefit principle cannot justify corporate tax: see DODGE, J. M. *Does the 'New Benefit Principle' (or the 'Partnership Theory') of Income Taxation Mandate an Income Tax at Both the Individual and Corporate Levels?' FSU College of Law, Public Law Research Paper No. 118 (August 2004)*. [online]. Available at: http://dx.doi.org/10.2139/ssrn.571826

[31] The benefit principle plays an important role the international tax law in the beginning of the early 20th century, see the introduction by L. J. Global Profit Split – An Evolutionary Approach to International Income Allocation. *Canadian Tax Journal,* 2002*,* vol. 50, no. 3, p. 823–883; Other scholars argue that, the benefit principle in the international tax law is actually a failure. See FLEMING, J. C., PERONI, R. J., SHAY, S. Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income. *Florida Tax Review*, 2001, vol. 5, no. 4, p. 299–354, at p. 334; More recently Avi-Yonah and Xu also argue, the current way that the benefit principle applied to international tax law is already outdated and can no longer properly allocate international active and passive income earned in a digitalized world. They argue for a reverse application of the benefit principle, i.e. active income to the source jurisdiction and passive income to the residence jurisdiction. I do not fully agree with their conclusion, but I agree with them that the benefit principle should also be reformed. See AVI-YONAH, R. S., XU, H. Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight. *Harvard Business Law Review*, 2016 vol. 6 no. 2, p. 185–238.

[32] See note 26, Miranda Stewart.

[33] MAYER, S. *Formulary Apportionment for the Internal Market*. Amsterdam: IBFD, 2009, p.1–354, p. 21.

[34] HASEN, D. M. Tax Neutrality and Tax Amenities. *Florida Tax Review*, 2012, vol. 12, no. 2, p. 57–125.

principle, but opts to the baseline which takes into account the taxation covering public revenues.[35] Another scholar, Knoll also casts doubts on this presumption of no-tax "ideal" world. To pursue the fairness and the benefit principle between EU Member States via a large-scale harmonization as CCCTB, the no-tax world should not be the hypothetically perfect world or the base line.

As to evaluate the boundary between EU and Member States' competence, the subsidiarity principle plays an essential role, when we formulate tax neutrality under the EU law for evaluating the CCCTB Directive. As Portuese[36] analyzes, the subsidiarity principle in essence, is a principle of economic efficiency. The EU value-added test to evaluate the subsidiarity, as the impact guideline indicates, is a test of 'efficiency'. EU should intervene only when the net benefits are larger than Member States' actions could convey. The test of necessity (Portuese uses the term 'the sufficiency test'), is the test of effectiveness. Portuese argues that, the subsidiarity is criticized for its vagueness, but this vagueness is actually essential for such principle to deal with weighting difference economic consequences. Both decentralization (keeping fiscal autonomy) and centralization (harmonization) can use the subsidiarity principle to justify themselves. In the context of CCCTB, the subsidiarity principle would be achieved when harmonization and maintaining diversity are balanced: EU will harmonize the tax base and the sharing formula whereas Member States will decide the actual amount of taxation by setting their own CCCTB tax rate.

To sum up, the neutrality principle that CCCTB endorses is a trio-formulation: pursuing the efficiency that takes into account the benefits principle and the subsidiarity principle. It is intriguing that such trio-formulation coincides with Richard Musgrave's formulation of three functions of taxation: macro-economy stabilization, re-distribution, and resource allocation.[37] Richard Musgrave argues that the functions of macro-economy stabilization and re-distribution should be assigned to the central-government level and the function of resource allocation should be assign to sub-national government level. The trio-formulation

[35] Ibid., Hasen redefines taxation that can enhance taxpayers' product-ability as 'tax amenities'.

[36] See note 21, Aurelien Portuese.

[37] Scholars have elaborated based on Richard Musgrave's early work on these three functions. See McLURE Ch. E, MARTINEZ-VAZQUEZ, J. *The Assignment of Revenues and Expenditures in Intergovernmental Fiscal Relations (The World Bank Institute 2000).* [online]. Available at: https://gsdrc.org/document-library/the-assignment-of-revenues-and-expenditures-in-intergovernmental-fiscal-relations/

The original work, see MUSGRAVE, R. A. *The Theory of Public Finance*. New York: McGraw Hill, 1959, p. 1–628. Peggy Musgrave explains again that this three-branch model is the normative idea but does not necessarily match the reality, since the reality is far more complex. See MUSGRAVE, P. B. Comments on two Musgravian concepts. *Journal of Economics and Finance*, 2008, vol. 32, no. 4, p. 340–347.

neutrality coincides with Musgrave's idea of delineation of competence between central and sub-national governments. In the case of CCCTB more precisely, the scope of the group tax base and taxing powers division are decided by EU level, i.e. the Directive, but the tax rate, i.e. the exact tax burden occurs in each Member State is decided by Member States. Richard Musgrave's three functions of taxation also coincides with CCCTB's multiple purposes, including to establish a business-friendly internal market (coinciding with macro-economy stabilization function), combating BEPS problems and ensuring MNE taxpayers' economic activities to relate to where they are actually occurred (related to with redistribution function). Since CCCTB still keeps the Member States' competence to decide the corporate tax rate, it also preserves Member States' competence of 'allocating resources'.

2.3. Neutrality Is Not Identical As Intra-Nation Equity

As indicated above, I argue that, CCCTB should be evaluated against the neutrality principle that also includes the benefit principle and the subsidiarity principle, and thus the baseline of the neutrality is not a no-tax world, but a world that sufficiently public goods are provided to achieve the internal market, implemented by each Member State that can into account their diversity and maintain 'healthy' tax competition. In the context of international tax law as well as the domestic tax law, scholars have started to use the 'new benefit principle'[38] that benefits are not understood as specific benefits offered or received but should be understood as 'all relevant public goods maintaining a market' and I endorse the benefit principle in the broad sense. Different states provide different public benefits in the EU internal market, and thus it is justified for Member States to have fiscal autonomy to decide the size of the public revenue and expenditure, via a democratic process. It seems that, inter-national equity and healthy tax completion between Member States would exist

Here comes the basic question: why do we not start from the inter-nation equity, but from the neutrality and broaden it? Putting it differently, is it still logical to discuss the neutrality principle as the main normative framework when the distinction between the neutrality and equity is inevitably blurred in the context of establishing an internal market of EU? My answer is affirmative: it is still logical and necessary to start from the neutrality and extends its borderline to 'inter-nation equity' or

[38] The new benefit principle is analyzed by DODGE, J. M. Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles. *Tax Law Review*, 2005, vol. 58, no. 4, p. 399–461. In this paper Dodge also discussed Liam Murphy and Thomas Nagel's argument in tax and justice. It should be noted that Dodge does not agree with this new benefit principle, though he agrees with Liam Murphy and Thomas Nagel's he anti-Libertarian objective.

fairness, but not the other way around, even though I do recognize the fundamental importance of the subsidiarity and fiscal autonomy of EU Member States.

The reason is: CCCTB is a harmonization effort from EU internal market perspective; whereas inter-nation equity, developed by Peggy Musgrave and other economists, is the norm of pursing fairness between 'fully' sovereign states. EU Member States, even though they are still sovereign, have the obligation not to hinder the functioning of the internal market but to facilitate the internal market. Any EU law harmonization to pursue the internal market, should be evaluated from the efficiency perspective. Pursuing the neutrality toward the optimal status of the internal market, is still the primary norm. While designing any EU law in line with the neutrality norm, it is equally important to ensure that different EU Member States' taxing powers are divided/allocated fairly and Member States maintain their diversities and healthy tax competition. Therefore, while acknowledging that the tax neutrality principle under the EU law is in part overlapping with the inter-nation equity, these two principles are neither identical nor interchangeable.

3. Philosophical Theories As CCCTB's Justification: A Thought Experiment

3.1. The Disputes of the existence of 'Global Tax Justice' and the Corporate Tax incidence Issue

Section 3 will discuss the second main part of this paper: exploring philosophical theories regarding tax, applying these ideas to the CCCTB Proposal and examining if the CCCTB Directive us justified. Before exploring the application of well-accepted philosophical theories to CCCTB as part of EU law, we need to be aware of a discussion gap of 'global tax justice' or 'regional tax justice' in the context of European Union. Some scholars embrace the concept of 'global tax justice'[39] whereas some are skeptical.[40] Although I am of the opinion with the supporters that global tax justice does/should exist as a norm, this is not a trivial consensus but arguable as follows.

As to the first dispute, EU is not a sovereign state itself but it has supranational feature and EU law with direct effect. It is true that, until now European

[39] For example, POGGE, T., MEHTA, K. (eds.). *Global Tax Fairness*, Oxford: Oxford University Press, 2016, p.1–384.

[40] For example NAGEL, T. The Problem of Global Justice. *Philosophy & Public Affairs*, 2005, vol. 33, no. 2, p. 113–147.

Union does not levy its own direct tax from individuals or companies. Therefore, the traditional political philosophies may confront some difficulties when we try to use these theories to evaluate a supranational taxation system such as CCCTB Directive. Most political philosophies mainly describe justice as the ideal relation between individuals and a single sovereign state, not the relation between individuals and international organizations as such EU. In my view, it is still reasonable to apply these philosophies to EU corporate tax law context and I also believe that 'regional justice' or 'global justice' is an appropriate tool to evaluate EU tax laws. The theories from political philosophers do not necessarily prefer a specific tax type or tax base, but they will provide an underlying rationale that describes the ideal relationship between states and taxpayers. What we cannot deny is that, quite a lot EU law instruments have direct effect upon taxpayers. European Union has provided quite a few rights that are directly applicable to citizens, including free movements of goods, workers, service, capital and freedom of establishment. Each fundamental freedom is a right that a single EU citizen can invoke against Member States.

As to the second dispute on the actual burden of the corporate tax, corporate tax is levied upon corporations but the tax burden of corporate tax will be borne by other natural persons, such as shareholders or employees. Traditionally, it is believed that shareholders of corporations will bear the corporate tax.[41] Some scholars have started to argue that[42], employees of the companies will be the ultimate people who bear the corporate tax incidence.[43] But more recent studies also show that the corporate tax incidence is **not** necessarily significantly employees' burden.[44] Besides, when the corporate income taxation on cross-border activities in the manner of formulary apportionment, some economists like McLure argue that the factors of the formula will also lead to tax incidence effect, so customers, employees and immobile capital owners will de facto bear the corporate tax incidence.

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41 For example Dodge reiterates this, see note 38.

42 This seems the mainstream view currently. The academic literature review on the tax incidence, see FUEST, C. *Who bears the burden of corporate income taxation?* ETPF Policy Paper, no.1, Centre for European Economic Research (ZEW) (2015) [online]. Available at: http://www.etpf.org/papers/PP001CorpTax.pdf

43 The economic incidence of corporate tax law is a difficult issue without consensus since early. See note 27 Kim Brooks, at p. 632. She cited an early academic discussion that demonstrates the difficulty for lawyers, see KLEIN, W. A. The Incidence of the Corporation Income Tax: A Lawyer's View of a Problem in Economics. *Wisconsin Law Review*, 1965, vol. 1965, no. 3, p. 576–605.

44 The new empirical data showing the opposite conclusion to the mainstream theory of corporate tax incidence, see CLAUSING, K. A. In Search of Corporate Tax Incidence. *Tax Law Review,* 2012, vol. 65, no. 3, p. 433–672.

Corporate tax incidence is indeed born by natural persons, but empirically it is not clear who ultimately or significantly bear the burden. It is also possible that, shareholders, employees, investors, customers, all bear corporate tax incidence respectively, but we are not sure exactly to what extent.[45] Despite of the tax incidence issue, it is well accepted that effectively paying corporate taxation at least should not create obvious inequality to the society.[46] Aggressive tax planning scenarios by multinational taxpayers mentioned by OECD's Base Erosion& Profit Shifting reports have revealed that the corporate income tax that multinationals have paid, is far from sufficient, so multinationals are accused of creating further inequalities. In my view, the current lawful-looking but aggressive tax planning scenarios from corporate taxation, have created inequalities from two aspects: for one, creating inequality to other market competitors who do not conduct such tax planning; for the other, creating individuals who do not invest as corporate shareholders. Therefore, to negate corporate income tax completely, by arguing the actual corporate tax burden/tax incidence being by customers and employees, seems to overlook the function of the corporate tax. It might be accepted that, due to the possible tax incidence effects, corporate taxation should not be the 'only measure' to pursue re-distribution, but the tax incidence effects should not be the main reason to negate corporate taxation completely either. In Section 4 of this paper I will go back the presumption tax incidence effect of corporate tax to evaluate the weighting factor selection the CCCTB Directive.

Briefly speaking, I am of the opinion that it still makes sense to adopt the philosophical justice concept to conduct the thought experiment to examine the current CCCTB Directive Proposal, though these political philosophers' original work has not yet discussed justification of corporate taxation at the international or the regional level. The following sections will discuss different theories and examine if the CCCTB Directive Proposal in general and its several policy options are in line with these philosophical criterion of 'justice' and the reasoning. I will discuss John Rawls, Robert Nozick and Liam Murphy and Thomas Nagel's work respectively. As to the existence of the CCCTB Directive Proposal in general, they might have different reasoning

[45] For example, Clausing also indicates the complexity to model corporate tax and thus it is not definitive yet to draw conclusions on corporate tax incidence, Ibid. Moreover, there are also data showing that corporate tax incidence is on customers. See SALLEE, J. M. The Surprising Incidence of Tax Credits for the Toyota Prius. *American Economic Journal: Economic Policy*, 2011, vol. 3, no. 2, p. 189–219.

[46] The phenomenon of 'paying merely small amount of tax' has been recognized as the evidence of inequalities caused by the various planning scenarios embedded in the current (international) corporate tax systems, see PIKETTY, T. *Capital in the Twenty-First Century*. Cambridge: Harvard University Press, 2017, p. 1–93, Ch. 16.

from their perspectives but would come to the same conclusion to justify the CCCTB. But as to the specific policy options in the CCCTB, they would have different judgments.

3.2. Liberalism: John Rawls' Basic Liberty Principle and Difference Principle

John Rawls is one of the representing philosophers of liberalism. Rawls' theory of justice has established two principles of justice. The fist principle is 'the liberty principle', which means state should ensure that citizens have political liberty equally. The second principle is the 'difference principle', which means that inequality in law can only be allowed when such inequality is for the purpose of re-distribution from the better-off to the worse-off. Briefly speaking, Rawls embraces 'equality of opportunity' and heavily emphasizes 'redistribution' as justice. A state should guarantee equality of opportunity to individuals to realize their own talents and choices in a free-competition market.

What Rawls demands for a tax system of justice,[47] should ensure the individual's basic rights and liberties to be exercised freely and equally; and a tax system should also be capable of conducting some re-distribution. Here arise two fundamental questions under Rawls' theory when it comes to the EU law: (1) are EU treaty fundamental freedoms, such as free movement of workers, services, freedom of establishment 'qualified' as basic rights and liberties as Rawls mentioned? (2) If the previous answer is affirmative, do legal persons, such as companies also enjoy the EU treaty freedoms as the same as natural persons, according to Rawls' justice criterion?

These two answers are both affirmative in my view. Rawls' 'basic rights and liberties' include a set of political and economic rights. As De Boer[48] analyzed, EU treaty freedoms are in fact qualified as fundamental rights in Rawls' idea, not because these treaty freedoms are extended from property rights, but because these treaty freedoms will ensure 'equality of opportunity' and free market access of market participants in the EU. Furthermore, companies are conglomeration of real people's interest, so ensuring 'equality of opportunity' of companies will also ensure 'equality of opportunity' of real people.[49]

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[47] SUGIN, L. Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems. *Fordham Law Review,* 2004, vol. 72, no. 5, p. 1991–2014.

[48] De Boer argues that EU treaty freedoms are qualified as fundamental rights under Rawls' first principle. See DE BOER, N. Fundamental Rights And The EU Internal Market: Just How Fundamental Are The EU Treaty Freedoms? A Normative Enquiry Based On John Rawls' Political Philosophy. *Utrecht Law Review*, 2013, vol. 9 no. 1, p. 148–168.

[49] CJEU's jurisprudence also confirms to such interpretation. Ibid., p. 156.

Given that exercising EU treaty freedoms to pursue the internal market will promote 'equality of opportunity' according to Rawls' justice theory, the CCCTB Directive Proposal that aims to facilitate companies to exercise their treaty freedoms and conduct cross-border activities, is in line with Rawls' 'first principle of justice'. A harmonized corporate group taxation at the EU law level is justified, though CCCTB as such is not a measure to conduct re-distribution effectively. A corporate tax system in any case, should not be designed as allow the inequalities persist.

3.3. The Libertarianism: Robert Nozick's Minimal State And The Strict Benefit Principle

Rober Nozick is one representative philosopher of libertarianism. Nozick embraces the idea of a minimal state and thus he argues that taxation (and public service) should be minimum, limited to the extent of providing the necessary public service that only the government could provide. Nozick's most well-known and provocative argument is that levying taxation is equivalent to 'forced labour'[50] because individuals have to work more than they need, in order pay tax. In Nozick's view, when the government is the only institution capable of providing such public service and citizens give consent to it, the government is justified. In Nozick's view, taxation is the payment for specific public service. In other words, the benefit principle in the strict sense that views taxation as the payment to the public service, is the core concept of Nozick's theory.

A lot of types of tax would still be compatible with libertarianism's benefit principle, including the income tax.[51] The strict benefit principle will focus on the minimal state and minimal public service; when there are not sufficient link between public service and taxation levied, such taxation would be defined as injustice under the strict benefit principle.

CCCTB as such, does not seem to relate a specific public service to the MNE taxpayers. However, we can also argue that the broader sense of 'benefit' that establishes and improves the EU internal market, adopting CCCTB will provide extra benefit to economic operators in the EU to have more extended freedom of establishment and free movement of service, such benefit can justify CCCTB itself. The most direct benefits that the CCCTB will provide, is 'cross-border loss-offsetting mechanism' and the one-stop shop administrative mechanism. These 'new' benefits should justify the adoption of the CCCTB Directive.

[50] NOZICK, R. *Anarchy, State, and Utopia*. Oxford: Blackwell, 1974, p. 1–357.

[51] BIRD-POLLAN, J. The Philosophical Foundations of Wealth Transfer Taxation. In: Bhandari M. (eds.). *Philosophical Foundations of Tax Law.* Oxford: Oxford University Press, 2017, p. 217–232.

Since Nozick endorses the minimal state, he would argue that after adopting the CCCTB Directive the tax burden should not be heavier than the companies already pay to Member States.[52] In fact, the European Commission's empirical simulation research has showed that MNE taxpayers would not bear heavier tax burden if the CCCTB is adopted, because the European Commission predict revenue reduction for several Member States,[53] and MNE taxpayers can reduce largely compliance costs.[54] Furthermore, the CCCTB harmonizes corporate tax that is already levied by Member States, not adds an extra new type of tax. The subjective application scope of the CCCTB is strictly defined in line with companies that already have been subject to corporate tax law of EU Member States.[55] The CCCTB would just replace current bilateral tax treaties between Member States. Generally speaking, adopting the CCCTB Directive based on the scope of national corporate tax law, should be consistent with the minimal state idea. Harmonization at EU level as well as setting a one-stop-shop mechanism is also consistent with the idea of a minimal state, because reducing disparities of national laws of each Member State could also streamline administrative and compliance burdens, such as filing different tax returns in different Member States. Therefore, it is justified, in Nozick's view to adopt CCCTB system, provided that such system does not create extra burden or let governments of Member States expand too much. That said, when CCCTB is designed as a harmonization measure effectively reducing tax law disparities and compliance burden, Nozick would not be negative about such system.

3.4. The Pre-tax Income as Myth Theory: Liam Murphy and Thomas Nagel

Liam Murphy and Thomas Nagel's book 'The Myth of Ownership: Taxes and Justice' has provided another view on taxation and justice. Murphy and Nagel

[52] The opposite view, see BARRY, N. The Rationale of the Minimal State (2004). [online]. Available at: https://doi.org/10.1111/j.1467-923X.2004.619_1.x Barry argued that Nozick would be against international organizations such as EU, because such creating supranational organization is 'not resurgence of individualism and economic liberty but a new form of statism'. Put it differently, Barry interpreted Nozick's minimal state would not endorse EU because according to Barry Nozick would see EU as another 'big state', not resulting in limiting EU member states. However, it is arguable.

[53] Annex XII: The impact on tax revenues of Commission Staff Working Document Impact Assessment Accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB){COM(2016) 683 final} {SWD(2016) 342 final}.

[54] Ibid., Annex VII: Compliance Costs.

[55] See Article 2 of CCTB Directive Proposal and Annex 1 and Annex 2.

negates 'everyday libertarianism' derived from Nozick[56] and provocatively argues that, the natural right on pre-tax income is a myth, because taxation is essential for the state to provide public goods and earning income is based on the environment with sufficient public goods. Nozick's minimal state for Murphy and Nagel is 'too minimal'[57] and not sufficient. In other words, without taxation or such public goods, earning any pre-tax income is just impossible. Therefore, instead of regarding pre-tax income should be owned by taxpayers, Murphy and Nagel argue that, taxpayers cannot claim 100% of the pre-tax income, and the state has the legitimacy to levy tax.

Murphy and Nagel especially endorse the outcome of the free 'market', because such outcome reflects personal choices and responsibilities.[58]Murphy and Nagel argue strongly that, a well-functioning market requires comprehensive legislation and government services from all aspects, such as anti-trust legislation, the monetary policy, the transportation policy, etc.[59] Therefore taxation and government are just essential to establish a market. Since the CCCTB Directive Proposal is based on pursuing the internal market, Murphy and Nagel would recognize this justification to adopt the CCCTB Directive too.

4. Policy Options From The Different Philosophies' Perspective

4.1. The Different Attitudes to the Tax Rate Competition

As indicated above, the CCCTB system in the general sense would be justified by Rawls, Nozick, Murphy and Nagel's theories. However, when it comes to specific policy options, these philosophers might have different conclusions. One distinctive feature of the CCCTB Directive is that tax rate competition is still possible and even encouraged. After harmonizing the tax base, Member States can still set their own statutory corporate tax rate. In other words, tax rate differentials are a given fact and are not seen as non-neutral or injustice under the CCCTB Directive Proposal. In other words, tax rate competition is 'neutral' for the European Commission.

Rawls would have a different judgment on the tax rate competition and the risk of race to the bottom. Rawls' justice theory argues that, a minimum social need for every individual is necessary. If tax rate competition leads to race to the

[56] *Liam Murphy and Thomas Nagel,* at p. 31 (note 2).
[57] Ibid., 182.
[58] Ibid., 66.
[59] Ibid., p. 32–33.

bottom and thus insufficient public service provision, such system is not justice. Rawls would support a healthy tax competition under coordination. Therefore, to set up a minimum tax rate for CCCTB, in order to prevent race to the bottom and secure the minimum social need.

Nozick argues for a minimal state, and tend to see taxation as payment of specific public service. Therefore, Nozick would be in favor of tax competition in general. In case of tax rate competition to the bottom, Nozick would regard such competition as justified, when such tax competition will drive different states to reduce their tax rate, downsize the public expenditure and provide the most 'cost-efficient' public service. Nozick might also support that there is a maximum tax rate set in the CCCTB Directive to prevent Member States 'racing to the top'.[60]

According to Liam Murphy and Nagel's tax justice theory, they would be negative about tax rate competition. According to Murphy and Nagel's theory, taxpayers earn their 'pre-tax income' because they have made use various public goods provided by the government, and therefore the natural rights to 'pre-tax income' is a myth. In this regard, sufficient provision of public goods[61] is so important in Murphy and Nagel's justice concept; Murphy and Nagel will definitely be negative about the possible risk of 'race to the bottom'.

4.2. Formula Apportionment

4.2.1. The Status Quo of CCCTB's Formula: The Sales Factor, the Labour Factor, the Asset Factor

In addition to harmonizing the tax base, CCCTB has another feature: it is a formulary apportionment system. CCCTB allocates Member States' taxing powers by apportioning the MNE taxpayer's consolidated tax base according to the sales factor, the asset factor and the labour factor that are attributed to each group member. Each factor is weighted equally as one-third. The three-factor formula had been widely used in USA's state taxation practice.[62] The European

[60] Although it looks impossible, according to Pethig and Wagner's empirical data, adopting the sales factor in the formula could have the possibility for Member States to race to set a higher tax rate than the optimal one. See PETHIG, R., WAGENER, A. *Profit Tax Competition and Formula Apportionment.* CESifo Working Paper Series no. 1011 (August 2003) [online]. Available at: http://www.cesifo-group.de/DocDL/cesifo1_wp1011.pdf

[61] *Liam Murphy and Thomas Nagel,* at p. 140 (note 2).

[62] The overview of the formulary apportionment state taxation in USA, see WEINER, J. M. *Company Tax Reform in the European Union: Guidance from the United States and Canada on Implementing Formulary Apportionment in the EU*. Berlin: Springer, 2006, p. 1–122. Joann Martens Weiner's research is an important reference of the European Commission's CCCTB working group. She affirms the three-factor formula later. See WEINER, J. M. CCCTB and

Commission has taken this practice and followed several experts' advice, to adopt the three-factor formula.[63]

Nowadays, more and more tax scholars are arguing that a formula should consist of only the sales factor, because the sales factor is (claimed to be) harder to be manipulated. They argue that the labour factor and the asset factor are under taxpayers' control and thus easier to be manipulated, but even in a high jurisdiction taxpayers will still sell as much as possible and they cannot really control their customers.[64] As to the CCCTB Directive, there are some similar discussions[65] to favor the single sales factor formula. Despite of criticisms and doubts[66], the single sales factor formula has become quite popular in states of USA. Regarding the philosophers' ideas of justice we discuss, however, these philosophers might endorse that the formula consists multiple different factors, because the single sales factor formula might not fulfill their justice concepts because it only presents the very limited (though still important) aspect of the market economy: the consumption side.

In the following sections, I will further discuss the asset factor, the sales factor and the labour factor respectively from each philosopher's main concept. However, in each philosophy's perspective, they have different justifications to the current formula under the CCCTB Directive Proposal. To ensure the discussions comprehensive, I will discuss two different presumptions: the first presumption of companies' shareholders bearing the corporate tax; the second presumption that the actual tax burden is in fact on a formula's weighting factors, argued by the prominent economist McLure[67] and others.[68] Different philosophers would

Formulary Apportionment: The European Commission Finds the Right Formula. In: Weber, D. (eds.). *CCCTB: Selected Issues.* Alphen aan de Rijn: Kluwer, 2012.

63 European Commission, CCCTB' Working document No. 60 [online]. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/ccctbwp060_en.pdf

64 The widely cited work, see AVI-YONAH, R. S., CLAUSING, K. A. Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment, The Hamilton Project Discussion Paper (2007) [online]. Available at: https://www.brookings.edu/research/reforming-corporate-taxation-in-a-global-economy-a-proposal-to-adopt-formulary-apportionment

65 For example, LLOPIS, E. L. Formulary Apportionment in the European Union. *Intertax,* 2017, vol. 45, no. 10, p. 631–641.

66 GRUBERT, H. Destination-based income taxes: A mismatch made in heaven. *Tax Law Review*, 2015, vol. 69, no. 2, p. 43–72.

67 MCLURE, C. E. The illusive incidence of the corporate income tax: The state case. *Public Finance Quarterly,* 1981, vol. 9, no. 4, p. 395–413.

68 For example, GORDON, R., WILSON, J. D. An Examination Of Multi jurisdictional Corporate Income Taxation Under Formula Apportionment. *Econometrica*, 1986, vol. 54, no. 6, p. 1357–1373; MIESZKOWSKI, P., MORGAN, J. The National Effects of Differential State Corporate Income Taxes on Multistate Corporations. In: McLure, Ch. E. (eds.). *The State Corporation Income Tax: Issues in Worldwide Unitary Taxation*, Stanford Hoover Institution Press, 1984, p. 253–263.

have different judgments on these weighting factors under different presumptions. I will discuss the asset factor, the labour factor and the sales factor in turn under these two presumptions.

4.2.2. Rawls' Perspective About Factor Selection

Shareholders of Corporations Bearing The Tax burden: Three Factors Are All Justified

When we presume that shareholders of corporations bear the tax burden of the corporate income tax, the asset factor represents interests of jurisdiction where the assets are utilized. Rawls would be positive about the asset factor in the formula. Via corporations as a large-scale economic entities, their shareholders have the capacities to make use of more resources and thus own more assets than individuals.

When we assume shareholders of corporations bearing the ultimate burden, the labour factor represent the human resources that corporations make use of. Rawls would be positive about the labour factor in the sharing formula, because the jurisdiction where employees are located, would maintain a labour market that employees compete with each other and corporations can choose the most suitable employees. Rawls would also be positive about the sales factor in the formula. It should be noted that Rawls might not be very interested in the single sales factor formula, because although the single sales factor formula will only focus on the demand side of the market. Furthermore, the difference principle that endorses redistribution function will not be achieved.

Presumption of The Tax Incidence Effect On Factors: Only The Asset Factor And The Sales Factor Are Justified

However, when we preseume that the tax incidence effect of the payroll factor, there would be different reasoning. Rawls would be negative about the labour factor, because in the end of the say, it is immobile employees bearing the burden, so the labour factor cannot fulfill the purpose of re-distribution.

Rawls would be still positive about include the asset factor in the formula. The effect of including the asset factor in the formula is to putting tax incidence on capital owners. Since Rawls emphasizes the function of re-distribution, tax incidence on capital owners would actually fulfill the res-distribution function of the taxation.

Furthermore, according to Mclure's claim, adopting the sales factor of the sharing formula has the tax incidence effect on consumers. In Rawls' opinion of pursing re-distribution, he would support the sales factor in the formula. Rawls

has clearly expressed that his support to consumption tax. Due to Rawls' support to the consumption tax, Rawls would be very interested in a single sales factor formula, because a single sales factor formula would be equivalent to a type of sales tax, if we presume Mclure claim as true.

4.2.3. Nozick's Perspective about Factor Selection

Shareholders of Corporations Bearing The Tax burden: Three Factors Are All Justified

Generally speaking, Nozick would be negative about any tax burden levied on assets, because he believes in the natural right on the asset. However, in case of corporate income tax that is presumed to be born by companies, he would be positive about the asset factor in the formula, because sovereign states, via a corporation law system as such, provide more benefits to companies than individuals: a company has its own legal personality so its shareholders can separate the asset of corporations from their personal assets. Companies have limited liability and enhanced creditability in the market economy. This is a benefit that an individual business persons could not enjoy. Besides, Nozick would be also positive about the labour factor. Nozick would accept that the government provides public service, such as education, so the quality of labour is guaranteed. Shareholders can hire qualified employees via their corporations to conduct all the economic activities. Nozick would be also positive about the sales factor, based on his view of minimal state and the strict benefits principle. The state provides a competitive market for corporations to provide their goods and service to their customers. 'Regulating the market' has been recognized as a type of public service, even in a libertarian's view.[69]

Presumption Of The Tax Incidence Effect On Factors: Only The Sales Factor Is Justified

Nozick's judgment would be quite different, if we accept the tax incidence effect of the asset factor according to Mclure's claim. Nozick would be immediately negative about have the asset factor in the formula, because he is in general quite negative about levying tax upon assets. Therefore, if including the asset factor in the formula has the same tax incidence effect on the capital owner, Nozick would not endorse the asset factor because the capital owners of the corporations would be the one carrying tax burden. Nozick would see the asset factor as restriction to capital owners to make use of their own money. Nozick would be also negative

[69] See note 51 Jennifer BIRD-POLLAN.

about the labour factor under the tax incidence effect either, because Nozick has been always critical about wages tax and sees such tax as being limitation to personal freedoms.

Under the tax incidence effect presumption, Nozick would be also positive about the sales factor even if the actual tax burden is actually consumers. The regulation of the market has been recognized as a type of public service, and such regulation would apply to both customers as well as companies, and thus even if the sales factor would have the tax incidence on customers, the sales factor is justified because it relates to the public service of 'regulating a market'.

This reasoning of 'regulating the market' as a type of public service might sound a bit counter Nozick. We might have presumed that Nozick could have argued that with the tax burden, consumers cannot freely make their own choices to purchase and customers would never be able to give their consent to such tax burden, because it is an invisible one resulting from the tax incidence effect. However, it is important to note that, Nozick's core concept is a 'minimal state', not a pure anarchy nor a 'no state'. Therefore, if the result of 'regulating the market' has streamlined the government and grants more freedom for individuals, Nozick would still support such regulation.

4.2.4. Liam Murphy And Thomas Nagel's Perspective

Shareholders Of Corporations Bearing The Tax Burden: Three Factors Are All Justified

When we assume shareholders bear the corporate tax burden, Murphy and Nagel would also be positive about the asset factor in the sharing formula. In their view, the so-called pre-tax income is actually the result guaranteed by the government, and therefore it is justified for a state where corporations make use of their assets to conduct business, to levy corporate tax based on their assets.

With the similar rationale, Murphy& Nagel would be positive about the labour factor. In Murphy& Nagel's view, it would be justified to levy corporate tax based on corporate taxpayers' employees, because the state provides the education system to ensure employees' quality, for example.

Murphy& Nagel would be affirmative to include the sales factor in the formula, because the sales represent directly the result of the market.[70] Corporations make use of the consumer's market to make profits and thus it is justified to choose the sales factor in the formula.

[70] See note 66 Liam MURPHY and Thomas NAGEL.

Tax Incidence Of Factors Is Not The Main Concern Of Murphy & Nagel: Three Factors Are Justified

It should be noted that, Murphy and Nagel have been aware of the possibility of shifting corporate tax incidence to labour, but they argue that tax incidence is not the main concern of justice, but the 'social outcome'.[71] This is a main difference from Rawls and Nozick's thoughts. Therefore, for Murphy and Nagel, justification of levying a type of tax does not rely on the real tax incidence. In Murphy& Nagel's view, they would be also positive about the asset factor and the sales factor in the formula as well. Murphy& Nagel would still be positive about the labour factor in the formula even if the tax incidence effect on the immobile employees. As long as the government can achieve a fair social outcome, no matter the tax incidence effect falls on immobile employees, capital owners, or customers, it will not influence the justification of levying corporate tax.

4.2.5. Summary Of Three School Of Thoughts

It is clear that, a three-factor formula would be justified based on three schools of philosophies above, i.e. Rawls, Nozick, Murphy and Nagel, when we presume that shareholders are the real entities bearing the tax burden as the most traditional view. Even the classical libertarian Robert Nozick would be affirmative to a three-factor formula.

However, when we also take into account the tax incidence effect argument of the formula factors, the tax burden of corporate income tax, these philosophers' attitudes towards the labour factor and the asset factor would not be always the same. From Rawls' perspective, if corporations bear tax burden themselves, Rawls would be positive about the labour factor because corporation tax based on employees is consistent with his re-distribution concept: taxing the better-off who can have extra capital to invest and hire other people. When the corporate tax incidence is in fact on employees due to adopting the labour factor in the formula, Rawls would be skeptical to the labour factor, because the tax incidence effect on employees' payroll is contrary to the re-distribution objective of taxation. From Nozick's view, when taking into account the tax incidence effect, Nozick would be negative about the asset factor, because the tax incidence effect would be falling on owners of immobile assets. This would be contrary to Nozick's conclusion if we presume shareholders bearing the tax burden and enjoy the benefits of limited liability and separating the assets of corporations and the assets of shareholders. Nozick would also be negative about the labour factor

[71] Ibid., 131.

if the tax incidence falls on employees. Being quite different from Nozick and Rawls, Murphy and Nagel express that the tax incidence effect will not influence their judgment on tax justice, so from their philosophical view, the three factor formula will be still accepted.

It seems to me that, the neutrality derived from the CCCTB Directive, is the middle way of these three schools of philosophical thoughts. As to the tax rate competition, CCCTB Directive allows the tax rate competition between EU Member States, and Nozick would immediately accept this position, because it is consistent with Nozick's minimal state rationale. Rawls and Murphy& Nagel would be more concerned about the problem of 'race to the bottom' issue than Nozick. As to the formulary apportionment, the neutrality of CCCTB seems consistent with Liam Murphy and Thomas Nagels' idea of tax justice,[72] especially when the benefits principle is interpreted broadly as 'providing the pre-condition' of the market economy, not to require the causal link of a specific benefit received or provided. Therefore, the CCCTB Directive Proposal adopts three weighting factors that reflect different economic activities from the production side to the customers side. The CCCTB Directive Proposal does not seem to take into account Mclure's well-known claim of the tax incidence effect of the formulary apportionment, because it refers these weighting factors as the indicators of 'where the companies' profits are actually earned'.

5. Conclusion: Toward A Broad-Sensed Tax Neutrality As Tax Justice

The neutrality principle that regulates the EU tax law harmonization is trio-formulation: efficiency, the benefits principle and the subsidiarity principle. The baseline of evaluating the neutrality should not be the hypothetical non-tax world, but a well-functioning market that tax contributes to build up. The trio-formulation of neutrality is also suitable to regulate the competence division between Member States and EU, and it accepts the very existence of shared competence, such as pursuing an internal market. In the context of EU tax law that aims 'to establish a market', the neutrality norm and inter-nation equity will converge; CIN and CEN will also be achieved at the same time.

Intra-nation equity and tri-formulation neutrality cannot be separated, so the norm of neutrality is understood as broadly. In this regard, the broad-sensed

[72] It should be noted that Murphy and Nagel have expressed that their doubts regarding the classical meaning of benefit principle, though. Ibid., p. 31, under the subtitle of 'The Problem of Everyday Libertarianism'.

neutrality principle is partially overlapping with the scope of the 'justice' concept that has been long argued and discussed by political philosophers. Since the very existence of government relies on tax collection, whether a tax system is 'neutral', is also the core question of 'whether the government levies a tax as such is justified'. Most philosophers are not tax law scholars, and focus more on 'social justice' instead of tax justice, and thus they rarely discuss in detail on justification of a specific type of tax or specific policy options. Even they touch upon the tax, philosophers usually only discuss taxes levied upon individuals, not corporations. Therefore, the discussions above contribute to bridge the gap between these theories and the idea of tax neutrality.

While applying Rawls' liberalism, Nozick's libertarianism, and Murphy and Nagel's ownership myth and tax justice theory to analyze different aspects of CCCTB as if doing the thought experiments, I draw the conclusions as follows: based on these three schools of thoughts, CCCTB as a corporate taxation system at the EU law level, is justified. The tax rate competition under the CCCTB that possibly leads to 'race to the bottom' would not be accepted by Rawls and Murphy& Nagel's theory. Nozick would be more comfortable with the tax rate competition. As to justifications to the formulary apportionment method, when we presume the corporations as the real entity bearing the tax burden, that is the shareholders who make use of the form of the corporation to conduct business, three school of thoughts would all be positive about the three-factor formula which consists of the sales factor, the asset factor and the labour factor.

I have to admit that there are unsolved puzzles when it comes to the tax incidence effect of formulary apportionment argued by many economists. This presumed effect seems to make the philosophical reasoning murky. Nozick would be negative about the labour factor and the asset factor, because these two factors will make the corporate taxation as *de facto* payroll tax and asset tax, and owners of immobile properties and immobile employees will bear the actual burden. Such tax incidence effect is contrary to Nozick's basic belief that individuals' liberty should prevail other policy objectives. Rawls would also be negative about the labour factor, because the tax incidence effect will shit burden to immobile employees, and this seems directly contrary to Rawls' re-distributive justice. What still intrigues me is that, tax incidence effect of formulary apportionment and corporate tax, has been widely discussed but there is never a clear consensus even between economists. So I tend to be cautious about the policy implications derived from the claims on 'who de facto bears the corporate tax burden', especially in the formulary apportionment context, although this is still a puzzle for me. Therefore, being similar to Murphy and Nagel, I am of the opinion that the justification of a specific tax policy option is not based on the tax incidence effect, but the overall outcome after levying such tax.

Finally, while embracing the neutrality that takes into account 'inter-nation equity, when it comes to BEPS, aggressive planning, and tax avoidance concerns, I am cautious about the arguments of directly naming, shaming, and blaming MNE taxpayers. In other words, I do not see these problems as MNE taxpayers' 'fault', but a systematic failure of the current international corporate tax system, which is deviating from the tax neutrality. MNE are active economic actors in the market and can create employments and stimulate better production and consumption. I am also cautious about the current harmful tax competition claim that argues for a harmonized tax rate, because even in an integrated market, not every part of the market (i.e. every Member State) is homogeneous. Keeping diversity of EU Member States and freedom to compete is the opportunity to develop the most suitable public service from Member States. The neutrality principle in the broad sense, taking into account the benefit principle and the subsidiarity principle, would be a more appropriate norm of tax justice, to guide a supranational system such as CCCTB that involves interactions between MNE taxpayers, EU and Member States.

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Protection of Environmental Human Rights in the Scope of European Union Law

Juraj Jankuv*

Summary: European Union law enshrines altogether six environmental human rights. The first group of these rights is composed of substantive environmental human rights – right to environment, right to water and right to sanitation (right to safe hygienic conditions of environment). The second group represent three human procedural environmental rights – right of access to information on environment, right of public participation in decision-making in environmental matters, and right of access to justice in environmental matters. All mentioned rights originated in international public law. The research of mechanisms of the protection of these rights under European Union law is important today in view of the severe deterioration of the state of environment of in Europe and because European Union law includes somewhat better implementation mechanisms of its law compared with international public law. In the light of the above, European Union law is capable to make a significant contribution to clarifying the implementation, interpretation and implementation of human environmental rights in the legal orders of the Member States of the European Union. The aim of this article is therefore to identify enshrining human environmental rights in European Union law and mechanisms of the protection of these rights in European Union law.

Keywords: Law of the European Union – environmental law of the European Union – human rights law of the European Union – international public law – international environmental law – international human rights law – environmental human rights – substantive human right to environment – procedural environmental rights – right to water – right to sanitation

Foreword

European Union law (also EU law) has emerged in the scope of international public law, and naturally takes over and develops the mechanisms for protecting human rights. This concerns even environmental human rights created within the framework of the international public law. Under EU law, it is therefore possible

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to identify the provisions enshrining substantive environmental human rights – right to environment, right to water and right to sanitation (right to safe hygienic conditions of environment) and even procedural environmental human rights – right of access to information on environment, right of public participation in decision-making in environmental matters, and right of access to justice in environmental matters, as they have been formulated in international public law.

The research of mechanisms of the protection of these rights under EU law is important today in view of the severe deterioration of the state of the Earth's planet environment, and because European Union law includes somewhat better implementation mechanisms of its law compared with international public law. In the light of the above, European Union law is capable to make a significant contribution to clarifying the implementation, interpretation and implementation of human environmental rights in the legal orders of the Member States of the European Union. The aim of this article is therefore to identify enshrining human environmental rights in European Union law and mechanisms of the protection of these rights in European Union law. As a theoretical basis in order to fulfil this goal we will provide for concise analysis of mechanisms of protection of human rights in the EU law in general.

1. Legal arrangement of protection of human rights in the scope of European Union law in general as a basis for protection of environmental human rights

The European Communities (also the EC) and later the European Union (also the EU) were originally created mainly for economic reasons. The gradual deepening of the competences of the various EU bodies has resulted in the extension of the EU agenda to the area of human rights, including human environmental rights. Development in the area of protection of human rights law in European Union law generally appear at first sight to be very complex.[1] The unifying and sticking element in protection of human (fundamental) rights in the scope of EU law are,

[1] To this very complex problematic see ŠIŠKOVÁ, N. *Dimenze ochrany lidských práv v EU.* Praha: ASPI, 2003, 228 p.; ŠIŠKOVÁ. N. *Dimenze ochrany lidských práv v Evropské unii.* 2. rozšířené a aktualizované vydání. Praha: Linde, 2008. 256 p.; ŠIŠKOVÁ, N. Regulace lidských práv na úrovni EU – vývoj a perspektivy. *Mezinárodní a srovnávací revue,* No. 10, 2004, p. 29–36; KERIKMÄE, T., HAMUĽÁK, O., CHOCHIA, A. A Historical Study of Contemporary Human Rights: Deviation or Extinction? *Acta Baltica Historiae et Philosophiae Scientiarum*, 2016, Vol. 4, No. 2, p. 98–115. ISSN 2228-2009.

in particular, the provisions of the *Treaty on European Union* (1992, hereinafter referred to as the TEU)[1] as amended by the *Treaty of Lisbon* (2007).*Treaty of Lisbon* (2007)[2] significantly amends both the Treaty on European Union and the Treaty establishing the European Community, the title of which, as a consequence of the Treaty of Lisbon, was changed to the *Treaty on the Functioning of the European Union* (1957, TFEU).[3] Treaty of Lisbon caused even certain modifications in the area of protection of human rights. The issue of the protection of human rights is, in general, in line with the provisions of the *Lisbon Treaty* (2007), enshrined in Articles 2 and 6 of the *Treaty on European Union* (1992). More detailed analysis of these articles goes beyond the scope of this paper. In order to reach the goal of this paper it suffices to say that within the European Union, coming up from provisions of Article 6 of the Treaty on European Union, there are in parallel three binding human rights catalogues – catalogue of rights enshrined in the *Charter of Fundamental Rights of the European Union* (2000, 2007),[4] catalogue enshrined in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950)[5] created by the Council of Europe and the catalogue of rights created under the *doctrine of fundamental rights* created by Court of Justice of the European Union or its predecessor Court of Justice of the European Communities.[6] These catalogues are complementary to each other and to a certain extent overlap. Some of these rights are anchored even in *secondary EU law* even as far as the environmental rights are concerned. Certain number of environmental rights are anchored in *international treaties concluded by the European Union with the third states*[7] or in *multilateral treaties signed and ratified by the European Union*. The leading multilateral treaty in this sense is the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998) concluded in

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1 *Consolidated version of the Treaty on European Union* (1992). OJ C 326, 26. 10. 2012, p. 13–390.

2 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007. OJ C 306, 17. 12. 2007, p. 1–271.

3 *Consolidated version of the Treaty on the Functioning of the European Union* (1957).OJ C 326, 26. 10. 2012, p. 47–390.

4 *Charter of Fundamental Rights of the European Union* (2000, 2007). OJ C 326, 26. 10. 2012, p. 391–407. To the practical application of this charter see HAMUĽÁK, O., MAZÁK, J. The Charter of Fundamental Rights of the European Union vis-á-vis the Member States – Scope of its Application in the View of the CJEU. *Czech Yearbook of Public & Private International Law*, Vol. 8, 2017, p. 161–172.

5 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Council of Europe.

6 See ŠTURMA, P. *Mezinárodní a evropské kontrolní mechanismy v oblasti lidských práv.* 3. doplněné vydání. Praha: C. H. Beck, 2010, p. 51–68.

7 See ŠTURMA, P. *Mezinárodní a evropské kontrolní mechanismy v oblasti lidských práv.* 3. doplněné vydání. Praha: C. H. Beck, 2010, p. 56–57.

the Danish city of Aarhus (hereinafter the Aarhus Convention or the Convention), which will be analysed in a detailed manner in this paper later.

In view of the possibility of claiming protection of human rights under EU law, it is generally appropriate to mention the rules of EU law that make it possible to claim protection of human rights in proceedings before the Court of Justice of the European Union or other EU bodies. In EU law, a variety of means of enforcing or safeguarding the human rights are available to individuals. The means of enforcing individual rights in European law are diverse and feasible at different levels. There have been no major changes in this are by the Lisbon Treaty. First of all, it is possible to *invoke human rights under EU law directly before the national court*. It is a group of rights that have direct effect in national law. Where an individual invokes a right under EU law that has no direct effect, the national level of protection is inapplicable and the realization of individual rights takes place at EU level. An individual may use several procedural procedures that may be extra-judicial or judicial in this regard.

Extrajudicial remedies are underpinned by Article 24 TFEU (former Article 21 TEC), which sets out for every EU citizen the *right to petition the European Parliament* under Article 227 (former Article 194 TEC), the *right to apply to the Ombudsman* established in accordance with Article 228 (former Article 195 TEC) and the *right to apply in writing to any institution, body, office or agency* referred to in Article 13 TEU (former Article 7 TEC) *in one of the languages referred* to in Article 55 (1) TEU (former Article 314 TEC) and the *right to receive a reply in that language*. In this area, the Treaty of Lisbon has not brought major changes except the changing of the article numbers.

Judicial remedies are based on the possibility for an EU citizen to bring proceedings before the Court of Justice of the European Union. The actions may be brought before this court coming up from various articles of the EC Treaty. The most important type of human rights remedy is an *action for annulment of an act of the Union institutions and bodies* under Article 263 TFEU (former Article 230 TEC).[8] Under that article, any natural or legal person may, under the conditions laid down in the first and second paragraphs, bring an action against the acts addressed to him or to him which are directly and individually concerned, as well as regulatory acts which are of direct concern to him and do not require implementing measures. Legal acts establishing Union institutions, bodies, offices and agencies may lay down special conditions and arrangements relating to actions brought by natural or legal persons against acts of those Union institutions or bodies which give rise to legal effects against them. The proceedings referred

[8] See VARGA, P. *Fundamentals of European Union Law. Constitutional and Institutional Framework.* Plzeň: Aleš Čeněk, 2011, p. 80–81.

to in this Article shall be initiated within two months of the publication of the measure or its notification to the applicant or, in the absence thereof, from the date on which the applicant became aware of it.

Thus, that article allows individuals, but also environmental non-governmental organizations, access to the Court of Justice of the European Union (CJEU) to bring an action against the acts addressed to them or directly or individually related to them and to the regulatory acts directly related that do not need implementing measures. The CJEU has interpreted the provisions of this article quite restrictively and therefore, paradoxically, it is very difficult to file an environmental complaint under this article.[9]

After the European Community ratified the Aarhus Convention, the situation was to change. Under Article 216 TFEU, the Aarhus Convention is binding on all EU institutions. While in a number of cases, the CJEU stated in the context of the Aarhus Convention that the law of the Member States and the courts of the Member States should do everything to implement the Aarhus Convention, it still takes a restrictive stance on the issue of direct access to it in environmental actions in the spirit of Article 263 TFEU, that environmental protection is a public interest and not an individual's interest[10] and also because the international treaty has a lower legal force than primary law in the hierarchy of sources of EU law.[11] However, this approach is contrary to Article 9 (3) of the Aarhus Convention and is unacceptable.[12] However, in the case of the case-law od CJEU or in the past CJES, the question of the protection of procedural environmental rights, paradoxically, appears in other mentioned types of proceedings. Also important is *an action for failure to act by the Union institutions and bodies* under Article 265 TFEU (former Article 232 TEC).[13]

However, in both proceedings, an EU citizen has a so-called non-privileged position even under the Lisbon Treaty. In relation to both articles, a citizen must prove his interest in the case by designating that act or by an act or omission of the institution directly and individually concerned, with the exception of the procedure under Article 263 in relation to regulations which are not transposed

[9] KRÄMER, L. The EU Courts and Access to Environmental Justice. In: Boer, B. (ed.). *Environmental Law Dimensions of Human Rights.* Oxford: Oxford University Press, 2015, p. 132–133.

[10] KRÄMER, L. The EU Courts and Access to Environmental Justice. In: Boer, B. (ed.). *Environmental Law Dimensions of Human Rights.* Oxford: Oxford University Press, 2015, p. 127.

[11] See case *EEB and Stichting Natuur en Milieu v Commission*, T-236/04 a T-241/04, 28. November 2005.

[12] See KRÄMER, L. The EU Courts and Access to Environmental Justice. In: Boer, B. (ed.). *Environmental Law Dimensions of Human Rights.* Oxford: Oxford University Press, 2015, p. 128–133.

[13] See VARGA, P. *Fundamentals of European Union Law. Constitutional and Institutional Framework.* Plzeň: Aleš Čeněk, 2011, p. 83–84.

and do not require the adoption of implementing measures, it is necessary to show only direct concern.

The free access to the EU judicial authorities in the meaning of the unconditional *locus standi* without the need to prove interest in the case, has the EU citizen in the case of an *action for damages* under Article 268 TFEU (former Article 235 TEC) and Article 340 TFEU (former Article 288 TEC) in *disputes between the Union and its servants*, under Article 270 TFEU (former Article 236 TEC) and in *disputes arising from the application of competition rules*. In the context of these three procedures, given their focus, issues of protecting human rights with the dimension of the need to protect human environmental rights can rarely occur.

However, human rights issues, including issues concerning environmental human rights, can often be raised in proceedings base on *reference for preliminary ruling* brought by a national court under Article 267 TFEU (former Article 234 TEC) concerning the interpretation of founding treaties or the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union.[14] The EU citizen can only take part in the proceedings indirectly by initiating proceedings. The issue and the hearing of the preliminary question can no longer be influenced. This decision is the responsibility of the CJEU. Human-law issues may also be also a part of proceedings based on *action for failure to fulfil obligations* by a Member State under Article 258 TFEU (former Article 226 TEC). However, even this action cannot be initiated by the individual.

2. Protection of substantive human right to environment under European Union law

Scientific discussion on the stabilization of the new human right to environment (further even shortened "right to environment") strengthened in the mid-sixties of the twentieth century.[15] The result of this discussion was the embodying of this right, according to some views of international public law science understood as a basic human right,[16] into an international document of a fundamental nature for the protection of environment – *Declaration of the United Nations Conference*

[14] See VARGA, P. *Fundamentals of European Union Law. Constitutional and Institutional Framework.* Plzeň: Aleš Čeněk, 2011, p. 77–78.

[15] ZÁSTĚROVÁ, J. Jednotlivci: právo na životní prostředí. In: Šturma, P. et al. *Mezinárodní právo životního prostředí, I. část (obecná).* Beroun: Eva Rozkotová – IFEC, 2004, p. 36.

[16] ZÁSTĚROVÁ, J. Jednotlivci: právo na životní prostředí. In: Šturma, P. et al. *Mezinárodní právo životního prostředí, I. část (obecná).* Beroun: Eva Rozkotová – IFEC, 2004, p. 37.

on the Human Environment[17] adopted at the United Nations Conference on the Human Environment, June 5–16, 1972, Stockholm.Principle 1 of this declaration reads: *"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."*

Almost twenty years after the Stockholm Conference the UN General Assembly recalled the language of the Principle 1 of the Stockholm Declaration in resolution 45/94 (1990) stating that *"Recognizes that all individuals are entitled to live in an environment adequate for their health and well-being; and calls upon Member States and intergovernmental and non-governmental organizations… to enhance their efforts towards ensuring a better and healthier environment."*.[18]

The enactment of substantive human right to environment in the Declaration of the Stockholm Conference on the Human Environment (Stockholm declaration) has influenced lately adopted international public law normativity. This right was implemented in various other international instruments and conventions adopted within the framework of the United Nations, conferences organized by the United Nations, international organizations associated to the United Nations as well as conventions and documents international regional organizations such as African Union, Organisation of American States, League of Arab States or Association of Southeast Asian Nations.

The right to environment was anchored even at the European level, in the binding, form by the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998, the Aarhus Convention), which was adopted by the UN Economic Commission for Europe.[19] The Aarhus Convention is a new type of convention on international environmental law, which links international environmental law and international human rights law.

Coming up from the international public law science opinions, this provision is enshrining substantive right to environment called even substantive right to a healthy environment,[20] or substantive right to a decent environment.[21] Title of this right is used in the international public law scientific literature even in the

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[17] *Declaration of the UN Conference on the Human Environment*. Stockholm. 5–16 June 1972, UN Doc. A/Conf.48/14/Rev. 1 (1972).

[18] Resolution *„Need to Ensure a Healthy Environment for the Well-Being of Individuals "*, G. A. Res. 45/94, at p. 1–2, U. N. GAOR, 45th Sess., U. N. Doc. A/RES/45/94 (Dec. 14, 1990).

[19] Convention on Access to Information, Public Participation on Decision-making and Access to Justice in Environmental Matters (1998), United Nations, Treaty Series, vol. 2161, p. 447.

[20] DÉJANT-PONS, M., PALLEMAERTS, M. *Human Rights and the Environment.* Strasbourg: Council of Europe, 2002, p. 10.

[21] BOER, B. Human Rights and the Environment: Where Next? In: Boer, B. (ed.). *Environmental Law Dimensions of Human Rights.* Oxford: Oxford University Press, 2015, p. 219.

different form as far as the grammar is concerned. Some authors are using the formulation – substantive right to the environment[22] some of them are using the simplified form – substantive right to environment.[23]As far as this article is concerned, we will use the title of this right in the form *"substantive human right to environment"* or in its shortened form *"right to environment"*.

European Union law has reflected to the previous international public law documents and enshrined substantive human right to environment beyond the framework of the three basic mentioned human rights catalogues, in the scope of EU environmental law, through secondary EU law and in the scope of international treaties concluded by the European Union. Gradually, however, we can observe the process of linking this issue to the issue of human rights protection, as in international public law.

First step in order to recognize substantive right to environment in EC/EU law was made in the scope of non-bindinghigh-level political declaration of the European Council in the *Dublin Declaration on "The Environmental Imperative"*, adopted on 7 July 1990, the heads of state and government of the member states of the European Community proclaimed that the objective of Community action for the protection of the environment "must be to guarantee citizens the right to a clean and healthy environment". The European Commission, for its part, has twice recommended to intergovernmental conferences for the reform of the Community treaties that the right to a healthy environment be included in the Treaty provisions on citizens' rights, but the member states have thus far failed to act on this recommendation. But it should be recalled that "protecting human health" is one of the explicit objectives of EC environmental policy, as laid down in Article 130r (1) of the EC Treaty, and that the Court of Justice of the European Communities has held that EC directives laying down environmental quality standards for air and water must be understood as conferring rights on individuals which are to be upheld by domestic courts.[24]

An important role in the development of the protection of substantive human right to environment in European Union law also play the rules of international environmental law, which the European Union has become a party to. The already mentioned *Convention on Access to Information, Public Participation in*

[22] BOER, B. Human Rights and the Environment: Where Next? In: Boer, B. (ed.). *Environmental Law Dimensions of Human Rights.* Oxford: Oxford University Press, 2015, p. 3.

[23] See RIVERA-RODRIGUEZ, L. E. Is the Human Right to Environment Recognized under International Law? *Colorado Journal of International Environmental Law and Policy*, Vol. 12, No. 1, (2001), p. 31–37 or DÉJANT-PONS, M., PALLEMAERTS, M. *Human Rights and the Environment.* Strasbourg: Council of Europe, 2002, p. 19.

[24] DÉJANT-PONS, M., PALLEMAERTS, M. *Human Rights and the Environment.* Strasbourg: Council of Europe, 2002, p. 16.

Decision-Making and Access to Justice in Environmental Matters (1998, hereinafter the Aarhus Convention),[25]to which the European Union is a Contracting Party, plays a particularly important role. The Aarhus convention became a part of the EU law by virtue of *Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters* (2005/370/EC).

The Aarhus Convention is a new type of convention on international environmental law, which links international environmental law and international human rights law. Right to environment is primarily enshrined in the preamble to the Convention in the wording of *"…every person has the right to live in an environment adequate to his or her health and well-being…"*.Furthermore, this right is referred to in Article 1 of the Convention, entitled *"Purpose",* within the formulation *„in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."* For the first time, substantive human right to environment has been explicitly recognized in the Aarhus Convention in the operative provisions of the international legal instrument at the European level.[26] Article 1 of the Aarhus Convention creates a very specific form of protection of substantive right to environment. In the first part of the article there is evident a clear recognition of the substantive right to environment. However, it is clear from the second part of this article that the protection of this right will be exercised through three procedural rights, which have the unique relationship with the substantive right to environment.[27]

This provision has been followed by some proposals to formulate a general human right to a clean environment in the EU constitution, which would include even the environmental procedural rights.[28]

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[25] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998), 2161 UNTS 447. 2005/370/EC: *Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.* OJ L 124, 17. 5. 2005, p. 1–3.

[26] See DÉJANT-PONS, M., PALLEMAERTS, M. *Human Rights and the Environment.* Strasbourg: Council of Europe, 2002, p. 16–17.

[27] DÉJANT-PONS, M., PALLEMAERTS, M. *Human Rights and the Environment.* Strasbourg: Council of Europe, 2002, p. 18.

[28] See JENDROSKA, J. Public information and Participation in EC Environmental Law; Origins, Milestones and Trends. In: Macrory, R. (ed.). *Reflections on 30 Years of EU Environmental Law. A High level of Protection.* Groningen: Europa Law Publishing, 2006, p. 67.

Certain form of enactment of substantive right to environment in EU law can also be identified under secondary EU law, namely in the framework of *Directive 2003/35/E Cof the European Parliament and of the Council of 26 May 2003 providing for public participation inrespect of the drawingup of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.*[29] This directive was adopted in order to implement provisions of the abovementioned Aarhus (dan. Århus) convention. Paragraph 6 of the preamble of that directive states that "*Among the objectives of the Århus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being."* This provision, in our opinion, indicates another form of declaratory recognition of the existence of substantive environmental law in EC / EU law. When examining other EU law standards, it is clear that they do not further develop this substantive right, but instead concentrate itself on the development of procedural environmental rights and substantively-understood rights – rights to water and right to sanitation (right to safe hygienic conditions of the environment) whose practical application contributes to the protection substantive right to environment indirectly.

To the protection of this right also contributes indirectly the very existence of EU environmental law as such, which protects the environment as a value essential to the realization of the environmental right itself in a substantive form.

EU law also includes the potential for indirect protection of substantive right to environment by respecting the abovementioned *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) and certain provisions of the abovementioned *Charter of Fundamental Rights of the European Union* (2000, 2007). However, these options have not yet been used.

3. Protection of human procedural environmental rights under European Union law

Protection of human procedural environmental rights developed itself in the scope of international public law in wide range of documents and conventions.[30]

[29] *Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC,* OJ L 156/17.

[30] See ANTON, D. K., SHELTON, D. L. *Environmental Protection and Human Rights.* New York: Cambridge University Press, 2011, p. 356–435.

One of the key documents in this sense is the United Nations *Rio Declaration on Environment and Development* (1992),[31] which created the base for development of human environmental procedural rights in its Principle 10. This principle reads: *"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."* The most important international public law document anchoring human procedural environmental rights is the abovementioned Aarhus convention.

Human procedural environmental rights, in the context of EU/EC law, have been emerging for the first time in earlier EU/EC secondary legislation before the European Community signed and ratified the Aarhus Convention (1998). The milestone in order to enshrine the procedural environmental rights to the EU/EC law was ratification of the Aarhus Convention (1998). Later, procedural environmental rights were further enshrined in some secondary rules of EU/EC law adopted to implement the Aarhus Convention and as well as the directives on environmental protection, unrelated to the Aarhus Convention.[32]

The process of anchoring procedural environmental rights under EC/EU law was relatively complex. Within the period before the European Community signs and ratifies the Aarhus Convention, it is possible to identify provisions enshrining procedural environmental rights in earlier standards of European secondary Community law at that time. The general right to information on the environment was contained in *Directive 90/313/EEC on the freedom of access to information on the environment*, which aims at ensuring free access to environmental information at the disposal of public authorities and the free dissemination of such information.[33]

This relatively brief directive provided for free access to environmental information as well as free circulation of this information. The preamble to this directive highlights the idea that access to environmental information by public authorities will improve environmental protection. The Directive defines and describes basic conditions for the exercise of this right by establishing entities obligated to provide for the information and the procedure leading to its

[31] *Rio Declaration on Environment and Development* (1992). UN Doc. A/CONF.151/26 (vol. I).

[32] See ŠIŠKOVÁ, N. *Dimenze ochrany lidských práv v EÚ.* Praha: ASPI, 2003, p. 66–67.

[33] *Council Directive 90/313/EEC of 7 June 1990 on the fredom of access to information on the environment,* OJ 1990 L 158/56.

acquisition. At the same time, it provides for cases where their granting may be refused, together with the possibility to appeal against such refusal.[34]

This Directive seems to be the first more comprehensive document adopted in the scope of the EU/EC law devoted exclusively to one of the procedural environmental rights. Historically this directive probably had great inspirational importance. The content of this directive maybe inspired states by creating the Aarhus Convention itself. However, in the meantime, this Directive has been repealed by *Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC*. Following Directive 90/313/EEC, there is also the case law of the CJEU (CJEC). It is for example the case *Wilhelm Mecklenburg v Kreis Pinneberg-der Landrat* (1998)[35] or case *Commission v Germany* (1999).[36]

Both cases concerned exceptions to the right to environmental information, the first of which was a preliminary ruling under Article 234 of the Treaty establishing the European Community (now Article 267 of the Treaty on the Functioning of the European Union) following a request by the German court and a second of the United Kingdom under Article 226 of the Treaty establishing the European Community (now Article 258 of the Treaty on the Functioning of the European Union). In the case of Wilhelm Mecklenburg v Kreis Pinneberg-der Landrat (1998), the complainant sought a copy from the local authority of Kreis Pinneberg of a statement from the competent country protection authority to permit the construction of the road.

The local authority rejected the request, arguing that it is not environmental information. In that regard, the Court of Justice of the European Union (at that time the Court of Justice of the European Communities) found that the opinion delivered in the relevant proceedings should also be regarded as environmental information, since that position may affect the outcome of that procedure and thus have an environmental impact.

In the case of the Commission against Germany (1999), the Court of Justice of the European Union (at that time the Court of Justice of the European Communities) found that the transposition of Directive 90/313/ EEC by Germany was incorrect, since its national legislation did not contain express provisions on the possibility of disclosing part of the information the provision of which was rejected as a whole.

Procedural environmental rights can also be identified in some other directives from this period. *Council Directive 85/337/EEC on the assessment of the effect of*

[34] See KRUŽÍKOVÁ, E., ADAMOVÁ, E., KOMÁREK, J. *Právo životního prostředí Evropských společenství.* Praha: Linde, 2003, p. 86–88.

[35] *Case C-321/96 Wilhelm Mecklenburg v Kreis Pinneberg-der Landrat(1998), ECR I-3809.*

[36] *Case C-217/97 Commission v Germany (1999),* ECR I-5087.

certain public and private projects on the environment, as amended,[37] lays down the obligation for Member States to ensure that applications for approval, designation of the assessment and documentation are made available to the public within a reasonable time to allow the public to express their views before the consent is granted. Consequently, the public has a right to participate in environmental matters in that regard.[38] *Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control,*[39] enshrined the right of the public to participate in environmental decision-making as well as the right to environmental information in connection with applications for new installations or substantial changes to the business operations that may increase the level of environmental pollution.[40] Public access to information of an environmental nature was defined by reference to the relevant provisions of Directive 90/313/EEC. *Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants*[41] defined terms such as air pollution, air quality limit values, emission limit values and sets out the need to issue permits for the operation of certain air pollutants. In this context, it has enshrined the commitment of Member States to ensure that requests for such authorizations and final decisions by the competent authorities are made available to the public in accordance with national rules.

These directives were later superseded by *Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control,*[42] which was later repealed by *Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)*.[43]

Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants[44] and *Council Directive*

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[37] *Council Directive 85/337/EEC on the assessment of the effect of certain public and private projects on the environment, as amended,* OJ 1985 L 175/40.

[38] See KRUŽÍKOVÁ, E., ADAMOVÁ, E., KOMÁREK, J. *Právo životního prostředí Evropských společenství.* Praha: Linde, 2003, p. 54.

[39] *Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control,* OJ 1996 L 257/26.

[40] See KRUŽÍKOVÁ, E., ADAMOVÁ, E., KOMÁREK, J. *Právo životního prostředí Evropských společenství.* Praha: Linde, 2003, p. 84.

[41] *Council Directive 84/360/EEC on the combating of air pollution from industrial plants, as amended,* OJ 1984 L 188/20.

[42] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control. OJ L 24, 29. 1. 2008, p. 8–29.

[43] *Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).* OJ L 334, 17. 12. 2010, p. 17–119.

[44] *Council Directive 89/369/EEC on the prevention of air pollution from new municipal waste incineration plants.* OJ 1989 L 163/32.

89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste-incineration plants,[45] enshrined a commitment to inform the public of the requirements applicable to new and existing incineration plants. These directives were repealed by *Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste*.[46] Even this directive was later repealed by mentioned *Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).*[47]

Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management[48] enshrined the commitment of Member States to inform the public of programs processed for zones and agglomerations where the level of pollutants exceeds certain limits and to exceed the alert thresholds. This directive was repealed by *Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe*.[49] The provisions of this group of directives indicate the existence of a long-term tendency to anchor procedural environmental rights in directives relating to various environmental activities.

The protection of procedural human environmental rights (and even substantive human right to environment) within the European Union (hereafter the EU) was significantly improved by the act of signing and ratifying the Aarhus Convention by the European Community (hereafter EC)[50] The EU is therefore now a full Contracting Party to this Convention. All Member States of the European Union are also parties to the Aarhus Convention. The Slovak Republic became a party to the Aarhus Convention by accessing the Treaty on 5 December 2006.[51]

As it was mentioned above the Aarhus Convention, in its Article 1, states as follows: *"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or*

[45] *Council Directive 89/429/EEC on the reduction of air pollution from existing municipal waste-incineration plants.* OJ 1989 L 2003/50.

[46] *Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste.* OJ L 332, 28. 12. 2000, p. 91–111.

[47] *Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).* OJ L 334, 17. 12. 2010, p. 17–119.

[48] *Council Directive 96/62/EC on ambient air quality assessment and management.* OJ 1996 L 296/55.

[49] *Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe*. OJ L 152, 11. 6. 2008, p. 1–44.

[50] See Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters. OJ L 124, 17. 5. 2005, p. 1–3.

[51] See Slovak Collection of Laws – Announcement No. 43/2006 Col. of Laws.

her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

As it was mentioned above, this provision, on the one hand, contains the declaratory recognition of the existence of substantive right to environment. This provision stipulates, on the other hand,also the main goal of the Aarhus Convention to protect substantive right to environmentthrough three procedural environmental rights – right of access to environmental information, right to participate in environmental decision-making and right of access to legal protection in environmental matters, in accordance with the provisions of the Convention, and acts of national authorities in the field of application of their national rules. The Aarhus Convention provides, in its content, the necessary definitions, general provisions, detailed legal regulations for all three procedural environmental rights, and creates scope for the gradual completion of the Convention's control mechanisms, including mechanisms of communications from the public to the international authority in case of violation of these rights.

The control mechanisms of the Convention shall be established in the spirit of Articles 10 (2), 12, 14 and 15. Article 10 (2) in the first sentence states *"... At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties..."*. This is a reporting procedure similar to the reporting procedures of the UN human rights conventions. Article 12 creates a special body of the Aarhus Convention – Secretariat. Article 10 (1) creates another specific international body of the Aarhus Convention – Meeting of the parties. Article 15 further states that *"... The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention. ..."* These authorities have been created over time. Several bodies have been set up within the meetings of the parties. From the point of view of compliance with the provisions of the Convention, it is probably the most important the Compliance Committee, also called the Aarhus Committee, created by *the Decision 1/7 (2002) on the examination of the compliance* of the Meeting of the Parties. The mechanism of this committee may be triggered by the communication of a Contracting Party on compliance by another Contracting Party with the Convention, by the communication by a Party of compliance with the Convention on its part, by the reference of the Secretariat of the Meeting of the Parties to the Aarhus Committee, and by communication of compliance by the State to the Convention made by members of the public (individuals or legal

personalities). In addition, the Compliance Committee may examine compliance with the Convention on its own initiative, make recommendations, prepare compliance reports at the request of a meeting of the Parties, and monitor, assess and facilitate the implementation of the reporting requirements of the States pursuant to Article 10 (2). Details regarding the implementation of the reporting procedure were elaborated in the framework of *Decision No. 1/8 (2002) on the Reporting Requirements of the Meeting*. In addition to the Aarhus Committee, the Secretariat has an important role to play in this procedure.

Given the recent creation of the Aarhus Committee, there is not enough information in the literature to make it absolutely clear the nature of this body. But there is the potential for creating a quasi-judicial mechanism.[52]

The Aarhus Committee currently records a smaller number of communications from states against another state and a higher number of communications from the public (individuals) against the state. In several cases (including the Slovak Republic), the Aarhus Committee found non-compliance with the provisions of the Aarhus Convention.[53]

The act of ratifying the Aarhus Convention by the European Community has created a new legal situation. As in other cases, in relation to the application of the Aarhus Convention, a new situation of shared competence between the European Union institutions and the Member States has arisen. This situation has also caused some conflicts, particularly concerning access to justice in environmental matters. Ultimately, Member States have expanded their commitments, and from the EU level they have an obligation to implement all secondary legislation adopted following the Aarhus Convention, and at their own national level, adopt legal standards to implement the Aarhus Convention itself. The European Union itself has a primary obligation, following the Aarhus Convention, to adopt legislative, administrative and other measures, including measures to ensure compliance with the provisions of the Aarhus Convention pursuant to Article 3 thereof, as well as the other Contracting Parties, as well as the obligation to submit to control mechanisms under Article 10 (2). 2 and Article 15 of the Aarhus Convention.

Following the commitment of the European Union to submit to the Aarhus Convention's control mechanisms, the European Union implements the reporting procedure under Article 10 (2). of this Convention and has also created a space for notifications under Article 15 of the Convention. The European Union made

[52] See SHAW, M. N. *International Law.* Sixth Edition. Cambridge: Cambridge University Press, 2008, p. 848–849.

[53] See JANKUV, J. Ľudské právo na životné prostredie a mechanizmy jeho ochrany v medzinárodnom práve. In: *Acta Universitatis Carolinae – Iuridica*. Praha: No. 4, 2006 (issued in 2008), p. 75–76 and website http://www.unece.org/env/pp/pubcom.htm

its first report under Article 10 (2) on the implementation of the Aarhus Convention in the second cycle of reports in 2008.[54] To date, the EU has submitted a total of 4 implementation reports to the Aarhus Committee.[55] Following the Article 15 control procedures, a number of communications from the public against the European Communities or the European Union are registered.[56]

One of the latest resolved cases of communications from the public against the EU by the Aarhus Committee is the case of the communication of the United Kingdom non-governmental organisation *Justice and Environment* (2017).[57]

In the scope of this communication, the NGO argued that the EU had infringed Article 9 (3) and 9 (4) of the Aarhus Convention enshrining the right of access to justice by not fully transposing this article into the EU legal order and, accordingly, infringed even the provisions of Article 2 par. 1 to 5, and Article 3 par. 1, 2, 3, 4, 8, 9 of the Aarhus Convention. Indeed, the EU has not yet been able to adopt a directive in this direction. In its defence, the EU has argued that, since the Aarhus Convention is part of European Union law, the European Union and its Member States have a specific obligation under Article 216 (2) of the Treaty on the Functioning of the European Union to respect their international obligations, including the obligations enshrined in the Aarhus Convention. Therefore, even in the absence of European Union legislation, the Member States must comply with the requirements of Article 9 para. 3 and 4 of the Aarhus Convention, as the requirements of the binding source of EU law. The EU further argued that it adopted the Regulations obliging the European Union institutions by the Aarhus Convention,[58] thereby ensuring the implementation of the provisions of the Aarhus Convention within EU law. In this regard, the Aarhus Committee supported the arguments of the EU and stated that, in the circumstances, the non-adoption of the Access to Justice Directive does not mean the EU failed to implement Article 9 of the Aarhus Convention and does not constitute an inconsistency with Articles 2 and 3 of the Aarhus Convention by the EU.

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[54] See *Implemetation report by European Community*, ECE/MP.PP/IR/2008/EC and report *Compliance with regard to the European Commission* ECE/MP.PP/2008/5/Add.10.

[55] See website http://ec.europa.eu/environment/aarhus/reporting.htm

[56] Communication ACCC/C/2006/17, Communication ACCC/C/2007/21, Communication ACCC/C/2008/32, Communication ACCC/C/2010/54, Communication ACCC/C/2012/68, Communication ACCC/C/2012/72, Communication ACCC/C/2013/96, Communication ACCC/C/2014/121, Communication ACCC/C/2014/123 a Communication ACCC/C/2015/128

[57] Communication ACCC/C/2014/123.

[58] *Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.* OJ L 264, 25. 9. 2006, p. 13–19.

As for the further development it is to say that several rules of secondary EU were adopted to implement the Aarhus Convention. The process of issuing these directives began after the signing of the Aarhus Convention by the European Community, before the ratification act. Primarily it is *Directive 2003/4/EC ofthe European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.*[59] This directive constitutes the implementation of the first pillar of the Aarhus Convention – the right to environmental information. It adapts EU law in a given field to a level that is consistent with the Aarhus Convention. It builds on the earlier Directive 90/313 / EEC, which repeals, extending access to environmental information provided for therein. Its fundamental objectives under Article 1 are to ensure the right of access to environmental information held by or for public authorities, to anchor basic concepts and conditions and practical arrangements for its performance and to ensure that environmental information is progressively available and disseminated to the public. Article 2 lists enshrine most important definitions, including terms such as *"environmental information", "public authority", "applicant", "public"* and so on. Comprehensive Article 3 lays down rules for access to environmental information on demand. Article 4 provides for exceptions under which an application for environmental information can be refused. Article 5 sets out briefly the rules for determining the fees for such information. Very important is Article 6, which regulates the right of access to justice where an application for environmental information has been ignored, incorrectly rejected, inadequately answered or otherwise resolved in contravention of Articles 3, 4 and 5. Member states ensure the possibility of reviewing those acts of public authority by another public body or by an independent and impartial body set up by law. In addition, States Parties shall provide access to appeal procedures before courts or other independent and impartial bodies in which acts or omissions of public authorities may be examined, whose decisions are being final in the case. Article 7 regulates obligations of States in the area of the dissemination of environmental information in the scope of activities of public authorities, including the obligation to create electronic up-to-date databases of all relevant environmental information, texts of international treaties, national, regional or local legislation, policies, reports and other data in the area. Following this article, the next Article 8 sets out the obligation to ensure that environmental information is up-to-date, accurate and comparable. In relation to Directive 2003/4/EC, several cases may also be registered in the case law of the Court of Justice of the European Union.[60]

[59] *Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC,* OJ 2003 L 41/26.

[60] For example, the case T-264/04, WWF-EPO v Council, case C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany, case C-552/07, case Commune de Sausheim v. Pierre Azelvandre and so.

An illustrative approach of the Court of Justice of the European Union to the issue of the right of access to environmental information in the context of Directive 2003/4/EC is documented by the interesting case of the *Commune de Sausheim v Commission* (2009).[61] In this case, Mr Azelvandre, a French citizen, wanted to know about the location of tests of genetically modified organisms carried out under Directive 2001/18 / EC on the deliberate release of genetically modified organisms and the repeal of Directive 90/220 / EEC. After being dismissed by the Mayor of Sausheim, he addressed in this case the French administrative court. The French State Council then referred the case in the scope of proceedings of reference for preliminary ruling to the Court of Justice of the European Community (under Article 234 of the Treaty establishing the European Community, now Article 267 of the Treaty on the Functioning of the European Union). The question was whether it is possible for a public authority to withhold information on the location of land where such attempts are being made for the protection of public order and other interests protected by law. The court took the view that this information could not be concealed in the light of the fact that it was information relating to the environmental risk assessment. Furthermore, referring to Directive 2003/4 / EC, the Court has stated that a State cannot rely on the exceptions provided for by the directives on the freedom of access to environmental information in order to be accessible to the public.

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation inrespect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access tojustice Council Directives 85/337/EEC and 96/61/EC[62] represents the implementation of the second pillar of the Aarhus Convention – the right of public participation in environmental decision-making. The basic objective of the directive under Article 1 is to contribute to the implementation of the Aarhus Convention by creating conditions for public participation in relation to the preparation of plans and programs relating to the environment, as well as to create conditions for improving public participation and access to justice under Directives 85/337/EEC and 96/61/EC. Following these objectives, Article 2 regulates the conditions for public participation in environmental plans and programs, Article 4 makes appropriate amendments to Directive 85/337/EEC and modifies Directive 96/61/ EC. Article 5 sets out

[61] *Case Commune de Sausheim v. Pierre Azelvandre,* Judgment of the Court of Justice in Case C-552/07, 17 February 2009.

[62] *Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation inrespect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access tojustice Coucil Directives 85/337/EEC and 96/61/EC.* OJ L 156/17.

reporting obligation of the Commission with regard to the European Parliament and the Council on the effectiveness of this directive. Following Article 5 of the Directive 2003/35/EC it was adopted *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of directive 2003/35/EC of the European parliament and of the council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice council directives 85/337/EEC and 96/61/EC*.[63]

In relation to Directive 2003/35/EC, cases have already been solved by the Court of Justice of the European Community (now the Court of Justice of the European Union). For illustration we can mention the case *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (2009).[64] This case concerned the right of public participation in relation to the plan to build a tunnel for the underground location of electric cables and also works to drain the hill through which the tunnel was to be routed. The case was referred to the Court of Justice of the European Community by the Swedish court (Högsta domstolen) as a request for a preliminary ruling under Article 234 of the Treaty establishing the European Community (now Article 267 of the Treaty on the Functioning of the European Union). From the point of view of the procedural environmental right of public participation in environmental decision-making, it is important the formulation in the judgment under which the members of the public concerned must have access to the procedure under Article 1 (2) and (10) and Directive 85/337/EEC as amended by Directive 2003/35/EC in order to challenge the decision by which the court of a Member State has decided to approve the construction of the work, irrespective of the role they would play in the assessment of that request, and should be able to take part in the proceedings before that authority and express their views.[65]

[63] Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of directive 2003/35/EC of the European parliament and of the council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice council directives 85/337/EEC and 96/61/EC. *Document KOM/2010/0143*.

[64] *Case C263/08, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd,* Judgment of the Court (Second Chamber) of 15 October 2009.

[65] Relevant part of the judgement stipulates „… Members of the 'public concerned' within the meaning of Article 1(2) and 10a of Directive 85/337, as amended by Directive 2003/35, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views…".

A proposal for a *Directive on access to justice in environmental matters* (2003)[66] was drafted to implement the third pillar of the Aarhus Convention – the right of access to justice in environmental matters. In addition to obligatory definitions, this proposal for a directive enshrines the right of members of the public and so-called qualified entities, which are various associations, organizations, or groups aiming to protect the environment, attack acts and omissions of private individuals that are contrary to environmental law. It also contains rules governing the legal position of members of the public and qualified entities, the criteria for the recognition of qualified entities, and the framework rules for proceedings in those cases in the administrative proceedings of the Member States.[67] However, this proposal has not yet been approved for the resistance of many Member States.

In order to implement the Aarhus Convention was adopted even above mentioned*Regulation 1367/2006 of the European Parliament and oftheCouncil of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community.*[68] This regulation covers all three pillars – rights enshrined in the Aarhus Convention. It creates the scope for applying all three environmental rights within all Community institutions and bodies and sets out the conditions for their application. Furthermore, it requires the Community institutions and bodies to create the conditions for public participation in the preparation, modification or review of environmental plans and programs. The Regulation also allows environmental NGOs that meet the established criteria to request an internal review of adopted acts and omissions of EU institutions and bodies under EU environmental law.[69]

Two Commission Decisions were issued to implement this Regulation. Commission Decision 2008/50/EC *of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the*

[66] *Proposal of the Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final, 2003/0246 (COD),* Brussels, 24. 10. 003.

[67] See JANS, J. H. Did Baron von Munchausen ever Visit Aarhus? Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies. In: Macrory, R. (ed.). *Reflections on 30 Years of EU Environmental Law. A High level of Protection.* Groningen: Europa Law Publishing, 2006, p. 477–492. ISBN 90-76871-50-7.

[68] *Regulation 1367/2006 of the European Parliament and oftheCouncil of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community.* OJ L 264/13, 25. 9. 2006.

[69] KOŠIČIAROVÁ, S. *EC Environmental Law.* Plzeň: Aleš Čeněk, 2009, p. 36.

internal review of administrative acts,[70] ***and*** Commission Decision 2008/401/EC*, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies*.[71]

In addition to the above-mentioned rules of EU secondary legislation issued directly following the Aarhus Convention, procedural environmental rights have also emerged in other rules of secondary law from the area of EU environmental law since 2000. This group of directives includes Directive 2000/60/EC *of 23 October 2000 establishing a framework for Community action in the field of water policy,*[72] which enshrines the right of public participation in environmental decision-making, *Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC,*[73] where the right of access to environmental information is enshrined, Directive 2001/42/EC *of 27 June 2001 on the assessment of certain plans and programmes on the environment,*[74] including the right of public participation in environmental decision-making, *Directive 2002/3/ES of the European Parliament and of the Council relating to ozone in ambient layer, as amended,*[75] where the right of access to environmental information is enshrined, or *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community*

[70] *Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts.* OJ L 013 , 16. 1. 2008, s. 0024–0026.

[71] *Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies.* OJ L 140, 30/05/2008, s. 0022–0025.

[72] *Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy.* OJ L 327, 22. 12. 2000, s. 0001–0073.

[73] *Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.* OJ 2001 L 106, p. 1.

[74] *Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment.* OJ L 197, 21. 7. 2001, s. 0030–0037.

[75] *Directive 2002/3/ES of the European Parlament and of the Council relating to ozone in ambient layer, as amended.* OJ 2002 L 67/14.

and amending Council Directive 96/61/EC,[76] which enshrines the right of access to information on the allocation of allowances and emission reports required by the competent authority for greenhouse gas emissions permits. A more detailed analysis of these directives already goes beyond this contribution. Therefore, we will briefly state in their context that a given set of secondary EU environmental rules naturally complements the Aarhus Convention and secondary legislation, which follows this convention, in the area of various specialized environmental activities. It also complements the range of directives enshrining procedural environmental rights adopted in the period before the Aarhus Convention was signed and ratified by the European Union. Ultimately, this group of rules implies a further level of protection of human procedural environmental rights. It is highly likely that this group of rules will be gradually extended.

Current EU law also has the potential to protect procedural environmental rights indirectly (as in the case of substantive environmental law) by respecting the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) or through certain provisions of the *Charter of Fundamental Rights of the European Union* (2000) To the protection to procedural environmental rights also indirectly contributes the very existence of EU environmental law as such, which protects the environment as a value protected by the procedural environmental rights.

4. Protection of the human right to water and the human right to sanitation in European Union law

The right to water and the right to sanitation found its grounding primarily in international public law, but later was enshrined even in the EU law. The right to sanitation is also used by the science of international law in the form of the right to safe hygienic conditions of environment.[77] Both of those forms of titles of rights have the same contents. Anchoring of human right to water as well as the right to sanitation (right to safe hygienic conditions of environment) in international public law occurred primarily through some of international treaties falling within the framework of international human rights law. Among the

[76] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.* OJ L 275/32.

[77] See MASLEN, M. *Právna úprava starostlivosti o vody v Slovenskej republike.* Praha: Leges, 2017, s. 10–11.

international treaties which explicitly enshrine both rights are the *Convention on the Elimination of All Forms of Discrimination against Women* (1979, Article 14 (2)), the *Convention on the Rights of the Child* (1989, Article 24) and the *Convention on the Rights of Persons with Disabilities* (2006, Article 28).[78]

A key document to recognize both rights at the level of international public law is the *Resolution No. 64/292 of the General Assembly of the United Nations of 28 July 2010*.[79] In this resolution are both of mentioned rights considered as one substantive right in its point 1 as follows: *"The General Assembly...Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights"*. The existence of both rights in the form of one substantive right is confirmed by the subsequent Adoption of the *Report of the Special Rapporteur on the human right to safe drinking water and sanitationCatarina de Albuquerque* at 4 July 2011,[80] discussed at the 18th session of the United Nations Human Rights Council and Resolution No. 24/18 "*The human right to safe drinking water and sanitation."*[81] of the UN Human Rights Council itself.

Both rights are close. They could be considered as a part of one substantive right but even as two independent substantive rights. Under the views of science of international public law the human right to water and the human right to sanitation are two distinct but related human rights.[82] This view is also supported by fact that those rights can be indirectly protected separately through the case-law of the European Court of Human Rights, following individual complaints by individuals against breaches of certain rights under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950, ECHR). The human right to water can be protected indirectly in the context of Article 8 of the ECHR enshrining the right to respect for private and family life. This approach demonstrates, for example, the case of *Dubetska and others against Ukraine* (2011).[83] The human right to sanitation can be protected in the context

[78] See MASLEN, M. *Právna úprava starostlivosti o vody v Slovenskej republike.* Praha: Leges, 2017, s. 10–12.

[79] Resolution adopted by the General Assembly on 28 July 2010, No. 64/292. *"The human right to water and sanitation"*. UN Doc. A/RES/64/292 (2010).

[80] *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque.* UN Doc. A/HRC/18/33, 4 July 2011.

[81] *Resolution adopted by the Human Rights Council 24/18. The human right to safe drinking water and sanitation.* UN Doc. A/HRC/RES/24/18. 27 September 2013.

[82] COLLECTIVE OF AUTHORS. WaterLex. *The Human Rights to Water and Sanitation. An Annotated Selection of International and Regional Law and Mechanisms.* Geneva: WaterLex. 2017, p. 6.

[83] *Dubetska and Others v Ukraine*, Judgment, Merits and Just Satisfaction, Ap. No. 30499/03, 10. February 2011, European Court of Human Rights.

of Article 5 of the ECHR establishing the right to liberty as well as Article 3 of the ECHR providing for right to prohibition of torture and inhuman or degrading treatment. This approach is clear, for example, in the case of *Riad and Idiab against Belgium* (2008).[84]

Right to water and right to sanitation are anchored in even many other international documents. The profound analyse of those documents goes beyond the scope of this article.[85]

The EU protects these rights through several standards of EU secondary legislation[86] on the protection of water quality and purity, although it often does not specifically emphasize these rights in these rules. The EU also responded to their existence by political documents and concepts.[87]These rules and documents relate mainly to water management, but some of them also relate to the right to sanitation (right to safe environmental conditions).

The right to water and the right to sanitation are especially resonant in the EU document *Communication from the Commission on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!"* (2014)[88] This document builds on the framework of the European Citizens' Initiative – the legal institute introduced by the Lisbon Treaty to promote greater democratic involvement of citizens in European affairs. This legal institute allows one million citizens of the European Union (EU), coming from at least seven Member States, to call on the European Commission to propose legislation on matters of EU competence. It is the first ever participatory democracy instrument at EU level. Since its launch in April 2012 more than 5 million citizens have signed up to over 20 different initiatives. The mentioned document further stated that *"Right2Water"* is the first European Citizens' Initiative to have met the requirements set out in the *Regulation No 211/2011 of the European Parliament and the Council on the citizens' initiative*.[89] It was officially submitted to the Commission by its organisers on 20 December 2013,

[84] *Riad and Idiab v Belgium*, Judgment, Merits and Just Satisfaction, Applications No. 29787/03 and No. 29810/03, 24 January 2008. European Court of Human Rights.

[85] For detailed commentary to relevant international documents see COLLECTIVE OF AUTHORS. *WaterLex. The Human Rights to Water and Sanitation: An Annotated Selection of International and Regional Law and Mechanisms.* Geneva: WaterLex. 2017. 212 p.

[86] KRUŽÍKOVÁ, E., ADAMOVÁ, E., KOMÁREK, J. *Právo životního prostředí Evropských společenství.* Praha: Linde, 2003, p. 119–166.

[87] See KOFF, H., MAGANDA, C. The EU and The Human Right to Water and Sanitation: Normative Coherence as the Key to Transformative Development. *European Journal of Development Research*, Volume 28, Number 1, 1 January 2016, p. 91–110.

[88] Communication from the Commission on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!" COM/2014/0177 final.

[89] Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens' initiative. OJL 65, 11. 3. 2011, p. 1.

after having received the support of more than 1.6 million citizens. In line with the provisions of the Regulation on the citizens' initiative, the Commission has three months to present its response to this initiative in a Communication setting out "its legal and political conclusions on the initiative, the action it intends to take, if any, and its reasons for taking or not taking that action"

The Right2Water initiative invites the Commission *"to propose legislation implementing the human right to water and sanitation, as recognized by the United Nations, and promoting the provision of water and sanitation as essential public services for all". The initiative urges that the EU institutions and Member States be obliged to ensure that all inhabitants enjoy the right to water and sanitation, that water supply and management of water resources not be subject to 'internal market rules' and water services be excluded from liberalization and that EU increases its efforts to achieve universal access to water and sanitation"*.

In response to the citizens' call for action, the Commission in the mentioned document committed itself to take concrete steps and work on number of new actions in areas that are of direct relevance to the initiative and its goals. In particular, the Commission will reinforce implementation of its water quality legislation, building on the commitments presented in the *7th Environmental Action Programme*,[90] will launch an EU-wide public consultation on the Drinking Water Directive, notably in view of improving access to quality water in the EU, will improve transparency for urban wastewater and drinking water data managementand explore the idea of benchmarking water quality, will bring about a more structured dialogue between stakeholders on transparency in the water sector, will cooperate with existing initiatives to provide a wider set of benchmarks for water services, will stimulate innovative approaches for development assistance (e.g. support to partnerships between water operators and to public-public partnerships); promote sharing of best practices between Member States (e.g. on solidarity instruments) and identify new opportunities for cooperation, will advocate universal access to safe drinking water and sanitation as a priority area for future Sustainable Development Goals. Finally, the Commission invited the Member States, acting within their competences, to take account of the concerns raised by citizens through this initiative and encouraged them to step up their own efforts to guarantee the provision of safe, clean and affordable drinking water and sanitation to all.

The previous document identified even the most important secondary EU law rules relevant in relation to the protection of human right to water and human

[90] *Decisions No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'.*

right to sanitation.These rules include *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy,*[91] *Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption*,[92] *Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment*,[93] and the *Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.*[94] Comprehensive commenting on these rules goes beyond this paper. We will therefore confine ourselves to commenting on the fact that these standards ensure adequate water quality and sanitation.

In connection with the human right to water, resp. the human right to sanitation can be identified a smaller number of judgments of the Court of Justice of the EU, which do not directly refer to both rights, but their purpose is to ensure the quality and purity of the water, thereby contributing to the protection of both rights. Water management case law in this area highlights consistent water protection. European Union case-law sees water as an environmental component that is capable to affect other parts of the environment. Water is therefore not primarily perceived as a commodity but as part of the environment that exists in interaction with other environmental components. Therefore, case law strictly insists on the consistent transposition of water quality protection measures in the interpretation of environmental policy. At the same time, it emphasizes the obligations of the Member States in the area of the correct transposition and implementation of rules ensuring the protection of waters against dangerous substances. According to the previous case-law approach, water protection is also intended to identify vulnerable waters management areas.[95]

For illustration we will mention case *Commission of the European Communities v Sweden (2009)*.[96] Commission of the European Communities in this case

[91] *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.* OJ L 327, 22/12/2000, p. 0001–0073.

[92] *Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption.* OJ L 330, 5. 12. 1998, p. 32–54.

[93] *Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment.* OJ L 135, 30. 5. 1991, p. 40–52.

[94] *Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.* OJ L 134, 30. 4. 2004.

[95] See MASLEN, M. *Právna úprava starostlivosti o vody v Slovenskej republike.* Praha: Leges, 2017, s. 62–63.

[96] *Case C-438/07, Commission of the European Communities v Sweden.* Judgment of the Court (Third Chamber) of 6 October 2009.

brought on 18 September 2007 against Sweden an action under Article 226 EC for failure to fulfil obligations.

By its action, the Commission of the European Communities asks the Court to declare that, by not ensuring, by 31 December 1998 at the latest, that all discharges from treatment plants of urban waste water from agglomerations of more than 10 000 population equivalent (p.e.) which enter directly into sensitive areas or their catchment areas fulfil the relevant requirements of Annex I to *Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment,*<?>as amended by *Commission Directive 98/15/EC of 27 February 1998,*<?> the Kingdom of Sweden has failed to fulfil its obligations under Article 5(2), (3) and (5) of Directive 91/271. The decision of the court in this case stated that, by not ensuring, by 31 December 1998 at the latest, that discharges from the treatment plants of urban waste water from agglomerations of more than 10 000 population equivalent listed in Annexes 2 and 3 to its defence, as amended by its rejoinder, which enter directly into sensitive areas or their catchment areas fulfil the relevant requirements of Annex I to Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, as amended by Commission Directive 98/15/EC of 27 February 1998, the Kingdom of Sweden has failed to fulfil its obligations under Article 5(2), (3) and (5) of that directive.

That case-law clearly identifies efforts of the EU to ensure more demanding waste water treatment before it is released into sensitive areas, thereby contributing to maintaining adequate water quality and thus protecting the right to water or the right to sanitation. Thus, the EU environmental law rules, which protect water and environmental components, also contribute to protecting these rights.

5. Conclusion

European Union law enshrines altogether six environmental human rights. The first group of these rights is composed of substantive environmental human rights – right to environment, right to water and right to sanitation (right to safe hygienic conditions of environment). The second group represent three human procedural environmental rights – right of access to information on environment, right of public participation in decision-making in environmental matters, and right of access to justice in environmental matters, as they have been formulated in international public law. These rights were transformed to the European Union law from the international public law documents and treaties.

Key EU documents as far as the protection of substantive human right to environment are the non-bindinghigh-level political Dublin Declaration on "The Environmental Imperative" of the European Council, adopted on 7 July

1990, The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998, Aarhus Convention) signed and ratified by the EU and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation inrespect of the drawingup of certain plans and programmes relating to the environment and amending with regard to public participation and access tojustice Council Directives 85/337/EEC and 96/61/EC.

The most important documents as for the protection of procedural environmental rights are the abovementioned Aarhus Convention, Directive 2003/4/EC oftheEuropean Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation inrespect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access tojustice Council Directives 85/337/EEC and 96/61/EC and Regulation 1367/2006 of the European Parliament and ofthe-Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community supplemented by other directives enshrining procedural environmental rights in the area of various specialized environmental activities.

Legal basis for the protection of the substantive human right to water and substantive human rights to sanitation in the EU law provides for the in the EU document Communication from the Commission on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!" (2014), Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment and the Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

As for the protection of these human environmental rights there is a certain number of case law of the Court of Justice of the European Union or its predecessor Court of Justice of the European Communities. The most numerous case law in this area concerns the protection of human procedural environmental rights.

Protection of all the mentioned human environmental rights is also indirectly supported by the very existence of EU environmental law as such, which protects the environment as a value essential to the realization of these rights. EU law also

includes the potential for indirect protection of all mentioned rights by respecting the abovementioned European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and certain provisions of the abovementioned Charter of Fundamental Rights of the European Union (2000, 2007).

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The Variations of Judicial Enforcement of EU Charter of Fundamental Rights vis-á-vis Union Institutions and Bodies

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Summary: The aim of this paper is to offer overview of the potential judicial instruments and mechanisms which are available in the current state of EU legal system and which are thinkable as means of the enforcement of rights included in the EU Charter in relation to acts and omissions of the EU bodies. The paper deals with theoretical options and practical examples of using the Charter as the source of review within different types of proceedings before General Court and Court of Justice.

Keywords: EU Charter – EU institutions and agencies – CJEU – General Court – Enforcement – Remedies – Supervision

1. Introduction

Even though we are very close to the end of first decade of having the legally binding EU Bill of Rights, there is still a wide space for discussions and elaboration of potential ways of its enforcement in legal practice. The EU Charter itself offers the space for analyses, "demanding" and proposing the potential options in this regards. It opens the space for mentioned discussions by the way of quietness about the instruments of its enforcement.

While looking at the contents of the Charter, it is clear that guidelines on its enforcement in practice (i.e. procedural chapter) are missing. Unlike other international human rights instruments, which introduce the judicial[1] or administrative

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[1] The most developed and comprehensive is the system of European Convention on Human Rights and Fundamental Freedoms, which introduced the judicial mechanisms of its enforcement represented by the European Court of Human Rights.

and quasi-judicial[2] means of enforcement[3], the EU Charter does not define any special procedures and tools for the execution of guaranteed rights. In this respect, it recalls national catalogues of human rights (such as the Czech Charter of Fundamental Rights and Freedoms), which in the same way only anchor material (protected) rights and leave protection procedures to other existing enforcement systems (general courts, constitutional courts).

The aim of this paper is to offer overview of the potential judicial instruments and mechanisms which are available in the current state of EU legal system and which are thinkable as means of the enforcement of rights included in the EU Charter. In this paper the impetus will be given to judicial remedies for EU Charter enforcement particularly in relation to acts and omissions of the EU bodies.

2. Note on Intricate Sum of Mechanisms Related to the Enforcement of EU Charter

When discussing the available and potential instruments of the enforcement of the EU Charter in practice, we necessary need to distinguish the categories of entities, which are obliged to respect and protect the rights encoded in the EU catalogue. The key provision here is article 51(1) of the Charter, which defines the addressees of that obligation[4]. There are two categories of addressees which have an obligation to respect the Charter:

- **EU bodies.** Firstly and in general it is about the institutions, bodies, offices and agencies of the Union. Here the Charter serves as the tool for strengthening the rule of law and the democratic legitimacy of supranational governance.[5] It is the goal of a long path on which the Communities and Union were

[2] Here we could mention the system of enforcement of European Social Charters (original – 1961 as well as revised – 1996) in a form of collective complaints mechanisms (introduced by Additional Protocol of 1995), which is giving the special control power to European Committee of Social Rights. See further BENELHOCINE, C. *The European Social Charter*. Strasbourg: Council of Europe Publishing, 2012, see also FALALIEVA, L. The Fundamental Instruments of Social Rights Protection: the European dimension, further in this volume.

[3] For further details and comparison of particular systems see TOMUSCHAT, Ch. *Human Rights – Between Idealism and Realism*. 3rd edition. Oxford: Oxford University Press, 2014 or BARTOŇ, M. et al. *Základní práva* [The Fundamental Rights]. Prague: Leges, 2016.

[4] See further WARD, A. Commentary on Article 51 – Field of Application. In: Peers, S., Hervey, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1415–1454; LENAERTS, K., GUTIÉRREZ-FONS, J. A. The place of the charter in the EU constitutional edifice. In: Peers, S., Hervey, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 16.0–1637.

[5] LENAERTS, K., CAMBIEN, N. The democratic legitimacy of the EU after the Treaty of Lisbon. In: Wouters, J. (ed.). *European constitutionalism beyond Lisbon*. Intersentia, 2008, p. 185–207 or

seeking the ideal tool for the protection of fundamental rights.[6] Institutions of the EU are responsible for respecting rights protected by the Charter generally in all activities that could touch upon individuals' rights.

- **Member States.** The second category of addressees is represented by the Member States. Here the Charter brings the federalisation question onto the scene. The question of the existence of a common (central) standard of fundamental rights protection binding upon all Member States (peripheries) is clearly interconnected with the emancipation and dominance of EU law.[7] And it deepens the scope of protection of individuals within the whole system of application of EU law. What is worth to mention here, is the fact that not all activities of Member States falls under the Charter conformity test. It is clear from the wording of article 51(1) that the Charter is applicable vis-à-vis Member States 'only when they are implementing Union law'.

The Charter (unlike for example the European Convention for the Protection of Human Rights and Fundamental Freedoms) is not universally applicable. Its applicability occurs, roughly speaking, where the conduct of a Member State has some EU dimension. The question of boundaries of Charter applicability vis-á-vis the Member States was among the most discussed issues in relation to the negotiation of the Charter[8] and brought a significant case law of the Court of Justice in recent years related to the extent of term "implementation" and determining the scope of application of the Charter in relation to Member States' conduct.[9] To sum up, the notion of 'implementation of EU law' covers a wide

DE BÚRCA, G. After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 2013, vol. 20, p. 168–184.

6 See KERIKMÄE, T. et al. *Protecting Human Rights in the EU. Controversies and Challenges of the Charter of Fundamental Rights.* Springer, 2014 or ŠIŠKOVÁ, N. (ed.). *The process of constitutionalisation of the EU and related issues.* Europa Law Publishing, 2008.

7 On this issues see e.g. SARMIENTO, D. Who's afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Euurope. *Common Market Law Review*, 2013, vol. 50, p. 1267–1304; HAMUĽÁK, O. *National Sovereignty in the European Union – View from the Czech Perspective.* Cham: Springer, 2016 or more generally MARTINICO, G. *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*. New York: Routledge, 2012.

8 SCHÖNLAU, J. *Drafting the EU Charter – Rights, legitimacy and process*. Palgrave Macmillan, 2005.

9 See HAMUĽÁK, O., MAZÁK, J. The Charter of Fundamental Rights of the European Union vis-à-vis the Member States – Scope of its Application in the View of the CJEU. *Czech Yearbook of Public & Private International Law*, 2017, vol. 8, p. 161–172 or FONTANELLI, F. The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights. *Columbia Journal of European Law*, 2014, vol. 20, p. 194–247.

range of situations, i.e. the direct application of EU rules and the application and interpretation of national rules that serves as transposition of EU sources; moreover, it regulates the application of national rules which could lead to derogation of EU-based entitlements (most in the internal market) and, finally, it covers the application/interpretation of national rules that relate to specific areas of Union competence settled by concrete EU law provisions in national situations which are in close relation (exact proximity[10]) with the EU rules.

The article 51 (1) represents a double-meaning gateway in relation to Member states conduct.

Firstly it's the doorway for EU supervisory capacity over conformity of the Member state action with the EU Charter requirements. It's quite clear from the wording of article 51 (1) that potential application of EU Charter within the infringement procedure (art. 258–260 TFEU)[11] could cover only actions of the Member state which appears within the scope of EU law.[12] On the other side broad understanding of this scope, which has been described above, is giving EU (i.e. Commission) a wide potential to using the EU Charter to supervise the states. The most visible examples from last period are infringement actions related to the EU Charter addressed to Hungary and Poland.[13]

Secondly, article 51 (1) is introducing the EU Charter into the national practice of fundamental rights protection. From substantive point of view, the new source of fundamental rights review at national level occurs here. The scope, limits and interpretation of particular EU Charter rights must follow the unified rules and national authorities must take due account of the authority of the case law of the Court of Justice. Conversely, from a procedural point of view, Member States are free to apply their internal procedures and instruments for human rights review. In this context, we must count on the great diversity and differences in

[10] SPAVENTA, E. *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures*. European Parliament, 2016, p. 21.

[11] See further DE SCHUTTER, O. *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Open Society European Policy Institute, 2017.

[12] See Opinion of AG Tanchev in C-619/18, *Commission v Poland*, ECLI:EU:C:2019:325.

[13] See C-286/12, *Commission v Hungary,* ECLI:EU:C:2012:687; or Action brought on 2 October 2018 – European Commission v Republic of Poland (Case C-619/18). See ŠIŠKOVÁ, N. European Union Legal Instruments to Strengthen the Rule of Law, their Actual Reflections anf Future Prospects. In: Šišková, N. *The European Union – What is Next? A Legal Analysis and the Political Visions on the Future of the Union*. Koln: Wolters Kluwer Deutschland, 2018, p. 136–162 or CIRCOLO, A. Il Rispetto Dei Valori Fondanti Dell'Unione e l'Attivazione Della Procedura Di Controllo Alla Luce Delle Recenti Vicende Di Polonia e Ungheria. *DPCE Online*, 2019, vol. 38, no. 1, p. 19–39.

approach of the national authorities.[14] Differences already appear in the very understanding of Article 51 and the extent of applicability of the Charter.[15] There are differences in procedural instruments and even theoretical disputes about which national authorities should deal with the Charter in their case law.[16] States have a relatively wide discretion in the choice of instruments to apply the Charter in their practice. Here again, however, they must respect the principles regulating national procedural autonomy, namely the principle of effectiveness and equal treatment, and in addition they must adhere to the principle of effective judicial protection under Art. 19 (1) TEU.[17]

It is clear from previous paragraphs that scope of application of Charter in relation to Union and the Member States differs. Following this difference there are also distinct tools of enforcement of the Charter connected to one or another object. It's worth to mention at this stage, that there is no single universal instrument applicable on the cases related to both mentioned categories of addresses. In connection with the application/enforcement of the Charter, one could consider also another variable that is related to question whether the Charter is invoked by individuals for the sake of their specific rights, or whether it is invoked in some abstract review (with no direct involvement of the individual as holder of some protected fundamental right). Here we may distinct some incidental mechanisms – direct remedies – by which individual directly seeks the protection of bestowed rights and some supervisory mechanisms, connected to mentioned abstract control launched by body different to holder of the rights. Last distinction is connected to the variable of using judicial or non-judicial mechanisms of enforcement (and promotion) of EU Charter, which are available both in connection to the Union as well as Member States. Further in this paper we shall focus on

[14] See in particular BURGORGUE-LARSEN, L. *The EU Charter of Fundamental Rights seized by the national judges.* Paris: Pedone, 2017. For some national reports see MAZÁK, J., JÁNOŠIKOVÁ, M. et al. *The Charter of Fundamental Rights of the European Union in Proceedings Before Courts of the Slovak Republic.* Košice: Pavol Jozef Šafárik University, 2016; JENEY, P. The scope of the EU Charter and its application by the Hungarian courts. *Acta Juridica Hungarica*, 2016, vol. 57, no. 1, p. 59–75; HAMUĽÁK, O. Listina základních práv Evropské unie jako okolí ústavního pořádku České republiky. *Acta Iuridica Olomucensia*, 2015, Vol. 10, No. 3, s. 7–30 or SVOBODOVA, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního soudu ČR. *Acta Universitatis Carolinae – Iuridica*, 2018, vol. 64, no. 4, p. 53–63.

[15] See e.g. *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*. European Union Agency for Fundamental Rights, 2018. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

[16] See KOMÁREK, J. Why National Constitutional Courts Should Not Embrace EU Fundamental Rights. In: Weatherill, S., de Vries, S., Bernitz, U. *The EU Charter of Fundamental Rights as a Binding Instrument*. Oxford: Hart Publishing, 2015, p. 75–92.

[17] See C-64/16 *Associação Sindical dos Juízes Portugueses*, ECLI: EU:C:2018:117.

only one of the mentioned variabilities – the direct judicial remedies applicable against alleged breached of fundamental rights by EU bodies and institutions.

3. Options and Tools of Enforcement of the EU Charter in Relation to EU Bodies

Since December 2009, EU Charter is a fully-fledged part of the EU legal system with the same legal value as the Treaties[18] therefore it must be understood, applied and interpreted by using the same tools and in the same extent, like the other sources of primary law. It's a new "Materia" embedded into an existing procedural framework[19], which does not lead to elevation of any new remedies or instruments of judicial enforceability of fundamental rights within the EU legal system.[20] The existing system of procedural tools offer us a wide variety of instruments thinkable (and already being used) as means of Charter enforcement vis-á-vis Union institutions and bodies. Those are bound by the EU Charter in most thinkable wide sense, even in situations when "they act outside the EU legal framework."[21] In following text I'll try to summarize the potential instruments available for judicial enforcement of the Charter vis-á-vis EU bodies and to determine the practical impact of those remedies.

As was already mentioned, by the category of incidental tools of Charter enforcement, I mean the actions/ claims (judicial) brought before the courts by individual seeking the protection of its concrete individual right(s) in particular case. The logic and importance of this kind of enforcement is the protection of individual against the encroachments into conferred rights for which public (EU) bodies are responsible. Here, the most efficient tool, the one with the widest potential of use in the practice, is the direct action for annulment according to article 263 TFEU. But will discuss also other tools available and applicable for sake of protection of rights included into the Charter.

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[18] See art. 6 para 1 TEU.

[19] For general (tough very comprehensive) overview of procedural law instruments within the EU constitutional edifice see LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law*. Oxford: Oxford University Press, 2014.

[20] See WARD, A. Remedies under the EU Charter of Fundamental Rights. In: Douglas-Scott, S., Hatzis, N. (eds.). *Research Handbook on EU Law and Human Rights*. Cheltenham: Edward Elgar, 2017, p. 162–185.

[21] See C-8/15 P *Ledra Advertising v Commission and ECB,* ECLI:EU:C:2016:701, p. 67.

3.1. Action for annulment under art. 263 TFEU

This direct action is a perfect tool for Charter enforcement against activities of EU bodies that potentially breach the individuals' fundamental rights.It can be used against wide diversity of EU bodies and offers a full judicial review, with primary challenge against decision or an act of Union bodies before the General Court and later possibility of appealing to the Court of Justice. Charter – as a source with the same value and effects as the Treaties – could serve here as the general standard of legality (constitutionality) review of all acts of EU institutions reviewable under art. 263 TFEU.

Of course it's the Treaty, that defines the cases and conditions under which an individual may initiate this proceeding. And here we must mention one of the most discussed problems in EU constitutional law, particularly the limited locus standi of individual in relation to action for annulment. There is no space and no need to analyse this never-ending story of EU law scholarly discussions.[22] Even sometimes criticised, it is a constitutional choice of Treaty founders and Court of Justice as constitutional interpreter, not to grant individuals the general right to sue all EU acts. I am not going to contend this choice at this stage. For the purpose of seeking the tools of Charter enforcement, we must conclude, that action of annulment is (due to the limited locus standi of individuals) only relative, but still available and potentially effective tool of enforcement of the EU Charter. In connection to the protection of the rights conferred by the Charter, the consequences of abovementioned restriction may not be so dramatic. The inability to sue the abstract (non-addressed) EU law acts is to a great extent a hypothetical problem. Such an act is brought to the sphere of an individual mostly in the form of application by Union (or national authorities), within which certain individual – addressed – acts/decisions are regularly created. In these circumstances, consistency with rights protected by the Charter is thereof open to challenge before the Union Courts.[23]

According to the statistical comparison, the action for annulment is the far most frequent direct action before Union courts, by which breaches of rights protected by Charter are challenged. The most visible example of cases where applicants claim (also successfully) the breaches of their rights are cases against EU restrictive measures connected to economic sanctions and fights against

[22] See (among others) ARNULL, A. Private Applicants and the Action for Annulment since Codorniu. *Common Market Law Review*, 2001, vol. 38, no. 1, p. 7–52 or WARD, A. Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a 'Wobbly Polity'. *Yearbook of European Law*, 2003, vol. 22, no. 1, p. 45–77.

[23] Or before the courts of the Member States respectively, with potential raise of preliminary question on legality of EU acts. See further section 3.4 Preliminary questions claiming the breach of EU Charter.

global terrorism. Mostly it goes about disputes on retention, listing, de-listing and re-listing of individuals on the lists of the subjects covered by restrictions. It's worth so say, that majority of challenges is not successful.[24] But there are some cases where the EU courts annulled the restrictive measures concerning concrete individuals with reference to violations of the provisions of the Charter, in particular and mostly the right to a fair trial.[25]

3.2. Action for failure to act under article 265 TFEU

Another thinkable, or rather hypothetical instrument is the action for failure to act under article 265 TFEU, whereby an individual could oppose the omissions of EU institutions. According to article 265/3 TFEU any natural or legal person has a right to complain against Union bodies which failed to adopt the act addressed to those individuals. The wording of this provision is very limiting and reduces the options of individuals only to possibility to challenge the omissions to adopt individual measures.[26] It's worth to note here, that action for failure to act does not cover the claims demanding certain decision of concrete content, but only the case of total absence of any measure adopted.[27] The key question here is the understanding of notion of an "act addressed to individual other than recommendation and opinion", which is textually challengeable by the action for failure to act (article 265 para 3). The most simplicist interpretation is that action covers only binding acts (*a contrario* to non-binding recommendations and opinions) and only acts directly addressed to applicant. The development of case-law, nevertheless, brought a significant broadening of this narrow textual interpretation. Court of Justice (with the argument of principle of unity between action for annulment and action for failure to act) accepted the right of applicant

[24] See https://europeansanctions.com/category/european-court-cases/

[25] T-208/11 *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union*, ECLI:EU:T:2014:885; T-384/11 *Safa Nicu Sepahan v Council*, ECLI:EU:T:2014:986; T-316/14 *Kurdistan Workers' Party v Council of the European Union*, ECLI:EU:T:2018:788; T-240/16 *Klyuyev v Council*, ECLI:EU:T:2018:433;C-530/17 P *Azarov v Council*, ECLI:EU:C:2018:1031; AG Opinion in case C-225/17 P *Islamic Republic of Iran Shipping Lines and Others v Council*, ECLI:EU:C:2018:720.

[26] See WOODS, L. et al. *Steiner & Woods EU Law.* 13th ed., Oxford: Oxford University Press, p. 296–297.

[27] Obviously in case of disagreement with the content of decision and demand of certain decision of different content, the applicant must use the action for annulment under article 263 TFEU. See C-10 & 18/68 *Eridania v Commission*, ECLI:EU:C:1969:66; C-15/91 *Buckl and Others v Commission*, ECLI:EU:C:1992:454; C-196/12 *Commission v Council*, ECLI: EU:C:2013:753. For analyses of this limitation of the action for annulment See DAUKŠIENĖ, I., BUDNIKAS, A. Has the Action for Failure to Act in the European Union Lost its Purpose? *Baltic Journal of Law & Politics,* 2014, vol. 7, no. 2, p. 209–226.

to challenge also the omissions of adoption of acts addressed to someone else, if applicant would have been directly and individually concerned by omitted act.[28] Another development came with the broader understanding of challengeable acts. In some competition cases[29], cases related to public procurement and in connection to enforcement of certain procedural rights[30], Court of Justice accepted the admissibility of the action for failure to act even in connection to the non-binding acts (e.g. letters) as a consequence of certain specified obligations of EU Institutions prescribed by EU law.[31]

In relation to the Charter, it's necessary to determine, whether there are some protected rights which prescribe (or at least indirectly presuppose) the adoption of such "acts addressed to individuals" in the meaning of article 265 TFEU? In other words, whether there are some provisions, giving individual the right to request some active conduct on a side of EU bodies. The few possible examples are right of individual to access to data which has been collected concerning him or her (article 8/2 EU Charter), right of every person to have access to his or her file (article 41/2 b) EU Charter), right to address the EU institutions the written demand and right to answer (article 41/4 EU Charter) and right of access to documents (article 42 EU Charter). In connection to all these rights, the demanded action of EU bodies might have a form of some individual addressed measure and could be determined as the act of institution. In case of omission of issuing such an act, and given the fulfilment of other admissibility criteria of action for failure to act (pre-litigation call to act, time limit of two months) we could assume the enforcement of those rights by action for failure to act.

Above I've mentioned, that this instrument of enforcement of the Charter is rather hypothetical or theoretical. The reasons for this judgement are twofold. First of all, the practice of EU bodies in responding the requests for some actions could be determined as "active". In majority of situations, there is at least negative reaction refusing the claim (e.g. the access to requested information). In this situation, the individual has option to use the action for annulment (article 263/4 TFEU) of such a negative act addressed to it.[32] Second reason is the absence of any case law so far, which shall confirm the possibility of using this tool in practice. Notwithstanding all of these problems, I still assume the action for failure to act as a possible instrument of the enforcement of Charter, especially in connection with those rights which preclude some active duty of EU institutions.

[28] C-68/95 *T. Port v Bundesanstalt für Landwirtschaft und Ernährung*, ECLI:EU:C:1996:452.

[29] T-24/90 *Automec Srl v Commission*, ECLI:EU:T:1992:97.

[30] C-191/82 *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission*, ECLI:EU:C:1983:259.

[31] See T-24/90 *Automec Srl v Commission*, ECLI:EU:T:1992:97, p. 72.

[32] Seecase T-590/10 *Thesing a Bloomberg Finance v. ECB*, ECLI:EU:T:2012:635.

3.3. Action for damages under article 268 TFEU

Another conceivable instrument by which an individual may (indirectly) claim an infringement of particular right protected by the Charter is an action for damages under Article 268 TFEU.[33] Even though this action represent predominantly a judicial tool of reaching the reparation of damages caused by illegal action or negligence of EU institutions, it may serve as the litigation path pointing on breaches of Charter and therefore lead to its enforcement. There are several thinkable examples of connection of damage reparation claims with fundamental rights assertions. If, for instance, some Union's action adversely affects the right to protection of property or the right to a fair trial and simultaneously this action also cause some financial damage on the side of individual. In addition to damages, the applicant will also claim infringement of his/her fundamental right. This action, likewise the direct action mentioned above, can be used against wide diversity of EU bodies and offers a full judicial review, with primary challenge against decision or an act of Union bodies before the General Court and later possibility of appealing to the Court of Justice.

Actually, in the context of this action, quite a settled case-law of the EU Courts has occurred in past period, which deals primarily with the problem of delays in court proceedings. Here the Court of Justice has acknowledged that protection of the right to a fair trial can be claimed by the individual in order to assist his/her claims for damages against the Union's judicial bodies (the General Court). There is a set of cases in which the excessive length of proceedings has been found as a serious violation of the right to a fair trial protected by the Charter andaction for damages was upheld as an effective (and presupposed) remedy and appropriate sanction in those situations.[34]

3.4. Preliminary questions testing the conformity of EU measures with the rights protected by EU Charter

Indirectly, an individual may claim his/her rights protected by the Charter against the activities of the Union institutions even in proceedings before national courts. In a cases where national court would apply (or concern) – directly or indirectly

[33] Here, obviously, the analysis is given to the notion of liability of EU (and its institutions). The question of damage remedies in relation to the behaviour of Member States is different and depends on national liability arrangements. The EU Charter once again has no provisions related directly to this particular claim. See further WARD, A. Damages under the EU Charter of Fundamental Rights. *ERA Forum*, 2012, vol. 12, No. 4, p. 589–611.

[34] C-150/17 P *European Union v Kendrion*, ECLI:EU:C:2018:1014, C-411/15 P *Timab Industries a CFPR v. Komise*, ECLI:EU:C:2017:11; C-603/13 P, *Galp Energía España a další v. Komise*, ECLI:EU:C:2016:38.

– EU legal acts in proceedings before it and some doubts as to their compatibility with the EU Charter (mostly on the initiative of the party to the proceedings) will occur, the national court will have to refer a question to the Court of Justice on the legality of such an act. The decisions of the Court of Justice on a reference for a preliminary ruling under Article 267 TFEU are then binding on national courts.

The initiation of the preliminary ruling in the case of doubts on validity of EU measure is generally understood as compulsory.[35] It is connected with the established monopoly of the Court of Justice to review the validity of EU law acts.[36] The unique responsibility of the Court of Justice for delimitation of validity of EU law is general and in connection with the EU Charter, there is no space for revising of the Foto-Frost doctrine. The possibility to refer on the EU Charter by national court within described initiation of preliminary ruling procedure questioning the validity of EU measure seems as much broader than in the cases of direct application of the EU Charter in domestic cases questioning the conformity of national measures with the Union's fundamental rights catalogue. In this type of proceedings, the national court is not obliged to provide and satisfy the "scope" test of art. 51 (1).[37] Of course on the first sight, it is the national judge who is using the EU Charter here, but only in some indirect way[38], as the point of reference – the reason for staying the procedure an referring the preliminary question to CJEU. EU Charter is not applied against the Member state, but against the EU institution, and therefore we must count with its general applicability without any conditions. Notwithstanding this wider space for application of the Charter, the practice has not brought so many examples of preliminary references questioning the validity of EU measures based on the conflict with the rights protected by the Charter.[39] But it's worth to mention here, that modest number of such references is not surprising and is fully in line with the general statistic, where preliminary questions on interpretation exceed several times the validity questions brought before the CJEU by national judges. On the other side, we must mention, that several examples of the preliminary references questioning the conformity of EU measures with the Charter (or fundamental rights generally), represent the significant "hard" cases. The most visible and discussed was the

[35] LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law.* Oxford: Oxford University Press, 2014.

[36] 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*., ECLI:EU:C:1987:452.

[37] As described above in section 2.

[38] See also WARD, A. Remedies under the EU Charter of Fundamental Rights. In: Douglas-Scott, S., Hatzis, N. (eds.). *Research Handbook on EU Law and Human Rights*. Cheltenham: Edward Elgar, 2017, p. 162–185.

[39] To mention the most significant, we could refer to the cases: C-236/*09 Test-Achats*, ECLI:EU:C:2011:100; C-293/*12 Digital Rights Ireland*, ECLI:EU:C:2014:238; C-362/14 *Maximillian Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650.

decision of preliminary question in Digital Rights Ireland[40] case. Here the court of Justice declared invalid the long discussed directive on data retention.[41] It is not the purpose of this paper to deal in detail with the (in)famous data retention saga.[42] But wat is important for our analysis is the scope, or better said impact of the judgement of the CJEU. The court invalidated the data retention directive, which was adopted in 2006, so in the time, where the EU Charter was not legally binding. Nonetheless this fact, the CJEU declared directive as invalid *ab initio*. With regard to this "retro-active" use of the EU Charter and in connection to no time limitation on validity control initiated via preliminary ruling procedure[43], we must count seriously with the potential of this variable of enforcement of supranational fundamental rights catalogue.

4. Conclusions

The purpose of this article was to define and address the potential of the various instruments of enforcement of the Charter in relation to the activities of the Union authorities. Here we must conclude, that system of EU procedural tools offers the wide range of applicable remedies, which (in combination) could led to the establishing the functioning system of human rights review within the European Union.

Although the adoption of the Charter has not brought any formal changes to the system of procedural instruments for the enforcement of EU law, it is observable from the judicial practice during first decade after adoption of Treaty of Lisbon, that the presence of the Union fundamental rights catalogue in the context of judicial review has brought about some partial qualitative changes (e.g. in the area of liability regimes or in the control of inactivity of Union intentions), but also has brought significant quantitative shifts, in the form of an increased

[40] C-293/*12 Digital Rights Ireland*, ECLI:EU:C:2014:238.

[41] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[42] See e.g. LYNSKEY, O. The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland. *Common Market Law Review*, 2014, vol. 51, no. 6, p. 1789–1811 or VEDASCHI, A., LUBELLO, V. Data Retention and its Implications for the Fundamental Right to Privacy: A European Perspective. *Tilburg Law Review*, 2015, vol. 20, no. 1, p. 14–34.

[43] See further HAMUĽÁK, O., STEHLÍK, V. *European Union Constitutional Law: Revealing the Complex Constitutional System of the European Union*. Olomouc: VUP, 2013; LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law.* Oxford: Oxford University Press, 2014.

number of fundamental rights cases (mainly in the context of a direct action for annulment) before Union courts.

Even though, before the Charter was adopted, and at the time of its creation and reception, concrete calls for a specific instrument to enforce fundamental (constitutional) rights before the EU courts has being occurred[44], we could summarize that existing framework of instruments and judicial remedies and their use in practice has proven the efficiency and functioning of the system. One may always open some doubts about full access of individual to the justice and every single case may open such reservations. But when we are looking on the system of available remedies from complex point of view, we must admit, that Charter could be (and is being) enforced in effective and wide sense.

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[44] The most of them were based on the claim of existing deficits in the options of individual to access to justice. See Opinion of AG Jacobs in case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union*, ECLI: ECLI:EU:C:2002:197; Opinion AG Jacobs in case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA*, ECLI:EU:C:2003:410; or ARNULL, A. A constitutional court for Europe? *Cambridge Yearbook of European Legal Studies* 2004, vol. 6, p. 1–34; or VESTERDORF, Bo. A constitutional court for the EU? *International Journal of Constitutional Law*, 2006, vol. 4, no. 4, p. 607–617.

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The Fundamental Instruments of Social Rights Protection: the European Dimension

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Summary: It is highlighted in the research the fundamental instruments ensuring and protecting of social rights in Europe. Emphasized that the European Social Charter (revised) 1996 (ESC(r)) is an essential (pivotal) element of European standards, instrument ensuring and protecting social rights, the main source of modern standards of the Council of Europe in the sphere of social and economic rights, updated version, which should gradually replace the European Social Charter 1961 (ESC), as a regional multilateral international treaty, where on the basis of international standards, which are contained in the convention norms of the United Nations and the International Labor Organization, as well as best examples of national legislation of socially oriented states, the European social model was defined, a directory of social rights was determined and obligations of states to implement them were provided. Underlined the importance of the Turin process (Turin 1 and Turin 2) for enhancement of the effectiveness of the ESC/ESC(r), for the improvement of the implementation of European standards in the field of social and economic rights for the development of cooperation in this sphere between the Council of Europe and the European Union.

Keywords: Council of Europe – European Union – European Social Charter – social standards of the Council of Europe – social rights – social state

1. Introduction

The European Social Charter (ETS No 35, hereinafter – ESC) and European Social Charter (revised) (ETS No 163, hereinafter – ESC(r)) are the most significant international legal acts of the Council of Europe after the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which, along with the European Cultural Convention of 1954, constitute an comprehensive legal mechanism for collectively ensuring respect for human rights, determine

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the relevant European human rights standards, creating a single legal sphere of interdependent civil, political, economic, social and cultural human rights, the interaction of which is recognized by the Council of Europe as a dominate of European democracy functioning[1].

The actualization of the need to protect social and economic rights (hereinafter – social rights) and improve social security of population led to the adoption of relevant international legal norms, their implementation into the internal legal order of states, thus contributing to the establishment and development of European standards for ensuring social rights, their implementation in law and law-enforcement states' practice. The complexity and ramification of these standards, their dynamism and the ability to absorb more and more new facets emphasizes the importance of their careful study and understanding. The ESC(r), adopted on May 3, 1996 and entered into force on July 1, 1999, is an essential (pivotal) element of European standards, instrument for ensuring and protection of social rights, the main source of modern standards of the Council of Europe in the sphere of social rights, updated version, which should gradually replace the ESC, adopted on October 18, 1961 and entered into force on February 26, 1965, as a regional multilateral international treaty, where on the basis of international standards, which are contained in the convention norms of the United Nations and the International Labor Organization, as well as best examples of national legislation of socially oriented states, the European social model was defined, a catalog of social rights was determined and obligations of states to implement them were provided. As of September 1, 2018, 45 out of 47 Council of Europe member States signed the ESC/ESC(r), except for Liechtenstein and Switzerland, which have now signed it, but have not expressed their consent to be bound by the ESC by any of the methods envisaged in it: by ratification or approval.

Considering that all European Union member States are at the same time members of the Council of Europe, the ESC(r) has significantly influenced on reaffirming of the provisions fixed in it in the Charter of Fundamental Rights of the European Union as version of 2007 (hereinafter – EU Charter). In particular, principles specified in Title IV "Solidarity" mainly correspond to social rights enshrined in the ESC(r), which played an important role in filling their with relevant content. At the same time, the rights that are traditionally attributed to the second generation are contained in other sections of the EU Charter, for example, Title I "Dignity" prohibits of forced labour (Article 5). Title II "Freedoms" guarantees freedom of assembly and of association (Article 12), the right

[1] DENYSOV, V. N. Pro osoblyvosti implementatsii socialno-ekonomichnykh ta kulturnykh prav u systemi mizhnarodnoho prava prav liudyny. *Pravova derzhava.* Collection of essays, vol. 12. Kyiv: V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, 2001, p. 513.

to education (Article 14), freedom to choose an occupation and right to engage in work (Article 15), freedom to conduct a business (Article 16), right to property (Article 17) and so on. The adoption of the EU Charter as a legal instrument for European integration has the potential to be interpreted, in the words of Check scientist Ondrej Hamuľák, as a revolution in the level of protection of social rights and shift in their material understanding[2].

It is noteworthy that three categories of fundamental rights set out in the EU Charter: rights, freedoms and principles. Distinction into rights and freedoms is conditional, does not have significant legal consequences, therefore significant differences between the principles and rest of categories are important[3]. The purpose of such a distinction is a separation, on the one hand, the rights and freedoms which are subject to full judicial protection, and, on the other hand, principles which can be protected in court only in certain cases[4]. Since the principles require implementation, the reference in the specific Article of the EU Charter to the implementation measures to be taken by the EU or the member States shows that this Article belongs to the principles. Nowadays, almost all provisions of Title IV "Solidarity" of the EU Charter are considered as principles[5]. При цьому варто враховувати, що "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)"[6].

2. The peculiarities of content and implementation of the European Social Charter

The preparation of the ESC was stipulated by the desire of European states that were supporters of a social state to determine guidelines for the development of social rights and the Council of Europe's activities in this area, as well as to fill

[2] HAMUĽÁK, O. Is Charter of the Fundamental Rights of the EU Taking Social Rights Seriously? *European Studies – The Review of European Law, Economics and Politics*, 2015, vol. 2, p. 28.

[3] DE SCHUTTER, O. The European Social Charter as the Social Constitution of Europe. *The European Social Charter and the Employment Relation.* Ed. by Niklas Bruun, Klaus Lorcher, Isabelle Schomann, Stefan Clauwaert. Oxford and Portland: Bloomsbury Publishing, 2017, p. 15.

[4] See: ŠIŠKOVÁ, N. Chartija osnovnyh prav Evropejskogo Sojuza i problemy ee primenenija. In: Šišková, N. *Pamjati profesora Pavla Petrovycha Zavorotka. Aktualni problemy pravovoi nauky*. Kyiv: Precedent, 2014, p. 188; ŠIŠKOVÁ, N. New Challenges for the EU in the Field of Human Rights (Focusing on the Mechanism of the Charter). *European Studies – The Review of European Law, Economics and Politics*, 2014, vol. 1, p. 15.

[5] DE SCHUTTER, O. *The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights*. Brussels: 2016, p. 18.

[6] HAMUĽÁK, O. Op. cit, p. 19.

the gap of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, by establishment of civil and political rights. Structurally, the ESC consists of a preamble, five parts and an annex. The preamble of the ESC defines its main objective, which is to guarantee, without any discrimination, a rise in the standard of living and an improvement in the social care of population of the Council of Europe member states. Part I contains 19 paragraphs, establishing the basic principles of the ESC. The peculiarity is that it is an act combining a declaration (Part I) and an international treaty (Part II), which guarantees 19 fundamental social and economic rights, establishes a monitoring mechanism for its implementation.

By accession to the ESC, the state undertakes basic obligations set out in Article 20, in accordance with paragraph 1 (a) of which it "undertakes to consider Part I of this Charter as a declaration of goals, the achievement of which it will seek by all necessary means". It is about creating conditions under which the effective realization of the 19 rights listed in Part I would become possible. This obligation is enshrined in the treaty, however, it has a political, programmatic nature, corresponding to the provisions of the 1948 Universal Declaration of Human Rights in this area. At the same time, another obligation, enshrined in paragraph 1 (c) of the Article 20, is legally binding – to consider at least 10 out of 19 articles of Part II or 45 out of the designated articles of this Part to be legally binding. Each of these 19 articles relates to one of the rights listed in Part I. The impossibility of the state accepting all the obligations set forth in Part II is due to many international lawyers, including Virginia Mantuvalo and Voyatis Panayotis, significant differences in the economic and social development of the Council of Europe member states, tangible financial consequences of taking such obligation[7], the dependence of their implementation from the capabilities of the national economy.

The peculiarity of the implementation of the ESC into the domestic law of the member states is that the latter, under paragraph 1 (b) of the Article 20, have pledged from the 19 articles of Part II of the ESC, which define social and economic rights, to select at least 5 of the recognized in them 7 main articles, which include articles 1, 5, 6, 12, 13, 16, 19. These articles were chosen not because they protect the seven most important rights, but to achieve a balance between the various groups of rights defined in the ESC. These rights are: the right to work (Article 1), the right to organise (Article 5), the right to bargain collectively (Article 6), the right to social security (Article 12), the right to

[7] MANTOUVALOU, V., VOYATZIS, P. The Council of Europe and the Protection of Human Rights: A System in Need of Reform. *Research Handbook on International Human Rights Law.* Ed. by S. Joseph, A. McBeth. Cheltenham: UK, Northampton: MA, USA, Edward Elgar Publishing, 2010, p. 337.

social and medical assistance (Article 13), the right of the family to social, legal and economic protection (Article 16), the right of migrant workers and their families to protection and assistance (Article 19). The total number of articles or numbered paragraphs that the contracting party deems mandatory for it self must be at least 10 articles or 45 numbered paragraphs. In addition, the member States are obliged to comply with European standards, defined in the articles they have chosen, regardless of the resources at their disposal, although some of the provisions of the ESC, in particular paragraph 3 of the Article 12, provide for the possibility of states expanding the scope of guaranteed rights and principles in the process of improvement of economic and other conditions, therefore, have an evolutionary character.

Part II of the ESC discloses and details the following rights: the right to work; the right to just, safe and healthy working conditions; the right to a fair remuneration; the right to organise and bargain collectively; the right of children, young persons and employed women to protection; the right to vocational guidance and training; the right to protection of health; the right to social security, social and medical assistance; the right to benefit from social welfare services; the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement; the right of the family to social, legal and economic protection; the right of mothers and children to social and economic protection; the right to engage in a gainful occupation in the territory of other Contracting Parties; the right of migrant workers and their families to protection and assistance.

Part III of the ESC consists of only one Article 20 "Undertakings", which contains formalized obligations of the Contracting Parties. Each of them must select and consider themselves bound by at least five of seven articles that provide for fundamental social rights, which make up a "hard core" of social human rights. Part IV establishes a monitoring mechanism for the application of the ESC. With the adoption of the Protocol Amending the ESC 1991, the monitoring procedure was reformed and, in an updated form, ensures control over the fulfillment of obligations by the States Parties of both the ESC and the ESC(r). Part V of the ESC regulates the grounds for derogation and the mechanism for their implementation, the possibility of imposing restrictions on these rights, the procedure for signing, ratification, entry into force and denunciation of the ESC as a whole and its individual provisions. The annex to the ESC fixes the interpretation of its individual articles, as well as the scope of the ESC on the content of the phrase "persons under its protection".

It is noteworthy that the Constitutions of the majority of the ESC States Parties provide for the method of incorporation for the implementation of the norms of international law in their domestic legal order, implying that international treaties ratified by parliament automatically become part of the legislation

of the respective state. At the same time, the practice of some the ESC States Parties knows the cases of its direct application, in particular, by decisions on labor disputes of 1984. The Federal Court of Germany recognized that the courts of the state are bound by the ESC every time when they had to interpret a gap in labor dispute legislation, and in 1995 the Belgian State Council relied on the Article 6 of the ESC when repealing one of its internal administrative acts, thus reaffirming that the ESC is a source of national law.

The ESC does not contain provisions that would allow individuals to directly use its norms to protect their rights at the national and international levels, but the final decision on the ability of a citizen to refer to certain provisions of the ESC in the national court should remain with the relevant national court that implements the law-enforcement function. For example, the Supreme Court of the Netherlands in its decision No. 1986/668 of May 30, 1986 recognized the direct effect in the legislation of paragraph 4 of the Article 6 of the ESC on the right to strike[8].

3. The mechanisms of improving the European Social Charter

In the late 80s on the initiative of the Committee of Ministers of the Council of Europe, the process of supplementing and updating the ESC was launched in order to strengthen the protection of social rights: *Additional Protocol to the European Social Charter* of May 5, 1988 was adopted (entered into force on September 4, 1992), increasing the number of rights protected by it; *Protocol Amending the European Social Charter* of October 21, 1991 (has not yet entered into force, but is applied by decision of the Committee of Ministers), which improved the ESC monitoring mechanism based on reports and more clearly defined functions of the control bodies; *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* of November 9, 1995 (entered into force on July 1, 1998), providing a procedure for the consideration of collective complaints. The ESC(r) combined new provisions with the provisions of the ESC and its amendments, as well as the provisions of the Additional Protocol to the ESC of 1988, therefore it is supplemented and updated in terms of content, therefore more advanced than the ESC.

The Additional Protocol to the ESC of 1988 extended to the States Parties legal obligations to take new measures to enhance the protection of social

[8] GOMIEN D., HARRIS D., ZVAAK L. *European Convention on Human Rights and European Social Charter: Law and Practice.* Moscow: 1998, p. 567.

rights guaranteed by the ESC, adding four more human rights to the 19 rights established by the ESC: the right to equal opportunities and equal treatment in resolving issues on employment and occupation without discrimination on the basis of sex (Article 1); the right to information and advice (Article 2); the right to participate in the determination and improvement of working conditions and working environment (Article 3); elders 'right to social protection (Article 4). The process of updating the ESC, above all, was aimed at improving its monitoring and supervisory system with a gradual revision of the basic guarantees envisaged by the ESC, subsequently enshrined in the ESC(r). Thus, the Council of Europe began the process of revising the concept of ensuring social rights in order to widen them and, accordingly, fill gaps among European standards of social rights. However, the increase in the number of articles aimed at ensuring social rights did not solve the problem of proper implementation of the provisions of the ESC and did not contribute to the implementation of domestic policy by the States Parties in accordance with the principles included in the mentioned treaty.

According to the decision of the Committee of Ministers in 1990, the Committee on the ESC (Charte-Rel) was established, which prepared an act aimed at reforming the monitoring procedure, which envisaged the passage of 4 control bodies. The European Committee of Social Rights, as a committee of independent experts, analyzed the reports and prepared conclusions, and the Subcommittee of the Council of Europe's Government Committee prepared a report on the same issues. The Parliamentary Assembly analyzed the conclusions of the European Committee on Social Rights, prepared a report to the Subcommittee of the Governmental Committee of the Council of Europe and reported its position on these issues to the Committee of Ministers, which, after reviewing all the reports and conclusions, made the decision.

The Protocol Amending the ESC 1991 improved its monitoring mechanism and more clearly defined the functions of the control bodies. It has not yet entered into force, but since 1991 most of the provisions have been implemented by the control bodies by decision of the Committee of Ministers, inasmuch the guarantee of protection of human rights is reliable, provided that the system for monitoring their implementation is effective. The monitoring mechanism of the ESC requires the States Parties to report annually to the Secretary General of the Council of Europe on the application of the provisions adopted by them, enshrined in its Part II. It is noteworthy that the mechanism of monitoring over the execution of the ESC and ESC(r) is the same.

The reports are analyzed by a committee of independent experts – the European Committee of Social Rights, authorized to interpret and enforce the provisions of the ESC in its application. The European Committee of Social Rights is the main element of the contractual mechanism of international monitoring

over the compliance of the States Parties with their commitments under the ESC/ESC(r). It consists of 15 independent experts elected by the Committee of Ministers by a majority of votes from the list of independent experts proposed by the ESC/ESC(r) States Parties for 6 years with the possibility of re-election for one repeated term.

The European Committee of Social Rights operates on a sessional basis. The monitoring mechanism does not provide for the right to an individual complaint, as defined by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Supervision system, including monitoring over collective complaints, concerns only Part II of the ESC; there is no direct mechanism for monitoring compliance with the general programmatic obligations of Part I. Although the conclusions of the European Committee of Social Rights in each case relate to the laws and law-enforcement practices of a particular state, they are a common guideline for all the ESC States Parties. According to Gerard Quinn, a law professor and ex-vice-president of the European Committee of Social Rights, ESC, as such, "comprises a "productive factor" in our market economies and helps to advance social cohesion. Just as important, it constitutes a "civilising factor" in our democratic cultures by avoiding severe social dislocation that can afford breathing space for political extremes"[9]. Analyzing the compliance of national legislation with the rights and principles enshrined in the ESC/ESC(r), it is necessary to focus not only directly on the text of the norms, but also on the conclusions of the European Committee of Social Rights, which, as a rule, the recommendations of the Committee of Ministers are based.

4. The peculiarities of the Revised Charter

The above changes and additions to the ESC did not fundamentally solve the problems of the new social policy of the Council of Europe, which necessitated the revision and updating of the ESC, in May 1992 the Committee on the ESC (Charte-Rel) began work on improving its provisions. At the 98th meeting of the Committee of Ministers on May 3, 1996, a new edition of the ESC called ESC(r) was opened for signature and entered into force on July 1, 1999. For each Council of Europe member State expressing its consent to be bound it ESC(r) after its entry into force, the ESC(r) comes into force on the first day of the month following the expiration of one month from the date of the deposit of the instrument

[9] QUINN, G. The Legal Status of the European Social Charter – Taking Interdependence and Indivisibility of Human Rights Seriously. *Report, UNIDEM Seminar: The status of international treaties on human rights*. Venice Commission, Coimbra, 7–8 October 2005, p. 3 [online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile= CDL-UD(2005)021rep-e

of ratification, acceptance or approval. During the ratification process, the state must make declarations on what provisions the ESC(r) it assumes.

ESC(r) consists of a preamble, six parts and an annex. Part I of the ESC(r) is a declaration of objectives (paragraph 1 (a) of the Article A), which proclaims social and economic rights and principles that the States Parties will aspire to implement. Each of the 31 names of rights in the socio-economic sphere corresponds to the article of the same name of Part II of the ESC(r), which unites 31 articles distributed by items and is the main part of the ESC(r) structure, securing specific social and economic rights guaranteed to all or certain categories of persons: workers, migrant workers, women, children, young persons, etc. The States Parties may selectively accepteds the articles and paragraphs of Part II of the ESC(r) subject to the minimum quotas provided for in Part III of the ESC(r). Of the 9 "main articles" contained in Part II ESC(r) (Articles 1, 5, 6, 7, 12, 13, 16, 19, 20) the States Parties undertake, in accordance with paragraph 1 (b) of Article A, to accepted at least to 6, recognizing them legally binding.

So, there have been changes in the volume of the obligations that the contracting party on the ESC(r) should undertake. The list of "main articles" envisaged by the ESC added articles 7 "The right of children and young persons to protection)" and 20 "The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex". Regarding the rights enshrined in the remaining articles (2–4, 8–11, 14, 15, 17, 18, 21–31) of Part II of the ESC(r), the number of "additional articles and clauses" to which each Contracting Party accepteds, must be at least 16 articles or 63 numbered paragraphs (paragraph 1 (c) of Part III, Article A).

Ukraine[10] has ratified 27 articles, including 6 of 9 main articles and 74 paragraphs of Part II of the ESC(r): paragraphs 1, 2, 3, 4 of the Article 1; paragraphs 1, 2, 4, 5, 6, 7 of the Article 2; paragraphs 1, 2, 3, 4 of the Article 3; paragraphs 2, 3, 4, 5 of the Article 4; Article 5; paragraphs 1, 2, 3, 4 of the Article 6; paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 of the Article 7; paragraphs 1, 2, 3, 4, 5 of the Article 8; Article 9; paragraphs 1, 2, 3, 4, 5 of theArticle 10; paragraphs 1, 2, 3 of the Article 11; paragraphs 1, 2 of the Article 14; paragraphs 1, 2, 3 of the Article 15; Article 16; paragraphs 1, 2 of the Article 17; paragraphs 1, 2, 3, 4 of the

[10] Ukraine on May 7, 1999 to accession to the ESC(r), having ratified it with statements by the Law of Ukraine No. 137-V of September 14, 2006. The first of the statements indicates that "Ukraine undertakes to consider Part I of the Charter as a declaration of goals for which it will strive with all necessary means, as defined in the introductory paragraph of Part I of the Charter" and in the second statement Ukraine made commitments under relevant articles and paragraphs of Part II ESC(r). On February 1, 2007, the ESC(r) entered into force for Ukraine, which pledged to introduce social and economic standards in full as envisaged by mentioned treaty, taking into account the above statements.

Article 18; Article 20; Article 21; Article 22; Article 23; Article 24; paragraphs 1, 2 of the Article 26; paragraphs 1, 2, 3 of the Article 27; Article 28; Article 29; Article 30; paragraphs 1, 2 of the Article 31[11]. At the same time, Ukraine at their discretion, chose social and economic rights for which it assumed obligations, without including in this list, in particular, the Article 12 "The right to social security" and the Article 13 "The right to social and medical assistance", without implementation of the provisions of which it can hardly be argued about the existence in the state of an effective social security system.

Consequently, under the ESC(r), each member State of the Council of Europe has the right to ratify all its articles after signing or to choose and consider itself bound by at least 6 out of 9 "main articles" as well as "additional articles and clauses" of Part II of the ESC(r) in such a way that their total number is not less than 16 articles or 63 numbered paragraphs. Analysis of the rights and principles enshrined in the provisions of the ESC(r) shows that they contribute to the harmonization of the norms of the national legislation of its States Parties in the sphere of social rights protection and can be regulated by the norms of labor law, social security law, housing law, legislation health and education. According to the sectoral criterion, 6 out of 9 "main articles" of the ESC(r) are provided for by labor law norms, these include: Article 1 "The right to work"; Article 5 "The right to organise", Article 6 "The right to bargain collectively"; Article 7 "The right of children and young persons to protection"; Article 20 "The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex". At the same time, Article 19 "The right of migrant workers and their families to protection and assistance" should be attributed to those that are regulated by the legislation of several branches of law, including labor law.

Based on the analysis of the content of rights and principles enshrined in Part II of the ESC(r), the subject (sectoral) criteria are: rights in the sphere of labor relations (Articles 1–6, 18, 20–22, 24–29); integrated rights relating to several areas of public relations (Articles 7–10, 13, 15–17, 19); social security rights (Articles 12, 14, 23, 30); health rights (Article 11); housing rights (Article 31). According to the subject composition, rights in the sphere of labor relations can be classified as follows: the rights of employees, aimed at protecting of individual labor rights (Articles 1-3, 5, 8–10, 20–22, 24–26, 29) and the rights of special subjects under the category of "employees" aimed at protecting collective labor rights: rights of migrant workers (Articles 18, 19), the rights of family members of migrant workers (Article 19), the rights of workers with family responsibilities

[11] *Pro ratyfikatsiiu Yevropeiskoi Socialnoi Chartoi (perehlianutoi): Zakon Ukrainy* from 14.09.2006 r. № 137-V [online]. Available at: http://zakon1.rada.gov.ua/laws/show/137-16

(Articles 4, 27); the rights of persons with disabilities (Article 15), the rights of children and adolescents (Article 7); rights of workers' representatives (Article 28); rights of associations of workers (Articles 5, 6); women's rights (Articles 4, 8, 20); rights of employers (Articles 5, 6); rights of employers' associations (Articles 5, 6)[12].

The peculiarity of the ESC(r) is that the obligations under its individual articles are closely interrelated, for example, paragraph 4 of the Article 1 imposes on the States Parties the obligation to ensure proper "vocational guidance, training and rehabilitation". The provisions of this paragraph are specified in the articles that do not belong to the category of the main ones: Article 9 "The right to vocational guidance"; Article 10, "The right to vocational training"; Article 15 "The right of persons with disabilities to independence, social integration and participation in the life of the community".

The need to fully ensure the European standards established in the ESC(r) has led to the consolidation of a flexible system of commitment with the gradual expansion of the catalog of such obligations. According to paragraph 3 of the Article A, the States Parties are entitled at any time to expand the scope of their obligations under the ESC(r), i.e. to accepted other articles and paragraphs fixed in its Part II, including paragraphs of those "main articles" to which she did not express the desire to accepted to in full. As the experience of selective acceptance of commitments shows, the States Parties resolve this issue in stages, expanding from time to time the range of mandatory articles or paragraphs. Now only France and Portugal have assumed obligations in all articles of the ESC(r)[13]. One of the main problems of selective acceptance of individual obligations is the determination of the criteria by which it occurs. According to Olivier de Schutter, "economic factors, primarily the financial capabilities of the state, are usually a priority, but ultimately, the desire to create an organic human rights protection system is the most crucial"[14].

Parts III-VI of the ESC(r) are self-numbered, denoted by letters of Latin alphabet and contain general provisions on the fulfillment of commitments made, amendments, as well as signing, ratification and entry into force of the ESC(r), its territorial application, possibility of denunciation, rules of accepted of states to the articles and paragraphs contained in Part II of the ESC(r), etc. Part V was supplemented by a new Article E "Non-discrimination", similar in meaning to the

[12] FESKOV, M. M. *Trudove zakonodavstvo Ukrainy i Yevropeiska Socialna Chartia (perehlianuta): pytannia adaptatsii*. Kyiv: Znannia, 2005, p. 32–33.

[13] *European Social Charter and European Union law* [online]. Available at: https://www.coe.int/en/web/european-social-charter/european-social-charter-and-european-union-law

[14] *The European Social Charter – A Social Constitution for Europe.* Ed. by Olivier De Schutter. Bruxelles: Bruylant, 2010, p. 174.

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which extends non-discrimination principles to the sphere of protection of social and economic rights. The appendix is an integral part of the ESC(r), it gives explanations about the scope of its application to a circle of persons. The monitoring over the fulfillment by States Parties of legal obligations under the ESC(r) is carried out in the same manner as determined by the ESC, as amended by the Protocol Amending the ESC of 1991 and the Additional Protocol to the ESC Providing for a System of Collective Complaints of 1995.

The approach that underlies the ESC(r) differs fundamentally from the approach adopted by the drafters of the Additional Protocol to the ESC of 1988, included in it a small number of additional rights not covered by the ESC. ESC(r) completely replaced for the States Parties main guarantees provided for by the ESC, as amended, and the Additional Protocol to the ESC 1988, textually combed them into a single document, and also, taking into account modern social changes, expanded the scope of guaranteed social rights, having secured new rights. The ESC(r) contains texts of Articles 1–19 of the ESC and the Articles 1–4 of the Additional Protocol to the ESC of 1988 with amendments due to the requirements of the time, as well as new provisions that guarantee the following rights: the right to protection in case of dismissal (Article 24); the right of workers to protection of rights in the event of the bankruptcy of their employer (Article 25); the right to be treated with dignity at work (Article 26); the right of workers with family responsibilities to equal opportunities and equal treatment of them (Article 27); the right of workers' representatives to protection at the enterprise and the conditions that must be created for them (Article 28); the right to information and advice during collective layoffs (Article 29); the right to protection from poverty and social marginalization (Article 30); the right to housing (Article 31).

5. Implementation of Revised Charter: topical theoretical and practical issues

The legal obligations that the States Parties undertake under the ESC(r) are formulated with varying degrees of details. Since most of the ESC(r) norms contain evaluative concepts, in particular "decent standard of living", "just, safe and healthy working conditions", "adequate conditions for vocational training", "adequate social, legal and economic protection", "decent attitude at work", the boundaries of their content are determined by the European Committee of Social Rights, taking into account the peculiarities of social rights, including the

possibility of the state to implement its obligations depending on the economic situation.

The ESC(r) ratio "with national legislation is similar to the ratio of standards of the International Labor Organisation, i.e, it has primacy over national norms that contradict it in states where the monistic concept of ratio of national and international law, and in states where the dualistic concept is fixed, it should be implemented into national legislation"[15] emphasizes Arturo Bronstein. In implementation activity to bring national legislation into compliance with provisions of the ESC(r), the following stages can be distinguished: *firstly*, study and analysis of the ESC(r) norms in order to establish their essence, content, regulatory features – features of sectoral legal mediation; *secondly*, the identification of the degree of compliance of legal norms national legislation with the provisions of the ESC(r), i.e. comparative assessment, determination of the stages of elimination of the revealed nonconformity. In this case, a comparative assessment should include: a) an assessment of the compliance of the Constitution of Ukraine with the requirements of the ESC(r); b) an assessment of the compliance of international treaties of Ukraine, in respect of which she has expressed consent to the binding nature of their provisions, in particular, by ratification, to the ESC(r) legal norms; c) assessment of the compliance of sectoral legislation with the requirements of the ESC(r); *thirdly*, legislative activities to harmonize legal norms of national legislation in this sphere; *fourthly*, the incorporation of results of legislative activity into law-enforcement practice[16].

During the preparatory stage for ratification of the ESC(r), the Council of Europe member states carry out a full analysis of the current legislation and law-enforcement practices related to the rights guaranteed by the ESC(r). The Constitution of Ukraine provide for the method of incorporation[17] for implementation of norms of international law. When developing a mechanism for implementing the ESC(r) norms in national legislation, one should take into account numerous social and economic, organizational factors that significantly influence the practical implementation of this mechanism. The peculiarity of the ESC(r) is that its regulatory function is aimed at guaranteeing social and economic rights that require adequate material and financial support, which should create the actual conditions for the realization of social and economic rights in accordance with European standards in this sphere. In addition, when implementing the ESC(r) norms into national legislation, it is necessary to take into account the

[15] BRONSTEIN, A. *International and Comparative Labour Law: Current Challenges*. Basingstoke: UK, New York: Palgrave Macmillan, 2009, p. 196.

[16] FESKOV, M. M. Tam camo, p. 39.

[17] See article 9 of the Constitution of Ukraine [online]. Available at: http://zakon4.rada.gov.ua/laws/show/254к/96-вр (in Ukrainian)

peculiarities of its provisions, as well as the legal assessment activities of the Council of Europe's control bodies regarding the reports of States Parties on the status of compliance with the ESC(r) obligations. The ESC(r) not only takes into account the provisions of the ESC and its amendments, the provisions of the Additional Protocol to the ESC 1988, but also significantly expanded the catalog of social and economic rights, the range of individual rights, changed the amount of state obligations under certain articles, shifted the emphasis protection of certain categories of persons.

The practice of applying the provisions of the ESC testifies to its trial nature, and the international guarantees of the ESC(r) are more advanced, it has proved that it has sufficient material content to be an effective tool for protection of social rights, although the functioning of this mechanism suffers from structural weaknesses and lack of political will. At the same time, the ESC/ESC(r) noticeably influences on the law-making and law-enforcement processes in the States Parties that share common social values. The significance of their provisions for the development of labor and social law of the European Union is evidenced by the participation of all its member States in them, as well as references to them in the Treaty on the Functioning of the European Union of 2007 (Article 151) and in the EU Charter (preamble), indicating the similarity of the Council of Europe and the European Union standards for protection social rights. For persons who are under the jurisdiction of the ESC/ESC(r) States Parties that are not members of the European Union, these acts can actually be considered as the only pan-European guarantee of legal ensuring of social rights, a guideline for their protection.

6. Functionning of the reporting system: evolution of approaches

The reports of the States Parties on the application of the adopted provisions of Part II, provided in accordance with the Article 21 of the ESC, are first analyzed by the European Committee of Social Rights, which, based on them, prepares an conclusion, expressing its position regarding compliance by each of the participants for the reporting period of the provisions in respect of which it filed the report, from a legal point of view, assesses the state of compliance of the legislation and law-enforcement practice of specific States Parties their obligations under the ESC. Reports on not accepted provisions provided for in accordance with the Article 22 of the ESC are analyzed by the European Committee of Social Rights, which found that its role in this category of reports is

to interpret the meaning of a particular provision and examine the reasons for prompting states not to accept it[18]. He gives a conclusion in which he calls on states to adopt such provisions.

The reports of the States Parties and the conclusions of the European Committee of Social Rights are submitted, in accordance with paragraph 1 of the Article 27 of the ESC, for consideration to the Governmental Committee, which includes one representative from the government of each State Partie as well as observers with the right of deliberative vote from no more than two international organizations of employers and no more than from two international trade union associations can participate in meetings of the Governmental Committee. Similar practices have the European Trade Union Confederation (ETUC), the International Organisation of Employers (IOE) and the Business Europe (ex Union of Industrial and Employers' Confederations of Europe, UNICE).

In the light of the reports of the States Parties on the application of the ESC and conclusions of the European Committee of Social Rights regarding these reports, the Governmental Committee (the second, after the European Committee of Social Rights), the element of the monitoring mechanism of the ESC indicates to the Committee of Ministers (the third element of the monitoring mechanism of the ESC) on situations which, in his opinion, should become, according to the Article 28 of the ESC, the subject of individual recommendations for each of the State Partie. To this end, the Governmental Committee selects situations that deserve to be the subject of individual warnings / recommendations for the State Partie. The Governmental Committee prepares a report on the application of the ESC to be made public, and submits it, together with the conclusion of the European Committee of Social Rights, to the Committee of Ministers during each monitoring cycle. The report of the Government Committee also contains an analytical background on the dynamics of changes in the fulfillment of obligations by the States Parties that occurred after the previous control cycle. At meetings of the Committee of Ministers, the report of the Governmental Committee and the conclusion of the European Committee of Social Rights are discussed with suggestions and analytical assessments of the situation. Following the discussion, guided by the report of the Governmental Committee, the Committee of Ministers, by voting, in which only the States Parties have the right to vote, adopts a two-thirds majority vote of the resolution covering the entire control cycle and containing individual recommendations to the respective States Parties.

The resolution of the Committee of Ministers can also be directed to a warning of the State Partie, i.e. impose requirements on the need to take appropriate

[18] *European Committee of Social Rights* [online]. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp

measures to eliminate the identified inconsistencies, which, in essence, is a signal that the situation with the fulfillment of obligations does not fully meet the requirements of the ESC/ESC(r). If the Committee of Ministers adopts a resolution containing a warning / recommendation, the State Partie is invited to report on the measures taken in response to the warning / recommendation received in the next national report. Although the recommendations are not legally binding, their implementation is ensured by the political authority of the Council of Europe. According to Gráinne de Búrca and Bruno de Witte, "the acts of the ESC control bodies are not endowed with legally binding force, but they have political and legal significance"[19]. The Secretary General of the Organisation submits to the Parliamentary Assembly of the Council of Europe for discussion at periodic plenary meetings the conclusions of the European Committee of Social Rights, reports of the Governmental Committee and resolutions of the Committee of Ministers. At the same time, "how effective the conclusion of the European Committee of Social Rights about non-compliance will be and when the violation of rights should be resolved at the time of adoption of the conclusion is not known. That is why, in order to make the Charter a social constitution of Europe, the time-consuming mechanisms of monitoring over its implementation should be replaced by a more sophisticated surveillance system"[20] says Zaka Mirzayev. In this context, it should be emphasized that it is in the process of the functioning of the monitoring mechanism, above all the activities of the European Committee of Social Rights, that the practice of the same and dynamic interpretation and application of the ESC/ESC(r) is formed and that essential for the full implementation of their provisions, increasing the impact of the ESC/ESC(r) on the legislation and law-enforcement practice of the States Parties.

By the decision of the Committee of Ministers of May 3, 2006, a new reporting system was introduced providing for the division of the provisions of the ESC/ESC(r) into four thematic groups so that each State Partie reported once every four years. According to the approved division the provisions of the ESC/ESC(r) have been divided into four thematic groups: "Employment, training and equal opportunities" (Articles 1, 9, 10, 15, 18, 20, 24, 25), to the second thematic group "Health, social security and social protection" (Articles 3, 11, 12, 13, 14, 23, 30), to the third "Labour rights" (Articles 2, 4, 5, 6, 21, 22, 26, 28, 29) – and the fourth – "Children, families, migrants" (Articles 7, 8, 16, 17, 19, 27, 31) – to thematic groups. States Parties present a report on the provisions relating to one

[19] DE BÚRCA, G. *Social Rights in Europe.* Ed. by Gráinne de Búrca, Bruno de Witte. Oxford/New York, 2005, p. 316.

[20] MIRZAYEV, Z. The European Social Charter and its implementation in the Republic of Azerbaijan, November 2012 [online]. Available at: http://works.bepress.com/zaka_mirzayev/2

of the four thematic groups on an annual basis. Consequently each provision of the ESC/ESC(r) is reported once every four years. The first national report on the implementation of undertakings under the ESC(r), submitted to the Council of Europe on 4 December 2007, Azerbaijan was the first of the national reports submitted under the new reporting system. According to the approved division into thematic groups, the reports of Ukraine[21] concerned the adopted provisions of the ESC(r) articles belonging to all four thematic groups.

On 2 April 2014, the Committee of Ministers adopted new changes to the reporting and monitoring system with respect to the ESC/ESC(r). The most important aim of the changes is to simplify the reporting systemfor State Parties having accepted the collective complaints procedure. Following these modifications, States having accepted the Collective Complaints procedure have to submit a simplified report every two years. In order to prevent excessive fluctuations in the workload of the European Committee of Social Rights, the States which have accepted the collective complaints procedure so far have been divided into two groups. The groups are composed by distributing the States according to the number of complaints registered against them (from the highest to the lowest), as follows: *Group A*, made up of eight States: France, Greece, Portugal, Italy, Belgium, Bulgaria, Ireland and Finland; *Group B*, made up of seven States: Netherlands, Sweden, Croatia, Norway, Slovenia, Cyprus, and Czech Republic. In compliance with the Committee of Ministers' decisions from 2006 and 2014, States Parties are currently required to draw up their report on the basis preliminary agreed calendar. For instance, reference period: 1. 1. 2015–31. 12. 2018; thematic groups: *Group 1* "Employment, training and equal opportunities" (Articles 1, 9, 10, 15, 18, 20, 24, 25); deadline for submission of reports: 31. 10. 2019; normal report: all states except the ones from group A; simplified report: states from *Group A*; adoption of conclusions: December 2020[22]. It is important that States shall indicate what follow-up action has been taken in response to the decisions of the European Committee of Social Rights on collective complaints). At

[21] As for Ukraine, the assessment of some situations was not completed due to the lack of information provided by it on the implementation of the articles in question. Since the information provided was not detailed enough for a satisfactory assessment from a legal point of view, the European Committee on Social Rights stressed that it needs additional information regarding the relevant situations, and therefore requested the Government of Ukraine to provide such information in the next report on the articles under consideration. In: the conclusion of the European Committee of Social Rights, incomplete and inappropriate information contained in the national reports provided by Ukraine led to a number of deferred conclusions, while the European Committee of Social Rights considers the information incomplete when there is no information on how legislation is applied in practice and how its implementation is monitored.

[22] *Reporting system of the European Social Charter* [online]. Available at: https://www.coe.int/en/web/european-social-charter/reporting-system

the level of the Governmental Committee only cases of non-conformity selected by the European Committee of Social Rights will be discussed.

7. Collective complaints procedure

The modern monitoring mechanism is based on an analysis of the reports of the States Parties in the above method, but the complaint procedure also plays an important role. The Additional Protocol to the ESC Providing for a System of Collective Complaints of 1995 provides for the possibility of filing of collective complaints about the unsatisfactory application use of the ESC/ESC(r), the subject of which should not be a violation of the rights of a specific person, but its legislation and/or practices that, according to the applicant, do not comply with the ESC/ESC(r), which is evidence of its unsatisfactory application. It is important to bear in mind that, according to Cullen Holly, a reasonable opinion, "the complaints mechanism is intended only for collective complaints and, therefore, there is no requirement for the existence of a specific victim or the exhaustion of national remedies"[23]. Collective complaints can be lodged by the social partners, the national non-governmental organisations and the international non-governmental organisations[24] in participatory status with the Council of Europe (Collective Complaints procedure).

Following the consideration of a collective complaint by the European Committee of Social Rights, the report is made in the form of a "decision on the substantiation" of the complaint, in which the fact of a violation of the ESC/ESC(r) by the State Partie or the absence of a violation is stated. "Considering complaints, the European Committee of Social Rights interprets the Charter in full compliance with its human rights character and thus creates a solid basis for its future work. It is positive that the practice of considering complaints by the European Committee of Social Rights demonstrates the possibility of adequately protecting economic and social rights by appealing to an international treaty monitoring body"[25] emphasizes David Harris. The report of the European

[23] CULLEN, H. The Collective Complaints System of the European Social Charter: Interpretive Methods of the European Committee of Social Rights. *Human Rights Law Review*, Oxford: Oxford University Press, 2009, vol. 9, issue 1, p. 62–63.

[24] See *Participatory status for international non-governmental organisations with the Council of Europe: Resolution CM/Res(2016)3* [online]. Available at: https://search.coe.int/cm/P./result_details.aspx?ObjectId=090000168068824

[25] HARRIS D. J. Collective Complaints under the European Social Charter: Encouraging Progress? *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick*. Ed. by Kaikobad, K. H., Bohlander, M. (eds.). Leiden: The Netherlands, Martinus Nijhoff Publishers, 2009, p. 24.

Committee of Social Rights is sent to the Committee of Ministers and published. Guided by him, the Committee of Ministers, by a majority of votes cast, adopts a resolution at the end of each control cycle and, after considering collective complaints, if it makes a conclusion about the unsatisfactory application of the ESC/ESC(r), by two thirds of the votes, it adopts individual recommendations to states, which do not fully comply with the ESC/ESC(r). Only the States Parties of each of them, respectively, have the right to vote.

Only 15 of the ESC/ESC(r) States Parties ratified the Additional Protocol to the ESC Providing for a System of Collective Complaints 1995, and of these, only Finland recognized the right of national non-governmental organisations to file collective complaints against the government[26]. Ukraine's accession to the Additional Protocol to the ESC Providing for a System of Collective Complaints 1995 would certainly give impetus to the process of reforming the domestic social security system, and non-governmental organisations working to protect the rights of workers would not be deprived of the right to file directly to the European Committee of Social Rights complaints concerning violations of Ukraine obligations under the ESC(r).

8. Comparative analysis of the European Social Charter and Revised Charter

Many of provisions of the ESC in the ESC(r) are set out in the updated edition, namely: it is planned to increase the guaranteed duration of annual paid leave from 2 to 4 weeks (paragraph 3 of the Article 2); Article 2 "The right to just conditions of work" includes a new paragraph 6, designed to ensure that workers are informed about the essential aspects of an employment contract or employment relationship, the Article 3 "The right to safe and healthy working conditions" establishes the obligation to develop, implement and periodically review national policy in the sphere of labor protection, to promote the development of industrial hygiene services; the Article 7 "The right of children and young persons to protection" defines the minimum age of 18 years for employment with dangerous working conditions. The age below which the working time should be limited, increased from 16 to 18 years. Annual paid leave for persons under 18 years old, increased from 3 weeks to 4 weeks; paragraph 1 of the Article 8 "The right of employed women to protection of maternity" has been increased from 12 to

[26] *Council of Europe, Member States of the Council of Europe and the European Social Charter* [online]. Available at: p://www.coe.int/t/ dghl/monitoring/socialcharter/Presentation/Overview_en.asp

14 weeks, the length of leave for women during pregnancy and after childbirth; employers' responsibilities for night work for pregnant women, women who have recently given birth and women nursing their infants are clarified (paragraph 4 of the Article 8).

A characteristic feature of the ESC(r) approach to ensuring equality of rights for men and women are the changes reflected in paragraph 5 of the Article 8. If paragraph 4 of the Article 8 of the ESC prohibits the employment of women in work contraindicated for them in connection with dangerous, harmful or difficult working conditions, then paragraph 5 of the Article 8 of the ESC(r) extends such a ban only to pregnant women, women who have recently given birth to a child, and women nursing their infants; Article 10 "The right to vocational training" provides for the obligation to introduce special retraining and reintegration programs for long-term unemployed persons; replaces the reference defined in paragraph 2 of the Article 12 "The right to social security" to the International Labor Organization Convention No. 102 of 1952 by reference to the European Code of Social Security revised of 1990, setting higher standards for minimum standards of social security; Article 15 "The right of persons with disabilities to independence, social integration and participation in the life of the community" establishes the additional right of disabled persons to social integration and participation in society through the adoption of measures that provide access to transport, housing, cultural activities and recreation; it provides for the replacement of guarantees of "the rights of mothers and children" with guarantees of the "rights of children and young persons" contained in the Article 17 "The right of children and young persons to social, legal and economic protection", with a corresponding change in the emphasis and elements of these guarantees, in particular with regard to education. This article, set out in the new edition, is aimed at comprehensive protection of children and adolescents, taking into account their specific needs in matters of care, assistance, education, protection from neglect, violence, exploitation, etc.; strengthened the principle of non-discrimination (Article E), etc.

The ESC provides a wide range of rights belonging to the category of social and economic rights, but it does not provide for all of them, let say, there is no mention of the right to education, which is "a necessary condition for full realization of the right to employment"[27]. This gap was filled by the ESC(r), in accordance with paragraph 2 of the Article 17 of which the States Parties undertake to "provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools". The ESC does

[27] SWIATKOWSKI, A. M. *Charter of Social Rights of the Council of Europe*. Zuidpoolsingel: The Netherlands, Kluwer Law International, 2007, p. 298.

not contain a general guarantee of the right to housing, limited to the provisions on "family housing" (Article 16, as well as paragraphs 1, 2 of the Article 4 of the Additional Protocol to the ESC 1988) and "accommodation for migrant workers" (paragraph 4 (c) of the Article 19), at the same time, the Article 31 ESC(r) enshrines the right to housing. The ESC did not provide for general protection from poverty, a general guarantee of an "adequate standard of living" for all persons (paragraph 1 of the Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966), providing some protection for the right to fair remuneration that could provide "decent standard of living" of workers and their families (paragraph 1 of the Article 4, of the ESC, paragraph 1 (a) of the Article 4 of the Additional Protocol to the ESC 1988), and the right to social and medical assistance (Article 13 of the ESC). The Article 30 of the ESC(r) filled this gap, provided for the right to protection against poverty and social exclusion.

9. Priorities of the Turin process: new opportunities

The Turin process was launched by the Secretary General of the Council of Europe at the High-level Conference on the European Social Charter (Turin, 17 and 18 October 2014) soon after the Secretary General's decision to put the "system" of the European Social Charter treaties (*the ESC*/ESC(r)*; the Additional Protocol to the ESC of 1988; the Additional Protocol to the ESC Providing for a System of Collective Complaints of 1995)* at the top of its priorities, and this, with a view to increasing the relevance and impact of the work of the Council of Europe. The Conference, organised by the Council of Europe in co-operation with the Italian authorities (in the framework of the Italian Presidency of the EU Council), gathered policy-makers from 37 European countries to reaffirm the relevance of social rights in times of crisis[28]. In addition, the achievement of the objectives of the Turin process was discussed at the Conference on the Future of the Protection of Social Rights in Europe, held in Brussels on 12–13 February by the Belgian Chairmanship of the Council of Europe.

Two other high-level meetings marked the Turin process in 2016: the Interparliamentary Conference on the European Social Charter and Turin Forum on Social Rights in Europe. These events, held in Turin on 17 and 18 March, were organised by the Council of Europe in co-operation with the Italian Chamber of Deputies and the City of Turin. At the Forum, the European Commission

[28] *Report on Turin process presented at Committee of Ministers by Parliamentary Assembly's Vice-President Nicoletti* [online]. Available at: https://www.coe.int/en/web/european-social-charter/-/report-on-turin-process-presented-at-committee-of-ministers

presented its draft European Pillar on Social Rights. It is noteworthy that during the speech on the state of affairs in the EU on 9 September 2015, the President of the European Commission Jean-Claude Juncker stressed on the necessity for revitalization of the work for a fair and truly pan-European labour market[29]. European Pillar of Social Rights takes into account changing realities in the labour area, the basic principles and values that are shared at the EU level, actualizing the present EU social "acquis". In general, it is about encouraging reforms at the national level, adopting new trends in labour models, capable to contribute to the social effectiveness of the ESC/ESC(r) member states.

The Turin process aims at consolidation and enhancement of the European Social Charter's system of normative standards in social rights, mechanisms for ensuring compliance with the commitments made in this area. Within the framework of the Turin process, several important documents have been developed, among which: The '*General Report of the High-level Conference on the European Social Charter*' (***Turin 1****, 17 and 18 October 2014*), established by Mr Michele Nicoletti, Vice-President of the Parliamentary Assembly of the Council of Europe; The '*Brussels' Document on the future of the protection of Social Rights in Europe*', elaborated by a group of academic experts chaired by the General Coordinator of the Academic network of the European Social Charter and Social Rights, following the Brussels' Conference (2015); *The official Speeches and Interventions relating to the Interparliamentary Conference on the European Social Charter*, and *Turin Forum on Social Rights in Europe* (***Turin 2****, 17 and 18 March 2016*)); The '*Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights*'.

"Respect for fundamental social rights constitutes the best way forward to increase citizens' participation in democratic processes, reinforce their trust in European construction and combat fundamentalism and radicalisation by promoting inclusion and social cohesion"[30], highlighted Michele Nicoletti, Vice-President of the Parliamentary Assembly of the Council of Europe and General Rapporteur of the High-Level Conference on the European Social Charter, while presenting the report to the Committee of Ministers. Measures within the framework of the Turin process, according to Michele Nicoletti, "represent a genuine opportunity to turn declarations of principle, at national and European level, into targeted political actions, in order to fill the gap between civil and political rights on the

[29] *Commission launches a public consultation on the European Pillar of Social Rights* [online]. Available at: http://europa.eu/rapid/press-release_IP-16-544_en.htm

[30] *Report on Turin process presented at Committee of Ministers by Parliamentary Assembly's Vice-President Nicoletti* [online]. Available at: https://www.coe.int/en/web/european-social-charter/-/report-on-turin-process-presented-at-committee-of-ministers

one hand, and social and economic rights on the other"[31]. At the same time it is noteworthy that "The conclusion in Turin was that social rights are therefore doubly undermined: firstly, because of institutional disequilibrium between the monitoring systems of fundamental rights in Europe and secondly, because of the impact of the crisis, which is leading to restrictions of rights or the dismantling of the policies designed for their concrete implementation"[32], was emphasised by the President of the Italian delegation to Parliamentary Assembly of the Council of Europe.

Certainly, the Turin process aims at strengthening the "system" of the European Social Charter treaties within the Council of Europe and in its relationship with the law of the European Union and also it is oriented to eliminate the lack of a unifying effect between ESC/ESC(r). Based on the principles of indivisibility, interdependence and interrelation of fundamental rights, formally established by the United Nations, purpose of ESC/ESC(r) is to improve the implementation of social and economic rights at the continental level, along with civil and political rights granted by the Convention on Human Rights and Fundamental Freedoms of 1950. Undoubtedly, the Turin process promotes the consolidation of social rights in Europe that is an essential contribution to the principles of the Rule of Law, Democracy and Human Rights[33] as civilization values supported by the Council of Europe, the European Union, etc., and the future of Europe depends on the adherence to these principles. In view of the above, one of its objectives is the ratification of the ESC(r) and adoption of the Additional Protocol providing for a system of collective complaints by all the member States of the Council of Europe.

The important component of the Turin process is that it represents a vital step towards fresh restart for the process of uniting of Europe, which received a new vision, based on the fundamental values of the unification of States and their citizens, and especially on the values of the European Social Charter, which is recognized, being a part of this process, as a social constitution of Europe, which focuses on targeted practical actions aimed at increasing the effectiveness of its implementation, as well as at strengthening of the level of protection of social rights in Europe.

[31] Ibid.

[32] Ibid.

[33] *The Turin process for the European Social Charter* [online]. Available at: https://www.coe.int/en/web/turin-european-social-charter/turin-process

10. Conclusion

The Council of Europe and the European Union play an important role in provision and protection of social rights. The guarantees of the ESC(r) correspond and specify the guarantees of universal international legal acts in the sphere of social and economic rights. The guarantees of the ESC(r) contain constructive approaches to flexible implementation of European social standards into national legislation and law-enforcement practice, to their gradual and consistent harmonization. The ESC/ESC(r) norms on social rights are generally consistent with the guarantees provided by the International Covenant on Economic, Social and Cultural Rights of 1966 and guarantees for economic rights are closely related to the standards of the International Labor Organization, which have universal application.

The priority of the ESC(r), which is based on coordination and flexibility, is to create by the States Parties of conditions under which the practical realization of the rights and principles established therein is possible, using national and international instruments, which however emphasizes the special importance of developing European standards for ensuring social rights and also increase their effectiveness, which will open new opportunities on the labor market.

The European standards of social and economic rights contained in the ESC(r) reaffirmed in the EU Charter, promote the convergence of human rights protection systems operating in the Council of Europe and the European Union. Consequently the ESC(r) played a critical role in meaningfulness of social rights, reaffirmed in the EU Charter, which belongs to the primary sources of EU law.

The process of updating and improving of the "system" of the European Social Charter treaties is continuing, therefore it is a "living instrument" of ensuring of social rights in Europe, capable of raising the level of its protection. Under the conditions of existing crisis, globalization, european integration etc., the value of the Turin process for the ESC/ESC(r) (Turin 1 and Turin 2) is increasing. As part of this process, the fundamental instruments of social rights protection – ESC/ESC(r) are recognized as Social Constitution of Europe. The mentioned outlines actual targeted actions aimed at: increasing the effectiveness of the practical application of ESC/ESC(r); strengthening the effectiveness of mechanisms for social rights protection; the establishment of a social state whose priority is to achieve the same level of opportunity and equal use of potential; the formation of social Europe to be based on the fundamental values of respect for human rights, in particular for social rights that exist not for the sake of rights, but for the sake of human.

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EU Law and Investor-State Dispute Settlement

Gabriel M. Lentner*

Summary: With the entry into force of the Lisbon Treaty in 2009 the EU has acquired new competences in the area of international investment law and policy. Article 207 TFEU now provides the EU with external treaty-making power in the field of foreign direct investment. Still many legal issues remain unresolved today. This article deals with the legal framework for Investor-State Dispute Settlement (ISDS).It will first discuss the scope of the EU's investment competence since the entry into force of the Lisbon Treaty and what this means for existing BITs. Next, the EU law issues are addressed by looking at the recent *Achmea* decision of the CJEU. Lastly, financial responsibility of the EU and its member states regarding ISDS is addressed.

Key words: EU Investment Policy – Foreign Direct Investment (FDI) – Investor-State Dispute Settlement (ISDS) – International Investment Agreemtent (IIAS) – Investment Court System (ICS) – Article 207 (1) TFEU – External Competence – Achmea – Financial Responsibility

1. Introduction

With the entry into force of the Lisbon Treaty[1] in 2009 the EU has acquired new competences in the area of international investment law and policy. Article 207 TFEU now provides the EU with external treaty-making power in the field of foreign direct investment.[2] The EU is now expressly entitled to negotiate and

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1 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13 2007, 2007 O. J. (C 306) 1 [hereinafter Lisbon Treaty].

2 Article 207(1) of the Consolidated Version of The Treaty on the Functioning of the European Union art. 207, May 9, 2008 O. J. (C 115) 47 [hereinafter TFEU] provides "The common

conclude international investment agreements (IIAs) or free trade agreements (FTAs), including chapters on investment, comparable to those concluded by EU Member States individually before the Treaty of Lisbon.[3] Thus, the EU's comprehensive investment competence marks the beginning of a unified EU approach toward international investment law. This will undoubtedly have a considerable impact on the future shape of international investment law as the EU is the world's biggest investor and recipient of foreign direct investments.[4]

While the EU Commission clearly indicated that a Model bilateral investment agreement (BIT) will not be adopted,[5] the significance of the EU's investment policy for the world economy necessitates a more detailed look at some of the legal issues arising from the interaction between EU law and international investment law. Because the new generation of IIAs[6] so far concluded by the EU appear to depart from established drafting practice, this article deals with the legal framework for Investor-State Dispute Settlement (ISDS).[7] It will first discuss the scope of the EU's investment competence since the entry into force of the Lisbon Treaty and what this means for existing BITs. Next, the EU law issues are addressed by looking at the recent *Achmea* decision of the CJEU. Lastly, financial responsibility of the EU and its member states regarding ISDS is addressed.

commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." [emphasis added]; for a discussion of the precise scope of the new investment competence see e.g. FINA, S., LENTNER, G. M. The Scope of the EU's Investment Competence after Lisbon. *Santa Clara Journal of International Law*, 2016, vol.14, iss. 2, p. 419.

3 According to Article 3(1) TFEU, the common commercial policy of the European Union, including foreign direct investment, is an area of exclusive EU competence.

4 European Commission, Trade and Investment, 2014, p. 9 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0364&from=en

5 See European Commission, Towards a Comprehensive European International Investment.2010, p. 4–6 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0654&from=EN. For a first discussion of what could be called the 'invisible' EU Model BIT, see Special Issue: The Anatomy of the (Invisible) EU Model BIT, 15 2014) Journal of World Investment & Trade, 363-704. See also LENTNER, G. M. A Uniform European Investment Policy? The unwritten EU Model BIT. *Journal of Law & Administrative Sciences*, 2014, no. 2, p. 156.

6 Including Investment Chapters in Free Trade Agreements, as well as stand-alone Bilateral Investment Treaties (for example being negotiated between the EU and China).

7 Regarding the substantive investor protection provisions in CETA, see e.g. LENTNER, G. M. Investitionsschutz im Freihandelsabkommen CETA. *Ecolex*, 2016, p. 1026.

2. The EU's Investment Competence

2.1. The Legal Basis

The Member States of the European Union conferred upon the EU new exclusive competences through the Lisbon Treaty[8] in 2009.[9] With regards to the common commercial policy (i.e. the worldwide external trade-policy representation of the internal market of the EU), these competences were extended to include foreign direct investment (FDI).[10] FDI now squarely falls within the ambit of the EU's exclusive competences as part of its Common Commercial Policy (CCP) pursuant to Article 3(1)(e) of the Treaty of the Functioning of the European Union (TFEU). This means that negotiation and ratification of FDI related treaties will now be conducted by the organs of the EU rather than by individual Member States.[11] Overall, the inclusion of competences on foreign investment reflects a growing trend in international economic agreements such as Free Trade Agreements (FTAs) to also include rules on investment protection and promotion.[12]

The EU's competence and decision-making rules pertaining to investment are provided in Article 207 of the CCP. The CCP now covers all matters relating to trade in goods and services, commercial aspects of intellectual property, and foreign direct investment pursuant to Article 207(1) TFEU.[13] The EU is hence expressly entitled to adopt unilateral measures and conclude international agreements in that regard.[14]

The inclusion of FDI in the CCP has attracted great interest and discussion among European and international scholars,[15] mostly because there is neither

[8] Amendment 157(a) Lisbon Treaty.

[9] For an overview see e.g. BUNGENBERG, M. The Division of Competences between the EU and Its Member States in the Area of Investment Politics. In: Bungenberg, M., Griebel, J., Hindelang, S. (eds.). *International Investment Law and EU Law.* European Yearbook of International Economic Law, Springer, 2011, p. 29.

[10] See Art. 47 TFEU.

[11] MAUPIN, J. A. Where Should Europe's Investment Path Lead? Reflections on August Reinisch, "Quo Vadis Europe?" *Santa Clara Journal of International Law*, 2014, vol.12, iss.1, p. 185.

[12] BUNGENBERG, M. The Division of Competences between the EU and Its Member States in the Area of Investment Politics. In: Bungenberg, M., Griebel, J., Hindelang, S. (eds.). *International Investment Law and EU Law.* European Yearbook of International Economic Law. Springer, 2011, p. 31.

[13] SCHÜTZE, R. European Community and Union, Decision-Making and Competences on Ine ternational Law Issues. In: Wolffrum, R., Guhr, A., Heilmann, D., Kaiser, K., Lachenmann, F., Pohlmann, M. and Reuss, M. (eds.). *The Max Planck Encyclopedia of Public International Law.* Oxford University Press, 2012, vol. III, p. 814, p. 6.

[14] Ibid.

[15] See REINISCH, A. The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements. *Santa Clara Journal of International Law*, 2014, vol.12, iss. 1, p. 111.

any definition of the term 'foreign direct investment' in the treaties, nor any clarification of the exact scope of the FDI competence under the CCP.[16] A more precise definition would have been desirable, since foreign direct investment in practice necessitates a broad regulatory framework.[17] This ambiguity lead to different interpretations of the new FDI competence of the EU as to the question whether all aspects of the regulation of foreign investment generally included in IIAs are covered by the FDI competence as included in the TFEU.

A clarification from the CJEU was requested by the Commission concerning the EU-Singapore FTA. In its opinion, the CJEU opined that the FTA falls within the exclusive competence of the EU, with the exception of the following provisions related to investment protection: the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to portfolio investments between the European Union and the Republic of Singapore; the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9. These fall within a competence shared between the European Union and the Member States.[18]

2.2. The Grandfathering Regulation

With the FDI competence, the Commission adopted the view that EU Member States are now barred from taking any action in this area without EU authorization,[19] creating a legal problem for maintaining in force existing Member States' BITs.[20]

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[16] SHAN, W., ZHANG, S. The Treaty of Lisbon: Half: Way toward a Common Investment Policy. *European Journal of International Law*, 2011, vol. 21, no. 4, p. 1058.

[17] WEISS, W. Artikel 207 AEUV. In: Grabitz, E., Hilf, M., Nettesheim, M. Nettesheim (eds.). *Das Recht der Europäischen Union: Kommentar.* C. H. Beck, 2011, p. 40.

[18] Ag Sharpston Opinion 2/15 (16 May 2017).

[19] Art 2(1) TFEU ("When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States mentation of Union acts."); for existing BITs see 351 (1) TFEU.

[20] Indeed, as eg Lavranos correctly points out, under public international law "the transfer of FDI competence to the EU has not affected in any possible way the legal status and binding effect of all existing Member States' BITs". LAVRANOS, N. In: Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 establishing a Transitional Regime for existing Extra-EU BITs: A Member State's Perspective. *Transnational Dispute Management*, 2013, vol. 10, iss. 2, p. 3.; see also generally TIETJE, Ch. The Status of International Law in the European Legal Order: The Case of International Treaties and Non-Binding International Instruments. In: Wouters, J., Nollkaemper, A., De Wet, E. (eds.). *The Europeanisation of International Law – the Status of International Law in the EU and its Member States*. The Hague: 2008, p. 55; TIETJE, Ch. EU-Investitionsschutz und -förderung zwischen Übergangsregelungen und umfassender europäischer Auslandsinvestitionspolitik. *Europäische Zeitschrift für Wirtschaftsrecht,* 2010, vol. 21, no. 17, p. 647.

Hence a quick pragmatic solution had to be found for the approximately 1200 BITs of EU Member States.[21]

A compromise to the European Commission's proposal for grandfathering existing Member States' BITs was reached after 2 years of arduous negotiations.[22] The adopted 'grandfathering' Regulation then permits the EU to authorize Member States to act in fields of its own exclusive powers.[23]

The outcome is – compared to the Commission's original proposal – providing a significant reduction of the Commission's powers.[24] It ensures the continuation of all pre-Lisbon BITs of Member States until they are replaced by EU investment agreements.[25] Regarding future BITs and those estimated thirty[26] that have been signed after the entry into force of the Lisbon Treaty (1 December 2009) but before the entry into force of the grandfathering Regulation, the European Commission will in essence perform a full assessment of the EU law compatibility and can prescribe in detail which provisions in the BITs will have to be included or removed.[27] Hinting at the Commission's proposed standard, recital 6 of the Regulation includes a mention that these future EU agreements shall provide 'for high standards of investment protection'. As a result, the European Commission fully controls all Member State BITs post-Lisbon.<?>

With regards to dispute settlement, the grandfathering regulation[28] provides the European Commission with considerable powers to participate in proceedings initiated against Member States on the basis of existing BITs of EU Member States.[29] Pursuant to Article 13 of the regulation, the Commission may direct the

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21 REINISCH, A. The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements. *Santa Clara Journal of International Law*, 2014, vol. 12, iss. 1, p. 120.

22 LAVRANOS, N. In: Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 establishing a Transitional Regime for existing Extra-EU BITs: A Member State's Perspective. *Transnational Dispute Management*, 2013, vol.10, iss. 2, p. 2.

23 Regulation 1219/2012, OJEU, L 351/40, 20. 12. 2012. Regulation No. 1219/2012 of the European Parliament and the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Treaties Between Member States and Third Countries, O.J. (L 351) 40; Reinisch, (n 21) 120.

24 KLEINHEISTERKAMP, J. Financial Responsibility in the European International Investment Policy. *LSE Law, Society and Economy Working Papers*, 2013, no. 15, p. 3–4.

25 Article 3 of Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries OJ L 351/40.

26 LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague Yearbook of International Law*, 2011, vol. 24, p. 290.

27 Ibid 291.

28 Regulation 1219/2012, Establishing Transitional Arrangements for Bilateral Investment Treaties Between Member States and Third Countries, 2012 O. J. (L 351) 40.

29 LAVRANOS, N. In: Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 establishing a Transitional Regime for existing Extra-EU BITs: A Member State's Perspective.

respective Member States to take or refrain from taking a particular position or action during the dispute settlement proceedings.[30] Where appropriate, the Commission may be even granted standing to take part in the defense of a Member State in the context of an ISDS initiated by a third state investor.[31] This means that the EU (as represented by the Commission) will be the sole defendant when Member State measures become the subject of investment arbitration claims by investors from third party countries.[32] The EU also enacted the regulation on financial responsibility[33] dealing with the potential financial consequences flowing from investor-to-state dispute settlement.

Since investor-state awards by arbitral tribunals are susceptible to annulments or denials of recognition and enforcement in Member State courts, the relationship of these arbitration treaties and EU law face two sets of imperatives: those flowing from the obligation to uphold, recognize and enforce awards under the arbitration treaties and those flowing from obligations to comply with EU law.[34] How these two imperatives are resolved appears to remain an open question especially with a view to the principle of the autonomy of EU law.[35]

3. The EU and Investor-State Dispute Settlement

3.1. The Background

The interaction between EU law and international investment law already caused problems before the entry into force of the Lisbon Treaty. In three important cases, the Commission brought infringement proceedings under former Article 307(2) EC Treaty (ECT) against Austria, Finland and Sweden, on the grounds that their respective BITs concluded with third states were in violation

Transnational Dispute Management, 2013, vol.10, iss. 2, p.10.

30 Ibid

31 Ibid.

32 BERMANN, G. A. Reconciling European Union Law Demands with the Demands of International Arbitration. *Fordham International Law Journal*, 2011, vol. 34, no. 5, p. 1213–1214.

33 Regulation 912/2014, Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party, 2014 O. J. (L 257), p. 121–134.

34 BERMANN, op. cit., p. 1215.

35 See also, HINDELANG, S. The Autonomy of the European Legal Order. In: Bungerberg, M., Hermann, Ch. (eds.). *Common Commercial Policy after Lisbon. European Yearbook of International Economic Law.* Springer, Berlin/Heidelberg: 2013, p. 157. On the autonomy of the EU legal order in light of the case law of the Court of Justice of the European Union see e.g. LENTNER, G. M. Kadi II before the ECJ – UN Targeted Sanctions and the European Legal Order. *European Law Reporter,* 2013, p. 202.

of Community law even in case of only 'hypothetical incompatibilities'.[36] The (then) ECJ held in those cases that indeed the respondent States failed to fulfil their obligations under Article 307(2) ECT by not taking appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in an investment agreement it has entered into with a third country.[37] These cases concerned BITs entered by the respective States before their accession to the EU.[38]

The CJEU's approach represents a claim of supremacy of EU law over BITs (and the applicable public international law rules and principles) similar to the much debated *Kadi* jurisprudence.[39] In any case, for the internal EU law, former Article 307(2) EC (now Article 351(2) TFEU), obliges Member States to eliminate any incompatibilities between their international and EU law obligations in favour of the latter.[40]

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[36] C-249/06, COM/Swe; C-205/06, Com/Austria, Commission v. Austria, [2009] E.C.R. I-1301, P 45; Commission v. Sweden [2009] E.C.R. I-1335, P 45; Case C-118/07 Commission v. Finland, [2009] E.C.R. I-10,889, P 50.

[37] LEAL-ARCAS, R. The European Union's New Common Commercial Policy after the Treaty of Lisbon. In: Trybus, M., Rubini, L. (eds.). *The Treaty of Lisbon and the Future of European Law and Policy*. Edward Elgar Publishing, 2012, p. 279; for an elaborate discussion see eg LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague Yearbook of International Law*, 2011, vol. 24, p. 281; ANDERER, C. E. Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty. *Brooklyn Journal of International Law*, 2010, vol. 35, p. 851.

[38] The concept 'hypothetical incompatibility' has been continued and expanded by the ECJ in Case C-45/07 *Commission v. Greece* [2009] ECR 1-701; Case C-246/07, *Commission v. Sweden* [2010] ECR I-3317; Cf LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague yearbook of International Law,* 2011; For the limit to the supremacy of EU law regarding pre-accession treaties, see Case C-264/09 *Commission v. Slovak Republic* [2011] ECR I-08065; In: similar proceedings Denmark agreed to terminate the respective agreement and Malta terminated its 1965 Agreement with Switzerland before joining the EU, Amtliche Sammlung des Bundesrechts der Schweiz (AS) 2005, 1163.

[39] Joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v Council and Commission, 2008 ECR I-6351; Joined cases C-584/10 P, C-593/10 P und C-595/10 P, European Commission and Others v Yassin Abdullah Kadi, 18 July 2013; see also Case C-459/03, Commission v. Ireland, 2006 ECR I-4635; for a brief commentary on the Kadi jurisprudence see eg: LENTNER, G. M. Kadi II before the ECJ – UN Targeted Sanctions and the European Legal Order. *European Law Reporter,* 2013, p. 202.

[40] See further on this issue e.g. TERHECHTE, J. P. Article 351 TFEU: The Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties. *European Yearbook for International Economic Law, Special Issue: International Investment Law and EU Law*, 2011, p. 79; LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague Yearbook of International Law*, 2011, vol. 24, p. 287.

3.2. Achmea

On 6 March 2018, the Court of Justice of the European Union (CJEU) handed down its decision in the case of Achmea v Slovakia in which it held that an arbitration clause included in a bilateral investment agreement (BIT) between two EU member states (so-called intra-EU BITs) is incompatible with EU law.[41] Before the ECJ was the question whether an arbitration clause, which grants an investor of a member state in case of a dispute concerning investments in another member state the possibility to initiate proceedings before an arbitral tribunal, is compatible with articles 18, 267 and 344 TFEU. The CJEU found incompatibility relying in particular on the autonomy of EU law, because according to the Court the arbitral tribunal, due to its nature, may interpret or even apply EU law. And because it cannot be regarded as a Court of a member state within the meaning of Article 267 TFEU, the arbitration clause of the BIT, together with the limited reviewability of the award by national courts, therefore calls into question 'not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation.'[42]

In its *Achmea* decision, the CJEU did not provide any guidance as regards the effects of its decision. The European Commission opines that *Achmea* has now clarified that all arbitration clauses in intra-EU BIT no longer apply and, moreover, that all arbitration tribunals established on the basis of such a clause no longer have jurisdiction.[43] Member States' courts are – according to the European Commission – thus required to set aside and not enforce arbitral awards issued on the basis of intra-EU BITs and Member States have to terminate all their intra-EU BITs.[44]

However, open questions remain on the effects of the decision.[45] This relates to pending intra-EU BIT arbitrations as well as future proceedings on the basis of intra-EU BITs still in force. Whether ICSID tribunals will consider the CJEU's ruling appears also questionable, as they are not directly bound by the CJEU's decision.

41 CJEU C-284/16 (6 March 2018).

42 CJEU C-284/16 (6 March 2018), p. 58.

43 European Commission, 'Protection of intra-EU investment' (Communication from the Commission to the European Parliament and the Council, 18 July 2018) COM(2018) 547/2.

44 Ibid.

45 For an exhaustive treatment of all questions, see e.g. LANG, A. Die Autonomie des Unionsrechts und die Zukunft der Investor-Staat-Streitbeilegung nach Achmea. *Beiträge zum Transnationalen Wirtschaftsrecht*, 2018, iss. 156, p. 1.

The most important issue, however, revolves around the Energy Charter Treaty (ECT) and investment disputes arising within the EU under it. Here, the European Commission argues that *Achmea* equally applies to such disputes.[46] However, the CJEU has not addressed the issue and an arbitral tribunal has already made it clear that *Achmea* does not apply to ECT cases.[47]

Further issues under EU law[48] as well as under certain domestic constitutions[49] arise as regards investor-state dispute settlement procedures in EU negotiated treaties such as CETA. It is not undisputed whether the Court of Justice of the European Union (CJEU) accepts the EU's submission to an investment tribunal (be it an Investment Court System or investment arbitration), particularly in light of *Achmea* and opinion 2/13 in connection with the EU's accession to the European Convention of Human Rights.[50] Much will depend on the specific design of ISDS in that respect. For example, Article 8.31(2) CETA (on the applicable law in the resolution of investment disputes) states that

The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

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46 European Commission, 'Protection of intra-EU investment' (Communication from the Commission to the European Parliament and the Council, 18 July 2018) COM(2018) 547/2, p. 3–4.

47 *Masdar Solar & Wind Cooperatief U. A. v Kingdom of Spain,* ICSID Case No. ARB/14/1, Award (16 May 2018), p. 678–683.

48 See https://stop-ttip.org/wp-content/uploads/2016/10/28.10.16-Updated-Legal-Statement_EN.pdf ; http://www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf

49 See the constitutional complaint regarding CETA before the German Constitutional Court, https://www.mehr-demokratie.de/fileadmin/pdf/2016-08-30_CETA-Klage.pdf

50 CJEU (18. 12. 2014) Opinion 2/13, p. 155–176. See also SCHILL, S. Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements? *Journal of World Investment & Trade*, 2015, vol. 16, iss. 3, p. 379; HERRMANN, Ch. The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy. *The Journal Of World Investment & Trade*, 2011, vol.15, iss. 3–4, p. 570; GÁSPÁR-SZILÁGYI, S. A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union, *Journal of World Investment & Trade,* 2016, vol.17, iss. 5, p. 701; UWERA, G. Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle? *The Law & Practice of International Courts and Tribunals*, 2016, vol.15, iss. 1, p. 102.

Such wording is clearly drafted to ensure the exclusive jurisdiction of the CJEU under Articles 19(1) TEU and 267 TFEU over the interpretation, application and validity of EU law. A similar provision is included in Article 16(2) EU-Vietnam FTA.[51] It must be noted, however, that this is arguably already ensured by 8.18(5) that specifies that 'A Tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.' This provision already 'provides that the tribunal has no jurisdiction to decide (ie, make principal determinations on) anything other than claimed breaches of CETA's substantive investment protections.'[52]

In any event, it will be up to the CJEU to decide on these issues, as the Belgian federal government sought an opinion of the CJEU on the compatibility of the Investment Court System (ICS) with the EU treaties.[53]

In addition to the legal issues regarding ISDS, limiting the access to these investment tribunals to foreign investors appears problematic in light of Article 47 in connection with Article 52 Charter of Fundamental Rights of the European Union.[54] The resulting privileges with respect to the procedural and substantive status of foreign investors in contrast to domestic investors through these agreements can be seen as problematic as well.[55] Furthermore, the issues relating to the tendencies of investment tribunals to disregard human rights in its decisions[56] are not mitigated simply by new institutional arrangements.[57]

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[51] Similar provisions are found in the 2008 Canada-Colombia FTA, the Colombia 2007 Model BIT and Colombia's BITs with Belgium, China, India, Japan, Peru, UK and Switzerland.

[52] HEPBURN, J. 'CETA's New Domestic Law Clause' (EJIL:Talk!, 17 March 2016), http://www.ejiltalk.org/cetas-new-domestic-law-clause/.

[53] Belgian Request for an Opinion from the European Court of Justice (6 September 2017), https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf. On 29 January 2019, AG Bot delivered his opinion on the case finding the ICS in CETA compatible with the EU treaties, see Opinion 1/17 (Opinion of AG Bot).

[54] See PETERSMANN, E. U. Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens? *Journal of International Economic Law*, 2015, vol. 18, iss. 3, p. 579, 589–594. Additionally, CETA excludes any legal remedies for private persons in its Art 30.6 CETA.

[55] It is debatable whether that in fact satisfies the goals and principles of the EU in general (see Articles 3 and 21 Treaty of European Union). See also Ernst-Ulrich Petersmann (n 55), p. 590. For a comprehensive critique see KUMM, M. Ein Weltreich des Kapitals? Die Institutionalisierung ungerechtfertigter Investorenprivilegien in TTIP und CETA. *Leviathan–Berliner Zeitschrift für Sozialwissenschaft*, 2015, vol. 43, iss. 3, p. 464.

[56] See HIRSCH, M. Investment Tribunals and Human Rights: Divergent Paths. In: Dupuy, P. M., Francioni, F., Petersmann, E. U. (eds.). *Human Rights in International Investment Law and Arbitration*. Oxford University Press, 2009, p. 106–107.

[57] See however, the legal opinion of the European Parliament that considers investor protection compatible with fundamental rights, Legal Service of the European Parliament, 'Legal Opinion on the Compatibility with the Treaties of investment dispute settlement provisions in EU trade agreements' [2016], p. 84–92.

3.3. Financial Responsibility

As regards financial responsibility,[58] the EU has adopted a Regulation for establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party.[59] The regulation addresses the issue of allocating responsibility and financial liability between Member States and the EU. The Commission recognized the need to establish a framework for managing the financial consequences of ISDS.[60] This is an important step in defining the future shape of the European international investment policy, clearing the path for substitution of the Member State's BITs with EU agreements.[61] The Regulation builds on the one agreement to which the EU is already a party with the possibility for ISDS, namely the Energy Charter Treaty.[62]

The central principle guiding the regulation is that financial responsibility flowing from ISDS is to be attributed to the actor which has afforded the treatment in dispute. For treatment afforded by the Union, the Union shall act as respondent pursuant to Article 4 of the Regulation, whereas if a Member State afforded the treatment in dispute, the Member State shall act as respondent pursuant to Article 5 of the Regulation. Where the actions of the Member State are required by EU law, financial responsibility lies with the Union according to Article 3(1)(c) of the Regulation.

Among the issues that must be addressed is the fact that Article 3(1)(c) of the Regulation would expose the EU to financial responsibility for (under EU law) perfectly legal legislative acts in the case where an arbitral tribunal considers the EU to be in breach of standards of an investment treaty. While not surprising from the perspective of existing BITs, this would significantly alter the traditional institutional approach towards the liability of the EU.[63]

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[58] For a recent discussion see e.g. KLEINHEISTERKAMP, J. Financial Responsibility in the EuE ropean International Investment Policy. *International and Comparative Law Quarterly*, 2014, vol. 63, no. 2, p. 449.

[59] Regulation 912/2014, Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party, 2014 O. J. (L 257) 121.

[60] Commission Proposal for a Regulation,Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party, COM (2012) 335 final, http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf

[61] KLEINHEISTERKAMP (n 59), p. 449–450.

[62] *See* Energy Charter Treaty, Annex 1 to the Final Act of the Conference on the European Energy Charter, Dec. 17, 1994, 34 I.L.M. 381, 1995.

[63] KLEINHEISTERKAMP (n 59), p. 461–462; TIETJE C., SIPIORSKI, E., TÖPFER, G. Responsibility in Investor-State Arbitration in the EU – Managing Financial Responsibility Linked

The regulation also includes rules on the conduct of ISDS procedures, under which it is largely at the Commission's discretion as to who will act as respondent when non-EU investors bring a claim. In addition, the regulations structure co-operation between the Commission and the Member State in specific cases, and ensure that any apportionment of financial responsibility can be made effective.

However, any such criteria for allocating responsibility must find their basis in the provisions of the EU investment agreement under which the foreign investor is bringing his/her claim.[64] This means that, in order to have effect under public international law, the proposed rules regarding the determination of responsibility in this Regulation must be included in the future EU investment agreement. Hence, for the sake of legal certainty, it is important that any future EU investment agreement contain such a clarification.[65] In order to avoid circumvention of the effective application of this Regulation, further clarification is needed to the effect that future EU IIAs must completely and effectively supersede existing BITs of Member States with the same third state.[66]

4. Conclusion

This article sought to present an analysis of the legal framework of the EU regarding ISDS and revealed that many open questions remain. Clarification will be required regarding the constitutional basis for ISDS and the proper relationship between the ISDS mechanism and the autonomy of the EU legal order. It remains to be seen how the Investment Court System works in practice and whether and how this will then be replaced by a multilateral investment court in the future, as the European Commission envisions.[67]

to Investor-State Dispute Settlement Tribunals Established by EU's International Investment Agreements. *EU Publications Office*, 2012.

64 KLEINHEISTERKAMP, J. Financial Responsibility in the European International Investment Policy. *LSE Law, Society and Economy Working Papers*, 2013, no. 15, p. 8.

65 Ibid.

66 Ibid 9.

67 On these proposals see the European Commission's proposals from 18 January 2019 submitted to UNCITRAL concerning establishment of such court http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972

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Remedies in Antitrust under EU and Slovak Law*

Katarína Kalesná & Mária T. Patakyová**

Summary: Competition is indispensable for proper function of market economy. In order to secure that competitive process is not harmed, competition authorities on both EU and national level observe conduct of undertakings. In case of a distortion of competition, the competition authorities are entitled to impose remedies. This article deals with the legal regulation of remedies within EU law and Slovak law, completed by discussion on significant cases and relevant opinions of scholars. It concentrates on antitrust part of competition law, providing complex view on the problematics. The discussion is supplemented by presentation of legal regulation of public procurement and cases, which were concerned with both antitrust and public procurement issues, bid rigging in particular. The dangerousness of this practice is confirmed by a recent Slovak case on luncheon vouchers, which is analysed in the last part of the article.

Keywords: Structural Remedies – Behavioural Remedies – Public Procurement – Slovak Competition Law – Luncheon Vouchers

1. Introduction

Generally, legal rules shall secure proper and smooth functioning of economic and social relations. If these rules are infringed, law should provide for a proper tool correcting the malfunctioning relation arising from infringement. Consequently, the wished setting of economic and social relations is restored.

The importance of competition law for proper functioning of economic relations is undoubtable. It enables the market economy to function in a desirable

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manner through protection of competitive process on market.[1] It should rectify deformations on market, such as abuse of dominant position or cartel agreements. The latter anticompetitive practice is particularly dangerous, as the competition between undertakings is only pretended. This is even aggravated if the cartel takes a form of bid rigging, i.e. that the agreement between undertakings is concerned with their behaviour in tendering procedures. If public procurement is at stake, the efficient use of public resources is directly endangered.

This article deals with these issues, particularly with remedies. It focuses on antitrust part of competition law, i.e. on abuse of dominant position and on agreements between undertakings. It deliberately leaves apart merger control and issues related to state aid. Aside from antitrust issues, the article zeros in on public procurement and the remedies which are beneficial from both the antitrust and the public procurement point of view. It presents the examples of cases which were related to both areas of law. From jurisdictional point of view, the article presents the situation in the EU and in the Slovak Republic, whereas it compares the legal regulation and practice.

In order to discuss the abovementioned issues, the article is organised as follows. First, the article gives a general introduction into the public procurement and competition law in relation to sustainable development. Second, remedies in antitrust part of competition law are presented. The theoretical background is supplemented by discussion on the most important case law. Third, the article focuses on public procurement, its legal regulation and presentation of significant bid rigging cases. Four, a recent Slovak case related to luncheon vouchers is analyses with a special attention given to the bid rigging part of the collusive behaviour.

2. Role of the Public Procurement and Competition in the Sustainable Development

Definition of sustainable development usually puts in harmony economic and social development with preserving environment for the next generations. Although emphasis is given on environmental protection goals, equally important is, how economic development is managed. Smart, sustainable and inclusive growth is emphasized also in Europe 2020 Strategy[2] and is attainable when combined with

[1] CHALMERS, D., DAVIES, G., MONTI, G. *European Union Law. Third edition*. Cambridge: Cambridge University Press, 2014, p. 944.

[2] Europe 2020, Commission Communication of 3 March 2010. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC2020

the most efficient use of public funds; public procurement is indispensable to achieve this goal. The EU internal market is based on the principles of market economy with the significant role of competition functioning as the principal and decentralised self-regulator of the market due to the main economic functions it fulfils. Therefore, solving of important economic questions (what to produce and for what price, which production requires optimal costs, what is the optimal allocation of resources etc.) is a task for effective competition.[3] Not to forget, it is also a question of appropriate legal regulation. For example, one of definitions of public procurement define this term as a system designed with the objective to simulate competitive constraint in the relations where goods, works or services are purchased by public sector.[4] So, competition is undoubtedly a very important principle governing the public procurement process as a whole.

The importance of public procurement has grown gradually with the development of internal market. Although the EU regulation of public procurement appears in the later development of the EU law, a proper attention has to be paid to its impact. Expenditures on public contracts represent 10 – 15 percent of gross domestic product nowadays, based on OECD data. Therefore, efficient use of public resources[5] strengthens the role of competition also in this important sphere; competition has to bring more transparency and to enable access to all potential competitors.[6]

Public contracts have to comply with the principles of the TFEU[7] and, in particular, four freedoms of the internal market[8] and "principles derived therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Public procurement has to be opened up to competition."[9]

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[3] SELDON, A., PENNANCE, F. G. *Everyman's Dictionary of Economics*. London: J. M. Dent and Sons, LTD, 1965, p. 80–82.

[4] KALESNÁ, K. Tendrové kartely a ich špecifiká. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 23–31, p. 23 and literature there cited.

[5] Bid rigging can raise prices up to 10 percent or even 30–70 percent. ZEMANOVIČOVÁ, D., BLAŽO, O. Kartelové dohody vo verejnom obstarávaní – prečo a ako sa brániť. Verejné obstarávanie. *Právo a prax*, 2014, no. 3–4, p. 5–7. In: Blažo, O. Obmedzenie účasti na verejnom obstarávaní ako nástroj ochrany hospodárskej súťaže. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 4–12, p. 5.

[6] TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. *Evropské právo*. 5. Edition. Prague: C. H. Beck, 2014, p. 471.

[7] Treaty on Functioning of the European Union.

[8] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC., Recital, No. 1.

[9] Ibid.

2.1. Collusion in public procurement

Considering competition in different stages of procurement cycle is very important, as there are several factors that can lead to collusive behaviour.[10] Concentrated and homogenous markets as well as some types of public procurements, usually characterised by a limited number of the same tenderers taking part in procurement process, are prone to collusion.[11] Cartel agreements concluded in such markets, as a part of antitrust regulation, raise prices artificially and lead to ineffective use of public funds denying the sense of public procurement completely.[12] Based on agreement between/among competitors determining the winning bid in advance, they also bring deformation to the market itself as an undesirable side effect. For all these reasons it is the key role both of competition authorities and of administrative bodies in field of public procurement to fight against collusive behaviour using different remedies.

2.2. Nature and forms of bid rigging

Bid rigging is understood as a very dangerous form of competition restriction with regard to the amount of contracts concluded depending on results of public procurement. Following its nature,it is a horizontal cartel, having either a special legal regulation[13] or caught by other cartels forbidden per se, first of all price cartels. Collusive tendering or bid rigging is caught also by Article 101 (1) TFEU. The essence of this kind of collusion is rooted in adjusting bids in a manner designating the winning bid in advance.<?> Tenderers can agree to quote identical prices or at least to notify intended quotas to each other[14], others may use the rotation system, "in which case a firm whose turn it is to receive an order will ensure that its quote is lower than everyone's else's."[15] Also other forms can be

[10] KALESNÁ, K. Tendrové kartely a ich špecifiká. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 23–31, p. 24 and literature there cited.

[11] RAUS, D., ORŠULOVÁ, A. *Kartelové dohody*. First Edition. Prague: C. H. Beck, 2009, p. 124.

[12] KALESNÁ, K. Tendrové kartely a ich špecifiká. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 23–31, p. 24 and literature there cited.

[13] E. g. section 4, para 4 lit. f) of the Slovak Act No. 136/2001 Coll. on Protection of Competition as amended.

[14] WHISH, R., BAILEY, D. *Competition Law.* Eight Edition. Oxford: Oxford University Press, 2015, p. 571–572.

[15] Ibid., p. 572.

applied. Besides rotation system, market segmentation compensation principle, supplementary bids and controlled bids are usually mentioned.[16]

Raus and Oršulová offer basic characteristics of these diverse forms. They define rotation system similarly to Whish and Bailey; if it is applied, bids are on regular basis distributed among all economic operators. The tenderer whose turn it is, presents the most convenient bid while the bids of other tenderers are only formal. Market segmentation based either on geographical principle or segmentation of contracting authorities or types of orders provides each of the tenderers with the market being solely at his disposal. Compensation principle is based on compensation afforded to those tenderers who resign on presentation of their bids either in form of financial compensation or in form of sub-deliveries. Principle of supplementary bids enables the supposed winner to get a contract with a pre-agreed price beyond competition level. Other economic operators offer higher prices. Principle of controlled bids is based on exclusion of the potential tenderers from the public procurement and participation of those who are allowed to participate, usually under condition of paying a kind of entrance fee.[17]

The authors stress, there are several pre-conditions of bid rigging. All economic operators, or at least majority of those interested in public procurement should participate on collusive behaviour. Collusion is typical for long-term agreements enabling each of operators to get a turn.[18]

2.3. Role of Competition Authorities and Types of Remedies

Some problems of effective market functioning cannot be solved by competition itself. To keep a convenient market structure requires sometimes market interventions or protection of effective competition itself. This is a task both for sector regulators (ex ante regulation) and competition authorities as enforcers of competition law (ex post regulation). But this separation is not always feasible in practice.[19] "Competition authorities often end up doing supervisory work akin to what regulators do."[20]

Competition authorities who are in charge of the effective competition have to identify and analyse competition problems. But it is surely not enough to investigate the relevant market and to identify a competition problem if "a suitable

[16] RAUS, D., ORŠULOVÁ, A. *Kartelové dohody*. First Edition. Prague: C. H. Beck, 2009, p. 122–123.

[17] Ibid., p. 122–123.

[18] Ibid., p. 123–124.

[19] NIELS, G., JENKINS, H., KAVANAGH, J. *Economics for Competition Lawyers.* Second edition. Oxford: Oxford University Press, 2016, p. 362.

[20] Ibid.

remedy cannot be found"[21], because "remedies matter a great deal for the effectiveness of competition law enforcement."[22]

Due to the importance of remedies, competition law is now more focused on the design of remedies depending on competition problem to be solved. Remedy can be understood in a wide sense, comprising not only fines imposed to punish offender and to prevent competition law infringements in the future but also other remedies intended either to shape undertaking's conduct or to change the market structure, private damages actions not to be forgotten.[23] Depending on the character of infringement in bidding market, fines belong to the most frequently imposed remedies punishing collusion in the public procurement. Except for them, exclusion of offenders from the future tenders, as a special remedy, can also be applied.

Apart from fines and damages, recovery remedies are usually categorised to two main types – behavioural and structural remedies. Some authors offer another categorisation, finding "four types of remedies:

1. orders to cease the infringement and not to commit it again;
2. behavioral remedies;
3. structural remedies, including break-up remedies; and
4. flanking measures."[24]

3. Antitrust Remedies

3.1. Overview of Behavioural and Structural Remedies

"A behavioural remedy requires the undertaking concerned to perform certain acts or refrain from certain acts relating to its behaviour on the market, for example with regard to prices, supply obligations, product characteristics, contracts, or internal organisation measures (eg. Chinese walls)".[25] Compared to that, structural remedies are intended to change a market structure using different measures (e.g. transfer of property rights, assets, transfer of business unit, dissolution, divestiture etc.)[26]. Unlike behavioural remedies "a structural remedy does not

[21] Ibid., p. 360.
[22] Ibid., p. 360.
[23] Ibid.
[24] RITTER, C. How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice*, 2016, p. 1–12, p. 6.
[25] Ibid., p. 9.
[26] O'DONOGHUE, R., PADILLA, J. *Law and Economics of Article 82 EC*. Oxford and Portland, Oregon: Hart Publishing, 2006, p. 731.

require any further monitoring"[27], it modifies property rights and it is"based on the 'clean break principle'."[28]

Although frequently used, dichotomy of structural vs. behavioural remedies has its opponents. Lévêque considers this categorisation to be "oversimplifying and confusing"<?> and proposes his own criteria of categorisation.

Controversy of this dichotomy can be shown also based on analysis of the Microsoft Case.[29] This case is often referred to as "Microsoft saga"[30] and it opened undoubtedly discussionon character of remedies imposed by this decision. The Commission contested in its decision two types of Microsoft's conduct infringing in its opinion Art. 102 TFEU: first, the refusal to disclose to other companies the information and technology indispensable for interoperability of the operational systems; second, the prohibited tying of Windows Media Player with Windows operational system for clients' PC. As far as imposed remedies are concerned, the Commission ordered to provide other competitors with necessary information and unbundling of WMP with Windows operational system distribution. Decision also provided introducing of special supervision mechanism to ensure fulfilment of Microsoft's obligation.[31]

A number of questions were evoked by this decision. "Is unbundling media Player from the operating system a structural remedy? It splits up a product, but doesn't affect structure of the defendant company... Nor does it affect the structure of the market: …"[32] Similarly, what about interoperability remedy? Is it structural in its nature? Marsden argues, it is not a structural remedy, requiring only access to information, being thus closer to behavioural remedies.[33] And finally, "so is the case then «after Microsoft» there is no room for structural remedies in Article 82 cases?"[34]

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[27] RITTER, C. How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice*, 2016, p. 1–12, p. 10.

[28] Ibid., p. 10.

[29] CFI Decision in Case T-201/04, 17. 9. 2007, Microsoft corp. v. European Commission ECLI:EU:T:2007:289.

[30] ŠMEJKAL, V., DUFKOVÁ, B. *Průvodce aktuální judikaturou Soudního dvora EU k ochraně hospodářské soutěže*. Prague: Univerzita Karlova v Prahe, Právnická fakulta, 2015, p. 144.

[31] Ibid.

[32] MARSDEN, P. *Article 82 and Structural Remedies After Microsoft.* [online]. Available at:https://www.biicl.org/files/3554_art_82_and_structural_remedies_(marsden).pdf, p. 1.

[33] Ibid.

[34] Ibid., p. 3.

3.2. Remedies in Antitrust Cases

Power to apply structural remedies in antitrust cases was conferred to the Commission by Regulation 1/2003[35]. Article 7 (1) states that the Commission "may impose ... any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end." But "structural remedies can only be imposedwhere there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy."[36] And the exact wording of this provision leads often to the conclusion of preference for behavioural remedies over structural remedies, but "Regulation No. 1/2003 does not prefer or prioritise behavioural remedies over structural remedies."[37]

Recital 12 of Regulation 1/2003 describes structural remediesas "changes to the structure of the undertaking as it existed before the infringement was committed." R. O'Donoghue and J. Padilla add that these "changes to the structure of a company may range from a complete break-up or dissolution to the divestiture of a particular unit or holding or less intrusive measures such as accounting separation."[38]

The authors state that structural remedies are subject to three conditions that must be fulfilled cumulatively before any structural remedy may be imposed:

1) "structural remedies are a remedy of last resort, i.e. behavioural remedies would be insufficient;
2) structural remedies must be effective; and
3) structural remedies must be proportionate."<?> It means, there must be a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.[39]

When imposing structural remedies it should be taken into account what are the consequences for the third parties, for efficiencies realised by the firm and for the consumers.[40] Equally important might be if undertaking can be broken

[35] 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.

[36] Art. 7 of Regulation No. 1/2003.

[37] RITTER, C. How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice*, 2016, p. 1–12, p.10.

[38] O'DONOGHUE, R., PADILLA, J. *Law and Economics of Article 82 EC*. Oxford and Portland, Oregon: Hart Publishing, 2006, p. 731.

[39] Recital 12 of Regulation 1/2003.

[40] O'DONOGHUE, R., PADILLA, J. *Law and Economics of Article 82 EC*. Oxford and Portland, Oregon: Hart Publishing, 2006, p. 734–735.

up naturally or if it is a unified company where structural remedy of this kind is impossible.[41]

Although there is still "asymmetry between the relatively frequent use of structural remedies in merger cases on the one hand and their sparse use in antitrust and in particular abuse of dominance cases on the other hand"[42], there is undoubtedly a significant role for structural remedies in competition law[43]. Their imposing should be considered in a remedy design stage also from efficiencies point of view.[44]

3.3. Remedies in Slovak Law

The regulation of antitrust law is governed by Competition Act[45]. The Antimonopoly Office of the Slovak Republic ("AMO") is the national competition authority enforcing competition law within Slovakia. The powers of the AMO are similar to the powers of the Commission, power to impose remedies included. However, the Competition Act does not provide for a special provision on remedies similar to Article 7 of the Regulation 1/2003. Nevertheless, pursuant to section 22 para. 1 lit. d) of Competition Act, the AMO is empowered to issue a decision that certain activity of an entrepreneur is forbidden, as well as it imposes an obligation to refrain from such activity and to repair the illegal state. Apart from this general provision, there is only one special remedy in the antitrust part of Slovak competition law. The remedy is related to prohibition to participate in tendering proceedings and is discussed below.

4. Public Procurement

4.1. Collusive Tendering in EU case law

The Commission has investigated bid rigging several times. Just to mention few examples of collusive tendering in EU case law, the outline of the most outstanding cases is given. First of all, it is the famous *GIS cartel*, in which the

[41] Ibid. On these grounds the structural remedy in the above mentioned Microsoft case was rejected. (Ibid., p. 736).

[42] MAIER-RIGAUD, F P. Behavioural v. Structural Remedies in EU Competition law. In: Lowe, P., Marquis, M., Monti, G. (ed.). *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*. Oxford and Portland, Oregon: Hart Publishing, 2013, pp 207–224, p. 207.

[43] Ibid., p. 222.

[44] Ibid.

[45] Act No. 136/2001 Coll. on Protection of Competition as amended.

most important world GIS producers agreed on common strategy on allocation of GIS projects and price coordination, market division, maintenance of the pre agreed quotas and collusive behaviour in public procurement. This collusive behaviour was punished by imposing fines to the actors participating on market cartelisation, public procurement included.[46]

Another good example is *Schindler case*[47], referred to also as *Elevators and escalators case,* where Commission imposed severe fines on several undertakings for bid rigging, price fixing and exchange of information in relation to the installation and maintenance of lifts and escalators in some EU Member States.[48] There are many other cases where the Commission condemned practices designed to rig tenders and imposed substantial fines, e. g. *Wire harnesses*.[49]

4.2. Legal Regulation of the Public Procurement

As already mentioned, public procurement regulation represents in the EU a relatively new phenomenon. This legal regulation was undoubtedly inspired by fulfilling goals of the EU internal market, as public contracts with up to 15 percent of GDP are nowadays a very important market where a significant part of undertakings' activities is carried out. Therefore, it is necessary to make competition in this market transparent and accessible to all potential competitors. As primary EU law does not enable direct European regulation, the legislative initiative is targeted on harmonisation of procurement law of the Member States. Starting point of harmonisation legislation is abolition of discrimination and effective functioning of basic freedoms in general.[50]

The latest development is represented by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("the Public Procurement Directive").[51] The

[46] Court of Justice, Judgement in cases C-247/11 P and C-253/11 P of 10 April 2014, AREVA, SA, ALSTOM SA and others v. European Commission. EU: C: 2014:257.

[47] Court of Justice, Judgement in case C-501/11 P of 18 July 2013 – Schindler Holding Ltd. and others v. European Commisssion. EU:C:2013:522.

[48] WHISH, R., BAILEY, D. *Competition Law. Eight Edition*. Oxford: Oxford University Press, 2015, p. 572.

[49] Ibid., p. 573.

[50] TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. *Evropské právo*. 5. Edition. Prague: C. H. Beck, 2014, p. 471.

[51] Harmonization in sphere of public procurement begins with the directive No. 77/62, followed by directives 88/295, 92/50, 93/37, 93/38, 93/36. Except for directive 2004/18/EC also a sectoral directive 2004/17 was issued in 2004. Other four directives were repealed. Tendency was to simplify the legal regulation dissolved in many directives and therefore lacking a clear and transparent character. (TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. *Evropské právo*. 5. Edition. Prague: C. H. Beck, 2014, p. 471)

main objective of the harmonisation is to award concrete contractsbased on objective criteria and with regard to price-quality ratio.[52]

Competition as one of the main principles of public procurementhas to be observed in different stages of the public procurement cycle and in the whole design of the public procurement process.[53] In this regard the selection of the potential tenderers, exclusion of some economic operators included, plays undoubtedly an important role. In this respect, special attention has to be drawn to Art. 57 (4) of the Directive determining that "contracting authority may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: […]

d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure... cannot be remedied by other, less intrusive measures."

Any economic operator that should be otherwise excluded may provide evidence of taking "concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct."[54]

Determining of the maximum period of exclusion if no measures specified in paragraph 6 are taken by the economic operator is left to the Member States, but it "shall not exceed five years from the date of conviction by final judgement... and three years from the date of the relevant event in the cases referred to in paragraph 4."[55]

In Slovakia, system established by the Public Procurement Directive was transposed to the bill of the new Public Procurement Act[56], the grounds of exclusion, possibility of exclusion and also measures of economic operators to prevent the future misconduct included. Bill was objected by the AMO that proposed to amend the Competition Act completing thus the bill on public procurement. This new provision, i.e. section38h of the Competition Act, is based on the obligation of AMO to exclude economic operators participating on bid rigging when imposing fines for this kind of competition law infringement[57]. Participation on leniency program and corresponding reduction of fine for

[52] Recital, N. 90 of the Public Procurement Directive.
[53] E. g. Art 18 of the Public Procurement Directive.
[54] Ibid., Art. 57 (6).
[55] Ibid., Art. 57 (7).
[56] Act No. 343/2015 Coll. on Public Procurement as amended.
[57] Collusion of the economic operators in public procurement is prohibited as a special agreement on restriction of competition [Section 4 para 4 lit. f) of the Competition Act].

infringement[58] is a ground not to exclude an economic operator from public procurement[59]. Settlement procedure[60] leads to reduction of the period of exclusion from three years to one year only. The exclusion period is dated on the time of validity of the decision to prevent shortening of the exclusion period.[61]

5. Collusive Tendering in Slovakia

After presentation of the theoretical background of antitrust remedies and legal regulation of public procurement, it is apt to supplement the discussion with a real case from practice where the bid rigging took place. A very important decision related to both remedies and public procurement was concerned with luncheon vouchers. The decision of the AMO No. 2016/HK/1/1/004 from 11 February 2016 ("the DOXX decision") was addressed to entrepreneur DOXX – Stravné lístky, spol. s r.o., Edenred Slovakia, s. r. o., LE CHEQUE DEJEUNER s.r.o., SODEXO PASS SR, s. r. o. and VAŠA Slovensko, s. r. o. ("the entrepreneurs") and it declared that the entrepreneurs coordinated their practice and applied a common commercial strategy, hence they infringed section 4 of the Competition Act by object.

Although the DOXX decision is 450 p. long, the most relevant issues from the DOXX decision will be presented below. The AMO applied both the Slovak Competition Act and European competition law too. This was due to the fact that the trade between Member States was potentially affected, even though the territory of only one Member State was at stake.[62]

As to the relevant market, the AMO determined two relevant product markets due to the fact that there were two separated infringement committed by the entrepreneurs. The first product relevant market was determined as the market of emitting, distribution and sale of luncheon vouchers and beneficial vouchers, including services related to this. This market was related to agreement by which the entrepreneurs divided the market. The second relevant market, the market of emitting, distribution and sale of luncheon vouchers, including services related to this, was concerned with limitation of the number of luncheon vouchers in commercial chains.The geographical market was determined as the Slovak Republic.

[58] Section 38d para 2 of the Competition Act.
[59] Section 38h para 2 of the Competition Act.
[60] Section 38e of the Competition Act.
[61] BLAŽO, O. Obmedzenie účasti na verejnom obstarávaní ako nástroj ochrany hospodárskej súťaže. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 4–12, p. 9–10.
[62] DOXX appeal decision, p. 27, 28.

It was stated in the DOXX decision that the listed entrepreneurs coordinated their practice on the relevant product market of emitting, distribution and sale of luncheon vouchers and beneficial vouchers, including services related to this. The AMO claimed that, between 2009 and 2014, the entrepreneurs implemented a common commercial strategy which consisted in non-competing strategy. In particular, the entrepreneurs were not approaching clients of competing entrepreneurs and they were not offering them zero fees, benefits and bonuses. The entrepreneurs were also coordinating their acting within public tendering procedures and similar tendering procedures. In short, the entrepreneurs divided market[63]. Apart from this practice, the entrepreneurs also limited the number of luncheon vouchers in the commercial chains[64], which was the second committed practice.

In relation to the tendering procedures, the Antimonopoly Office analysed almost 300 public procurements on the relevant market between the years2011 and 2014.[65] The analysis indicated that the relevant market was divided among the entrepreneurs. The particular clients were supplied by a particular entrepreneur, despite the fact that there were conditions for competing for the clients.[66]

The object of the tendering procedures were luncheon vouchers and other vouchers as well as related services.[67] As the entrepreneurs categorised their clients as "ours; free; those of the competitors", this division also applied in tendering procedures. Depending on the category, the particular entrepreneur adapted its willingness to participate as well as its price and commercial conditions. The aim was to secure that the winner of the tendering procedure is the prior designated entrepreneur.[68]

The persistence of the division of the market was secured by communication among the entrepreneurs, agreeing on participating in a tendering procedure by a "no bid" or a "cover bid".[69] The revised tendering procedures were related to, for example, the Centre of Scientifi-Technical Information SR (*Centrum vedecko-technických informácií SR*), Municipal authority Čaklov (*Obecný úrad Čaklov*); State Fund of Housing Development (*Štátny fond rozvoja bývania*), Water-economic Construction (*Vodohospodárska výstavba*), Railways of the

[63] The DOXX decision, para 66 et seq.

[64] The DOXX decision, para 335 et seq. The aim here was to prevent the owners of restaurants to use luncheon vouchers in supermarkets instead of paying provisions to the entrepreneurs. See the DOXX decision, para 406.

[65] Before the year 2011, there was insufficient amount of data available, hence, the Antimonopoly Office could not conduct the analysis.

[66] The DOXX appeal decision, para 98.

[67] The DOXX decision, para 38.

[68] The DOXX decision, para 156.

[69] The DOXX decision, para 157.

Slovak Republic, Bratislava (*Železnice Slovenskej republiky, Bratislava*), Railway Company Slovakia (*Železničná spoločnosť Slovensko*).

The fact that the tendering procedures were spoiled by the entrepreneurs was taken into account in the assessment of the severity of fines for the entrepreneurs. The Antimonopoly Office highlighted that cartel agreements eliminate the competitive pressure between participants and that the particular participants do not propose independent bids. Due to this the entrepreneurs' clients, i.e. public procurers, assumed that they could choose from competing bids, however, the entrepreneurs knowingly substitute competition by a cooperation among themselves. In case of public procurements, it is necessary to stress that cartel agreement can lead to inefficient use of public sources. Therefore, the harm to public interest was in higher intensity.[70]

The Council of the Antimonopoly Office as the appeal tribunal issued decision on appeal No. 31/2017/ODK-2017/KH/R/2/025 on 11 September 2017 ("the DOXX appeal decision"). The Council imposed the sanction not to participate in public tendering procedure for three years, even though this sanction was incorporated into Competition Act as of 18 April 2016, i.e. after the first instance decision was issued and before the DOXX appeal decision was issued. However, a similar decision was incorporated in Act No. 25/2006 on public tendering procedures as amended, even before 18 April 2016. Consequently, the Council did not consider imposing of such sanction to be retroactive.

6. Conclusion

This article presented remedies in Slovak and EU antitrust law. It may be concluded that, from regulatory point of view, Slovak law does not provide for remedies as they are established in the Article 7 of Regulation 1/2003. On the other hand, the Slovak Competition Act prescribes the use of a special behavioural remedy related to public procurement. Exclusion of economic operators from public procurement is a special remedy among antitrust remedies, as to its nature being close to behavioural remedies. In Slovakia, it is imposed by AMO together with a fine punishing participation in bid rigging on obligatory basis.

From the point of view of legal practice, the Slovak legal practice does not in general differ from the EU case law, meaning that structural remedies dominate in merger cases rather than in antitrust cases. In antitrust cases the competition authority usually prohibits the conduct infringing the competition rules and it imposes corresponding fines to punish the infringement at stake and to prevent

[70] The DOXX decision, para 1395, 1396.

its repeating in the future. Other remedies are rare, although there are cases including abusive behaviour of network industries in liberalised markets, where structural remedies might be suitable for a final solution of behaviour detrimental for competition.[71]

Nevertheless, it is inevitable to stress that to prosecute bid rigging cases is a difficult task for competition authorities. As it flows from the DOXX decision, the AMO needed to gather considerable amount of data and spent significant amount of time and personal efforts in order to prove the existence of the cartel. Taking into account the sources of the AMO, it is probable that many dangerous bid rigging will survive unpunished. Therefore, the enhanced cooperation between authorities supervising public procurements and competition authorities should definitely take place.

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KALESNÁ, K. Tendrové kartely a ich špecifiká. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, s. 23–31.

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[71] ECN Recommendation on the Power to Impose Structural Remedies, p. 3. Available at: http://ec.europa.eu/competition/ecn/structural_remedies_09122013_en.pdf

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Implementation of Mediation in Czech Legal Environment with Regard to Actual Evolution in Europe*

Michal Malacka & Lenka Westphalová**

Summary: The article deals with the systematic problem of an acceptance and implementation of foreign law instruments in Czech Republic, incoming from Anglo-American law system. Supporting partial methods of the ADR, European legislative is focusing on the mediation and using this method in civil procedure law, especially in family law matters. The practitioners have accepted the idea of mediation as a part of civil law procedure without analysing or studying the real nature of this method or instrument. The study is looking into the problematics of the Mediation model and comparing it with European situation in the member states. It is also trying to find the best possible future ways for the development in the area of mediation with the reflection of the results of the implementation of the European mediation directive.

Keywords: Mediation – European mediation directive – mediation as ADR – dispute resolution – appropriate dispute resolution – alternative dispute resolution – and European Union member states – Harvard Negotiation Project – Czech mediation

1. Directive 2008/52/EC of the European Parliament and of the Council

The main role in modern perspective of mediation played a model developed in the Harvard – based and forwardly supported by *Harvard Negotiation Project*. Mediation process, meaning the process of individual steps itself, leading to solution of the conflict, has enshrined so called "*Harvard*

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model "[1], which consists of separating people from the problem itself, concentrating on interests rather than on positions, creating as many solutions and making decisions as possible on the basis of objectively verifiable criteria.

Mediation in Anglo-American legal environment went through intensive and flexible development on which European environment reacted more fragmented. In the European mediation law in a modern sense gain mediation support through the directive of the European Parliament and of the Council 2008/52/EC from the 21st of May 2008, which dealt with some aspects of mediation in civil and commercial matters. Very positive contribution of this directive was a demand on the Member states, which lead to establishment of legal and other provisions necessary to comply with the Directive till the mid-year of 2011. Individual members states dealt with this task with different scope of intensity.

The Green book of alternative dispute resolution in civil and commercial matters[2] marked opinion lately considered as a wrong one, which stated that mediation and other tools should serve to elimination of shortcomings of individual courts dealing and besides that it supposed to lighten the justice system of their heavy burden. In the background of the expressed beliefs, the principles of the above-mentioned Harvard model and the emphasis on consensual dispute resolution can be seen, while it has been discussed and stated that mediation serves to *support EU citizens' access to justice.*[3]

The biggest problem in the system of finding a position and promoting the mediation method was to reconcile its nature and the methodological framework with other non-alternative ways of dispute resolution. The whole process was completed by the adoption of the European Code of Conduct for Mediators and by the abovementioned Directive of the European Parliament and of the Council[4]. Apart from the indisputable benefits of the Code of Ethics, which also stipulates the duty of mediators to conduct proceedings in an appropriate manner with the modern trends of mediation, we can mark the above-mentioned Directive on Some Aspects of Mediation in Civil and Commercial Matters as one of the key acts in setting up mediation in the system of finding a solution to a conflict

1 FISCHER, R., URY, W. *Das Harvard-Konzept, Sachgerecht verhandeln – erfolgreich verhandeln*. Campus, 9. Auflage, Frankfurt/Main: 1990.

2 International Mediation Interaction: Synergy, Conflict, Effectiveness, Tobias Böhmelt, Springer Science & Business Media, 17. 2. 2011 – Number p. 145, p. 39.

3 HOLÁ, L., MALACKA, M. *Mediace a reflexe jejích aktuálních trendů.* Praha: Leges, 2014, p. 33.

4 International Mediation Interaction: Synergy, Conflict, Effectiveness. Tobias Böhmelt, Springer Science & Business Media, 17. 2. 2011 – Number of p. 145, p. 40.

The Directive brings with it the possibility of agreeing on the enforceability of the mediation result, the obligation of the Member States to ensure adequate rules on limitation and termination and the relationship of mediation to judicial proceedings. An important element is the anchoring of the precursor to justice and the possibility of using the arbitration procedure after mediation. Of course, individual Member States did not take over all of the provisions of the aforementioned norms, just as the Czech Republic and other Member States have diverged from these standards in many aspects. Despite the variations in national regulations, we can see a significant degree of unification and harmonization of problematics connected to the mediation and a significant shift in the situation from the point of view of situation in the European Union.[5]

The analysed mediation and the Directive 2008/52/EC underwent a demanding and long-term legislative process.[6] The preparation plans for the mediation directive were discussed at the end of the last century and the individual proposal of the Commission for the Directive for civil and commercial matters was from the point of first conception prepared in the 2004. Though this proposal was taken negatively by the Members States because of its content and wording. Critically was viewed especially the fact that the directive was applied both to the cross-border and national dealing and it was often doubted if such a wide field of reach is in the competences, which were stated in the Primary European Treaties which werevalid at the beginning of the century.[7] At the outset, the Commission was unwilling to accept deviations from its intentions and insisted on the scope of the directive as set out in its original proposal. Negotiations between the competent concerned authorities have come to a standstill, and in the 2007 the discussed issues were submitted to the European Parliament, which has dealt with the draft of the directive in question and it endorsed ultimately many of the amendments. Outputs from the European Parliament were discussed both in the Council and in the Commission, with the Council finally joining the amendments and the new texts that emerged from the European Parliament's deliberations in 2008. The Commission also insisted on its originally planned aspects of competence and at the same time it strongly criticized the limitations of the scope of the directive accepted by the Council and prepared by the European Parliament, nevertheless they have joined to the concept of a new proposal as a result of the political compromise. The final text of the Mediation Directive was published on 24 May 2008 and mediation entered into force on 13 June 2008.

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5 The New EU Directive on Mediation: First Insights, Association for International Arbitration, Maklu, 2008 – Number of p. 95, p. 49.

6 LASÁK, J. Směrnice o některých aspektech zprostředkování v obchodních a občanských věcech aneb návrh právního rámce pro mediaci v EU. *Právní rozhledy*, 2007, č. 15, n. 2, p. 57.

7 TYLEČKOVÁ, M. Podpora mediace v legislativě ES. *Obchodní právo*, 2005, č. 14, n. 5, p. 13.

The final version was published in 2008 and it was divided into individual parts of the Mediation Directive. The general part of the Mediation Directive contained, among other things, the objectives of the adjustment set out for mediation itself. Among these goals have belonged the aspects of support of the internal market and its smooth functioning, since the functioning of the internal market is directly linked to the ability of citizens of the Member States to have free and unrestricted access to law and justice trough the free access to court proceedings**,** as a result of the implemented directive, the smooth handling of the disputed situations could be guaranteed. Without such a solution would be the internal market area practically an area of injustice and would only represent a set of high risk factors for those involved in this market.[8] According to the concept of European legislation, access to law and justice also includes access to out-of-court dispute resolution.[9] It is obvious that the Directive is focused and has been focused especially on this area. Implementation and reinforcement of the ADR[10] the way in which the dispute is dealt with is, according to the Directive itself, a guarantee of an unbalanced relationship between mediation and judicial proceedings, that intention is also reflected in Article 1 (1) of the mediation directive itself.

It should be noted that the intention to implement the Directive did not initially address the issue of multiple ways of resolving disputes and out-of-court procedures. Let us recall only the issue of distinguishing the meaning of the ADR abbreviation and the meaning of ADR's alternative dispute resolution as an amicable settlement of the dispute with regard to the conciliation procedure, which is characteristic especially for the Austrian and German legal environments, arbitration of the worldwide used and implemented area of property disputes, various mixed types of arbitration proceedings and mediation including etc.[11] Under the Mediation Directive was not implemented the support of these mixed and inter-institutional aspects. It is generally assumed that mediation as an instrument of out-of-court settlement represents a possibility of facilitating access to justice, as was already mentioned above, but it is not yet fully from the point of view of its capabilities implemented and applied, unlike the arbitrator's management, which have been already established from the continental perspective by the proper way. The Mediation Directive should therefore serve in particular to strengthen the importance of this method of friendly dispute resolution. The very reasoning behind mediation brings emphasis to the benefits

[8] HESS, B. *Europäisches Zivilprozessrecht*. 2010, Paragraph 10, Marginalities137.

[9] Eidenmüler/Prause, NJW 2008, p. 2737.

[10] There is a need to differentiate between the importance of ADR in the context of an alternative to judicial management and the appropriate way of solving amicable disputes.

[11] KÖNIG, B., MAYR, P. G. *Europäisches Zivilverfahrensrecht in Österreich.* 2, 2009, p. 137.

of mediation such as saving of finance and the time.[12] When applying mediation techniques and comparing time-consuming mediation and administrative requirements, mediation brings another significant positive result.[13] Through the mediation and during the implementation of the Mediation Directive should be strengthen the situations, where bilateral relations or relationships with an international element are to be addressed. This solution should be quicker and, in particular, due to the application of the Directive in the individual Member States, in its conclusion also legally binding.[14] Such a goal should be achieved through the flexibility of mediation management itself, since parties and participants of the mediation have many options to deal adequately with the disputed situation in question and during which in continental approach is procedural aspects of court proceedings often linked by a codified legal framework.[15] Paradoxically, especially this positive aspect, which is during implementation of the directive emphasized lead to its considerable limitation, both to as limitation in the method and the way in which the dispute is resolved and given to the paradoxical fear of the creation of the space in which is total freedom of way how to decide the dispute the directive itself states the necessity to secure it before creation of chaotic lawless state or space, which existence would be contradictory of the principles of the European Internal Market.[16] The purpose of the Directive itself is to set out the basic principles and basic content of the legal regulation of mediation in the individual legal systems of the Member States.[17] The actual text of the mediation directive is considered to be the minimum standard of the harmonization trend. As a result, individual Member States are allowed to implement legislation in a manner consistent with the understanding and perception of the nature and purpose of mediation in the national context. It is clear that the more detailed and extensive legal regulation of mediation in the individual national legal systems have not been considered as an obstacle, on the contrary, it was explicitly welcomed.

[12] Point 6 to the Directive.

[13] HIRSCH, ZRP 20 12, S. 189, and further also DE PALO, FEASLEY, ORECCHINI, Quantifying the cost of not using mediation – a data analysis, 2011, Brusel.

[14] SCHMIDT, F. H., LAPP, T., MONSEN, H. G. *Mediation in der Praxis des Anwalts.* München: 2012, p. 35.

[15] HIRSCH, ZRP 20 12, p. 189.

[16] Point 7 to the Directive.

[17] Eidenmüler/Prause, NJW 2008, p. 2737.

2. To individual provision of the Directive, studies on the implementation of the Directive in the Member States

According to the current EU primary law at the time the of the issue of the directive, it has been necessary to consider the position of countries such as Great Britain, Ireland and Denmark, which reserved the right to autonomously decide whether to take any legal acts of the EU. While the Great Britain and Ireland complied voluntary with the relevant regulations[18] in the matter of their positions, Denmark opposed the participation in the Directive in the matter of the fact that mediation has already been properly legally grounded in its legal order.[19]In the terms of local scope, the Directive therefore applies to all Member States except Denmark. As a matter of principle, the mediation directive is related to cross-border disputes and its scope is significantly reduced in relation to the previous proposal. The Directive supposed to be a tool of harmonizing trends targeted at national legal order, but as a result of the abovementioned and competence disputes in the preparation of the Directive the result of the attitude of the European Parliament and the Council was in the end the reason for limiting the scope of the Directive. That all have happened in the context of authorization to regulate judicial cooperation in cross-border situations. Such a procedure was later identified as one of the biggest mistakes in the preparation and implementation of the Directive itself.[20]

Through such a procedure, it was not possible to require a global member establishment of the mediation in the appropriate range. However, it is clear from the text of the mediation directive that the legislature wishes to extend the scope of the Directive, which also makes it possible to apply the provisions of the Directive itself to national mediation procedures, despite the restrictions put in place explicitly by the Member states. However, the minimum framework for the transformation of the Directive is set for cross-border disputed situations. The cross-border disputes are characterized in the context of the Directive as situations in which a dispute arises between the parties having their domicile or habitual residence or usual habitual residence in the territory of different Member States and, in the context ofArticle 2 of the Directive, such a dispute can be then considered as cross-border. In relation to these aspects, the nationality of the parties of the dispute is not accentuated, but rather the question of residence or habitual residence, regardless of the nationality itself.

[18] Protocol (No 4) on the position of the United Kingdom and Ireland (1997).
[19] Protocol (No. 5) on the position of Denmark (1997).
[20] WALLIS, D. *Encouraging cross-border mediation.* adr & odr, Trier, 2013.

The question remains whether cross-border mediation is also the case when one of the parties involved in the negotiations is a party domiciled in a third state, meant in the non-EU country. The Directive itself does not take this into the account and the inspiration for the answer to this question can be found in the judgment of the European Court of Justice in Owus v Jackson and Others[21] which is related to a decision on a question linked to the Brussels Regulation 1. In the context of this decision, Union legal acts cannot bound third States without further action, and these conclusions can also be transferred to issues which are related to the concerning mediation directive. The directive needs to be interpreted in such a way to achieve the goal of this norm as much as possible with an easy procedure as possible. In such a perception of the Directive, the participation of a third party in mediation does not change anything, because in the end we could have a paradoxical result when the harmonization measures taken by the Directive in most proceedings involving a third country entity did not cover such cases of mediation, which European legislator could not intend.[22]

The relevant moment of the assessment of the different domiciles at the parties of the mediation proceedings is related to the point in time in which the court orders the mediation procedure or it is set by the law. But it can be also the moment where the mediation is assumed by the law or by the parties at the moment and it is negotiated for that moment. This approach is in order with Article 2 section 1 of the Mediation Directive. It is important to perceive the situation already during the negotiation of the mediation clause within the contracting process and to set in this context the corresponding time. In the mediation clause, the parties in the most cases commit themselves that any later disputes which will arise from the concern contract will be settled through mediation before the parties turn to the court for the settlement.[23] However, such a dispute can only arise after a longer period of time, which may be related to the nature of cross-border mediation with regard to the changes in the seat or the residence. In these cases, must be distinguished the timing of finalized negotiation of the mediation clause and the actual realization or initiation of the mediation process. Thus, the question of status within the meaning of Article 2 Section 1 of the Mediation Directive arises. However, part of paragraph 1a of this article discusses in a somewhat peculiar way the decisive time when it is necessary to consider the situation where the parties have agreed to use mediation after the dispute has arisen.

At first, it appears that the realization of mediation is tied to the moment of negotiation of the mediation clause, but the dispute usually arises after the

[21] Judgment of the ECJ, Owus in Jackson and Others, C-281/02.

[22] POTACS, EuR, 2009, p. 465–466.

[23] UNBERATH, NJW 2001, p. 1320–1321 and further RISSE, Wirtschaftsmediation, 2003, Paragraph 3, Marginalie 3.

implementation of this clause. However, such a perception would be very negative for the application of the harmonization rules of the Directive and, in the context of accentuating the autonomy of the parties' will, as well as Article 15 of the Directive[24] is necessary to stabilize the cross-border mediation needs at the time of negotiation of the mediation clause. Thus, we can state that the stabilization timeframe for the cross-border mediation will generally be used when the parties have decided to mediate, but only on the assumption that the parties themselves in this context have not negotiated a divergent procedure, or a deviation of the mediation provision, mediation clause.

The following court or arbitration proceedings are also integrated in the concept of mediation directive itself. In the context of cross-border disputes, the assessment of Article 2 Section 2 of the Directive is also important. However, this article is propriate to interpret in the context of the other provisions of the Directive, in particular Articles 7 and 8, relating to the mediation process's confidentiality by the mediator side but also by other parties involved in the proceedings itself in connection with the subsequent legal proceedings and with the possibility of denying testimony in this procedure. Here it is important that, according to Article 8 of the Mediation Directive, it is further determined that during the mediation proceedings, limitation periods are set and, in the case of unsuccessful mediation proceedings is allowed to the parties to initiate judicial proceedings.

The apparently incoherent provisions have very narrow relation given to the cross-border disputes and their solutions. Since in the context of the above-mentioned and in the accordance with Article 2 Section 2 of the Mediation Directive, cross-border mediation and resolution of the dispute which occurred will be also considered as an arbitration even if there will be initiated court or arbitration proceedings in the Member State other than the one in which the parties had their registered office at the time of initiation of the mediation proceedings. Extending the cross-border nature of mediation in this context and its reflection by the national law should result in the avoidance of limitation due to the implementation of individual mediation proceedings, as well as the enhancement of the confidentiality aspect of mediation itself. The question of the place where the mediation should have been performed is not conclusive. The mediation may take place or be performed outside the EU. This results from Article 2 Section 2, which applies to the proceedings following after mediation and not only to the mediation proceedings itself. It is important to perceive the construction of a limitation period in meditation proceedings that took place outside the EU.

[24] The text is referred to as a puncture to Directive 2008/52/EC.

The Mediation Directive covers civil and commercial matters. Therefore, those aspects are exclusively limited, as is also illustrated by the wording of Article 1 Section 2 of the Directive. In this context, the issue of the nature of civil and commercial matters must be properly understood within the EU, as there is a lack of specification of the range of disputes or legal disputes in the light of variability in the Member States. If it is purely in the context of national legal systems when it comes to implementing the Directive to consider civil and commercial matters, a situation could arise where the scope of the mediation standard issues in each national law would be regulated in a different way. In this situations, it is appropriate to interpret the terms connected with the civil and commercial questions or matters always autonomously, or to use the case-law of the European Court of Justice in the context of the decision.[25] The impact of the Directive in the EU Member States has been examined and several reports have been published.[26] In overall has been evaluated that the Directive has brought to the whole European Union an added value.

This approach also corresponds to the approach of the EU Member States which during its implementation within the framework of individual national legislative acts has extended its harmonizing influence beyond the scope of the Directive also to the national situations and cases. Only three EU Member States have strictly implemented the term for cross-border disputes.[27] As can be expected, the broadening of the harmonization impact of the Directive itself is welcome in most Member States and as already has been stated, the goal of the Directive was far wider than the harmonization trend for cross-border dispute resolution despite conflicts of competences. Thus, the provisions of the Directive in most Member States have an impact beyond the scope of the Directive itself for the benefit of mediation. This situation is positive because it demonstrates that Member States perceive the importance of mediation consistently both for national and cross-border disputes. Despite the autonomous interpretation of the term civil and commercial matters, it is currently possible to state that the Directive has found its application particularly in matters of family law across EU Member States. So far, the reserves are maintained in the context of the

[25] Eidenmüler/Prause, NJW 2008, p. 2739.

[26] European Commission: Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive' Final Report (update from the year 2016) [online], visited: May 2018. Available at: https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:52016DC0542&from=CS; DE PALO, G., D'URSO, L., TREVOR, M., BRANON, B., CANESSA, R., CAWYER, B., FLORENCE, R. L. *'Rebooting' The Mediation Directive: Assessing The Limited Impact Of Its Implementation And Proposing Measures To Increase The Number Of Mediations In The EU*, www.europarl.europa.eu [online], visited: May 2018. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

[27] DE PALO a kol. '*Rebooting' The Mediation Directive*. 2014, Brussel: p. 150 and following.

mediation of individual Member States over the entire range of the terms in the civil and commercial matters.[28] Especially underestimated and unrealized is the implantation of the mediation into the insolvency proceedings. Implementation of mediation would bring with it a significant correction of damaged relationships between the creditor and the debtor in these types of proceedings.[29]

Particularly in relation to Article 4 of the Directive, the introduction of ethical codes and the status of mediators' behaviour at national levels was an important step, which of course encouraged the quality of mediation. In most Member States, a mandatory code of conduct for mediators is currently prescribed.[30] In the Member States where this obligation is not being implemented, the various forms of ethical codes are prepared within individual interest groups or agencies offering mediation itself. An important element in this context is, of course, the European Code of Conduct for Mediators.[31] This code is either applied directly to individual national regimes or is recommended as a model code for questions during the realization of mediation issues.[32] It is therefore up to the Member States how they will incorporate them into the national legislation. Without any doubt, it is possible to say that the ethical aspects and the implementation of codes of ethics have a positive impact on the implementation of adequate legal regulation of mediation in the Member States and the establishment of a real state of matters. The quality of mediation and its standards are also related to the control mechanisms targeted at mediation providers. The form of registration or records of mediators is implemented in a different way in most EU Member States. It should be noted that different mechanisms for the quality evaluation of media service providers have been chosen across the EU, whether in an institutional or personal area. In most Member States the characteristic model is the one which who has been legally adapted forms of mediation and a corresponding register of mediators at the relevant central body of the state.[33]

In connection with Article 4 of the Directive and the question of mediator education, it is also clear that mediation in most Member States is linked not only to the issue of guarantee of quality, but also that the quality assurance is tied to an adequate mediator training platform. The EU Member States, in line with the harmonization trend in the Directive, address the issue of mediator

[28] Ibid., p. 142.
[29] Ibid., p. 79 and following.
[30] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brussel: p. 158 and following.
[31] Available at: http://www.forarb.com/wp-content/uploads/2013/01/Evropsk%C3%BD-kodex-chov%C3%A1n%C3%AD-pro-medi%C3%A1tory.pdf
[32] SVATOŠ, M. *Evropské aspekty mediace a dalších ADR*. Available at: https://www.epravo.cz/top/clanky/evropske-aspekty-mediace-a-dalsich-adr-88570.html
[33] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 16 and following.

training in most or all cases by the concerned national legal systems.[34] However, it is a question of whether it is a good idea that most Member States regulate beyond the text of the Directive and they lay down the mandatory formalities and conditions of a particular type of education as an approach to performance of the mediation.[35] The nature of mediation as such tends to be suppressed in many national regulations by a targeted tendencies towards legal professions.[36] Besides the different forms of compulsory education for mediation, most of the legal framework has also set up a mediator training framework, but its scope and frame are still inconsistent at the moment.[37] As objectively correct have been seen the presumption of the existence of a system of further mediator education. Nevertheless, in the future we can expect a minimal harmonization effort in uniting the approach to recognition, further education and the formation of the profession of mediator in the context of widely diverging national.[38]

Considering and making mediation available is different in the various national legal systems. Most Member States, in connection with disclosure and consideration of the mediation process itself and also in connection with Article 5 of the Mediation Directive, expects that their judicial authorities to at least call on the parties to have the mediation possibility on their mind, or to participate in information sessions which are concerned with selected aspects of benefits of mediation and the introduction of mediation. Issues of taking into consideration a compulsory mediation are often accompanied by a discussion on the mandatory implementation of mediation, which is linked to Article 5 Section 2 of the Mediation Directive, but the aspect of acquittance with mediation and, possibly, the 1st mandatory meeting with the mediator falls under the question of the use and availability of mediation. This aspect is governed by Article 5 Section 1 of the Mediation Directive. The disclosure and taking into account of mediation can therefore be perceived in different intensities, from the statutory duty for lawyers and advocates to inform their clients about the possibilities and purpose of the mediation process trough the finding in the petitions that mediation is not possible and for what reasons to regular mentioning about the possibility and suitability in most proceedings and during the whole court proceedings with the invitation for the parties to participate in mediation itself.[39] In general, other EU

[34] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: s. 155 and following.

[35] REPORT FROM THE COMMISSION on the implementation of Directive 2008/52 / EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, p. 6. Available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/CS/1-2016-542-CS-F1-1.PDF

[36] Ibid., p. 7.

[37] Ibid., p. 6.

[38] Compare Article 5 (1) of the Directive.

[39] REPORT of the EU Commission on the implementation of Directive ..., p. 8.

harmonization activitiescan be seen despite the inconsistent approach and the varying intensity of reflection and motivation for mediation in individual national jurisdictions as very likely. From the point of view of mediation as a tool for facilitating access to justice and simplifying and shortening court proceedings, it would be appropriate to impose measures such as mandatory statements by parties or lawyers on whether an attempt was made to mediate and to take in to the account this obligation both by the legal representatives and also by the representatives of judiciary bodies, to consider the issue of information obligations regarding mediation in court proceedings and their scope and content. Also consider the question of approach of the court to mediation in the context of its regulation at each stage of the proceedings, which supposed to match with the case and also with the position of the parties.

The Directive in its Article 5 deals with another aspect of implementation effort. Article 5 deals with mandatory mediation as well as sanctions, which should be implemented in the event of a breach of the stated obligation. Here again, it is necessary to draw attention to the difference between the perception of the term "notice" on the mediation, taken mediation on consciousness, or the acquaintance with mediation and their obligatory forms in connection with compulsory mediation as part of the solution itself. As a result of the Mediation Directive, in the context of the provisions of Article 5, there has been a stratification in the Member States as regards mandatory mediation in a horizontal and vertical manner. Horizontally, as to mandatory mediation in civil judicial proceedings, vertically, as to the individual types of mediation, that is, the use of mediation in civil and commercial matters.[40] In the various scales of mandatory mediation, financial incentives are also used in terms of individual instruments, namely to reduce the costs associated with the court proceedings or their reimbursement supposing it mediation was used.[41] This motivation aspect is implemented either by reducing court fees or with obligatory mediation by link with the claim for compensation.[42] Aspects of mandatory mediation are also tied to sanction measures that respect this obligation. Sanctions are directed against non-compliance with the mediation agreement or even against unauthorized refusal to mediate. They are also tied to disablement of costs, even if the parties succeed. However, this whole range of options does not clearly answer the question of whether to be prescribed as mandatory in the context of the European future integration of mediation.[43] The general regulation of mandatory mediation would be probably against the sense of the current text of the Directive and its intentions. The

[40] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 146 and following.
[41] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 147.
[42] REPORT of the EU Commission on the implementation of the Directive..., p. 9.
[43] DE PALO a kol. *'Rebooting' The Mediation Directive*. 2014, Brusel: p. 146 and following.

question remains whether to conceive compulsory mediation in aspects where its use has already proved its worth. In the future, therefore, it will be necessary to answer the question of whether to mandate compulsory mediation in the family matters for all EU Member States and how the individual civil and commercial matters will be towards obligation mediation compared with the question of its compulsory use. Therefore, there is a need further clarification of the situation regarding business-related matters, labour law and consumer affairs. The question of motivation factors is most likely associated with financial motivation and a corresponding adjustment in the amount of court fees in case of recourse or refusal of mediation.[44]

The Directive supposed the confidentiality aspect of the mediation process and enshrines the scope of confidentiality in Article 7, but the scope of confidentiality is approached diversely in mediation. Aspects of confidentiality are tantamount to the obligation to maintain confidentiality regarding the mediation agreement and to tie the aspects of confidentiality to the autonomy of the parties' will, together with public law implications.[45] The position of mediators, as well as lawyers seems especially problematic. For mediators, the issue of confidentiality continues to be a problem, unrelated to the general regulation of the right to refuse to testify or witness testimony in the context of mediation proceedings, as a result of which mediators are unequal in their position as lawyers.

Furthermore, the mediation directive assume possibility to allow to the parties who decided to settle the mediation dispute to still have the opportunity, despite the expiry of the limitation periods in the mediation proceedings, to initiate proceedings. Judicial levying of a limitation period is particularly important when it comes to statutory time limits, cases that are important for the protection of specific interests, etc. Mostly, this harmonization tendency is accepted positively and practically in all Member States is also legislatively enacted.[46]

As regards information on mediation, whether in relation to the society or the professional public, it is important to note in the context of Article 9 of the Directive that Member States have used various procedures for the promotion of mediation when transposing the Directive. One of the most intense was to promote the introduction of mediation in Poland.[47] Since the Directive has been effective, it has been possible to perceive the use of various instruments consisting

[44] REPORT of the EU Commission on the implementation of the Directive..., p. 9.

[45] Ibid., p. 10

[46] Compare Article 8 of the Directive and the REPORT of the EU Commission on the implementation of Directive..., p. 10.

[47] PANIZZA, R. *The development of mediation in Poland*. Brussels: 2011. Available at: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19605/20110518ATT19605EN.pdf

of the use of the Internet, television spots, prints and other media. However, it is possible to demonstrate on the example of the Czech Republic that, despite the funds and considerable effort put in the promotion of the mediation the awareness about the it is still low. The same situations we can see in general in the EU, although it may be noted that, on the one hand it is also caused in the developed Member Stated by the other out-of-court ways of resolving disputes that have already occurred and they are more typical for the society. For example, in Italy, mediation has become part of societies' awareness quite successfully. The aspects of the necessity to promote mediation within the public as well as the professional public, especially the lawyers, have been constantly emphasized. Especially the last lawyers should be involved more effectively in the promotion and popularization of mediation, also through material involvement in its more frequent use.

3. Transposition of the Mediation Directive from the 2008 and the Act on Mediation in the Czech Republic

As mentioned above, EU Member States, despite initial and erroneous tendencies to restrict the scope of the Directive only to cross-border disputes reactedin most cases with a national legislation not only to cross-border dispute resolution and regulation, but also to the issues related to national aspects of the application of mediation methods and realization of the mediation. The current legal regulation of mediation in the Czech Republic does not distinguish the aspects of cross-border mediation from the national mediation proceedings.[48]The cross-border issue is mentioned in the Czech legal norm – Act on Mediation No. 202/2012 Coll., mentioned in the context of a single internal market related to the Czech legal regulation on the activity of the guest mediator. The Act in the § 2 defines mediation as *a conflict resolution procedure with the participation of one or more mediators who promote communication between the parties of the conflict in order to help them reach a friendly solution to their conflict by concluding a mediation agreement*. *Family mediation is then mediation, which focuses on solving conflicts arising from family relationships.* The current Czech legislation does not exclude mediation being carried out outside the regime of the Mediation Act, respectively by unregistered mediators. However, the mediation carried out this way does not have consequences for the commencement of mediation under the

[48] PAUKNEROVÁ, M., PFEIFFER, M. Mediation, more particularly, cross-border and judicial mediation [online]. Příspěvek ve sborníku. In: *The Lawyer Quaterly*. Vol 5, No 2 (2015). Available at: http://www.ilaw.cas.cz/tlq/index.php/tlq/article/viewFile/148/132, p. 127.

law, which includes, in particular, the setting of limitation and preclusion periods. Also, aspects related to ensuring access to justice, even when a friendly way of resolving a dispute has been used, i. e. in situations concerning the running of limitation and preclusion periods, are associated with cross-border aspects and European integration. This reflects the minimalist adaptation in Article 1 of the Directive with significantly higher implications for the possibility of using mediation in the national environment.

As regards Article 2 of the Directive, this is reflected in the national law on mediation[49]. The Directive itself deals in Article 2 with the nature of the cross-border dispute. For a long time in the Czech Republic the legal regulation of mediation procedures within the criminal law area was given and the definition of mediation in terms of its terminology was directed to the public sector. The Mediation and Probation Service Act have spoken about mediation as an out-of-court arrangement. For this arrangement, there was involved unspecified subject in the conflict and for the purposes of settling the conflict.[50]

As to the definition, the Directive defines mediation as a formal procedure in which two or more parties of the dispute voluntarily strive to reach an agreement, to resolve the dispute with the help of a mediator as it is stated in the Article 3. This broad concept corresponds to the harmonization instrument and, therefore, that most implementing Member States deviated from this concept. As well as the Mediation Act in the Czech concept, which deals with mediation as a process of conflict resolution with the participation of one or more mediators, while it is specifying their role by promoting communication between the persons involved in the conflict. The method of their support should aim at achieving a successful solution and concluding a mediation agreement.[51]This definition rather recalls other kinds of friendly ways of resolving disputes and does not reflect the phasing and structuring of the mediation process. At the same time permits a wider interpretation of mediation, especially with regard to the phrase "promote communication".

Article 3 of the Directive includes not only the definition of mediation, but also refers to judicial mediation, in the sense of mediation led by a judge who is impartial and at the time in question does not conduct proceedings and does not decide in any court proceedings associated with the dispute. This question remains unaffected by the provision of § 2 of the Czech law.

An important aspect which refers to the provisions of § 2 of the Act on Mediation in the Czech legislation opposite to Article 3 of the definition is the dictum

[49] PAUKNEROVÁ, M., PFEIFFER, M. Mediation, more particularly, cross-border and judicial mediation [online]. Příspěvek ve sborníku. In: *The Lawyer Quaterly*. Vol 5, No 2 (2015). Available at: http://www.ilaw.cas.cz/tlq/index.php/tlq/article/viewFile/148/132, p. 129.

[50] Compare with § 2 of the Act and Mediation Service No. 257/2000 Coll.

[51] Compare § 2 of the Mediation Act No. 202/2012 Coll.

relating to the modification of the mediation agreement and the achievement of the mediation agreement in the Czech legislation as compared to Article 3 of the Directive which talks about the resolution of the dispute and the achievement of the agreement which is a wider concept, allowing for a general perception of the parties' agreement without its being incorporated into the mediation agreement.

Article 3 of the Directive also deals with the person of the mediator when it is describing a person who is asked to have perform effective, impartial and qualified leading of the mediation, irrespective of his or her designation or profession in the concerned Member State and regardless of the way how this3rd person was appointed or requested to lead a mediation. In this context of the implementation has the § 1 of the Mediation Act connection to the Directive, i.e. the subject of the mediation regulation itself in the Czech legal norm, when the law regulates the performance and effects of mediation by registered mediators, and the provisions of § 2, where the basic concepts are under the letter c stipulated that the mediator is a natural person who is registered in the list of mediators, that is natural persons registered in the list of mediators, which according to § 15 paragraph section 1 is an information system of public administration led by the Ministry of Justice.[52]

As part of the resonance of implementation and related harmonization efforts, it is important to mention Article 7 of the Directive and the question of the confidentiality of mediation where mediation should take place in a confidential manner. Member States should seek to ensure that mediators and persons involved in administrative support do not disclose mediation procedures. They also should not be forced to mention or submit further information resulting from mediation proceedings or obtained in connection with the circumstances surrounding the meditation procedure. These aspects do not have to be realized unless, in the scope of the autonomy will of the parties is agreed upon a different procedure. Member States have the right to make exceptions to these situations and situations particularly affected by public policy, by ensuring protection of the legitimate interests, in particular the interests of the child, as a result of harm to the physical or mental integrity of a person. The Directive furthermore refers to the disclosure of the content of the agreement resulting from mediation itself for the purpose of implementing or executing the mediation agreement. The directive also talks about the possibility of implementing stricter measures beyond the directive.[53]

The § 9 of the Czech Act on Mediation refers to the facts on which the mediator is obliged to maintain *confidentiality*. This concerns the information which he learned in connection with meditation proceedings, that is in connection with

[52] Compare with § 13 of the Mediation Act and the purpose of Act No. 522/1991 on state control.
[53] See also Article 7 (1) and (2) of the Mediation Directive.

the preparation and performance of mediation, which is interesting from the point of view of the law to compare with the definition of mediation itself. This confidentiality should continue to be maintained, even if it is removed from the list of mediators. The mediator is forced to maintain silence even if no contract of execution of mediation has been concluded, which must be distinguished from the mediation agreement.[54] The Directive is implemented in accordance with the principle of considering the autonomy of the parties' wishes where the mediator's duty of confidentiality may relieve by all parties involved in the mediation. However, it is necessary to interpret adequately the dictum of the law with respect to the wording "all sides of the conflict". The right to dispose the mediator of his confidentiality passes in the event of his death or his declaration of dead to the legal successor of the mediator himself.[55] Confidentiality is not stated for a mediator in proceedings before a court or other authorities if the dispute is the result of mediation between a parties of the conflict, by itself or possibly between the legal counsellor of the conflict and the mediator. The mediator is further relieved of confidentiality to the extent necessary for his or her own defence and protection in the event of any situation related to the oversight of the mediator's activities, or disciplinary proceedings. When we compare discretionary adjustments in mediation or mediation confidentiality, in the revision of the Directive, the UNCITRAL Rules, the ICC Rules, the ICDR Rules where the confidentiality adjustment is wider in the circle of persons it binds, and in terms of the information circle it covers. Mediation in the international trade is from this perspective more advantageous and more secure than an adaptation according to the Czech Mediation Act.[56] The reflection of the confidentiality of the persons involved in the administration of mediation proceedings, stipulated in the mediation directive, is further the legal regulation in the Czech Mediation Act[57], when the duty of confidentiality laid down for mediators is further extended to those who have participated with mediator in the preparation and conduct of mediation. Furthermore, it is clear from the Czech regulation that the duty of confidentiality applies to the mediator, but it does not apply to the parties of the conflict and their legal counsel, but the obligations of confidentiality and possible sanctions for the violation can be appropriately modified in a mediation agreement.[58]

[54] Closer to Article 9 (1) of the Mediation Act.

[55] See above for the unequal status of mediators and advocates with regard to the duty of confidentiality.

[56] BUHRING-UHLE, CH., KIRCHHOFF, L., SCHERER, G. *Arbitration and Mediation in International Business*. WK, p. 223–224.

[57] Section 9, paragraph 4 of the Mediation Act No. 202/2012 Coll.

[58] Explanatory Report to the Mediation Act, p. 26 (§ 8 and § 9).

The cross-border nature of mediation as well as the reflection of cross-border situations is surprisingly more rigorously regulated in the Czech Act on Mediation, where the mediator pursues his or her activities under the law of another Member State in a position where he cannot be compelled to breach the confidentiality obligation to the extent imposed on him by the legal legislation of that Member State.[59]

The internal market and the free service sector are mentioned in Article 5 of the Mediation Directive, where the Directive clearly refers to the non-restriction of the provision of services in terms of professional qualifications in another Member State. Questions which are in concern which relates to the provision of a service in accordance with the law in force in a particular Member State for the purpose of pursuing their profession in relation to situations arising as a result of the relocation of a service provider are also addressed, as well as on the circumstances of the ad hoc case assessment. In Czech legislation, the provisions of Article 5 of the Directive are reflected in the Treatise on Visiting Mediators.[60] For nationals of another Member State, this provision provides for the possibility to perform mediatory activities in the Czech Republic on a temporary or occasional basis under the conditions laid down by this Act. The paragraph 19 section 2 deals with the necessity and the possibility to be included in the list of mediators in the form of a guest mediator, accompanied by a document in the form of a certified copy which proves that the person is in accordance with the legislation of another Member State able to perform an activity comparable to that of a mediator accompanied with an affidavit of non-refusal and non-disqualification of this authorization. The guest mediator's activity itself is then subject to Czech law and the visiting mediator is entitled to provide services in the Czech Republic once the Ministry submits all the documents required by law. The Mediation Directive also deals with ethical rules and procedural rules, which Czech law does not explicitly mention.

The Article 1 Section 2 of the Directive and its definition of the scope of the Directive in the aforementioned cross-border civil and commercial disputes is governed by the provisions of paragraphs 28 of the Act on Mediation, where this law incorporates the relevant EU regulations. It should be noted here that the incorporation of EU regulations and their implementation into the national law does not yet indicate how the Member State will assume the scope of transposition of the implementation of the Directive. In this context, it is appropriate to mention the scope of the law itself, which applies both to national mediation and mediation with an international element. Concerning mediation with the

[59] Section 9 paragraph 5 of the Mediation Act.
[60] § 19 of the Mediation Act No. 202/2012 Coll.

cross-border element, the Directive is criticized for the absence of a conflict clause dealing with the applicable law on the admissibility of mediation, the mediation agreement for the performance of the mediation and the mediation agreement itself.[61] However, it addresses three important aspects of cross-border mediation. The first of them is the enforceability of mediation agreements under Article 6 of the Directive which allows to the parties of the dispute in a Member State to request that their mediation agreement be rendered enforceable, and this is rendered impossible if the content of such an agreement is contrary to the law of the Member State where the parties or such content cannot be enforced under such law.[62]If the mediation agreement is thus rendered enforceable in a Member State, it should be recognized and declared enforceable under EU law, that is in the civil and commercial matters under the Brussels I Regulation.[63] Therefore, if mediation is terminated by the conclusion of mediation agreements, this agreement must be written and contain the signatures of all parties, the date of its conclusion and the signature of the mediator by which the mediator confirms the conclusion of such mediation agreement. Under the Czech law, the mediator is not responsible for the content of the mediation agreement, since only the parties of the conflict are responsible for the content of the mediation agreement.[64] Although this is not further specified in the Czech Mediation Act, the mediation agreement is not directly enforceable by tiself and is therefore not a type of enforceable title.[65] The mediation agreement can be enforced by entering this agreement into a notarial or enforceable enactment or by having the mediation agreement approved by the court.[66]

Mentioned provision of Article 8 of the Directive concerns with the obligation of the Member States to ensure that mediation which the parties of the conflict choose as a way of the conflict resolution not to become an obstacle at a later stage in access to justice, that is the opening of judicial or arbitration proceedings in the same matter following the expiry of the limitation or preclusion period. On the basis of the adoption of the Act on Mediation, an amendment to the SPD was further elaborated and the provision of § 100 section 3 stipulates the possibility for the court to order the parties to meet with the mediator and to discontinue the proceedings whenever it deems appropriate and at the same time is kept the mediation as a voluntary option and remains

[61] PAUKNEROVÁ, M., PFEIFFER, M. *Mezinárodní mediace a české právo*. p. 22.
[62] BŘÍZA, P. Evropská unie přijala směrnici upravující přeshraniční mediaci. *Bulletin advokacie*, 2008, n. 12, p. 59.
[63] GRYGAR, J. *Zákon o mediaci a prováděcí předpisy s komentářem*. p. 40–44 (§ 7).
[64] Ibid.
[65] Explanatory Report to the Mediation Act, p. 25–26 (§ 7).
[66] Ibid.

only on the parties of the dispute whether they undergo mediation.[67] As stated in the enforcement of the mediation agreement, the mediation agreement can be approved by the court in the form of a reconciliation, in accordance with § 67 of the Civil Procedure Code. In addition, it is necessary to mention the aspect of the alert on the possibility of using the mediation, followed by the directive, which is reflected in § 99 of the Civil Procedure Code. The court informs the parties about the possibility of using mediation pursuant to the Act on Mediation, if it is appropriate due to the nature of the case, as well as in the preparation of the proceedings pursuant to § 114a and the preparatory act pursuant to § 114c of the Civil Procedure Code.[68] The information obligation of the court on the possibility of mediation is also mentioned in the Act on Special Procedures in § 9.[69] In favour of mediation, the Civil Code also admits that it allows for the establishment of a limitation and limitation period in the course of an extrajudicial hearing in the event that an agreement has been concluded between the parties on any out-of-court hearing.[70]

4. Conclusion

From the Report of the European Parliament's Committee on the implementation of Directive 2008/52 / EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters arises a fundamental closure. The Commission noted that "*some difficulties have been identified regarding the functioning of the national mediation systems in practice. These problems are mainly related to the lack of mediation culture in the Member States, lack of knowledge how are the cross-border cases handled, a low level of mediation awareness, and with the functioning of quality control mechanisms for mediators."*[71] Emphasis on quality standards and Ethical Codes for mediators should be part of the training of a mediator. It can only be added that even in the Czech Republic, mediation is not automatically part of the conflict resolution culture, which is also related to the set-up of barriers for citizens during the access to mediation.

[67] HRNČIŘÍKOVÁ, M. Vynutitelnost mediačních doložek. *Právní fórum*, 2012, č . 9, n. 12, p. 530.
[68] Act No. 99/1963 Coll., the Civil Procedure Code, as amended.
[69] Act No. 292/2013 Coll., on Special Procedures, as amended.
[70] HRNČIŘÍKOVÁ, M. *Vynutitelnost mediačních doložek*. p. 530.
[71] https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:52016DC0542&from=CS, p. 4, cited on 28. 6. 2018.

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Judgment of the ECJ, Owus in Jackson and Others, C-281/02

Preliminary Questions before Civil Courts and the Impact of the European Union Law in the Light of Their Future Direction

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Summary: In the context of a preliminary ruling Slovac and Czech civil courts can give preliminary question to Court of Justice of the European Union in accordance with Art. 267 of the Treaty establishing the European Community. This institute helps unify comunity law, enable cooperation of our courts with Court of Justice and helps them to apply community law correctly. This paper deals with effect of preliminary question on our civil trial the binding character of decision of Court of Justice about this question and the future of this institute. There is always a potential danger that European law is not applied uniformly in all Member States and Community law conferred upon the Court of Justice of EU a monopoly of its interpretation.

Keywords: preliminary question – preliminary ruling – Court of Justice of the European Union (CJEU) – stay of proceeding

1. Concept of Preliminary Question

By a preliminary question we understand a question which is not directly related to a case pending before the court, but its resolution is one of the prerequisites for a decision in the matter and is based on the merits of prejudiciality. They can have both material and procedural law nature. However, it is not decisive for the purpose of assessing a question as a preliminary issue whether it is submitted for a separate procedure to the competent authority or is made by the civil court itself. The relationship of question to the present case is relevant. If we look at the concept itself, the difference between the term 'preliminary' and 'prejudicial' must also be perceived. We are of the opinion that preliminary questions represent a wider concept, including questions of both procedural and material nature. The question referred for prejudiciality relates exclusively to questions of a material nature.

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For the legal order of the Slovak Republic or the Czech Republic, the term "prejudice" is not unknown. "In the broadest sense, it means the determination of a particular legal issue involved by another legal issue from which resolution the verdict on the dispute is directly dependent, which may in certain cases be considered by the acting body itself. Classical prejudice, however, means respecting the decision of another authority (superior in the hierarchy of a particular system of protection of the law to a procedural, acting body) on a preliminary issue.."[1]

„Precudiciality can generally be seen as a causal relationship between two subjective rights, one of which is conditional to the other.[2] Its place is found especially in cases where the valid decision on the case has resolved the issue which is of fundamental importance for the further dispute and from its judgement the next case decision depends on. The prejudiciality also express a fact that in a particular case a relatively separate issue exist, which has been the subject of a lawfully adjudicated procedure and has a decisive role in the present proceeding."[3]

We believe that, apart from the fact that this is one of the procedural consequences of the substantive material link between the cases under consideration; the prejudiciality also has a logical origin in the existence of the diversity of jurisdictional authorities in the legal system.

The assessment of the preliminary question can be manifest only in the manner in which the court has ruled on the merit of proceeding and can be the part of the reasons which led the court to concrete content of the decision. (judgment n. R 61/1965). If the court would answer the preliminary question in the form of a statement, the obstacle of res adjudicata would be created. In practice it happens often that the competent authority issues a decision on the matter, which is the same as the judgment on which the court based its decision-making process. However, it is more interesting if the institution considers a preliminary question differently. Such a situation has other procedural consequences and gives the parties the opportunity, for example to use the reopening of the trialas an extraordinary remedy. From a procedural point of view, the bringing of a question for a preliminary ruling to another authority results in the interruption of the proceedings.

From the historical- legal point of view, the roots of the preliminary questions can be found in the Roman civil process. They represented decisions that

[1] ŠTEVČEK, M., FICOVÁ, S. a kol. *Občiansky súdny poriadok*. I. diel. Komentár. 2. vydanie. Praha: C. H. Beck, 2012, s. 391.

[2] GRŇA, J. *Prejudicialita v civilním řizení*. Praha: 1930.

[3] Resolution of the Supreme Court of the Slovak Republic n. 2MCdo/2/2014 of 30 October 2014– Uznesenie Najvyššieho súdu Slovenskej republike č. k. 2MCdo/2/2014 zo dňa 30. októbra 2014.

the judge could join in latter case.Here we may well find the roots of decisions known as precedents recognized as formal source of law in the Anglo-American system.[4]

Among the numerous types of Romanesque actions there existed also so-called „*actionses preiudiciales*" actions leading up to finding whether there is any disputed right or fact alleged in the application, for example whether or not a person is a slave. In essence, it was the case of then determination actions.

In addition, the Roman process used the "*praeiudicialis formula*" through which the magistrate ordered to jurors only decide on whether or not there is a certain legal relationship or legal fact (most often address status issues). It differed from its own actio by the fact that the formula included only the contention of the declaration, but not "*condemnatio*", therefore, the conviction of the defendant.

The formula praeiudicialis was intended to rule on the preliminary question, on decision of which depended the further follow-up proceeding.[5]

The Romans also dealt with the settlement of disputes and based on the principle of "*per minorem causa*" where the more important matter takes precedence over matter less important. "However, this method was not the most appropriate, often it became that the dependent matter was decided rather than the preliminary. Therefore, the principle of pre-litigation was adopted rather than dependent matters."[6]

For the Middle Ages it was characteristic that the concept of prejuditial has been identified as a conditional. The concept of "*questio preajudicialis*" has been settled, according to which a decision on a preliminary question may itself put an end to the subsequent proceedings. From the end of the Middle Ages to the end of the 19th century, the "*prejudicium*" means both the matter decided in the process itself and also the preliminary question or final decision with the interlocutor of the second dispute.[7]

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[4] WETZELL, G. W. *System des ordentlichen Civilprozesses*. Lipsko: 1861, s. 705.

[5] „This particularity was manifested by the fact that, in the declaration formula, which the prosecutor instructed the jury to adjudicate, lacked a conclusive clause." In: Otto, J. *Ottův slovník naučný. Dvacátý díl*. Praha: 1903, s. 388. Dostupné z: http://archive.org/stream/ottslovnknauni13ottogoog≠p./n423/mode/2up

[6] GRŇA, J. *Prejudicialita v civilním řízení: procesuální studie*. Brno: Nakladatelství Barvič & Novotný, 1930. Sbírka spisů právnických a národohospodářských, s. 88.

[7] GRŇA, J. *Prejudicialita v civilním řízení: procesuální studie*. Brno: Nakladatelství Barvič & Novotný, 1930. Sbírka spisů právnických a národohospodářských, s. 6.

2. Preliminary Question in Slovak and Czech Civil Process

How is the prejudiciality regulated in the legal environment of Slovakia and the Czech Republic? The fact is that the Civil Procedure Code (hereinafter referred to as OSP- Občiansky súdny poriadok) in no provision defined the precise range of questions that can be considered as preliminary questions.[8] However, in Art. 135 of the OSP, negative delimitation of preliminary questions can be found. Other questions that may otherwise be decided by another body may be preliminarily assessed by the court itself. In accordance with the approved recodification of civil proceedings in the Slovak Republic, the prejudiciality was reflected in Art.162 section c) of Act No. 160/2015 Coll. Civil Proceedings Code for Adversarial Proceedings (***Civilný sporový poriadok CSP***) in relation to the interruption of proceedings (referral to the Court of Justice of the European Union – (reference for a preliminary ruling to the Court of Justice of the European Union). The court order of iniciation of a preliminary ruling shall be forwarded by the court without delay to the Ministry of Justice. The liability of the court is reflected in Art 193 CSP. A question that has jurisdiction over another public authority as a body under Section 193 of the CSP can be assessed by the court itself, but it can't decide on it (Art.194 CSP). Where the question referred to in paragraph 1 has been decided, the court shall take such a decision into account and settle it in the grounds of the decision.

Legislation in the Czech Republic is based on Art.109 section 1 Civil Procedure Code (OSŘ) regulating the compulsory cessation of court proceedings.

The currently discussed recasting of civil procedural law in the Czech Republic states in the legislative intention: "If the decision of the dispute depends in whole or in part on a preliminary question which is the subject of any other judicial or administrative proceedings, the court may suspend the proceedings until the legal proceedings have been terminated."

The proceedings in the main case may also be interrupted by the court if a dispute arises as to the admissibility of the incidental intervention or the main intervention. If there is a suspicion of a criminal offense and the conviction would have an impact on the court's decision, the court may suspend the proceedings until the lawful decision on the criminal offense.

Court will suspend the proceeding if it has decided to request the Court of Justice of the European Union to take a decision on a preliminary question which is not, in the present case, entitled to deal with".[9]

[8] A more precise definition is included, for example, in the Code of Administrative Procedure, Act no. 71/1967 Coll., In particular in § 40, it can be accepted also for the needs of the civil process

[9] VĚCNÝ ZÁMĚR CIVILNÍHO ŘÁDU SOUDNÍHO, dostupné z: https://crs.justice.cz/

As you can see, historical developments and the impact of EU law have logically required a more detailed adjustment of the preliminary questions. OSP did not even provide a definition of the exact range of issues that could be considered as preliminary questions. We believe that more detailed legislation in this area is a positive moment and underline the importance of this institute.

3. Prejudicial Questions in European Law

3.1. About preliminary question in European law in general

Upon joining the EU, Community legal acts become part of the law of a Member State and its courts are required to apply Community law. Art. 267 (formerly Article 234) of the Treaty establishing the European Community gives the CJ EU (hereinafter referred to as "CJ EU") the power to give preliminary rulings on the interpretation of the Treaties, the validity and interpretation of the acts adopted by the Community institutions and the European Central Bank and the interpretation of the statutes of the bodies set up by the Council, if these statutesprovide so.

According to that article, the Court has jurisdiction to give preliminary rulings on:

(a) the interpretation of the Treaties and their validity,
(b) interpretation of the acts of the institutions, bodies or offices or agencies of the European Union.

It is possible to talk about the so called- communitary prejudiciality. 'The preliminary procedure is a fundamental mechanism of European Union law, the purpose of which is to provide the national court with a instrument of ensuring uniform interpretation and application of European Union law in each Member State."[10]

The Preliminary Question Institute plays an important role in Community law in ensuring its uniform interpretation and application. It was through preliminary questions that the CJ EU also formulated important principles of European law-right of precedence or direct effect (Van Gend en Loos, Costa vs. Enel cases, et al.). In principle, it is about direct communication of a court of a Member State with the ECJ.

The European Union law has been dealt with concept of the preliminary question in the founding treaties of the European Communities. The first question was put to the ECJin 1961 (3/1961 De Geus, Bosch). The importance of this institute is also evidenced by the fact that at present they make up about half of the Court's

[10] JEŽOVÁ, D. *Prejudiciálne konanie pred Súdnam dvorom EÚ.* Žilina: Eurokódex, 2013, s. 10.

decision-making activity. This action before the CJ EU does not serve as a legal remedy against a judgment of a Member State court is an extension of a domestic dispute because the use of a preliminary question is fully available to the court of a Member State. The parties to the dispute for such filing are not legally entitled, whereas the use of the remedy is in the hands of the parties to the dispute.[11]

Use of Art. 267 The ZES applies only to the rules of Community law. The subject-matter of the reference for a preliminary ruling can't be the law of a Member State. The CJ EU has repeatedly stated in its case-law that it is not entitled to assess, interpret the legal acts of the Member States'.[12]

The EU SD is not entitled, either in the form of a preliminary question, to rule on the invalidity of national legislation or to express or evaluate the ongoing national dispute. That fact has also been repeated on several occasions in its judgments (C-28-30 / 62 Da Costa, C-13/61 De Geus, Bosch).

"It follows that the Court of Justice has no de iure jurisdiction to express, in the context of proceedings brought under Art. 267 TFEU, of the compatibility of provisions of domestic law with provisions of European law – it does not have the power to annul national rules which conflict with the EU law. However, it has the power to provide the national court with all the necessary means of interpretation which arise under European Union law and enable it to assess the compatibility of the national legislation with the European Union"[13]

The preliminary ruling procedure has additional nature in relation to the main proceedings before the national court. The system is based on a strict separation of functions between the national court dealing with the dispute between the parties and the application of Community law to a specific case and the CJ EU, whose role is limited to the interpretation of Community law or, where appropriate, the validity of the EU act. However, we also encounter a different point of view, for example, M. Bobek, which characterizes the relationship between the national court and the CJ EU as hierarchical. This is justified by the fact that the Court may refuse to deal with the question referred and reject the application for inadmissibility, although Art. 267 TFEU does not give such an opportunity to the Court.[14]

There are other similar systems in the European area (and also outside the European area, for example, within the Andean Community). The possibility of using a preliminary question is also known in other legal orders:

[11] VĚRNÝ, A., DAUSES, M. *Evropské právo se zaměžením na rozhodovací praxi Evropského soudního dvora.* Praha: Ústav medzinárodních vztahú, 1998, s. 159.

[12] ŠLOSARČÍK, I. *Európsky súdny dvor a predbežná otázka podľa čl. 234 SES*; www.europeum.org

[13] PROCHÁDZKA, R., ČORBA, J. *Právo Európskej únie.* Žilina, EUROKÓDEX, 2006, s. 165.

[14] BOBEK, M. *Porušení povinnosti zahájit řízení o prědběžné otázce podle článku 234 (3) SES.* C. H. Beck, 2004, s. 146 a 147.

- Courts in Belgium, the Netherlands and Luxembourg may use preliminary questions regarding the interpretation of the law on Benelux agreements
- Ireland, Liechtenstein, Norway and Switzerland may consult the EFTA (European Free Trade Association) to give their advice on the interpretation of the Agreement on the European Commercial Area or the European regulations applicable to them

Within the limited scope of the article, we will not analyze so many times discussed issues raised before the CJ EU in relation with the preliminary questions , such as mandatory / facultativereference of preliminary question, the definition of the national court or the remedy. We will concentrate on the effects of resolving a preliminary issue on national civil court proceedings, the possible direction of this system for the future.

3.2. The legal effects of the CJ EU Decision

No appeal may be brought against the Court of Justice's decision either at Community or national level. Judgments on preliminary questions have retroactive effects and act as *ex tunc* . The only possible way to limit the effects of the CJ EU Decision is to pronouncing restrictions by the court itself directly in a specific decision.[15]

This is not just about the link between the two courts but also about the binding nature of the EC legal system and the legal systems of the Member States. When deciding whether a decision is binding, it is necessary to distinguish whether it is a decision on:

1. the validity of Community acts or
2. interpretation of Community law

Ad 1. In the case of a declaration of invalidity, the CJ EU case law is fairly clear. In Case C-66/80 International Chemical Corporation, the CJ EU declared the binding nature of such a decision not only for the parties to proceedings but *erga omnes* for all authorities and persons as well as for any national court.

Chybí text (DTP) he second case is the decision declaring the validity of the contested act. In this case, the decision is binding only *inter partes*. Even the court which has submitted a preliminary question is entitled to re-submit it if it submits from different grounds for invalidity.

Ad 2. The court which has submitted a preliminary question is bound by the EU SD's interpretations and is required to take a decision in accordance with that

[15] KLUČKA, J., MAZÁK, J. a kol. *Základy európskeho práva*. Bratislava: Iura Edition, 2004, s. 212–213.

interpretation. "It can not accept a different interpretation of Community law than the one provided to it by ESD. Based on the principle of uniform application of Community law, decisions of this nature are generally binding.

The CJ EU Decision forms one entity. Since it is to be binding on Member States where there are differences in the understanding of the division of judgments, it is not appropriate to split them in any way.

3.3. Infringement of the obligations arising from Art. 267 TFEU

In practice, there may be situations where the national court fails to comply with a mandatory obligation to submit a preliminary question, or, after issuing a decision of the CJ EU he does not respect its position.

There are three ways how to act against such conduct:

a) Commission's action for failure to fulfill the obligation of a Member State under Article 258, 259 TFEU. It is rather rare and is considered to be an extreme solution. There is a predominant view that the Commission should only intervene in the event of serious, deliberate failure to comply. Used for the first time in the judgment in Case C-129/00 Commission v. Italy [2003] s. I-4637
b) **an action for damages** against a Member State. By judgment in Köbler, the EU granted individuals the right to compensation for damage caused by the non-application of Community law. Individuals must turn to the national courts and not to the ECJ.[16]
c) claiming subjective rights under Community law through a **constitutional complaint**.
d) **Complaint to the European Court of Human Right**s in Strasbourg. If the breach of the obligation to submit a preliminary question to the Cour was the caset, it may also be theoretically considered an infringement of the right to a fair hearing within the meaning of Art. 6 section 1of Convention, eventually other rights protected by this Convention. In the latter case the Moosbrugger / Austria 44861/98, in which the ECHR stated that an individual can't derive from the Convention the right to bring proceedings before the Court of Justice. However, none of the previous complaints to the European Court of Human Rights alleging breach of Union law have so far been recognized as admissible.

[16] BOBEK, M. *Porušení povinnosti zahájit řízení o předběžné otázce podle čl. 234 (3) SES.* Praha: C. H. BECK, 2004, s. 103–104. For the first time defined in the decision A. Frankovich a D. Bonifaci a ostatní v. Talianska republika, 6 a 9/90.

e) **Publication in the Commission's annual report on the application of European Union law.** In this case, it is not a sanction in the strict sense, because such a consequence of the failure to observe the obligation of the national court manifestly lacks a correctional function. But rather, it is a "negative advertisement"

The most frequent reason for the parties' dissatisfaction with the decision to refer the question to the Court of Justice and the interruption of the proceedings at the time of the Court's decision is the length of the reference for a preliminary ruling before the Court of Justice, which takes an average of approximately 14 months. The legal order of the Slovak Republic gives the party to the proceedings two possibilities to reverse this situation, namely the appeal against the order for reference and the constitutional complaint under Art. 127 of the Constitution of the Slovak Republic.

While the ***CSP*** order against the decision of the court of first instance to refer a question to the Court of Justice allows for appeal, that possibility can't be accepted by the Court if it rejects the request for a preliminary ruling. The dissatisfied participant does not have any effective remedy at national level, applicable before the General Court.

4. The Practice of Slovak And Czech Civil Courts

Since joining the EU, Slovak courts have filed altogether 38 references for preliminary rulings. The first preliminary question was submitted on 7. 7. 2006 by the Regional Court in Prešov (C-302/206) Kovaľský v. Dopravný podnik Prešov a. s. Then followed the case of Mihal (C-456/07), in which the Court, by reasoned order, stated that the activity of the judicial executor was not considered to be the activity of a body governed by public law.

2010 is one of the most productive periods since the accession of the Slovak Republic to the European Union in connection with the submission of preliminary questions by the courts of the Slovak Republic. First Case C-76/10 Pohotovosť s. r. o. the Court of Justice has ruled in a reasoned order. In September 2010, another question was raised in the field of consumer protection C-453/10 Perenicova and on 23. 5. 2011 Similarly C-252/11 Šujetová.

In August 2010, the Supreme Court of the Slovak Republic refered the preliminary ruling filed in the form of C-416/10 Križan, which is a confrontation of Pezinok citizens, Supreme and Constitutional Court of the Slovak Republic about junkyard in Pezinok. In October, the Supreme Court sended reference to preliminary questions concerning the taxation of industrial property rights

C-504/10 Tanoarch. At the end of the year, the case C-599/10 SAG ELV about public procurement of electronic toll collection is pending before the Court of Justice of the EU. Until now, the last question has been submitted by SC SR 4.4. 2011 with regard to the unification of Value Added Tax adjustment C-165/11 PROFITUBE.

Completed preliminary rulings initiated by the courts of the Slovak Republic: C-240/09 Lesoochranárske zoskupenie VLK – Recognition of the immediate effect of an international treaty, interpretation of the concept of the act of the public administration, C-76/10 Pohotovost, C-456/07 Mihal and C-302/06 Kovaľský.

Of the Czech Republic, there were 50 references, of which 10 judgments were delivered by the Court of Justice and 3 by a resolution. The remaining 10 proposals are legally in progress. Decision on the first Czech question submitted in the second year of membership, namely 5. 12. 2005, in Case C-437/05 in the case of Jan Vorel v. Hospital Český Krumlov.

The Supreme Court of the Czech Republic has notreferred to the Court of Justice for a preliminary ruling on the interpretation of the question referred for a long time, despite the fact that it was the subject of appeals brought by the parties. That was the case, for example. also in proceedings before the Supreme Court of the Czech Republic sp. zn. 29 Odo 242/2006, in which the Supreme Court dealt with the question of interpretation of the provision of § 81a et seq. of Act no. 591/1992Sb. on Securities, as it was effective before the accession of the Czech Republic to the European Union. The Supreme Court has asked for interpretation of EU law in criminal matters historically for the first time in 2016.

5. Conclusion

Finally, the question arises as to how the preliminary procedure will be pursued in the future in connection with the work of civil courts.

Objectively, it should not be forgotten that this preliminary issue was created in the 1950s as part of the European Coal and Steel Community, which had a different structure compared to today's EU. And, naturally, its creators did not even expect the CJ EU one day will discuss such cases of asylum, sexual orientation (C-148/13 to C-150/13 A, B, C v Staatssecretaris van Veiligheid en Justitie). It is clear that the nature of the preliminary questions formulated by the national courts has changed considerably over time.

In this situation, this will result in greater emphasis on European legislation and more active involvement of judges in individual Member States and more frequent use of preliminary questions. What has not changed is that national judges expect very clear and unambiguous answers from the EU SD. And this

requires dialogue between the Court of Justice and the national courts and the effective exchange of the necessary information between them.

Based on the approach of many judges, especially in the new member states like the SR or ČR, they are still aware of their concerns about this institute and its use due to ignorance. On the other hand, it is natural that the new Member States do not have many cases in their accounts. Traditionally, the most prejudicial questions come from Germany, Italy, Spain, the United Kingdom, France, the Netherlands, Belgium and Austria. Most national governments are reluctant to references to the CJ of the EU, because there is the impression that the CJ EU generally speaks for the benefit of the parties and this can also be seen as a loss of sovereignty.

It should also be pointed out that, in practice, the preliminary case has often turned into a tool for detecting infringements of Community law unresolved by the Commission, even though the CJ EU doesn't, by way of a preliminary ruling, declare non-compliance. The interpretation of the questions submitted to it by the national courts allows it to open the question and to establish the non-conformity of the national law with the rules of Community law.

At present, a reform of the preliminary procedure is being considered in the pursuit of its effectiveness. Several solutions have been offered for increase number of proceedings by Member States in the future. Let us mention the reform from March 2008 that introduced the so called urgent procedure. The solution is to increase the number of judges, electronizing the proceedings.

One option was also offered by the Nice Treaty (2011), which opened the possibility of moving part of the agenda (trade marks, tariff classification of goods) in the context of a preliminary ruling to the Court of First Instance. It was the proposal to introduce the hierarchical system of appeal where the national court would also rule on EU law and the parties to the dispute could subsequently request the court to send a decision to assess the CJ EU in terms of Community law. Finally, however, the original concept of the relationship between the national court and the CJ EU, which basically reflects the relationship between the Member State and the EU, has been upheld.

The solution to the future also offers a so-called green light process. These considerations were launched by the European Parliament in 2008 in its resolution (European Parliament resolution of 9. 7. 2008 on the role of national judges in the European Judicial System 2007/2027 (INI)). He stressed the role of national judges in the creation of a single European legal order and called for CJ EU and consideration of all possible improvement of the preliminary ruling procedure.

The essence of the green light system is that the judges of the national courts may (sometimes even have a duty) to put questions to the CJ EU to put

forward the proposed answer. The CJ EU would decide within the prescribed time limit whether or not it will accept the draft solution (give green) or decide on its own what would enable national judges to fully participate in the interpretation and creation of EU law by analyzing them. What is the transfer of greater responsibility to the judges of national courts who will be forced to know European law, which is still an ongoing problem, especially in the newer Member States.

If he does not agree with the proposal, due to insufficient processing or otherwise, or has a different opinion will turn the case into the normal preliminary ruling procedure. We add that the variant is the so-called red light system if the CJ EU does not respond to the proposal within the set deadline, the proposal of the national court becomes binding and final.

In the longer term, this could mean changing the current de facto semi-adjudication role to the role of monitoring administration of European law at national level.

They also spoke about the so-called "The Docket Control system, which would allow the CJ EUto reject cases of minor importance already at an early stage. Similarly, the application should restrict the possibility of referring the matter just to the Supreme Court of the Member State.[17]

There have also been suggestions for a structure made up of specialized national courts – newly created or already existing, which would take over the solution of less important preliminary questions under the control of the CJ EU, which would only deal with the most fundamental issues (authors M. Bobek, P Craig). An advantage would be regional approach to the case, removal of the language barrier. Such decentralization of the system could, however, pose problems in ensuring the consistency and coherence of European law, which is the main purpose of this procedure.

Whilst choosing *pro futuro* for any model, we believe that the weakening spirit of cooperation between the national courts and the EU's highest judicial body, which has historically transposed this process, needs to be strengthened today, and nowadays in the number of solved questions and the enormous number of adopted European law standards is disappearing.

And obviously the lack of common values is probably the root of the current state of the European institutions and the atmosphere of perceiving the role and importance of the EU as such. It may end with a quote by Jean Monet, the father of the European idea, "If I had to do it all over again, I would start with culture."

[17] BROBERG, M., FENGER, N. *Preliminary References to the European Court of Justice.* OXDOR University Press, Second Edition, 2014. ISBN 978-0-19-870402-7, 575 s.

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Definition of Relevant Market for the Purposes of Protection of Competition on Energy Markets in the Practice of the European Commission*

Ondřej Dostal**

Summary: This text deals with the topic of definition of relevant market for the purposes of protection of competition in the energy sector. With the use of examples related to two essential energy commodities, electricity and natural gas, the approach of the European Commission to the use of concepts included in the key Communication of the European Commission on definition of relevant market is illustrated together with position of the European Commission on definition of individual markets for specific activities connected with the above-mentioned commodities.

Keywords: abuse of dominant position – barriers to entry – cartel, competition – competition law – Commission Notice on the definition of relevant market for the purposes of Community competition law – electricity – energetics – European Commission – gas – geographic market – merger – product market – protection of competition – relevant market – SSNIP test – substitutability – time market

1. Importance of definition of relevant market in the competition law

Defining the market relevant for the behaviour assessed in individual cases of competition law application, or at least some level of that defining, is traditionally considered an indivisible part of competition law analysis. Definition of relevant market plays important role for assessment of applicability of both prohibitions

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and possible exemptions from them, in the area of prohibited agreements and abuse of dominant position, and similarly in analysing impacts of concentrations of undertakings. Although a duty to carry out analysis or exact procedure of the Commission in defining the relevant market is not prescribed by any rule of "hard" competition law, direct or indirect references to relevant market and aspects of its definition are contained in number of regulations and "soft" notices of the Commission related to specific areas, with support of rich case law of the Court of Justice of the European Union.[1] The European Commission dedicated one of its notices to the definition of relevant market completely, and the steps that it usually carries out during this definition, summarized in the Commission Notice on the definition of relevant market for the purposes of Community competition law (hereinafter the „Notice")[2]. This document has proven its durability and versatile usability among others by not having been changed once since its adoption in 1997, unlike many other documents of „hard" and „soft" EU competition law.As the Commission communicates in the Notice:

> *„Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article [101TFEU]. […] The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case"*[3]

Importance, main steps and practical application of relevant market definition have been summarised in a speech by a former EU Commissioner for Competition, Mr. Mario Monti:

> *„[…] Increased economic approach to competition policy has put market definition at the centre of the process of application of the EU competition rules. […]Market definition is not an end it itself but a tool to identify situations where there might be competition concerns. […] The main objective of defining a market is to identify the competitors of the undertakings concerned by a particular case that are capable of constraining their behaviour. […]*

[1] For their examples see e.g. PETR, M., DOSTAL, O., KREISELOVÁ, I., VAVŘÍČEK, V. *Zakázané dohody a zneužívání dominantního postavení v ČR*. C. H. Beck, 2010.

[2] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

[3] Ibid.

The Notice on market definition follows a classical "constrains" approach. In essence, this is based on the notion that the exercise of market power can be constrained by demand substitutability, by supply substitutability and by potential competition. We look first, and above all, at demand substitutability, that is to perfect or near perfect substitutes readily available in the geographic area or in an alternative area, to which consumers or users can actually switch should the price increase. In order to measure demand substitution, we use the hypothetical monopolist test, better known as SSNIP test, as it is referred to in the US horizontal merger guidelines.[…]

Supply substitutability is considered then. It refers to producers who are able to switch production to the relevant products as a response to a price increase. […]Potential competition is not taken into account for market definition. Instead competitive constraints coming from potential competition will be assessed at a later stage of the process to identify market power.[…] In practice [of the merger control], the starting hypothesis for our analysis is the market definition provided by the notifying parties. […] Parties are asked to define the relevant product and geographic markets and to provide very detailed additional information to allow the Commission to check that definition. This position is contrasted with the experience of the Commission in the sector as well as with the views of customers and competitors. […] On the basis of all this information, we are usually in a position to establish the relevant markets concerned by the operation or, at least, the few alternative possible relevant markets. In fact, in view of our limited resources, we define markets only when strictly necessary. In merger cases, for instance, if none of the conceivable alternative market definitions for the operation in question give rise to competition concerns, the question of market definition will normally be left open […] Before we adopt a final definition that could lead to a finding of competition concerns, the parties always receive a copy of our reasoning (in the form of an statement of objections) and are given the opportunity to reply in writing and orally to it. […]

Furthermore, barriers and switching costs for companies located in other areas are also considered. […] Finally, the existence or absence of regulatory barriers (for example, those arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, legal monopolies, requirements for administrative authorisations, or other regulations), is very important for geographic market definition."[4]

2. Importance of definition of relevant market in cases of competition law application in energy sector

Definition of relevant market is one of the main steps in analysing cases of breaking competition law, and there is no reason, for which it should not be so in the energy sector. In Commission practice, however, cases of prohibited agreements and abuses of dominant position in energy sector, especially concerning

[4] MONTI, M. *Market definition as a cornerstone of EU competition policy.* Speech by Commissioner for Competition Available at: http://ec.europa.eu/competition/speeches/index_speeches_by_the_commissioner.html

electricity and gas, have been regularly resolved by means of so-called commitments decisions[5], which, also with regard to the fact that they are more negotiation-based, regularly do without more in-depth analysis of the relevant markets. On the contrary, and as an example of a less obvious area, where more detailed relevant market analysis in energetics has been used, the applications of EU member states for exemption from the duty to apply public procurement directives may be presented. Such exemption is conditioned by proving existence of effective competition on the markets with activities that should be exempted from application of the directives. Negotiating with the Commission on the mentioned exemptions has thus been regularly aimed at defining the relevant market, especially its geographic definition and the markets power of the affected undertakings on the market. The focus of detailed relevant market analysis for the area of energetics has moved to the merger control, where nowadays there is rich decision-making practice of the Commission including definitions of various levels of the markets with energy commodities and services. Merger case law is the basis also for this article which serves to briefly illustrate the thinking of the Commission in defining the relevant markets in energetics, its standpoints on essential questions of competition on electricity and gas markets, as well as use of the most important notions of the Notice.

3. Key concepts of relevant market definition in energy sector

Also, in the energy sector the main issues in competition cases concern market power, its existence, strengthening or abuse. Therefore, also in the energy sector I tis necessary to identify first the market in relation to which the power is assessed. Alike other economy sectors, also in energy sector cases the Commission applies its Notice, which, as mentioned above, distinguishes three main dimensions of the relevant market, especially product and geographic dimension while considering also time dimension. The procedure of analysing the relevant market in line with the Notice and certain specifics of this analysis in the energy sector are illustrated by the below-cited cases of concentrations of undertakings on electricity and gas markets.

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The main tests

[5] ČERNÝ, M., PETR, M., DOSTAL, O., ZORKOVÁ, E., PŁONKOVÁ, D., DOHNAL, J., KAJLIKOVÁ, Z. *Vybrané výzvy v právu soutěžním a v českém právu obchodních korporací*. Olomouc: Iuridicum Olomoucense, 2017, 187 s.

indicated in the Commission notice on the definition of relevant market for the purposes of Community competition law are demand substitution, supply substitution and potential competition.[6]The relevant geographic market consists of an area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas[7].

Possible extent of the relevant market is defined by assessing the range of products or services, as well as the territory and time where and when the products and services are offered, which could be considered under certain circumstances as mutually interchangeable. One of the possible ways of assessing the view of consumers and interchangeability of goods or services and the territory where the offer takes place, is, according to the Notice, so called SSNIP test consisting in modelling reactions of consumers to small but significant non-transitory increase in price. The issue under scrutiny can be for example whether a customer would switch to an alternative supplier if confronted with a Small but Significant Non-transitory Increase in Prices.[8]

The variable measured by SSNIP test is price elasticity expressing capability and willingness of the purchasers to switch to substitute products or terminate orders once the suppliers increase the prices above competitive level. Whereas other goods are substitutable or dispensable, electricity is not, in-house production or switching to other energy sources being possible only to a limited extent, very costly and extremely time-consuming.[9] In its past decisions, the Commission has consistently considered that the supply of electricity and gas to end-customers did not pertain to the same product market because these two sources of energy were not seen as sufficiently substitutable. Low substitutability from the customers' point of view is mainly due to (I) the limited number of applications were they can actually be substituted (main water and space heating and cooking for households and limited industrial applications) and (ii) the high equipment costs induced by switching from one source of energy to the other.[10] In other words, electricity should be considered as a relevant product market distinct from the market for gas or the market for other energy sources. From a demand-side point of view, electricity is characterized by the universality of its usages. It is possible to distinguish between the exclusive usages (essentially lighting and the utilization of electricity to get some chemical reactions) and the usages for which there exists, from a technical point of view, a potential substitutability with

6 Case COMP/M.2947 – Verbund / Energie Allianz.
7 Case COMP/M.1673 – VEBA/VIAG.
8 Case M.3867 – Vattenfall/Elsam and Energi E2 assets.
9 Case M.1673 – VEBA/VIAG.
10 Case M.3448 –Electricidade de Portugal/ Hidroeléctrica del Cantábrico.

other sources of energy utilized by households as well as by industrial operators (traction and the production of heat). This technical substitutability relates only to the non-exclusive usages, essentially the production of heat. It remains very imperfect as electricity is produced from another source of energy and is therefore necessarily more expensive. It is thus utilized only when the characteristics of heat and the technical process require it. Lastly, this substitutability could take place only over a long period of time because it involves different choices of equipment, according to the source of energy chosen. From a supply-side point of view, every source of energy presents some different requirements as far as production, storage and transport are concerned. This distinguishes electricity from other sources of energy as it requires specific and important investments.[11]

As regards reaction of demand, there are substantial differences between the demand behaviour of large customers and mass customers. Large customers are usually more price-sensitive, and correspondingly more ready to change suppliers than small customers are. Negotiating power and conduct of negotiations are also different. This is reflected in different sales strategies adopted by the energy suppliers and a different level of prices. For large customers value for money and flexibility of supply are the major considerations, while for mass customers there is a further marketing differentiation (for example between. clean energy., especially from domestic hydroelectric sources, and electricity from fossil fuels or nuclear energy), and a qualitative approach to customers. Large customers and mass customers usually take power at different voltage levels, and this too helps to differentiate them. It is true that the voltage at which electricity is supplied is not in itself a barrier to entry, in view of the postage stamp tariff payable for through-transmission. But the lower the voltage at which current is delivered, the higher the share of the entire bill accounted for by the grid itself. The relative advantage to the customer of a change of suppliers is therefore lower at lower grid voltages with higher grid prices.[12]

An illustrative example of the Commission considerations in delineating relevant geographic market can be found in the case of the Nord Pool distribution system. There the Commission stated that the structure of the electricity market allows for a very precise answer to the question whether a customer would switch to an alternative supplier if confronted with a Small but Significant Non-transitory Increase in Prices. In the particular case, if the producers in, say, Denmark West were to increase prices above the system price on Nord Pool by submitting higher bids, then customers in Denmark West would automatically and seamlessly – due to the allocation process at Nord Pool – be assigned electricity originating from

[11] Case – IV/M.568 – EDF / EDISON-ISE.
[12] Case M.2947 – Verbund / Energie Allianz.

another region provided that sufficient free interconnector capacity is available. On the other hand, if the interconnectors were to be congested, the customers would not be able to switch and would have no choice but to pay the higher price. In other words: the SSNIP test will give different answers in different hours. It would point to a narrow market in hours where there is congestion and to a wider market in hours in which there is no congestion.[13]

As regards the temporal dimension of relevant market, the Commission observes that electricity is a product, which cannot be stored and must therefore be consumed in the same instant as it is produced. Combined with a limited possibility of substitutability between different time periods different geographic electricity, markets can be distinguished by the time at which the electricity is delivered. In the Sydkraft/Graninge case the Commission stated that congestion on the transmission network can cause the Nordic electricity market to split into separate price areas. This limited the number of suppliers able to supply electricity in a given area and thereby the competitive structure of the market[14].

From the temporal point of view the Commission in the past considered also delimitation of a market with production and wholesale of electricity out of the peak hours, during the peak hours and in the extreme peak hours. As the capacity available on interconnectors is biggest in the time outside the peak hours, electricity import could exert biggest competitive pressure exactly outside the peak hours.[15]

3.1. Specifics of the relevant market definition in energetics

According to previous Commission decisions, the definition of the relevant product market(s) must take into account the existing and foreseen degree of opening thereof.[16] This is completely in line with the diction of the Notice, according to which

> *„[...]the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market*

[13] Case M.3867 – Vattenfall / Elsam and Energi E2 assets.
[14] Case COMP/M.3268 – SYDKRAFT/GRANINGE.
[15] Case M.7137 – EDF / Dalkia en France.
[16] Case M.3696 – E.ON/MOL.

shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures "[17].

Due to the liberalisation process the definitions of relevant market are dynamically developing in the practice of the Commission. In a particular case the Commission has found becoming obsolete of a market definition when it concluded that

„ […]the old distinction becomes increasingly meaningless. There are indications that the market could further be subdivided[…] "[18]

For example, according to the Commission, as regards the geographical market, those companies involved in the production, transport and distribution of electricity are essentially active on a national basis, so that the structure of supply is different in each country. The regulatory frameworks may evolve, and consequently national markets may develop into wider markets at some point in the future.[19]

4. Definition of relevant market in decision making practice of the European commission for activities concerning electricity and gas

4.1. Electricity

As presented by the Commission, electricity is a homogeneous good, and as such is not subject to further technological development. Homogeneous goods, unlike heterogeneous goods, largely possess the same physical or subjective features. Price is the main factor of competition that influences a customer's choice between various power suppliers. Other factors such as quality, research, services, reliability, etc. are of no more than secondary importance when it comes to decisions about purchases.[20]

The market is subject to far-reaching transparency of production costs and selling prices […]. Production costs and network use costs, which determine the

[17] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03).
[18] Case M.2890 – EDF/Seeboard.
[19] Case – IV/M.568 – EDF / EDISON-ISE.
[20] Case M.1673 – VEBA/VIAG.

variable costs and hence essentially the prices quoted, are thus known throughout the industry […].[21]

Where price is the main factor of competition on a concentrated market, this does lead to very intense competition in the first instance. However, at the same time, this also increases the interest of the market participants in avoiding competition, since every time a company undercuts a competitor's prices, this also means a reduction in its own profits. A situation of hidden competition, in which each market participant cannot be certain about the success of its offer, is different. In such a situation, a company is more inclined to make competitive moves, in the hope of winning contracts. The circumstance of competitive moves on prices being immediately felt by all market participants is a factor which in the medium term may reduce price competition.[22]

On the electricity market it is necessary to make a distinction between electricity which is produced for the open market and electricity that is produced mainly by industry and municipalities for their own consumption. Since the latter, captive production, has no impact on the conditions of competition on the open market, it must be excluded from the relevant market for wholesale sales of electricity.[23]

4.1.1. Distinction of markets in the electricity sector

The Commission has in the past distinguished separate product markets for the generation and wholesale supply of electricity (i.e. production of electricity in power plants and physical import of electricity through inter-connectors and its sale on the wholesale market to traders, distribution companies, electricity exchanges or large industrial end-users); regulating/balancing services; transmission of electricity (via high-voltage grids); distribution of electricity (via medium and low-voltage grids) and retail supply of electricity. On the retail level, the Commission has distinguished between large (industrial) customers and small (small business and household) customers.[24]

Among the reasons of the Commission for distinguishing separate relevant product markets was that each of these activities could be regarded as constituting a separate product market, as they require different assets and resources, and the market structures and conditions of competition are different for each.[25]

[21] Case M.1673 – VEBA/VIAG.
[22] Case M.1673 – VEBA/VIAG.
[23] Case IV/931 – Neste/IVO.
[24] Case M.3868-DONG/Elsam/Energi E2.
[25] Case IV/M. 1606 – EDF / SOUTH WESTERN ELECTRICITY.

From the geographical point of view, in previous decisions the Commission has defined the following product markets as separate markets: (i) generation and wholesale supply of electricity, usually considered nation-wide; (ii) retail supply of electricity, usually considered nationwide; (iii) financial electricity trading and in addition (iv) trading for CO2 emission rights, these last two usually considered broader than national.[26]

Furthermore, for example the geographic scope of the transmission markets was defined by the Commission as being regional within the limits of the area covered by the respective grid[27] (with the same logic applicable to the distribution markets).

Details on the Commission's view to the individual above-mentioned main product markets are presented in the following part.

Production and wholesale of electricity

In past Commission decisions it has been held that electricity generation does not constitute a separate market but that, rather, generation and wholesale of electricity constitutes one single market encompassing the domestic production of electricity at power stations within a certain geographic market (net of exports) as well as the electricity imported into this geographic market. Sales on such a wholesale market consist of bilateral sales and auction-based sales. Whether they contain both captive (i.e. intra-group) and non-captive sales does not need to be answered for the purpose of the current case. Suppliers on such a wholesale market are producers, importers and traders. Customers are primarily operators supplying end-users and Traders.[28]

Put differently the generation and wholesale supply of electricity are considered one single relevant product market because generation of electricity is not a market activity if the electricity is not sold.[29] The Commission has consistently defined a relevant product market encompassing both the generation and wholesale supply of electricity, irrespective of the generation sources and trading channels.[30]

The generation of electricity involves the production of electricity at power stations as well as all electricity physically imported through interconnectors. Demand comes mainly from electricity suppliers, large industrial and commercial

[26] Case M.5496 – VATTENFALL / NUON ENERGY.
[27] Case M.5154 – CASC JV.
[28] Case M.3883 – GDF/CENTRICA/SPE.
[29] Case M.7927 – EPH/ENEL/SE.
[30] Case M.8660 – FORTUM/UNIPER.

customers who can buy directly on these markets, and traders.[31] Electricity generation constitutes not a market, but an industrial activity.[32]

The Commission distinguished a wholesale electricity market as comprising electricity generation, imports and trading on organised markets (such as the power exchange […]) or over the counter for both physically and financially settled products.[33]

At the same time according to the Commission for the wholesale electricity market no distinction is made between the different sources of electric energy.[34]

Trading of electricity

In previous decisions, the Commission has found that there is a separate electricity trading market and it may also be possible to distinguish a product market for financial trading from physical trading of electricity. In two more recent decisions, the Commission concluded that the electricity trading market could as well be part of the wholesale electricity market.[35] There are, however, several functional differences between financial electricity trading and physical electricity trading which make it doubtful whether they can be regarded as belonging to the same product market. One difference is that all financial electricity trading terminates in a mere financial settling of contracts without any physical delivery of electricity whereas physical electricity trading obliges the supplier to physical delivery of electricity. Even if prices (and price expectations) in both areas mutually influence each other it is thus clear that physical electricity trading cannot be substituted by financial electricity trading. The market investigation also indicates that financial electricity is distinct from the market (or markets) for physical contracts. Physical and financial electricity are not completely interchangeable as regards settlement and time horizon. Financial electricity always has a cash settlement and is not sold on a spot (day-ahead) basis, whereas physical electricity from Elspeth or bilateral contracts is delivered physically and is contracted on a spot basis.[36] Electricity can be traded on the wholesale market in a number of ways. At the bilateral market electricity is traded directly between a seller and buyer up to several years before the operating hour.[37]

[31] Case M.5224 – EdF/ British Energy.
[32] Case M.1673 – VEBA/VIAG.
[33] Case M.5978 – GDF SUEZ / INTERNATIONAL POWER.
[34] Case M.5224 – EdF / British Energy.
[35] CaseM.5711 – RWE/Ensys.
[36] Case M.3867 – Vattenfall/Elsam and Energi E2 assets.
[37] Case M.3268 – SYDKRAFT/GRANINGE.

Transmission of electricity

In previous decisions, the Commission identified two separate markets for the transportation of electricity: transmission and distribution.[38]

The electricity transmission market has been identified as a separate market from the market for the distribution of electricity, i.e. the operation and management of the lower voltage grids. Such a distinction between transmission and distribution is also recognized by Directive [2009/72/EU][39]. According to the Directive the transmission system may only include extra-high and high voltage levels but not the medium and low voltage level. The latter levels are exclusively covered by the distribution system. This difference is regularly reflected in a different topology of the networks. Transmission networks cover very few big lines whereas the distribution systems cover usually a high number of smaller lines. In addition, in the Directive [2009/72/EU] transmission is defined as the transport of electricity with a view to its delivery to distributors whereas distribution is defined as the transport of electricity with a view to its delivery to customers. This means that in general production is connected to the level of the transmission networks whereas consumption takes place in general at the distribution level. Finally, according to the Directive [2009/72/EU] different tasks are attributed to the transmission system operators and the distribution system operators[40].

The consumption and production of electricity must be in balance at every instant, which is achieved by balance control. There is a transmission system operator (TSO) in every country who is responsible for (I) the task of maintaining this balance, and (ii) the national grid.[41]

Regarding the operation and management of the high voltage grid (transmission) and the lower voltage grid(s) (distribution), the Commission has consistently found that these activities constitute natural monopolies and that no competition is taking place on this level. If parties owned distribution networks in different parts of the country it was found that these activities do not overlap as each of these grids constitutes a separate market as, for any given customer, distribution through one distribution grid is not substitutable with distribution through another grid.[42]

According to the previous decision-making practice of the Commission the geographic scope of the electricity transmission market is confined to each

[38] Case M.7927 – EPH/ENEL/SE.

[39] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

[40] Case M.5467 – RWE/Essent.

[41] Case M.3268 – SYDKRAFT/GRANINGE.

[42] Case M.3440 – EDP/ENI/GDP.

transmission operator's network. A transmission network constitutes a natural monopoly within the area it covers.[43]

Electricity distribution

Electricity distribution is the conveyance of electricity from the national grid to consumers through a local network.[44]

The core activity of the distribution businesses is the maintenance and operation of the distribution networks which are used to transmit electricity from the national high voltage transmission network (the National Grid) to its point of consumption. These distribution networks constitute the low-tension local cables, switchgear, transformers and other associated assets, which enable electricity to be transported from nodes on the transmission network to its point of consumption.[45]

In the case where interconnection capacities create constraints, the relevant market is not defined beyond national borders.[46]

Regulatory electricity/ancillary services

The supply of electricity differs from most other product markets in that electricity cannot easily be stored and the amount of energy to be supplied is not known with any precision in advance. Consumption forecasts are incorporated into schedules and load profiles. But the forecasts do not as a rule coincide with actual consumer behaviour. Specially generated balancing energy is therefore needed to ensure that the difference between electricity output and load is always met.[47]

Balancing and ancillary services can be defined as services consisting in maintaining the tension in the grid within a very narrow bandwidth. On the market for the provision of these services, transmission system operators ("TSOs") purchase electricity, using balancing exchange or bilaterally, in order to cover deviations between production and consumption within their relevant control areas. In past decisions, the Commission has taken the view that a separate product market exists for balancing and ancillary services. This is since this service cannot easily be replaced by other electricity suppliers on the wholesale market. In previous decisions, the Commission has considered this market to be at most

[43] Case M.5467 – RWE/Essent.
[44] Case M.2890 – EDF/Seeboard.
[45] Case M.2586 – CE Electric / Yorkshire Electricity.
[46] Case M.7927 – EPH/ENEL/SE.
[47] Case M.2947 – Verbund / Energie Allianz.

national in scope but potentially being regional or limited to the relevant TSO's control area.[48]

Retail supply of electricity

Retail supply of electricity consists of the sale of electricity to final consumers. On the supply side, operators active in this market include the retailers, which may be vertically integrated with electricity generators and source electricity from a parent company, or acquire it on the free wholesale market, through bilateral contracts or on the [power exchange]. On the demand side, this market would include all eligible customers.[49]

Electricity supply involves the sale of electricity to the final consumer and includes billing services.[50]

In its past decisions, the Commission defined the relevant product markets for the retail supply of electricity to end users based on categories of customers. The Commission has identified these customers groups based on the relevant regulatory framework applicable to them and their consumption profile.[51]

In previous decisions, the Commission identified two different product markets for the retail supply of electricity based on customer size: (I) the market for retail supply of electricity to large industrial customers that are connected to the high and medium voltage grid ('half-hourly metered') and (ii) the market for retail supply of electricity to small industrial and residential customers that are connected to the low voltage grid. Customers were differentiated by whether they were measured on a continuous basis or not, as this highlighted the different purchasing power of clients.[52]

In previous decisions, the Commission has considered this market to be national in scope for large industrial customers, provided that the market is fully liberalised and if the conditions of competition are found to be uniform throughout the relevant territory. As for end-customers connected to the distribution system, the Commission has generally considered the geographic market to be national.[53]

4.1.2. Examples of barriers to entry to the electricity supplies market

An important aspect in analysis of relevant market is in practice definition of barriers to entry to the market. The Commission in its decision-making practice

[48] Case M.7927 – EPH / ENEL / SE.
[49] Case M.4368 – Edison / Eneco Energia.
[50] Case M.2890 – EDF/Seeboard.
[51] Case M.3696 – E.ON/MOL.
[52] Case M.7927 – EPH / ENEL / SE.
[53] Case M.7927 – EPH/ENEL/SE.

for the area of electricity supplies stated that electricity supplies demand for example: generating capacity; a liquid trading market; green and CHP certificates; infrastructure such as power transmission and distribution systems. The difficulties of gaining access to these factors are major entry barriers for competitors wishing to penetrate the electricity market.[54]

4.2. Natural gas

4.2.1. Distinction of markets in the natural gas sector

According to the Commission's decision-making practice, the following activities constitute separate product markets:(I) exploration/production of oil and natural gas; (ii) gas wholesale supplies, including a separate market for LNG and the necessary gas import infrastructures, (iii) gas transmission (via high pressure systems), (iv) gas distribution (via low pressure systems), (v) gas storage, (vi) gas trading, (vi) gas (retail) supply, comprising several separate markets.[55]

A detailed definition of the above-mentioned markets is presented in the following part.

Exploration for crude oil and natural gas and upstream production and sales of crude oil and natural gas

Exploration i.e. the finding of new hydrocarbon reserves, constitutes a separate product market. In terms of market definition, no distinction is to be made between the exploration for oil on the one hand and exploration for natural gas on the other, as the contents of underground reservoirs cannot be known at the stage of the exploration. The exploration market is defined as worldwide in scope as the companies engaged in exploration do not tend to limit their activities to a particular geographical area. Upstream production and sales of gas involve the exploitation of the developed hydrocarbon reserves for crude oil and unprocessed gas. The Commission considered in previous cases that as gas and crude oil have different applications and are subject to varying pricing behaviour as well as cost restraints, it is appropriate to define separate product markets for the upstream production of crude oil and another relevant market for the upstream production of natural gas. Unprocessed gas often requires transportation by pipeline to a facility at which it is processed by separating the gaseous and liquid constituents. Although the owners of natural gas fields require both transport and processing to be able to market their gas, clearly pipelines and

[54] Case M.4180 – Gaz de France/Suez.

[55] Case M.6477 – BP/Chevron/Eni/Sonangol/Total/JV.

processing facilities fulfil different functions and therefore the Commission considered it appropriate to separate the transport and processing markets to reflect the differing competitive conditions. Crude oil can be transported from offshore fields by ship or pipeline; contrasting the position of natural gas which is generally transported by pipeline. For similar considerations as those for gas, the transportation of crude oil and crude oil onshore processing are considered as different product markets.[56]

Wholesale market of gas

Wholesale market of gas includes gas sales made by importers (and re-importers) and producers to resellers and traders.[57] The Commission has in previous decisions considered the market for the wholesale of natural gas to be no wider than national.[58]

In previous Commission precedents, the market for downstream wholesale supply of gas (comprising the activity whereby wholesalers procure gas from producers for resale to other wholesalers or downstream distributors) has been considered a separate market from the market for the upstream wholesale supply of gas (comprising the development, production and upstream supply of gas to large importers/wholesalers). As to the geographic scope, the market for the downstream wholesale supply of gas is generally delineated along existing (regional) grid areas.[59]

In the past the Commission has in some cases defined the market for the wholesale supply of gas to encompass various grids, if there are no bottlenecks or other obstacles, which might restrict free competition in 'balancing zones'.[60]

Transmission of natural gas

On the market for transmission (via high pressure systems) of gas, TSOs offer physical gas transportation services to gas wholesale suppliers that aim to resell their gas either to other gas wholesalers, to distributors, or to large industrial customers that are directly connected to the gas transmission network. The Commission has consistently considered gas networks as natural monopolies. As to the geographic scope, the market is generally taken to be national. However,

[56] Case M.5585 – Centrica / Venture Production.
[57] Case M.6068 – ENI/ACEGASAPS/JV.
[58] Case M.5740 – GAZPROM/A2A/JV.
[59] Case M.6984 – EPH / STREDOSLOVENSKA ENERGETIKA.
[60] Case M.7228 – CENTRICA / BORD GAIS ENERGY.

the region covered by the physical infrastructure grid constitutes the narrowest possible delineation of the geographic market.[61]

The transmission of gas constitutes a natural monopoly.[62] From the perspective of geographical extent of the network the Commission further distinguished for example product markets with supra-regional and regional transportation of natural gas. The market for supra-regional gas transmission includes the import of natural gas from foreign gas producers and its subsequent transport through overland pipelines to regional gas companies. Like the regional gas companies, the supra-regional gas companies mainly supply special-rate industrial customers, electricity generators and local gas distribution companies. Supra-regional gas transmission forms a separate market. The peculiarity of this activity, which is undertaken by supra-regional gas companies, is that it entails the import of large quantities of gas from producer countries. These companies have correspondingly long supply contracts with producers and the installations required for import, long-distance transport and services to customers (e.g. storage).[63]

Distribution of gas

On the market for distribution (via low pressure systems) of gas, DSOs offer gas transport services to distributors. Previous Commission decisions define this product market as encompassing the distribution of natural gas through a medium/low pressure pipeline network to final customers. As to the geographic scope, the market can be either taken to be national or local depending on the national regulatory framework of the Member State concerned. The region covered by the physical infrastructure grid in fact constitutes the narrowest possible delineation of the geographic market.[64]

According to the Commission practice, the market for the distribution of gas can be either national or local in scope depending on the national regulatory framework of the Member State concerned.[65] The distribution of gas constitutes a natural monopoly given that the distribution grid cannot be duplicated in any economically viable manner.[66]

[61] Case M.6984 – EPH / STREDOSLOVENSKA ENERGETIKA.
[62] Case M.3696 – E.ON/MOL.
[63] Case M.1673 – VEBA/VIAG.
[64] Case M.6984 – EPH / STREDOSLOVENSKA ENERGETIKA.
[65] Case M.6068 – ENI/ACEGASAPS/ JV.
[66] Case M.8358 – Macquarie / National Grid / Gas Distribution Business of National Grid.

Storage of gas

The Commission has consistently defined gas storage as constituting a separate relevant product market. At the same time, the Commission has considered distinguishing between so-called "pore" and "cavern" storage facilities as well as between storage facilities that are suited for H-gas on the one hand and for L-gas on the other. As to the geographic scope, the Commission has previously delineated national and regional product markets, whilst keeping reasonable account of a potential future broadening of the relevant geographic market in line with a further liberalisation of the European gas markets.[67]

Gas trading

Regarding the trading of natural gas, the Commission has in the past considered the existence of separate relevant product markets for: (I) the upstream wholesale supply of gas (comprising the development, production and upstream supply of gas to large importers/wholesalers); (ii) the downstream wholesale supply of gas (comprising the sale by non-integrated wholesalers to other wholesalers or downstream distributors); and (iii) the retail sale of gas.[68]

A special instrument for wholesale gas trading is a gas-trading hub (which) is a liquidity instrument that provides services to facilitate exchanges between actors on a market. Schematically, a hub facilitates trade between gas buyers and sellers, enabling them to find, at short notice, sufficient volumes of supplies or to sell excess capacity. In addition, trading at the hub differs notably from supply to retailers in that generally traders act as buyers and sellers.[69]

Gas supply/Retail

According to prior decisional practice, the gas supply activities have to be sub-divided in five markets, i.e. supply of gas to (i) dealers, (ii) gas-powered electricity plants, (iii) large industrial customers, (iv) small industrial customers, and (v) household customers. The distinction between these groups has been made according to certain factors such as their use of gas, profile and volume of consumption, connection to transmission networks and the purchase price.[70]

[67] Case M.6984 – EPH / STREDOSLOVENSKA ENERGETIKA.
[68] Case M.8660 – FORTUM / UNIPER.
[69] Case M.5585 – Centrica / Venture Production.
[70] Case M.5220 – ENI/ DISTRIGAZ.

The supply of gas to traders, RDCs and large customers is often referred to as "wholesale" supply, while the supply of gas to small customers is referred to as "retail" supply.[71]

As regards gas supply activities, following the opening of competition of the European gas markets, the Commission has also drawn distinctions between eligible and non-eligible customers, and between customers according to their annual gas consumption and their type of activity (e.g., power plants).[72]

Alike electricity, also for gas the Commission has distinguished market for eligible customers and non-eligible customers, as those markets are characteristic by different conditions of competition and are subject to different legislation.[73] Other segmentations have however also been considered depending on the specific circumstances of each country.[74]

As regards caloric value of natural gas, the Commission considers that the activities of (I) supply of H-Gas and L-Gas to dealers, (ii) supply of H-Gas and L-Gas to producers of electricity, (iii) supply of H-Gas and L-Gas to large industrial and commercial customers, (iv) supply of H-Gas and L-Gas to small industrial and commercial customers and (v) supply of H-Gas and L-Gas to household customers constitute separate product markets.[75]

The Commission considered that it is necessary to distinguish between L-Gas and H-Gas in all supply markets for final customers, since they (i) require the use of separate delivery infrastructures, both for transmission and storage, (ii) do not have the same characteristics or properties, and (iii) are not interchangeable for both customers and suppliers.[76]

In its previous decisions, the Commission has always held that the geographic markets for gas supply were not wider than national.[77]

The market of gas supplies to dealers in a particular case dealt with by the Commission was found to include the supply of gas to local authority utilities and third-party retailers, including national and international companies obtaining gas supplies that are subsequently sold to their final customers.[78]

The market for the supply of gas to electricity plants differs from other supply markets in that the competitive conditions are different, among other things

[71] Case M.3696 – E.ON/MOL.
[72] Case M.3696 – E.ON/MOL.
[73] Case M.3410 – Total/GDF.
[74] Case M.5183 – Centrex/ZMB/Enia/JV.
[75] Case M.6389 – ENI / NUON BELGIUM / NUON WIND BELGIUM / NUON POWER GENERATION.
[76] Case M.5549 – EDF/Segebel.
[77] Case M.5220 – ENI/DISTRIGAZ.
[78] Case M.6389 – ENI / NUON BELGIUM / NUON WIND BELGIUM / NUON POWER GENERATION.

because of the far larger and more variable consumption of gas by electricity plants than by big industrial customers.[79] Large power generators constitute a customer category with unique demand requirements in terms of gas quantities and consumption patterns.[80]

The market for the supply of gas to electricity plants differs from other supply markets in that the competitive conditions are different. Electricity plants consume far more gas than even the large industrial customers do. Moreover, the electricity plants are often directly connected to the transmission network, which distinguishes them from the small industrial and commercial customers and from the residential customers who are connected to the distribution network. Electricity producers can be distinguished from the large industrial customers by their consumption profile: whereas the large industrial customers have a relatively stable demand throughout the year, electricity plants' demand is subject to greater variation, particularly in function of the season. Consequently, electricity producers have flexibility needs different from those of other final customers.[81]

In an individual case the Commission indicated that a large power plant has a capacity of more than 50 MW.[82]

Large industrial and commercial customers differ from other industrial and commercial customers and from household customers, in particular in the volume of their demand, which largely exceeds the volumes required by the other types of customer. Accordingly, large industrial and commercial customers generally obtain lower prices and are often connected directly to the transmission network.[83]

Distinction between large industrial customers and small customers was carried out by the Commission in a specific case according to whether their annual gas demand exceeded 2 million cubic meters or were under this threshold.[84]

According to the Commission it is relevant to distinguish between small and large industrial customers, due to distinct consumption profiles and commercial relationships. In particular, the category of large customers is specifically targeted by new entrants.[85]

The market for the supply of gas to small industrial and commercial customers differs from the market for large industrial and commercial consumers due

[79] Case M.6389 – ENI / NUON BELGIUM / NUON WIND BELGIUM / NUON POWER GENERATION.
[80] Case M.3696 – E.ON/MOL).
[81] Case M.4180 – Gaz de France/Suez.
[82] Case M.4238 – E.ON / Pražská plynárenská.
[83] Case M.6389 – ENI / NUON BELGIUM / NUON WIND BELGIUM / NUON POWER GENERATION.
[84] Case M.5740 – GAZPROM/A2A/JV.
[85] Case M.3696 – E.ON/MOL.

to the volume of consumption and to the fact that small undertakings are not connected to the transmission network but rather to the distribution network11. At the same time, the market also seems to differ from supply to household customers as to the quantity purchased and the degree of fidelity to the default supplier usually characterizing these markets after liberalization.[86]

As regards gas supply to households, the Commission found that competition in this market – despite liberalization – has developed differently from other supply markets, including the market for small industrial and commercial customers. This was mainly due to the major role played by the default suppliers, to which all former customers of the local authority utilities who had not chosen any supplier were transferred once they became eligible and that many smaller industrial and commercial customers changed supplier than did household customers.[87]

4.2.2. Barriers to entry to the gas market

In practice the Commission distinguished as barriers to entry to the gas market for example complete booking of import capacities, very small volume of storage capacity available on the market, significant investment costs of building up a client base and requirements for composition of bank guarantees.[88]

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[86] Case M.6389 – ENI / NUON BELGIUM / NUON WIND BELGIUM / NUON POWER GENERATION.

[87] Case M.6389 – ENI / NUON BELGIUM / NUON WIND BELGIUM / NUON POWER GENERATION.

[88] Case M.5467 – RWE/ESSENT.

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YOUNG RESEARCHERS PAPERS

The Best Interests of the Refugee Child and Their Right to Family Reunification in Europe

Martina Delinčáková*

Summary: The paper gives an analysis of a legal framework of the best interests of the child principle applicable on EU member states when refugee children exercise their right to family reunification.[1] A legal analysis of the best interests of the child principle in the Convention on the rights of the child and relevant *soft law* documents is provided. It deals with the comparison of the regulation in the EU Charter of fundamental rights and the Convention on the rights of the child and an engagement of the Court of Justice of the EU with the Convention. Some practical examples of member states practices when applying Common European Asylum System legislation in the family reunification context are given, while assessing the compliance of these practices with the best interests of the child principle. Relevant case law of the CJEU and examples of national courts' decisions relating to interpretation of the best interests of the child principle are analysed to provide a complex legal framework of this matter.

Keywords: best interests of the child – Convention on the rights of the child – family reunification – refugee – subsidiary protection – international protection – Court of Justice of the EU – family reunification directive – recat dublin regulation – member states practice

1. Introduction

The principle of the best interests of the child is said to be one of the vaguest and most indefinite child's rights related principles of universal as well as regional international law. On one hand, the principle raises a lot of questions related to its interpretation and application. On the other hand, it is the vagueness that

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[1] The author uses the term refugee child(ren) in the material sense. It means this term includes all minors falling into the scope of the refugee definition stipulated in the 1951 Refugee Convention, regardless whether a formal decision on the refugee status has been made or not.

enables the priciple to be flexible and adaptable to various situations regarding child's rights. *"Flexibility comes at a price of vagueness."*[2] *Soft law* instruments issued by international organisations and by the European Union (hereinafter referred to as: EU) institutions have been created to help a better understanding of the priciple. At the level of universal international law, the guarantee that a primary consideration shall be given to answer the question – *what is best for the child?* – is laid down in article 3/1 of the Convention on the rights of the child (hereinafter referred to as: CRC). At the European Union (hereinafter referred to as: EU) level, we find the principle in the Charter of fundamental rights of the EU (hereinafter referred to as: EU Charter) – in its article 24/2. In relation to refugee children, the principle appears in secondary legislation of the Common European Asylum System (hereinafter referred to as: CEAS). The aim of the secondary legislation, as well as the CRC, is to protect the child from being separated from their parents. Should the child be separated, the legal instruments at issue protect the child by stipulating an obligation to states that family reunification shall take place in the shortest time period possible. The reunification of the refugee child with their parents is of a vital importance as the family represents a supportive environment. Such refuge facilitates the child to overcome the traumatizing experience they (have) faced in the country of origin, during flight or in the host country. A research has shown that post-traumatic stress disorder, depression and several anxiety disorders are the most common mental health problems refugee children face upon arrival in the host country.[3]

Lack of experience and the fact that a child is more prone to fall prey to physical and psychological strains than adults make the child vulnerable. Apart from this, the refugee child is vulnerable because of the situation they find themselves in. The protection of the family unity of the refugee child is therefore crucial. The imperative to protect children and prevent them from family separation collides with the practice of some EU member states. The states which have been mostly affected by the migration crisis have started to apply restricite policies on reunification of families of the third country nationals that have entered their territories since 2015. The states have the very right to control the (im)migration in(to) their territories, as this results from universal international law. However, the right is not absolute, especially when it comes to children. The margin of appreciation of states is limited and in particular situations when the refugee child is involved, the

[2] KHAZOVA, O. Interpreting and applying the bet interests of the child: the main challenges. In: Sormunen, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 27.

[3] VAN OS, C. The best interests of the child assessment with recently arrived refugee children. In: Sormunen, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 72.

competing interests of the individual/a group of individuals in exercising family life prevail over the interest of the state to control immigration to its territory. The EU member states have started to distinguish between persons who have been granted a refugee status and subsidiary protection beneficiaries, or have introduced limitations to the application of the preferential regime which was designed to facilitate family reunification bearing in mind the difficulties this part of a migrating population faces. However, they are bound by the EU legislation and by international law as well. In the first part of the paper the author focuses on the international legal framework of the states'obligations. The second part of the paper is devoted to the EU legislation and some examples of EU member states' interpretation and application of the best interests of the child principle in cases of family reunification when refugee children are involved.

2. Convention on the rights of the child

Convention on the rights of the child stipulates in its article 3/1 the obligation that *"in all actions concerning children[...]the best interests of the child shall be a primary consideration."*[4] This obliges courts of law, administrative authorities, legislative bodies, public and private social welfare institutions, as well as parents to apply the principle while taking actions.[5] The general comment no. 14 (hereinafter referred to as: GC14, general comment) issued by the Committee on the rights of the child (hereinafter referred to as: CRC Committee, Committee) in 2013 explains "actions" as all authoritative and non-authoritative decisions, failures to act, inactions or other measures directly or indirectly affecting children.[6] According to the Committee, the addressees of the obligation should take such actions that ensure a holistic[7] development of the child. While doing so, they should take into account short, medium and long term impacts of the actions on the child.[8] In the assessment and determination procedure, the individual

[4] Article 3/1 CRC, emphasis added.

[5] UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, p. 1)*, 29 May 2013, CRC /C/GC/14, p. 25. The Committee derives the duty from art. 18 CRC according to which parents have mutual responsibility for raising children. The responsibility to take care of child's best interests belongs to that kind of parents' responsibility as well.

[6] Ibid., p. 17, 19.

[7] The Committee means by the term *holistic* physical, mental, spiritual and moral psychological and social development. For further information see: *UN* Committee on the Rights of the Child (CRC), *General Comment No. 5 (2003) on General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, p. 4.

[8] Ibid., p. 4, 6, 16.

characteristics and specific circumstances of each case should be borne in mind. Application of the principle as a rule of procedure or an interpretative principle in cases of unclear interpratation of a provision should contribute to more effective use of the principle.

The concept of the principle is based on a presumption that the child is an object of protection, but a rights-holder as well, i.e. a subject having the right to be heard and to have their opinions taken into account[9] when providing the assessment and determination of the best interests. Adults (usually parents) act in the decision-making procedure merely because of lack of experience and judgement of the child. Thus they should act in a way that is *child-friendly* while giving the child the right to fully participate in the procedure and taking into consideration the views expressed by the child according to their age and maturity.[10]

Family unity of the child is guaranteed in articles 9 and 10. The horizontal application of the best interests of the child principle ensures that the family reunification article 10 talks about, should be in accordance with this principle as well. When talking about reunification of a separated family with a child/children, the states have the duty to deal with the family reunification applications *"in a positive, humane and expeditious manner."*[11] This obligation collides with the EU member states'practice as they have postponed the possibility to reunify the families separated during the migration crisis in 2015 and 2016. According to this provision, the states should react quickly and enable the reunification in the shortest time possible. As the paper shows further, because of EU member states' concerns about the loss of the ability to control imigration to their territories, their governments have passed legislations that apper to be not compatible with this commitment, nor with the prohibition of discrimination of any kind that is stipulated in article 2/1 CRC.

As the separation of the child from their family is an *ultima ratio* measure, the best interests principle should be applied in all cases involving refugee children. To prevent a longer lasting separation and to protect the refugee child at the same time, article 22 stipulates the obligation to ensure appropriate protection and humanitarian assistance in the enjoyment of the rights the refugee child is entitled to. Co-operation with UN and other humanitarian organisations should

[9] The right of the child to be heard along with the bests interests of the child, the prohibition of discrimination and the right of the child to life and survival create four *umbrella provisions* of the CRC with horizontal application which contribute to a better application of other rights stipulated in the CRC.

[10] ZERMATTEN, J. *Nejlepší zájmy dítěte v kontextu Úmluvy o právech dítěte: analýza textu a uplatňování Úmluvy.* In: Jílek, D. (ed.). *Cesty ke škole respektující a naplňující práva dítěte.* Brno-Boskovice: Česko-britská, o. p. s., 2013, p. 101.

[11] Article 10/1 CRC, emphasis added.

facilitate to trace parents or other members of the child's family in order to reunite the family.[12]

The high prority of the family unity of refugee children is stressed also in two latest general comments. The CRC Committee emphasizes the need to take appropriate measures contributing to the family unity. Should the separation occur, the authority acting or making the decision resulting in a separation of the refugee child from their family has to give sufficient reasons for such an action. A mere general reasoning by public security is not considered as sufficient.[13] In other words, the Committee imposes a primary obligation on states parties to prevent from family separation. Should the separation occur, it has to be in the best interests of the child. If not, the reunification of the child should take place as soon as possible using all the legal instruments the CRC and other relevant documents give the states.

3. The EU perspective

At the primary level of the EU legislation, the best interests of the child principle set in the EU Charter bind public authorities and private institutions. Unlike the CRC, EU Charter does not explicitely name courts within the range of addressees of the obligation. However, there is no doubt that administrative courts decising on family reunification matters of refugee children fall within the scope of "public authorities" addressees. The general comment no. 14 analysed above is a valuable source of interpretation which can be used also in cases of interpretative ambiguities when applying the principle stipulated in the EU Charter. The explanations relating to the EU Charter state that the principle in article 24/2 is based on article 3/1 CRC.[14]

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[12] Article 22 CRC.

[13] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4(2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration on Countries of Origin, Transit, Destination and Return,* 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, p. 27.

[14] European Union, *Explanations relating to the Charter of Fundamental Rights,* 14 December 2007. European Union, Official Journal of the European Union (2007/C 303/01), vol. 50, p. 25.

This proves that the EU law does not exist in a vaccum, but is affected by international law as well. If not the EU itself, then member states as they are parties to various conventions. The right to family life guaranted by article 7 EU Charter needs to be interpreted in accordance with the European Convention on Human Rights (hereinafter referred to as: ECHR). Interconnection of these two legal instruments arises from article 52/3 which states that the meaning and scope of the corresponding right shall be the same.[15] The protection given by the ECHR is a guarantee *de minimis*. Thus, the protection at the EU level can be more extensive.[16] The complexity of the legal framework is obvious from article 6/2 Treaty on the European Union since it anticipates accession of the EU to the ECHR.[17]

3.1. Secondary EU legislation – family reunification in the best interests of refugee children – theory v. practice

A more detailed regulation of the right to family reunification is found in the Common European Asylum System instruments – namely in Family reunification directive (hereinafter referred to as: FRD) and recast Dublin regulation (hereinafter reffered to as: DRIII). A brief overview is given to ensure a better understanding of practical cases which are described below.

3.1.1. Family reunification directive

FRD stipulates that third country nationals legally residing on the territory of EU member states have the right to reunify with their families applying a privileged regime in case they have been granted the refugee status. Such a provision may make an impression that the critical situation these find themselves in is sufficiently reflected. A closer look at the privileged regime reveals that member states are entitled to set limitations to the application of this regime. For instance, they may require of the refugee or their family member(s) applying for reunification to prove a sufficient and regular income, health insurance, adequate accommodation or compliance with integration measures in case the family reunification application is lodged after three months from being granted the refugee status.[18] The three months period has been criticised as a very short bearing in mind the circumstances. In many cases, it is impossible to gather all

[15] Article 52/3 EU Charter.

[16] Ibid.

[17] European Union, *Consolidated version of the Treaty on European Union*, 26 October 2012. European Union, *Official Journal of the European Union*, (2012/C 326/01), vol. 55, p. 19.

[18] Article 12/1 FRD.

the relevant official documents within this period and get to the embassy of the member state to lodge the family reunification application. For example, there is no German embassy in Kabul. It was closed after being severely damaged in an attack on 31st March 2017. Since then new applications for visa for family reunification purposes have to be submitted to one of the German embassies in India or in Pakistan.[19]

The EU member states mostly affected by the migration crisis have started to introduce these limitations and continuously keep on applying their restrictive policies when it comes to family reunification of refugees. According to the EU Fundamental Rights Agency (hereinafter referred to as: FRA) annual report, seven EU member states made legislative changes to family reunification in 2016. Five of them – Austria, Finland, Hungary, Ireland and Sweden – introduced the shorter period so that more favourable rules of chapter V of the FRD could be applied. Among other changes, two of these member states introduced a more restrictive notion of the term *family member* (including only nuclear family members) to narrow the application of the FRD.[20]

Germany and Sweden

The migration crisis in 2015 and 2016 created practical obstacles – for instance, the significant increase in number of family reunification applications caused that the waiting periods for an appointment to file such applications at German consulates in Turkey, Lebanon and Jordan reached a length of one year.[21] Germany also started to differentiate between beneficiaries of subsidiary protection and refugees in order to prevent from a massive influx of family members of migrants who had been coming to its territory since 2015. Based on a study carried out by the Council of Europe, from the estimated number of 800 000 persons who came to Germany in 2015, the vast majority of them was not able to formally apply for family reunification until March 2016.[22] The reason was very simple – a new legislation postponing family reunification of beneficiaries of subsidiary protection up to two years became effective at that time. When taking into consideration all periods applicable during the family reunification

[19] Informationsverbund Asyl und Migration. Criteria and conditions, Germany. [online]. Available at: http://www.asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and.

[20] European Union Agency for Fundamental Rights (FRA), *FRA Fundamental Rights Report 2017*, Luxembourg: Publications Office of the European Union, 2017, p. 135.

[21] Ibid.

[22] COSTELLO, C., GROENENDIJK, K., HALLESKOV STORGAARD, L. *Realising the Right to Family Reunification of Refugees in Europe.* Strasbourg: Council of Europe, June 2017, p. 34.

procedure, this group of beneficiaries of international protection might be separated for almost five years.[23]

Such a practice does not comply with the best interests of the child principle stipulated in article 5/5 FRD for two reasons. Firstly, the lengthy separation can severely disturb the family bond between the child and their parent(s) and while waiting for the reunification of refugees, the child might be endangered. One practical example is the case of *Tanda-Muzinga*, a congolese national legally residing in France – a refugee who applied for family reunification with his children and wife. Protracted procedures and inaction of French authorities caused that one of his minor daughter was raped and as a result became pregnant while waiting for three and a half years in Congo for the permission to enter and reside on the French territory and reunify with her father.[24] Even though it was an adult refugee who was applying for the reunification, the actions of the French authorities in terms of article 3/1 CRC and 24/2 EU Charter had a direct impact on the child in question. What is more, so lengthy separation is not in accordance with the obligation to proceed the family reunification application in an expeditious and positive manner laid down in article 10 CRC. Therefore, the French authorities did not act in compliace with the best interests of the child principle stipulated in article 24/2 EU Charter, 5/5 FRD and 3/1 CRC.

Secondly, the differentiation between the two groups of beneficiaries of international protection may be considered as discriminatory. Member states have started to misuse the fact that beneficiaries of international protection are not included in the personal scope of the FRD. The directive does not mention this group of third country nationals in need at all. Before the migration crisis, a lot of member states had the same legal regulation for refugees and beneficiaries of international protection. But when the crisis started, member states reacted to the mass influx by implementing different legal regimes for each of the categories. Among others, Germany and Sweden adopted temporary legislative measures excluding the subsidiary protection beneficiaries from family reunification.[25] According to the Swedish legislation effective since 2016, the beneficiaries of subsidiary protection are not entitled to family reunification. Exceptions include situations if Sweden was to breach its international commitments by not allowing to reunify the family – e.g. if the family member is in an exceptionally serious

[23] LAUBACH, B. *Subsidiary Protection instead of Full Refugee Status Complicates Family Reunification* [online]. Available at: http://legal-dialogue.org/subsidiary-protection-instead-full-refugee-status-complicates-family-reunification

[24] European Court of Human Rights, *Tanda-Muzinga v. France*, application no. 2260/10, judgement from 10 June 2014.

[25] European Union Agency for Fundamental Rights (FRA), *FRA Fundamental Rights Report 2018*, Luxembourg: Publications Office of the European Union, 2018, p. 131.

medical condition or is a victim of human trafficking.[26] This temporary regulation is effective until July 2019.[27]

When the German legislator introduced the restrictive legislation on beneficiaries of subsidiary protection in March 2016, it should have ceased in two years, i.e. in March 2018. However, the new law enacted in March 2018 taking effect in August 2018 set another legal barrier in the reunification of subsidiary protection holders. A monthly quota of 1,000 relatives who shall be granted a visa to enter Germany on the grounds of family reunification has been applied.[28] Such laws are contrary to the best interests of the child principle. They do not promote the reunification as this is the objective of the FRD according to the Court of Justice of the EU's (hereinafter referred to as: CJEU) case *Chakroun*. The margin of appreciation member states have should not undermine the objective of the FRD that is to promote promote the effectiveness of family reunification,[29] especially if children are involved.

The CJEU is rather reserved in its case-law in terms of reference to the CRC. It has found other ways of interpreting the best interests of the child principle, especially the EU Charter or ECHR.[30] Some authors say that its reservation is a mere consequence of a lack of training and expertise when talking about children's rights.[31] On the other hand, we can not just simply state that there is no reference to the CRC at all. The CJEU avoids to deliver judgements solely grounded on the CRC. The reference to the CRC is more of a superficial nature. The reason might be such that the CJEU believes that it is national courts' task to supervise the compliace of national legislation and international treaties in terms of children's rights and to deliver judgements with the reasoning based on the violation of the CRC provisions.[32]

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[26] MIGRATIONSVERKERT, Swedish Migration Agency. *Residence permits for those granted subsidiary protection status* [online]. Available at: https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-you-are-allowed-to-stay/Residence-permits-for-those-granted-subsidiary-protection-status-.html

[27] COSTELLO, C., GROENENDIJK, K., HALLESKOV STORGAARD, L. *Realising the Right to Family Reunification of Refugees in Europe*. Strasbourg: Council of Europe, June 2017, p. 35.

[28] Informationsverbund Asyl und Migration. *Criteria and conditions, Germany* [online]. Available at: http://www.asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and

[29] CJEU, *Chakroun v. Minister van Buitenlandse Zaken*, C-578/08, judgement from 4 March 2010, p. 43.

[30] STALFORD, H. The CRC in Litigation Under EU Law. In: Liefaard, T., Doek, J. E. (eds.). *Litigating the Rights of the Childs: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*. London: Springer, 2015, p. 226–227.

[31] Ibid., p. 220–221.

[32] Ibid., p. 222, 227.

In 2006, in *European Parliament v. Council* case, the CJEU characterized the CRC as a primary reference point in assessing compatibility of EU law with children's rights.[33] The CJEU in this case also stated that member states have a possitive obligation to authorise family reunification in case all the conditions set in article 7/1 and chapter IV of the FRD are met.[34] The boundaries of the margin of appreciation that member states have were set in joint cases *O., S. and L*. The FRD and article 7 EU Charter should be interpreted strictly and respecting the best interests of the child principle stipulated in article 24/2 EU Charter.[35] The recent case of A. and S. v. Staatssecretaris van Veiligheid en Justitie confirmed the special position children and refugees have in the family reunification context. The CJEU stated that it is member states obligation to examine the applications for family reunification of children in accordance with the best interests principle. They must ensure family reunification of thses so that the objective of the FRD – i.e. promotion of family reunification – is observed.[36] If we read the judgement in conjunction with the judgement of the *Parliament v. Council* case, it seems that member states have no discretion[37] when it comes to refugee children, and the obligation to respect the best interests of the child appears to be rather absolute. Some may argue that such interpretation might be subject to misuse.

Assuimg that the principle is absolute, it can be easily misused by the parties involved in the case. On the other hand, if we look at the principle so as member states have a certain amount of margin of appreciation, this may leave room for manipulation – meaning that member states could use it to justify their restrictive policies.[38] Looking back at the time when the FRD was being adopted, the approach of member states to protection of human rights has not changed since then. The very first draft presented in 1992 appeared to be too binding.[39] Two more proposals were prepared before the final version of the FRD was adopted. The third proposal reflected member states diverging opinions on family reunification of third country nationals and was much less ambitious. When reading

[33] CJEU, *European Parliament v. Council*, C-540/03, judgement from 27 June 2006, p. 37, 39.

[34] Ibid., p. 43.

[35] CJEU, *O. S. proti Maahanmuuttovirasto a Maahanmuuttovirasto v. L*., joint cases C-356/11 and C-357/11, judgement from 06 Decemeber 2012, p. 76.

[36] CJEU, *A. a S. v. Staatssecretaris van Veiligheid en Justitie*, C-550/16, judgement from 12. 4. 2018, p. 58.

[37] CJEU, *European Parliament v. Council*, C-540/03, judgement from 27 June 2006, p. 60.

[38] LLORENS, J. C. Presentation of General Comment No. 14: strengths and limitations, points of consensus and dissent emerging in its drafting. In: SORMUNEN, M. (ed.). The best interests of the child – A dialogue between theory and practice. Strasbourg: Council of Europe Publishing, 2016, p. 12.

[39] HAILBRONNER, K. KLARMANN, T. Family Reunification Diretive 2003/86/EC. In: Hailbronner, K., Thym, D. (eds.). *EU immigration and asylum law: A commentary.* München: C. H. Beck, Second edition, 2016, p. 302.

the FRD, the divergence between member states interests is visible as there are a lot of provisions setting only a low level of protection. What is more, The United Kingdom, Ireland and Denmark are not bound by the FRD at all.[40] More favourable regimes are subject to willingness of each member state, so that it can adopt a higher level of protection in national legislation.[41]

Even though the EU provides protection of human rights, we can see from the stance member states took during the drafting procedure and from their reactions to the migration crisis, that human rights protection at the EU level is still only a supplementary protection enabling the four freedoms of internal market and the EU is still more an economic integration entity. But since the situation of refugee children is in many cases very dangerous, the interests of this particular group of the migrating population should override those of member states.

3.1.2. Dublin regulation

The FRD cannot be used in cases of family reunification of those who have applied for recognition as refugees and the final decision has not been delivered yet.[42] In these cases, the DRIII might be applicable. The DRIII establishes the criteria for examining and deciding on international protection applications. In cases of families, whose members are present in different EU member states and have applied for the international protection, the DRIII lays down conditions facilitating the family reunification. In comparison with the FRD, recognition of the best interests of the child (the DRIII states the best interests of the minor) in the DRIII is more extensive. Since the respect for family life is of a high priority, the DRIII stresses the importance of family unity and the best interests of the child principle. In cases of separate families residing in different member states, a thorough examination of the international protection application is ensured, if only one member state is responsible for examination of the applications of the single family. To achieve this, so called *family tracing* should take place. This means a closer co-operation of member states for the purpose of faster identification of family members of the unaccompanied child within the territory of the EU.[43] Besides the provisions in the preamble of the DRIII,[44] the best interests of the child/minor are one of the guarantees given by the DRIII to minors. Provided that it is in the best interests of the child, the member state responsible for examining

[40] Recital 17 of the FRD Preamble.

[41] HAILBRONNER, K., KLARMANN, T. Family Reunification Diretive 2003/86/EC. In: Hailbronner, K., Thym, D. (eds.). *EU immigration and asylum law: A commentary.* München: C. H. Beck, Second edition, 2016, p. 304–306.

[42] Article 3/2 a) FRD.

[43] Article 6/4 DRIII.

[44] Namely recitals 14, 15, 16 of the DRIII Preamble.

the international protection application is the one where the family member(s) of the minor is/are legally present and is able to take care of the child. In other words, article 8 DRIII facilitates the family reunification during the international protection application procedure using the best interests of the child principle to facilitate the reunficiation of the minor's family, so that the separation is as short as possible. The responsibility for examining the application is realised by the take charge request and in certain cases needs to be consented in writing by persons involved.[45] In case the take charge request is made, it should take no more than 5 months to decise on the request and to transfer the family member into the member state which accepts the responsibility for examining the application.[46]

Germany

According to the FRA annual report, Greece faced significant delays in joining family members in Germany in 2017. Family members who should have been transfered to Germany on the family reunification grounds had to wait for the transfer for 13-16 months from the date of registration. The waiting period of 8–9 months since Germany accepted the responsibility was not compliant with article 29 of the regulation. The provision states that the transfer should take place within the period of 6 months. As FRA report shows, only 221 of the 4560 applicants accepted in Germany had been transfered. What is more, 60 % of those waiting for the transfer were children.[47]

The case of an unaccompanied Syrian minor – an asylum seeker residing in Germany – is a good example of such a practice. His parents and three brothers applied for international protection in Greece. The German governement accepted the responsibility for examining applications of the child's family members residing in Greece. As the period for transfer of these was about to expire, the minor requested an interim measure to enforce the family reunification on the German territory. Legal representative of the minor asylum seeker presented evidence proving that German authorities had been determining the amount in which family reunification could take place in Germany. The bilateral agreement between Greek and German authorities on the number of persons transferred to Germany on family reunification grounds is not in accordance with the DRIII. Following the judgement of the CJEU in *Mengesteab*[48], the asylum court stated

[45] For instance – articles 9, 10, 16/1, 17/2 DRIII.

[46] For more information see articles 21, 22, 29 DRIII.

[47] European Union Agency for Fundamental Rights (FRA), *FRA Fundamental Rights Report 2018*, Luxembourg: Publications Office of the European Union, 2018, p. 131.

[48] CJEU, *Tsegezab Mengesteab v. Bundesrepublik Deutschland*, C-670/16, judgement from 26 July 2017.

that asylum seekers have a subjective right to be transferred within the period stated in the DRIII and no DRIII provision allows member states to enter into agreements limiting the numbers of transfers. On the contrary, member states are obliged to allow the transfer of persons and ensure that it takes place the quickest time possible. The German court[49] ordered the transfer of minor's family members within the DRIII six month period with a reasoning based on the best interests of the child principle and the right to family life.[50]

France and the United Kingdom

Another example of the best interests of the child application is that of three minor and one major dependent asylum seeker who resided in the French camp near Calais, called „Jungle". Due to delays of French authorities when applying the DRIII, these four asylum seekers asked the British authorities for a transfer to their territory as they had major siblings who had been granted a refugee status and who could have taken care of them. According to the facts about the situation in the refugee camp given by the persons in question, French authorities did not inform them on the possibility to apply for international protection, on their right to a legal representative, etc. Because of the mistrust they had of the French asylum authorities, they refused to apply for asylum in France and wanted to realise their right to family life from article 8 ECHR. They wanted to circumvent the Dublin system and sought family reunification with their relatives in the UK by sending informal letters to the authorities and willing to lodge the international protection applications after the tranfer to the British territory. In the letters sent to the British authorities, they explained their exceptional steps towards family reunification by stating that the practice of French asylum authorities was affected by political interests and there was a true doubt that the procedure about their potential applications would be lenghty and that the take charge request might not be submitted. As their legal representatives stated, reunifying with their family members in the UK via article 8 ECHR would be faster and enable a smoother recovery after all the traumatizing situations they had experienced.

The case was subject to proceedings before British courts of two instances. The first instance court approved the transfer stating that there would have been a violation of article 8 ECHR, if it had refused to allow the transfer. Altough the

[49] For further information see: Wiesbaden Administrative Court decision no. 6 L 4438 / 17.WI, from 15 September 2017.

[50] EDAL. *Dublin Family Reunification: neither subject to limits nor delay – Note on the Administrative Court Wiesbaden, decision from 15 September 2017* [online]. Available at: http://www.asylumlawdatabase.eu/en/journal/dublin-family-reunification-neither-subject-limits-nor-delay-note-administrative-court

appelate court was of a different opinion in terms of circumvention of the DRIII provisions, it did not order to transfer the persons at issue back to France since this would not be in their best interests.[51]

4. A Dutch pilot study – an inspirational example

The Study Centre for Children, Migration and Law in the Netherlands carried out a research to improve a methodology for the assessment of recently arrived children. The outcomes show that many of unaccompanied children experienced a severe distrust when talking to authorities. They did not want to talk about their lives, experiences they had faced, not even about their families.[52] As the article 10 CRC stipulates, the procedure about family reunification application should be expeditious. However, building trust with recently arrived refugee children takes some time and presence of different people involved in the procedures may cause confusion about their roles. Since they experience instability in their lives (among others the loss of their families), they need some time to accommodate in their new country of residence. Therefore it is important to give them time (the study shows that approximately 4 weeks are necessary for acclimation before the child is able to talk about their experiences),[53] inform them in a *child-friendly* way on their rights and on people's roles in the procedure. The trust-building process takes some time and involves a psychologist and a social worker as well. The study shows that it is important to let the child decide about certain things (e.g. a place of the interview, an option whether to bring the best friend with them, etc), to use other techniques (e.g. drawing) to express their feelings about traumatizing things, to meet with the child on more that one occasion, etc.[54] As the outcomes of the Study Centre's research reveal, the adjusted methods of the best interests of the child assessment have broght better outcome and enabled an easier communication with the refugee children. The more information the professionals have about the child, the more precisely

[51] For further information see: Judgement of the Royal Courts of Justice in case *Secretary of State for the Home Department v. ZAT and others* (C2/2016/0712) from 06 August 2016 and judgement of the Upper Tribunal of the United Kingdom, Immigration and Asylum Chamber in case *ZAT and others v. Secretary of State for the Home Department* (JR/15401/2015, JR/15405/2015) from 29 January 2016.

[52] VAN OS, C., ZIJSTRA, E., KNORTH, E. J., POST, W., KALVERBOER, M. Methodology for the assessment of the best interests of the child for recently arrived unaccompanied refugee minors. In: Sedman, M., Sauer, B., Gornik, B. (eds.). *Unaccompanied Children in European Migraion and Asylum Prcatices – In Whose Best Interests?* Oxon: Routledge, 2018, p. 67.

[53] Ibid., p. 71.

[54] Ibid., p. 70.

they can predict the effects of the actions that are to be taken and decide what is in their best interests. To achieve this, well-trained professionals need to be engaged with the work with these children.[55] Van Hooijdonk expresses it well: *"… the background, knowledge and communicative skills of the individual who performs the best interests assessment may be more important than the tool that is used for the assessment…"*[56]

5. Conclusion

Comparing the application of the best interests of the child principle by EU member states, it is evident that there is no clear definition of the principle and it does cause problems. Authorities interpret the principle differently and the states' interests in the control of immigration into their territories still have an impact on the interpretation. As the British example illustrates, the concerns about far-reaching consequences, if giving a higher level of protection or creating new legal ways of family reunification possibilities, influence the member states application of the principle. EU restrictive policies are a setback in a full and effective application of the best interests of the principle. It needs to be accepted that it is not possible to elaborate a simple general interpretation of the priciple, since every situation is different. But the principle should be applied by the addressees of the obligation in the best possible way bearing in mind all the abovementioned methods. The best interests of the child is not a discretionary concept and the assessment and determination should be founded on objective criteria. As Llorens states: *"…the assessment and determination of the best interests of five different children should prompt us to make five different determinantions (given that no two children are alike in the same circumstances and in the same situation). But the assessment and determination of one child's best interests made by five adults individually in the adoption of a decision should arrive at the same result."*[57]

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[55] For more information, especially about the ELSA-recently arrived refugee child – case see: VAN OS C., ZIJSTRA, E., KNORTH, E. J., POST, W., KALVERBOER, M. Methodology for the assessment of the best interests of the child for recently arrived unaccompanied refugee minors. In: Sedman, M., Sauer, B., Gornik, B. (eds.). *Unaccompanied Children in European Migraion and Asylum Prcatices – In Whose Best Interests?* Oxon: Routledge, 2018, p. 59–81.

[56] VAN HOOJIDONK, E. Children's best interests: a discussion of commonly encountered tensions – A report by the Children's Rights Knowledge Centre. In: SORMUNEN, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 41.

[57] LLORENS, J. C. Presentation of General Comment No. 14: strengths ans limitations, points of consensus and dissent emerging in its drafting. In: Sormunen, M. (ed.). *The best interests of*

Such application of the priciple can be achieved only with the staff is well-trained on treating with children who have experienced traumatising situations, by providing child-friendly information and realising the right of the child to be heard via the child-friendly interview. It is important to predict potential consequences before the decision is made. The multidisciplinarity of the staff involved in the procedure is of a great importance as each of the persons is an expert in a different field and can contribute to the outcome of the decision-making process by their specific skills. A trained multidisciplinary team of professionals – i.e. a lawyer, a psychologist, a pedagogue, maybe medical or other professionals depending on the situation – taking into consideration the holistic development of the child and short/medium/long term impacts of the actions are a key to success.[58]

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[58] KHAZOVA, O. Interpreting and applying the best interests of the child: the main challenges. In: Sormunen, M. (ed.). *The best interests of the child – A dialogue between theory and practice.* Strasbourg: Council of Europe Publishing, 2016, p. 30.

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A Brief Comparison of the European and the American Approach to Predatory Pricing*

Eva Zorková**

Summary: Predatory pricing might be called as „the trickiest antitrust problem“ due to the power of predatory pricing to lay bare the most controversial features and deepest contradictions of antitrust law – „using competition to destroy competition“ and „probihiting competition to foster competition“ – those are the callenging statements that pust to the extreme the law and economic of the predatory pricing, since those two statements really make sence only when it comes to the predatory pricing. This article aims to provide a brief explanation of divergent approaches to predatory pricing within the European jurisdiction and the American jurisdictions. The situation in the Czech Republic is mentioned as well although the Czech decisional practice is in line with the European decisional practice in the field of predatory pricing.

Keywords: predatory pricing – comparison – recoupment – cost level tests – profitability – case law – Student Agency versus Asiana Case

1. Introduction

Predatory pricing is an unlawful business behavio our within the broader category of unlawful exclusionary practices. It is a practice whereby an undertaking prices its products so low that competitors can not live with the price and are driven from the market. Once the competitors are excluded from the relevant market the undertaking hopes to increase prices to monopoly levels and recoup its losses.

The fact that a low price may not necessarily be a good price is the chief reason for taking predatory pricing law and economics as one of the most exiting vessel for saling the turbulent waters of antitrust law.[1] The controversy of this

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1 GIOCOLI, N. *Predatory pricing and antitrust law and economics: A historical Perspective.* 1st edition, Taylor & Francis Ltd, p. 5.

topic is based on a different approach to predatory prices, since competition authorities in the European Union and the United States have a very different approach in the assessment of predatory pricing.

The intractable problem for competition authorities is to identify where robust price competition ends and predatory pricing begins. As such, predatory pricing is one of the most dauting subject confronting nations with competition policies. Wrongfully identifying robust price competition as predatory pricing as well as failing to identify predatory pricing when it occurs are both prejudicial to customer welfare, but many competitors agrue that in respect of predatory pricing the avoidance of wrongfully identifying robust price competition as predatory pricing should be the priority.

There are also different opinions about how often predatory pricing actually occurs. Some economists have argued that it is hardly ever a rational business strategy and that it is very rare. The main stream view nowadays is that predatory pricing can be a rational strategy where certain conditions are met. As such, if it is accepted that predatory pricing does occur the problem is to identify it correctly and prove successfully.

Most predatory pricing theory centres around costs levels. The basic concept of predatory pricing is that a dominant undertaking prices below cost. The difficulty with this is that an undertaking's costs are usually difficult to compute and so is the relationship between its costs and prices. Particular problem arise where an undertaking uses the same production capacity to make different products. Discussion, which cost test is the best one has not yet reached a consensus, and even the courts have not yet strived to one approach within their decisional practice. The consensus is that the sale prices can not be automatically deduced only in accordance with price and cost comparison, since it is very important to analyze all other features of predatory behaviour, such as predatory intent, structure of the relevant market and market shares of other undertakings within the relevant market, etc.[2]

1.1. The profitability of predatory pricing

In general, there are different opinions about how often predatory pricing actually occurs. Since the predator strategy is to sacrifice profit and its maximalisation in the short term in order to get monopoly profits in the long term. Some economists are asrguing that predatory pricing is very hardly a rational business strategy and as such i tis very rare. The main stream view nowadays is that predatory

[2] JONES, A., SUFRIN, B. *EU Competition Law. Text, Cases and Materials*. Oxford: Oxford University Press, 2014, p. 403.

pricing can be a rational strategy where the conditions are right, for example in new economy markets.[3] When it comes to the profitiability of predatory pricing, several arguments can be founf, there are the most common:

- At least in some circumstances established firms will find it profitable to practice predation by reducing their prices to deter entry to the relevant market.
- Predatory pricing will rarely or never be profitable because the direct cost of predatory price cutting will always be prohibitive.
- Predatory pricing will rarely or never be practiced because it will almost always be less profitable then buying the rival out.
- Predatory pricing will never be profitable because the predatory threat will never be credible in a finite game of complete and perfect information.
- Predatory pricing will be profitable only for dominant firms with monopoly power and only when „conditions of entry" to the relevant market are difficult, i.e. barries to entry the relevant market are high.[4]

1.2. Comparison of approaches

Predatory pricing strategy can be found in both jurisdictions, but the approach to this issue differs in terms of historical development and even nowadays it is still characterized by considerable differences. Therefore, it is appropriate to find and evaluate the differences and similarities of these two major competition law jurisdictions, European and American. Since the main aim of my research is to compare the differences in the interaction, I will focus on following three basic aspects.

1.2.1. Generally different approach to competition

Primary EU law, ie. article 102 TFEU, applies only to undertakings in a dominant position. The fact that an undertaking has a dominant position on the relevant market is not in itself unlawful unless there is an abuse of a dominant position. This led to the evolution of the European concept of special responsibility of a dominant competitor. The aim is to prevent all abusive and exclusionary behaviour by dominant undertakings. It is not about protection of less efficient undertakings from dominant competitors, it is more about protection of the competition as such (and, as a result, a protection of customers and their welfare). On

[3] JONES, A., SUFRIN, B. *EU Competition Law. Text, Cases and Materials.* Oxford: Oxford University Press, 2014, p. 402.

[4] MARKOVITS, R. *Economics and the Interpretation and Application of U. S. and E. U. Antitrust Law Volume I Basic Concepts and Economics-Based Legal Analyses of Oligopolistic and Predatory Conduct*. Springer-Verlag Berlin and Heidelberg GmbH & Co. KG; year 2014, p. 517–530.

contrary, in the US a more aggressive competition in the business environment is acceptable and it is not desirable to suppress this feature.In the US, a monopoly position (obtained in accordance with law, coming from the competitor's ability to grow and its development) is desirable. A successful competitor can never be punished for his success. A high market shares (and thus a possible dominant possition on the relevant market) are not in itself illegal, but a monopolization and an effort to reach it are strictly prohibited.

For these reasons, following questions might be asked:

- Can a toleration of aggressive competition be positive?
- Or, is it better to rely on enforcement of strict competition standards?

The fundamental problem lies in situation when competition laws set its standards too strictly because the dominant undertaking will feel threatened and may also abandon competitive behavior, for example the undertaking may give up price reductions that could have a posittive effect on the relevant competiton as well as on customers. At the same time, less effective competitors may feel support on strict competition standards and these price reductions may be judicially challenged as a predatory behavior, which would, at the end of the day, force the dominant undertaking to raise prices, even if it did not commit any illegal act. The fact is, that most dominant undertakings will always prefer to avoid litigation (due to costs, long-lasting court proceedings). As such, bringing the lawsuit can be an effective tool against the dominant undertaking, even if the action does not have a chance to succeed. It can also be an opportunity to gain any important internal competition information, and so on.

2. From different historical perspective to current legal bases

The US is considered to be the cradle of competition law. The American concept is much older than the European one, since *the Sherman Act* was adopted already in 1890. In 1939 *the Robinson-Patman Act* was adopted, which specified the prohibition of price discrimination. In the US, there are four relevant Acts which, although adopted as independent, need to be seen in a comprehensive way. Besides, in case of common law system, due to a rule of precedents, the key case law doctrines have provided the ruling precedents for many decades. The US Supreme Court produced its 1967 *Utah Pie decision*, which was a true milestone and, later in 1994, *Brook Group decision* which is considered to be a leading case of the US predatory pricing approach.

While European competition law has developed since 1950's in the context of economic integration and requirements to remove barriers to trade between EU Member States and the beginning of free movement of goods. As such, the European concept is younger, as well as the competition legislation. The European judicial practice started to deal with predatory pricing in 1991 when the first case of predatory pricing appeared. In that time, the basic rules for assessing of the predatory behavior were defined. So called *AZKO rules* are based on assessing the alleged predatory pricing by comparing prices, average variable costs and total costs. One important element of predatory behavior was established as well, it is the intention of the dominant undertaking to eliminate the relevant competition. About five years later, the European Court of Justice (hereinafter the ECJ) dealt for the first time with the question of recoupment as a necessary condition of predatory pricing. The ECJ finally stated that the reimbursement of suffered losses (ie. recoupemnt) is not a necessary precondition for predatory pricing.

The importance of case law and secondary legislation remains a consistent feature of both compatition systems. Especially in the US, key case law doctrines have provided the ruling precedents for many decades. Concerning the secondary law in the EU, those are in particular EC Guidelines that are providing a guidance for the proper interpretation of primary law provisions. A kind of a secondary law dealing with predatory pricing could be found within the US legislation as well. For example, Guidelines of the US Ministry of Transport (dealing with an air industry) have also determined that predatory behavior is a dangerous anti-competitive practice.

3. Case study comparison in relation to recoupment

The US judicial practice requires the recoupment as a necessary precondition for predatory pricing. This strict rule on proof of recoupment was set by the Brook Group decision, since so called Two-Step test must be applied to any alleged predatory behaviour of the undertaking. Firtly, the price is set below the level of reasonable cost, and secondly, there is a high probability that an undertaking will replace the losses suffered in the first stage of predatory behaviour through a significant increase in prices after (all) other competitors have left the relevant market. This is a necessary condition that any plaintiff must prove and it appears to be highly problematic.

Thus, the US judicial practice recognizes recoupment as a prerequisite for qualifying a prohibited act as predatory, while in the EU within the reasoning in Tetra Pak II case, the ECJ declared that the condition of recoupment is not

considered as a necessary prerequisite proving price predation. To prove predatory pricing, it is sufficient to prove the probability that the undertaking will be able to compensate their losses in the future. As such, in the EU, it is sufficient to prove a real threat of damage to the relevant competition, which may be much easier for the plaintiff.

At this point a practical collision of both systems can be found. The relevant case law, *Tetra Pack II* case (*C-333/94 P*) and *Brook Group* case *(*509 U. S. *209*) are both dated in the first half of the 90's. Since that time, a practical collision of EU concept and US concept can be seen.It is almost certain, that a particular undertaking (competitor) would meet any actions brought against it for its predatory practices in the EU, while in the US, the same undertaking would not have met any actions for the same predatory practices behaviour.

It is a fact that due to the current conditions for assessing predatory pricing, it is extremely difficult to prove such an abusive behaviour, and therefore ultimately less and less abusive practices are considered as forbidden in the US. Since the Brook Group judgment (since 1994), no plaintiff has ever won a case of challenging predatory behavior, precisely due to the inability to prove all conditions of recoupment. Plaintiffs do not actually bring the actions because they are aware of the fact that a chance to win the case is very low. The US approach is likely motivated by the fear that an undertaking will be unfairly convicted of a predatory behaviour, which would negatively affect the relevant market. However, it is necessary to admit that certain skepticism of predatory pricing as a business strategy is a characteristic of the US approach.

Whereas in Europe, within the European development in the field of predatory pricing during the last two decades, an interesting shift in the European approach to the predatory prices can be seen. Already in 2010, in the *Compagnie Maritime Belge case* (C-395/96 P and C-396/96 P), the Advocate-General proposed that the recoupment should become one of the core components of the predatory pricing test, but the ECJ disagreed. The same situation happened again in 2009 within the *France Télécom case* (C-202/07 P). Inter alia, the ECJ had ruled again not having a strict recoupment requirement.

Arguments supporting the present ECJ position, are as follows:

- It is often difficult to prove what the dominant undertaking could do succesfully at an unspecified time in the future. It would be necessary to show that there would be no entry by more competitive or more determined rivals, and that when the dominant undertaking increased its price, it would not attract new entry. It would be also necessary to prove that although buyers were accustomed to low prices, they would be willing to pay significantly higher ones in the future. All of this suggest that the burden of proof is crucial.

- Predatory pricing by a dominant undertaking may have anti-competitive effects even if the dominant undertaking does not or could not recoup its looses The undertaking may discourage market entry, or causes exit, by signaling to actual or potential competitors that their profitability in the market will be low as long as the dominant undertaking is price leader in the relevant market.
- Predatory pricing may have anti-competitive effects even if the rival is not forced out of the relevant market, but instead decides to raise its prices to approximately the prices of the dominant company. In particular, in a concentrated market predatory pricing may demonstrate the dominant undertaking's ability and willingness to retaliate against aggressive pricing by a competitor, and so may give rise to oligopolistic pricing. In such circumstances it would be extremely difficult to prove that recoupment had occurred, even i fit had.

Generally speaking, opinions of Advocates-General are innovative and represent the development of the EU law, or, where it is appropriate, point to its defects. It is also a valuable source of information on EU law, since they often give a retrospective overview of development within the EU law and the ECJ's case law on the issue. Opinions of Advocates-General also often precede the ECJ's own decisional practice, since they are followed by the ECJ in approximately 80 percent of cases. And so, although in case of predatory pricing the ECJ has decided not to follow the Advocate-General opition, it is more and more than obvious that the EU approach to predatory pricing is developing and can not be expected to stay static in the future. In my opinion, in today's increasingly globalized world, the situation in which predatory behaviour is treated so differently is not sustainable for a long time.

Although it might be hard to predict a possible future development of predatory pricing in Europe these questions logically arise for everyone who is interested in the subject:

- What will be (most likely) the approach to predatory pricing in Europe within the coming decades? In which direction the European competition law should be moved in this area?
- Should the ECJ judges follow the Advocates-General Opinions or should they keep on holding a strict recoupment requirements? What is better for the European business environment, and why?

4. Predatory pricing situation in the Czech Republic

In the Czech Republic, there is a ban on applying predatory pricing regulated in the Competition Protection Act, section 11, subsection 1, letter e)[5]. Of course, it is clear that predatory pricing conduct must be interpreted in the same sense as the European Union's decision-making practice. It is necessary to meet the following conditions:

- firstly, there must be a long-term, or systematic, offering of low-priced products or services, and
- secondly, such conduct must be capable of distorting effective competition within the relevant market. The predatory competitor is later able to compensate its losses by increasing its own prices. Therefore, the predatory behavior is not in a long run perspective beneficial for consumers although at the beginning it may seems to be „consumer friendly" due to price reductions.

The legal prohibition of predatory pricing has initially caused a criticism in the Czech Republic, mainly due to its rather vague content, both in terms of the assessment of inappropriateness of the conduct as well as in terms of what the distortions of competition within the relevant market should be(means) in this case. The legal provision mentioned above also does not precisely define the concept of 'unreasonably low price'. And so, it was not clear according to which given the costs (variable, average or fixed) the value of the unreasonably low price should be judged. The explanatory approach of the Czech Office for Protection of Competition to this provision was not clear for a long time, since it took quite a while to dealt with predatory pricing case in practice.[6]

The first (and so far the only) Czech case dealing with predatory pricing is *the Student Agency versus Asiana Case* often described as "the combat between David and Goliath" in the press, in particular because of the unequal position of both competitors in the relevant market and their unequal market shares. It is a case of an abuse of a dominant position by the STUDENT AGENCY competitor which created barriers to entry the relevant market and was also selectively reducing its prices within the national bus line service market on the Prague – Brno route from December 2007 to March 2008. The competition was of a negative nature (with the intention of eliminating other competition from the relevant market) and consisted of applying selective price reductions (and therefore the long-term use of unreasonably low prices) for passenger tickets on bus connections which

[5] Law no. 143/2001 Sb., zákon o ochraně hospodářské soutěže a o změně některých zákonů (zákon o ochraně hospodářské soutěže).

[6] KINDL, J., MUNKOVÁ, J. *Zákon o ochraně hospodářské soutěže. Komentář.* 3. přepracované vydání. Praha: C. H. Beck, 2016, p. 215–216.

were coincided with the shedule of ASIANA's bus connections on the same route. The behavior described above was found to be capable of distorting competition on the relevant market. The selective reduction of prices to the sub-cost level occurred in response to prices of passenger transport set up by competing undertakings. STUDENT AGENCY also strengthened its transportation capacity of the connections in competitive shedule by deploying buses and the price on the route was set on a sub-standard basis to 50 CZK, later increased to 95 CZK for a one-way ticket.

While assessing this case, the Office for Protection of Competition had in most relevant aspects referred to the so-called more economic approach and had applied the cost level test, essentially in line with the European decision-making practice and in line with the concept of equally effective competitors.[7] This approach was subsequently confirmed by the Czech administrative courts.[8] It can be considered as an interesting fact, that according to the opinion of the Regional Court in Brno, the Office for the Protection of Competition failed to reliably prove that the train transportation service and the bus transportation service on the Prague – Brno are two separate relevant markets. Therefore, if it was not sufficiently proved that the market for public bus transport is in fact a separate relevant market in relation to the period under consideration, then the position of the competitor (STUDENT AGENCY undertaking) can not be considered as dominant and so it is not possible to impose so-called special responsibility of the undertaking for infringement of the dominant position on the relevant market.

However, the Supreme Administrative Court did not agree with the legal opinion of the Regional Court. The Supreme Administrative Court confirmed all conclusions of the Office for Protection of Competition, mainly the definition of the relevant product market. The relevant product market was finally defined by which the approach of the Office for Protection of Competition was confirmed. The relevant product market was defined as a single an separate passenger bus market, which also resulted in the dominant position of STUDENT AGENCY undertaking within the relevant market and thus the abuse of its dominant position by creating barriers to entry the relevant market in order to eliminate other competitors from the relevant market with the assumption of later compensation for the losses suffered (so called recoupment) was confirmed as well.

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[7] The First Instance Decision of the Office for Protection of Competition dated on 3rd November 2010, No. ÚOHS-S162/2008/DP-4490/2010/820/DBr and Decision of the Chairman of the Office for Protection of Competition dated on 18th February 2011, No. ÚHS-R169 / 2010 / HS-2676/2011/310-PGa.

[8] Judgment of the Regional Court in Brno dated on 9th November 2012, No. 62 Af 27/2011 and Judgment of the Supreme Administrative Court dated on 30th September 2013, No. 2 Afs 82/2012-134.

The fact is, that none of the Central European countries have a lot of experiences with predatory prices and its assessment. The Czech Republic, as a member state of the European Union, is required to apply its national competitive legislation in line with the EU primary law and case law, since the main purpose is to achieve the full compatibility and the euroconform interpretation of the national competition law. All of the above mentioned tendencies were clearly apparent when analyzing the case.

5. Conclusion

Concerning the current state of knowledge, there is a considerable amount of foreign (english) literature dealing with competition law, namely dealing with the phenomenon of predatory pricing, both from an economic and legal point of view. For this reason, the current state of knowledge can be considered as highly developed. The monographs focus on the analysis of the theoretical basis for assessing predatory prices, as well as on the relevant case law. There is also a sufficient number of expert papers and articles dealing separately with the American and the European approaches to predatory pricing. It is not exceptional to find a paper dealing with a specific national case law or a particular situation in the field of predatory pricing within a particular European state. To my best knowledge, a comprehensive analysis of the European and the American approach to predatory pricing, including a detailed case law comparison has not been so far published in English.

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KINDL, J., MUNKOVÁ, J. *Zákon o ochraně hospodářské soutěže. Komentář.* 3. přepracované vydání. Praha: C. H. Beck, 2016, 860 pages. ISBN 978-80-7400-627-2.

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European Law and Regulation of Energy Security and Natural Gas Flows in the Light of Current Challenges

Mykola Dobysh*

Summary: Russia's plan to build Nord Stream 2 pipeline before the end of 2019 as well as the construction of EUGAL, TurkStream and its continuations to Bulgaria and Greece aim to weaken Ukrainian economy, make Eastern and Central Europe more vulnerable, and disrupt the EU solidarity and Transatlantic strategic cooperation. Despite commercial gains for Germany, this project together with EUGAL undermines principles of subsidiarity and solidarity in the EU. Geopolitical implications of Russian natural gas trade politics require stronger legislation and energy market regulations in the EU. It could be done in the framework of the existing Third Energy Package and Gas Directive or with a new agreement with Russia and Ukraine.

Keywords: Nord Stream 2 – EUGAL – energy security – energy strategy – Russia's energy geopolitics

1. Introduction

Russia plans to buildNord Stream 2, a new natural gas pipeline to Europe through the Baltic Sea doubling capacities of the existing Nord Stream pipeline (55 bcm). Germany, Sweeden, and Finland gave permits for the construction of Nord Stream 2 pipeline in their exclusive economic zones and territorial waters. Only in Denmark, the final decision is still under debate. However, Gazprom suggests re-routing of the initial plan from Denmark territorial waters to international waters. Russia is in a hurry with their new gas infrastructure plans because at the end of 2019 the Agreement for natural gas transportation between Gazprom and Naftogaz Ukraine ends. Current Agreement gave Ukraine the opportunity to win the Stockholm court case for the compensation of the unused but guaranteed volumes of the transit via Ukraine.

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Ukrainian gas infrastructure was only 61% loaded in 2017[1] but still was the main route for Russian gas to Europe. Russia plans to construct several new pipelines before the end of 2019: (1) Nord Stream 2 (55 bcm), EUGAL (55 bcm), TurkStream (31.5 bcm), pipelines from TurkStream to Bulgaria and Greece. Planned transit of 55 bcm via Nord Stream 2 and EUGAL is more than the whole transportation of Russian gas to Europe via the main line in 2017, which goes through Ukraine and the Slovak Republic (52.5 bcm). The rationale of the Nord Stream 2[2] states that it is a commercial project without political implications and re-routing strategies. However, in connection with EUGAL project, it is clear that geographically they are oriented not on the growing natural gas markets in the Netherlands and United Kingdom (due to a decrease in natural gas production in those countries), but on Central and Eastern Europe (Austria, Czech Republic, Slovak Republic, Hungary), Italy, and Balkan states (Slovenia, Croatia, Serbia). The growing demand in Germany could be assured by existing infrastructure in Ukraine, Slovak Republic, Czech Republic, and Austria. The rationale of the first Nord Stream project was the same as for the Nord Stream 2 pipeline; however, after its launch in 2011 the transit through Ukraine decreased by 18.7 bcm in one year. The significant part of that decrease was cutback of gas transit from Russia to Germany via Ukraine-Slovak Republic-Czech Republic line and Ukraine-Slovak Republic-Austria line. According to International Energy Association data, in 2017, only 2 bcm of total 53.44 bcm of Russian natural gas supply to Germany was going via Ukraine.

Moreover, in April 2018 first part of the TurkStream pipeline (16.75 bcm of 31.5 bcm) was already constructed and it will cut off 12–13 bcm of annual transit via Ukraine, Romania, and Bulgaria to Turkey. In June 2018, Bulgaria started a tender for the construction of the pipeline to the border with Turkey to make a connection with the TurkStream[3], which contradicts Brussels plans to build LNG terminal in the port of Varna for the alternative to Russian gas in Central, Eastern, and South Europe. At the same time, Bulgarian politicians delay construction of the interconnector from Greece that is aimed to transport natural gas from Azerbaijan, which will go via Southern Gas Corridor[4].

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1 Estimations based on International Energy Association data on transit via Ukraine in 2017 and 142 bcm capacity of the Ukrainian gas transportation system. Data available online at http://www.iea.org/gtf/#

2 A New Pipeline for Europe's Energy Future. Nord Stream 2 Project official website. Available at: https://www.nord-stream2.com/project/rationale/?

3 Bulgaria to build new link to Turkey in hope of Russian gas. REUTERS. Available at: https://www.reuters.com/article/bulgaria-turkey-pipeline/bulgaria-to-build-new-link-to-turkey-in-hope-of-russian-gas-idUSL8N1TS2WM

4 SOUTHERN GAS CORRIDOR. Available at: https://www.tap-ag.com/the-pipeline/the-big-picture/southern-gas-corridor

Therefore, there are clear political goals of such projects as Nord Stream 2, EUGAL, and TurkStream: (1) to weaken the Ukrainian economy (in 2014–2017 Ukraine had 2–3 bln Euro annual revenue from the transit, in 2017 the revenue was 2.6 % of GDP), (2) to have a strong position for the talks on a new agreement and minimization of the share of natural gas transit via Ukraine, (3) to make Europe more dependent on Russian energy politics as well as to have better foot on Germany energy market and better geopolitical positions in Europe. In such a situation, from the perspective of energy security, it is crucial to review the principles of the regulation of the natural gas flows within the EU. It should be consistent with the EU Energy security strategy, LNG market development strategy, Gas Directive of the Third Energy Package, and Association Agreement with Ukraine.

2. European law and regulation of energy security and natural gas flows

According to the Treaty of Lisbon, there are two basic principles regulating energy security and market in Europe: (1) the principle of subsidiarity, and (2) principle of solidarity[5]. Both of them are under question in the case of Nord Stream 2 pipeline. First, the Nord Stream 2 project is understood by Germany as being more effectively regulated on the level of Member States, while European Commission and some other Member States assume that the EU should intervene because it is capable of acting more effectively than the Member States alone. Second, the project undermines the solidarity of the European states when some countries are in opposition to the Nord Stream 2, while Germany is strongly supporting it. The European Commission insists that such projects as Nord Stream should be discussed at European and/or regional level to ensure that energy security of one state does not undermine the security of the other[6]. Moreover, European Commission policy memo on the short-term resilience of the European gas system shows that in case of 6-month disruption of natural gas supply from Russia the most vulnerable are East and Central-European states, Balkans, Baltic states, and Finland[7].

[5] The Treaty of Lisbon. Energy. *EU LEGISLATION* [online]. Available at:https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0024&from=SK

[6] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. *European Energy Security Strategy*, COM/2014/0330 final [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0330&qid=1407855611566

[7] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the short term resilience of the European gas system. Brussels, 16. 1. 2014

The second crucial piece of legislation regulating the EU energy sector is the Third Energy Package consisting of two Directives and three Regulations[8]. It aims to create a single EU energy market, provide security of supply, and better pricing. It also provides anti-monopoly regulations to cope with companies who try to win dominant positions on the EU internal market. However, it is not implied to the projects in the exclusive economic zones of the Member States, which was the aim of the European Commission proposition on its changes[9]. The proposed amendment's goal was to complement Gas Directive (2009/73/EC) and make it regulating not only pipelines within EU jurisdiction but also those that go from third countries to the border of the EU.

Therefore, currently, Third Energy Package does not apply to Nord Stream 2 but previously was used in the case of South Stream project from Russia to Bulgaria rejection. However, EUGAL pipeline, which is the continuation of the Nord Stream 2 to Checz Republic border could be regulated under the Gas Directive of the Third Energy Package. EUGAL (55 bcm) more than doubles capacities of the existing OPAL pipeline (goes along the same line with EUGAL project, transportation capacity – 35 bcm) and is equal to planned capacities of Nord Stream 2. At the same time, OPAL pipeline was under consideration for a partial exemption from certain obligations, including the obligation of Third-party access and unbundling because the level of risk was such that investment could not take place. Consequently, it is a crucial question for the construction and operation of EUGAL pipeline. In case of partial exemption from Third Energy Package obligations, it could lead to re-routing of natural gas supply from the transit via Ukraine to Baltic Sea route and make Eastern Europe and Balkans more vulnerable to Russian gas politics.

Ukrainian officials were not admitted to negotiations on OPAL pipeline because Ukraine is not a stakeholder in the project. However, according to the Association Agreement between Ukraine and the EU, both sides should communicate with each other on projects that are considered a threat to energy security. Moreover, the accession of the neighbor countries to the Energy Community is part of the Energy Strategy of the EU[10]. It should include not only one-sided

COM(2014) 654 final [online]. Available at: https://ec.europa.eu/energy/sites/ener/files/documents/2014_stresstests_com_en.pdf

[8] Questions and Answers on the third legislative package for an internal EU gas and electricity market. *EUROPEAN COMMISSION MEMO/11/125*, Brussels, 2 March 2011 [online]. Available at: http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en

[9] Commission proposes update to Gas Directive. *EUROPEAN COMMISSION*. Available at: https://ec.europa.eu/info/news/commission-proposes-update-gas-directive-2017-nov-08_en

[10] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. *Implementation of the Communication on Security of Energy Supply and International Cooperation and of the Energy*

demand for transparency, and upgrading of Ukrainian natural gas transportation system but also opportunity for the Ukrainian government to participate in talks about projects that are a threat to the energy security of the state.

Concentration of 90 bcm from 110 bcm capacities of Nord Stream and Nord Stream 2 pipelines on the line to the Czech Republic border (OPAL and EUGAL pipelines) shows that it is not oriented toward growing energy markets in the EU due to the decrease in domestic production of natural gas, but it could cut off main transit line via Ukraine to Slovak Republic, Austria, Italy, Hungary, Croatia, Serbia, Czech Republic, Germany, and Slovenia. The TurkStream project at the same time cuts off second largest transit line via Ukraine to Bulgaria, Turkey, Greece, and Macedonia. Gazprom plans pipeline from TurkStream to Bulgaria but is lobbying against interconnector from Greece to Bulgaria, which aims to supply natural gas from Azerbajdzan. It shows that Central and Eastern European as well as Balkan states should be involved in the debate about energy security in Europe. The one-sided decision of Germany based on its commercial interests causes the same reaction from the other states. For instance, Bulgaria decision to build the connection to TurkStream despite existing infrastructure of supply through Ukraine and Romania and planned interconnector from Greece (natural gas from Azerbaijan) also have commercial reasons but without consideration of energy security and natural gas sources diversification.

European Energy Security Strategy aims to strengthen emergency mechanisms, increase the EU's capacity in case of disruption, diversification of the external sources, and "speaking with one voice in external energy policy"[11]. All those principles are undermined in case of energy relations with the Russian Federation as the largest external source of natural gas supply and its active involvement in the construction of the new natural gas infrastructure on the continent. Transparency on intergovernmental agreements is also a basic norm in regulating relations in the EU energy sector[12]. However, the Russian approach to diplomacy and geopolitical goals in Europe undermine those principles in the cases of new agreements for the construction of gas infrastructure. Consequently,

Council Conclusions, November 2011. COM/2013/0638 final [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013DC0638

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the EU at least needs a special deal on the operation of the Nord Stream 2 and special regulatory norms for this project. There are examples of such agreements in case of TANAP project and Nord Sea pipelines from third countries. The basic principles of such decision and negotiations with Russian Federation should be transparency, a solidarity of the EU position, tariffs regulation, separation of supply from transmission of Russian natural gas in onshore EU territories, and energy security and lower dependence on Russian natural gas (especially in Central and Eastern Europe).

Nord Stream 2 project, as well as TurkStream continuation to Bulgaria and Greece, are also in conflict with the European Parliament resolution of 25 October 2016 on EU strategy for liquefied natural gas and gas storage[13]. Article 32 of the Resolution states that Nord Stream 2 project would have counterproductive effects on energy security and the principle of the solidarity, would give Gazprom dominant positions on the European internal gas market, and should be avoided. The Resolution also argues that Nord Stream 2 project undermines possibilities to develop better LNG infrastructure and diversify sources of natural gas supply for Europe. Article 31 states that LNG infrastructure and storage capacities are crucial for diversification strategies and lower energy dependency on supplies from the Russian Federation. In this concern cooperation with Ukraine might be useful because of the country's significant gas storage capacities. However, as stated in Article 25 of the Resolution, cooperation with Ukraine is only possible in the case of stable commercial and legal frameworks in the country. At the same time, the Resolution also assumes strategic interests of the EU to cooperate with Ukraine and also possibilities of LNG supplies to decrease Ukrainian dependence on Russian gas.The strategy of the LNG infrastructure development also assumes that if Nord Stream 2 were to be built, it would require coordination with the LNG terminals development and North-South gas corridor functioning.

While political experts are arguing that Nord Stream 2 project has negative security and geopolitical implications for the EU[14], and European lawmakers are proposing changes to the Third Energy Package and insist on law clarity in regulating third countries pipelines to the EU border, German politicians continue to accentuate commercial gains of the project for the chemical industry of the country, and to cover losses from the coal phase-out and closed nuclear plants. Bulgaria after denial from the European Commission to build South Stream

[13] EUROPEAN PARLIAMENT RESOLUTION of 25 October 2016 on EU strategy for liquefied natural gas and gas storage. Tuesday, 25 October 2016, Strasbourg [online]. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0406&language=EN

[14] Judy Asks: Should Germany Dump Nord Stream 2? Can it? CARNEGIE EUROPE, June 14, 2018 [online]. Available at: http://carnegieeurope.eu/strategiceurope/76597

from Russia to Bulgaria is accentuating its commercial interests to transport Russian natural gas from TurkStream to Central and Eastern Europe. Austria supports Gazprom initiatives because almost all natural gas consumed in the country is from the Russian Federation. Short-term commercial considerations and national agendas are undermining the long-term vision of the problem and unity and solidarity of the EU.

The issue of transparency also raises many questions about Russian geopolitical moves in the energy sector and their regulation by European law. Nord Stream AG, company which operates construction of the Nord Stream 2 project, is registered in Switzerland, which has lower standards for transparency of financial operation than the EU law requires. GASCADE, company, which operates the EUGAL project, also did not specify the costs of the project[15]. Susanne Götze[16] also accentuates that Germany's position on the project is influenced by a broad network of Russian lobbyists in the country and that lobbyism regulation in Germany needs revision because of the representation of the lobbyists as neutral experts in media, research institutions, NGO's, and political debates.

Consequently, there are many uncertainties about the long-term legal frameworks for natural gas trade between the EU and Russia. European Commission for a long time argues that the EU needs legal clarity in energy relations with Russia[17]. The Third Energy Package provides instruments for regulations, but it currently cannot be used in cases of Nord Stream 2 or more complex geopolitical situations as with Russian plan of re-routing natural gas transit via Ukraine to weaken its economy and have levers of influence on the EU. However, it could be implied in the regulation of EUGAL and OPAL pipelines which are the continuation of the Nord Stream and Nord Stream 2 on the continent. For instance, one of the instruments is Ownership Unbundling[18] instead of Independent System Operator and the Independent Transmission Operator as well as no exemption of obligations for these projects. Russia in an attempt to win stronger positions in

[15] ŁOSKOT-STRACHOTA, A., POPŁAWSKI, K. *The EUGAL project: the German branch of Nord Stream 2* [online]. Available at: https://www.osw.waw.pl/en/publikacje/analyses/2016-06-15/eugal-project-german-branch-nord-stream-2

[16] GÖTZE, S. *The shadow man of Nord Stream 2.* Spiegel Online, June 26, 2018 [online]. Available at: http://www.spiegel.de/wirtschaft/soziales/friedbert-pflueger-der-schattenmann-von-nord-stream-2-a-1219841.html

[17] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. Implementation of the Communication on Security of Energy Supply and International Cooperation and of the Energy Council Conclusions, November 2011. COM/2013/0638 final [online]. Available at:https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013DC0638

[18] Questions and Answers on the third legislative package for an internal EU gas and electricity market. *MEMO/11/12*. Brussels, 2 March [online]. Available at: 2011http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en

the EU market started a legal case against the EU Third Energy Package in the World Trade Organization. Russian position was that it is discriminatory against Russian suppliers, but WTO stated lawfulness of the European energy law[19].

3. Conclusion

The EU energy relations with Russia require a new legal base[20]. It includes a complicated geopolitical situation with the re-routing of natural gas supply to Europe, which aims to weaken Ukraine, make Eastern Europe more vulnerable and broke solidarity within Europe and in Transatlantic cooperation. European Parliament resolution on the EU strategy for liquefied natural gas and gas storage also admits that such projects as Nord Stream 2 put in danger diversification of natural gas sources, increase energy dependency, and interferes the plans of the development of LNG industry. Russia's Nord Stream 2 pipeline is not just controversial[21], but in connection with Gazprom abusive practices[22] and Kremlin geopolitical goals, it is a powerful political instrument, which needs a robust legal reaction from the EU.

Nord Stream has already decreased one of the previously dominant transit lines via Ukraine, Slovak Republic, and then through the Czech Republic or Austria to Germany. Quarterly Report Energy on European Gas Markets shows that in the first quarter of 2018 Nord Stream became the main supply route of Russian gas delivered to the EU[23]. Together with TurkStream Nord Stream 2 could cut off the existing transit via Ukraine. Only the use of the Gas Directive

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19 Commission welcomes WTO ruling confirming lawfulness of core principles of the EU third energy package. EUROPEAN COMMISSION [online]. Available at: http://europa.eu/rapid/press-release_IP-18-4942_en.htm

20 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. *On security of energy supply and international cooperation „The EU Energy Policy: Engaging with Partners beyond Our Borders"*. COM/2011/0539 final [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1408370068358&uri=CELEX:52011DC0539

21 Gazprom's controversial Nord Stream 2 pipeline. EUROPEAN PARLIAMENT. *At Glance*, July 2017 [online]. Available at: http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/608629/EPRS_ATA%282017%29608629_EN.pdf

22 Antitrust: Commission invites comments on Gazprom commitments concerning Central and Eastern European gas markets. *EUROPEAN COMMISSION PRESS RELEASE*, Brussels, 13 March 2017 [online]. Available at: http://europa.eu/rapid/press-release_IP-17-555_en.htm

23 Quarterly Report Energy on European Gas Markets. *Market Observatory for Energy*, Volume 11, Issue 1, 2018 [online]. Available at: https://ec.europa.eu/energy/sites/ener/files/documents/quarterly_report_on_european_gas_markets_q1_2018.pdf

without any exemptions and a special agreement with the Russian Federation could weaken Kremlin's geopolitical positions. Development of the single Energy market and integration of Ukraine with its transit and storage capacities should be of special importance for the EU.

However, at the moment EU solidarity and subsidiarity are under question. Such projects as Nord Stream 2, EUGAL in their connection to a broader picture of Russia's re-routing Ukraine plans should have a more extensive examination and discussion of the possible legal solutions including broader implications of the Gas Directive or special agreement with Russia. European Commission proposition to change the Third Energy Package did not receive much attention and support from the Member states. Germany states that operation of the Nord Stream 2 should take into account transit via Ukraine, but there are no transparent talks on the issue with a single EU position as is written in Energy Security Strategy. Moreover, Germany is against the United States interference in the European energy relations with Russia, while the US has a stronger position on the issue and proposed Protect European Energy Security Act[24], which is against the construction of the Nord Stream 2 pipeline.

Russia plans to finish construction works before the end of 2019 when the contract between Gazprom and Naftogaz Ukraine ends; however, still there are no talks on a special agreement between the EU and Russian Federation as the third side on the new conditions of natural gas supply, separation of the supply to the EU border and transmission of natural gas in the jurisdiction of the EU, Gazprom position on the EU energy market, and unbundling procedures. Question about the participation of Ukraine in such talks due to Association Agreement articles about communication on projects that can undermine energy security is also unresolved. Meanwhile, Russia started construction works on Nord Stream 2 in the Baltic Sea, is finishing TurkStream project, lobbying continuation of TurkStream to Bulgaria, and is actively working on the construction of EUGAL pipeline as the continuation of Nord Stream 2 in Germany. Moreover, Nord Stream 2 project is in disagreement with the development of Southern Gas Corridor, diversification by LNG supplies, cooperation with emerged Middeteranian producers of natural gas, and new gas infrastructure in North Africa, which are Energy Security Strategy priorities.

[24] H.R.6224 – PROTECT EUROPEAN ENERGY SECURITY ACT. 115th Congress [online]. Available at: https://www.congress.gov/bill/115th-congress/house-bill/6224/text?q=%7B%22search%22%3A%5B%22nord+stream+2%22%5D%7D&r=1

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INFORMATIONS, COMMENTARIES AND NOTES

Shaping Procedural Autonomy of the Member States of the European Union – A Case of "Market Regulators"

Ondrej Blažo*

Summary: The paper confronts procedural autonomy of the Member States to selected procedural requirements established by EU directives for so-called market regulators, i.e.sectoral and utilities regulators, competition authority as well as public procurement surveillance body. The analysis tries to identify some common features as well as estimate features of future development.

Keywords: Market regulators – procedural autonomy – public procurement – competition – EU law – inspections – sanctions – corrective mechanism

1. Introduction

There is a well-established triad of principles that shape enforcement rules of Members States stablished for implementation of EU law – procedural autonomy, effectiveness and equivalence. Indeed, requirement for effectiveness and equivalence in application of EU law by national bodies limit their procedural autonomy. On the other hand, the procedural autonomy of the Member States can be limited in two ways: (1) states shape powers of their judicial and administrative bodies themselves without any interference or guidance of EU law, or (2) EU law provides standards, basic requirements or stipulates exact rules that shall be transposed into respective national legal orders. Level of this direct interference into national legal orders can vary, usually depending on the necessity of harmonization, however certain features can be found common. For purpose of the analysis provided by this paper, rules laid down for so-called market regulators will be taken into account. "Market regulators" are national authorities empowered to govern economic activities of undertaking or other market

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players in conformity with the principles of market economy, so, in other words, remove negative externalities. Following bodies can be included in this group: authorities regulating specific sectors – e.g. utilities, gas, water or electricity supplies, networks and telecommunications, postal and financial services, also competition authorities as well as public procurement surveillance authorities can be included in this group. Common features of all of these authorities can be found also in their power to regulate common EU policies and enforce common EU interests via national law.

Procedural powers and requirements of public procurement authorities are given by Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[1] (hereinafter „Remedies Directive") and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[2] as they were amended. Since the Remedies Directive and Directive 92/13/EEC are quite similar, for the purposes of this paper the Remedies Directive will be analysed.

Gas and electricity market regulators are covered mainly by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (hereinafter „Electricity Directive")[3] and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[4] (hereinafter „Gas Directive").

In general, electronic services sector is governed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)[5].

Finally, powers of competition authorities are addressed by directive-like provisions of regulation as well as directive: 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.[6]

1 OJ L 395, 30. 12. 1989, p. 33–35.
2 OJ L 76, 23. 3. 1992, p. 14–20.
3 OJ L 326, 8. 12. 2011, p. 1–16.
4 OJ L 211, 14. 8. 2009, p. 94–136.
5 OJ L 108, 24. 4. 2002, p. 33–50.
6 OJ L 1, 4. 1. 2003, p. 1–25.

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market[7] (hereinafter „ECN+ Directive").

On a basis of analysis of aforementioned regimes following procedural features requirements for powers and operational framework of national authorities can be assessed: principle of effectiveness of procedure, specification of powers of national authorities, administrative and judicial review, fines and other sanction.

2. Effectiveness of powers of the national authority and procedure

Indeed, effectiveness of enforcement of European law is the basic duty for national legislator stemming from article 4 of the Treaty on European Union. This principle is enshrined in analysed legal instrument in both – preambles and operative parts. The principle of effectiveness is furthermore explicitly tied to specific powers or performance, in particular:

- effective carrying out duties – Rec. 13 of the Framework Directive, Preamble of the ECN+ Directive as a whole, Art. 1 of the ECN+ Directive, Art. 35(1) of Regulation 1/2003
- effective decision-making – Preamble and Art. 1(1) of the Remedies Directive,
- effective penalties – Rec. 33 and 34, Art. 4(4)(d) of the Gas Directive, Rec. 37 and 38, Art. 37(4)(d) of the Electricity Directive, Art. 13 of the ECN+ Directive, Art. 2e(1) of the Remedies Directive
- effective dispute settlement and consumer protection – Rec. 51, Art. 4(1)(o) of the Gas Directive, Art. 37(1)(n) of the Electricity Directive,
- effective review mechanism and remedies – Art. 2a(1) of the Remedies Directive, Art. 3 of the ECN + Directive, Art. 4 of the Framework Directive.

Requirement for rapid procedures can be seen as an integral part of the principle of effectiveness (effective enforcement), however particularly the Remedies Directive stresses this requirement as a specific feature of enforcement procedure (Art. 1 par. 1 subpar. 3). The interplay between effectiveness and rapidity is interesting and "separates" general principle of effectiveness (effective application) from specific duties of Member States to establish effectiveness of application

[7] OJ L 11, 14. 1. 2019, p. 3–33.

of particular rights. Therefore according to *Unilpex* judgment "the objective of rapidity pursued by Directive 89/665 does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in Article 1(1) of that directive."[8] Furthermore, objective of rapidity "must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations...".[9] This quite broad explanation of relationship between effectiveness and rapidity of enforcement procedures vis-a-vis procedural autonomy of Member States can be, however, linked to general values of the European Union, particularly rule of law. Hence Member States are limited in their procedural autonomy by the requirement of effectiveness, which includes rapidity of procedure, while this rapidity cannot frustrate effectiveness itself as well as fundamental rights and principle of rule of law. Rapidity of procedures cannot be seen as a specific requirement, even though it is explicitly stipulated in the Remedies Directive only, but an integral part of the principle of effectiveness.

3. Powers of national bodies and authorities

Description of explicit powers and procedural powers of national bodies can be seen as direct exemption form the general principle of procedural autonomy because Member States cannot chose its own set enforcement tool but they have to follow at least minimal toolkit laid down by respective directive. This minimal set can include investigation powers, e.g. inspections, preliminary and interim measures, decisions and sanction mechanism.

Both, the Gas Directive [Art. 41 par. 3(e) and Art. 41(5)(g)] and the Electricity Directive require national regulatory authority [Art. 36 par. 3(e)and Art. 36(5)(g)] to "have the powers to carry out inspections, including unannounced inspections, at the premises" of relevant undertakings and operators. These directives give no further details for the conditions and design of inspection powers. In this context, description powers of national competition authorities described in Art. 6 and 7 of the ECN+ Directive is much more detailed and distinguishes between inspection of business premises and other premises. The ECN+ Directive also

[8] Judgment of 28 January 2010, Uniplex (UK), C-406/08,EU:C:2010:45, p. 40.
[9] Judgment C-406/08 Uniplex (UK), p. 39.

stipulates minimum list of powers of competition authorities and their officials in order to conduct inspection[10].

Although there is no legal interplay between the Gas Directive and the Electricity Directive on the one hand and the ECN+ Directive, Rec. 4 of the ECN+ Directive can, however, link them: "Providing NCAs with inspection powers of a different scope, depending on whether they will ultimately apply only national competition law or also apply Articles 101 and 102 TFEU in parallel, would hamper the effectiveness of competition law enforcement in the internal market." Description of minimal powers of national competition authorities to inspect business premises can be, therefore, considered a legislative reaction to ineffectiveness of inspections, if they do not meet these minimal standards. In other words, from the point of view of the European legislator, list given in Art. 6(1) represents minimal standards for inspection of business premises in order to maintain effectiveness of enforcement of particular duty of national authority. Even though the Electricity Directive and the Gas Directive does not provide list of minimal powers for inspection and effectiveness is still the only scrutiny, non-compliance with the list laid down by Art. 6(1) of the ECN+ Directive in electricity and gas sector can lead to non-compliance with the requirement of effectiveness of inspection. Moreover, similarity of duties of national competition authorities and electricity and gas regulators vis-à-vis undertakings in dominant position cannot be overlooked in this context.

Interim measures, injunctions orpreliminary orders represent tool that have to ensure that real effects of the decision in particular case will have not been frustrated or diminished by time delay caused procedure itself. Their aim is, mainly, to maintain status quo or to prevent creating situations that could appear irreversible. Interim measures are directly required by the Remedies Directive [Art. 1(1)(a)][11]. The directive does not provide further details or criteria for interim measures except possibility to provide "that the body responsible for

[10] "… (a) to enter any premises, land, and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity subject to the inspection; (c) to take or obtain, in any form, copies of or extracts from such books or records and, where they consider it appropriate, to continue making such searches for information and the selection of copies or extracts at the premises of the national competition authorities or at any other designated premises; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.".

[11] „Member States shall ensure that the measures taken concerning the review procedures (…) include provision for powers to (..) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the

review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits"[12] and rule that "decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures"[13]. Lack of further details and conditions for interim measures can be seen from the two points of view – either it gives full procedural autonomy to Member States or no further conditions or criteria can be established by national legislation. Also in this case is procedural autonomy of the Member States restricted and even though the Member States can establish criteria for interim measures they cannot deviate from autonomous character of interim measures, as it was explained by the ECJ: "… under Article 2 of the directive, the Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures 'including measures to suspend or to ensure the suspension of the procedure for the award of a public contract'."[14]

Interim measures were briefly mentioned by Art. 5 of Regulation 1/2003. This provision empowered national competition authorities to apply Art. 101 and 102 TFEU and allowed them to adopt four types of decisions (requiring that an infringement be brought to an end, ordering interim measures, accepting commitments, and imposing fines, periodic penalty payments or any other penalty provided for in their national law). Thus all these types of decisions were subject to national rules and this provision could have been hardly read as duty to establish interim measures. Duty to introduce interim measures in competition matters has been introduced by the ECN+ Directive while conditions are much more detailed:

- interim measures can be imposed from own initiative of the authority;
- they must be imposed at least in cases where there is urgency due to the risk of serious and irreparable harm to competition,
- can be imposed only on the basis of a prima facie finding of an infringement of Article 101 or Article 102 TFEU.
- decision shall be proportionate and shall apply either for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken.
- the legality, including the proportionality, of the interim measures can be reviewed in expedited appeal procedures.[15]

suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority.."

[12] Remedies Directive, Art. 2(5).

[13] Remedies Directive, Art. 2(5).

[14] Judgment of 19 September 1996, Commission v Greece, C-236/95, EU:C:1996:341, p. 11.

[15] ECN+ Directive, Art. 11.

Again, requirement to introduce interim measures is not legally stipulated by gas and electricity directives, but Rec. 38 of the ECN+ Directive explains their importance "Interim measures can be an important tool to ensure that, while an investigation is ongoing, the infringement being investigated does not seriously and irreparably harm competition. This tool is important to avoid market developments that could be very difficult to reverse by a decision taken by an NCA at the end of the proceedings." Therefore Member States are not legally obliged to introduce power to impose interim measures for sector regulators, but they are still obliged to introduce such a set of powers and procedural tools in order to achieve effectiveness of performance of powers these authorities and effective enforcement of internal market rules. Similarly to competition rules, gas and electricity regulators are obliged to avoid situation when investigated activity "seriously and irreparably harm competition" and "avoid market developments that could be very difficult to reverse by a decision taken by an authority at the end of the proceedings."(mutatis mutandis Rec. 38 of the ECN+ Directive). Thus the Member States have procedural autonomy to avoid market deformities and ECN+-Directive-like interim measures can serve as a guideline, even not mandatory.

4. Quality of decisions and judicial review

Regarding quality of decision of competent authorities and their review the analysed directives feature on two elements – fully reasoned decision and possibility of judicial review, if the decision is not adopted by judicial authority itself:

- „decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review" [Art. 41(16) of the Gas Directive and Art. 37(16) of the Gas Directive]
- „party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government" [Art. 41(17) of the Gas Directive and Art. 37(17) of the Gas Directive and Art. 4 of the Framework Directive]
- „where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given" [Art. 2(2) of the Remedies Directive] and similarly in the Framework Directive (Art. 4): „Where the appeal body (...) is not judicial in character, written reasons for its decision shall always be given.[16]

[16] Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 267 of the TFEU.

All these requirements appear to be features of right to fair trial. This is much more obvious from the case-law that requires full judicial review of the decision of regulatory authorities with full access to facts of the case[17] and power to annul decision with effects ex tunc.[18] The Court of Justice made link between abovementioned provisions and Art. 47 of Charter of Fundamental Rights of the European Union (Right to an effective remedy and to a fair trial) apparent, particularly in Prezes Urzędu Komunikacji Elektronicznej and Petrotel case.

If we read provisions dealing with quality of decision and review as an expression of Art. 47 of the Charter Fundamental Rights of the European Union, it is not relevant that the list of these requirements is incomplete, unsystematic and is not included in all analysed directives. In this context, these provisions have no impact on procedural autonomy of the Member States since it is constitutionally subject to rule of law and fair trail scrutiny.

5. Fines and sanction mechanism

Properly designed sanction mechanism is one of the tool for achieving effectiveness ofenforcement of relevant rules. This mechanism shall consist of two groups of sanctions – sanctions for infringement of procedural duties and sanctions as remedies for infringement.

Art. 2e of the Remedies Directive requires Member States to establish alternative penalties for infringement of rules stipulated in that directive – the

[17] Judgment of 13 July 2006, Mobistar, C-438/04, EU:C:2006:463: „Article 4 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) must be interpreted as meaning that the body responsible for hearing an appeal against a decision of the national regulatory authority must have at its disposal all the information necessary in order to decide on the merits of the appeal, including, if necessary, confidential information which that authority has taken into account in reaching the decision which is the subject of the appeal. However, that body must guarantee the confidentiality of the information in question whilst complying with the requirements of effective legal protection and ensuring protection of the rights of defence of the parties to the dispute."

[18] Judgment of 13 October 2016, Prezes Urzędu Komunikacji Elektronicznej and Petrotel, C-231/15, EU:C:2016:769: „Article 4(1), first subparagraph, first and third sentences, and second subparagraph, of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that a national court hearing an appeal against a decision of the national regulatory authority must be able to annul that decision with retroactive effect if it finds that to be necessary in order to provide effective protection for the rights of the undertaking which has brought the appeal."

imposition of fines on the contracting authority or the shortening of the duration of the contract. The directive does not elaborate on level of the fine, require merely that penalties must be "effective, proportionate and dissuasive. More details regarding notion "effective, proportionate and dissuasive penalties" provide the Gas Directive and the Electricity Directive [Art. 41(4)d) and Art. 37(4) d) respectively]. Under these directives this penalties shall include the power to impose or propose the imposition of penalties of up to 10 % of the annual turnover of respective undertaking. This „benchmark" level of the fine san be found within the powers of the Commission under Regulation 1/2003 which was also copied to the ECN+ Directive into powers of competition authorities [Art. 15 thereof]. Moreover, sanction mechanism under the ECN+ Directive is much more detailed and provide rules for sanction for infringement of substantial rules as well as for non-compliance with procedural duties, such as subject to inspection, provide information.[19] Again, sanctions shall be "effective, proportionate and dissuasive" [Art. 13(1) and again Art. 13(3) of the ECN+ Directive]. Thus in this context the pattern is obvious. The European legislator considers "effective, proportionate and dissuasive"sanction mechanism that include fines at least up to 10 % of undertaking's turnover.

6. Position of the European Commission in national procedure

The analysis will omit involvement of the European Commission in consultations and other soft-law means of convergence of enforcement of European rules, since it will focus on involvement of the European Commission in enforcement cases. This involvement does not preclude, indeed, power of the European Commission to launch infringement procedure under Art. 258 TFEU.

The Remedies Directive introduce "corrective mechanism" in case the Commission "considers that a serious infringement of Union law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU." [Art. 3(1)]

[19] "(a) they fail to comply with an inspection as referred to in Article 6(2); (b) seals affixed by the officials or other accompanying persons authorised or appointed by the national competition authorities as referred to in point (d) of Article 6(1)) have been broken; (c) in response to a question referred to in point (e) of Article 6(1), they give an incorrect, misleading answer, fail or refuse to provide a complete answer; (d) they supply incorrect, incomplete or misleading information in response to a request referred to in Article 8 or do not supply information within the specified time limit; (e) they fail to appear at an interview referred to in Article 9; (f) they fail to comply with a decision referred to in Articles 10, 11 and 12."

This procedure may give some resemblance to infringement procedure under Art. 258 of the TFEU because the Commission addresses its reasoned opinion to the Member State[20]. The corrective mechanism does not establish further sanctions for non-compliance of the Member State and if the Member State does not enforce proper correction vis-a-vis contracting authority it can itself face responsibility for infringement of EU law.[21]

Involvement of the European Commission in electricity, gas and electronic communication sector focuses mainly to harmonization and cooperation between regulation authorities. The strongest power has the Commission under Regulation 1/2003 because the Commission can handle cases of infringement of Art. 101 and 102 TFEU itself and its action relieves national competition authority from their competence enforce these provisions of the TFEU [Art. 11(6) of Regulation 1/2003]. The difference between approach under public procurement regime and competition regime is that under public procurement regime the Commission can only try to "coerce" a Member State to enforce EU law properly, while under competition regime, the Commission can act in its own capacity.

[20] The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

[21] Judgment of 24 January 1995, Commission v Netherlands, C-359/93, EU:C:1995:14, par. 12 to 14: "It is clear from the letter and spirit of Directive 89/665 that it is very much to be preferred, in the interest of all the parties concerned, that the Commission should give notice of its objections to the Member State and the contracting authority as soon as possible before the contract is concluded, thereby giving the Member State and the contracting authority time to answer it, in accordance with Article 3(3) of Directive 89/665, and if necessary to correct the alleged infringement before the contract is awarded.

However, that special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil one of its obligations under the Treaty and that the State concerned has not complied with the Commission's reasoned opinion.

Furthermore, a declaration that a State has failed to fulfil its obligations under Article 169 does not depend on the existence of a clear and manifest infringement within the meaning of Directive 89/665. Such a declaration is confined to the finding that a Member State has not fulfilled an obligation under Community law and does not in any way prejudge the nature or seriousness of the infringement."

7. Conclusion

There are no common European administrative code and no common rules for enforcement of EU law in Member States and Member State enjoy broad discretion and procedural autonomy when they fulfilling their duty to effectively implement and enforce EU law. Nevertheless, specific directives are shaping this procedural autonomy by more or less detailed procedural standards. Although requirement of effective enforcement is the "umbrella" principle in this context, this general rule appeared insufficient and EU law provides gradually more and more detailed standards. The ECN + Directive can serve as an example of detailed harmonization of procedural rules. It opens a question whether such detailed harmonization of procedural rules that was manifestly reaction to ineffectiveness regime based on more procedural autonomy, can serve as a benchmark of some procedural standards designed to achieve and maintain effectiveness of enforcement, such as minimum sanctions, interim measures, inspections. On the other hand, some requirements laid down by the directives appear to be unnecessary (e.g. duty to provide reasons for decision, right for judicial review), because they are stemming from the Charter of fundamental rights of the European Union as well as values of the Union, such as rule of law.

Although directives subject to analysis were not selected randomly since covered areas of regulation have some common features, there is still little convergence between them. However, common features shall converge on a basis of recent development (e.g. inspection powers or interim measures on a basis of the ECN+ Directive can serve as an example of reform of gas and electricity as well as electronic communication sector rules).

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Judgment of 13 July 2006, Mobistar, C-438/04, EU:C:2006:463

Judgment of 13 October 2016, Prezes Urzędu Komunikacji Elektronicznej and Petrotel, C-231/15, EU:C:2016:769.

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Uncompetitive Practices in Public Procurement in EU/Slovak Context

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Summary: As United Nations and European Union repeatedly confirmed in various documents, public procurement is one of the means to achieve sustainable development. Only well-operated public procurement in competitive environment is capable to ensure wide participation of competing business entities, which brings the procurement of goods, services and works for best market price. This article is focused on conflict of interests and collusion between the tenderers in the process of public procurement. Author analyses various forms of uncompetitive behaviour of public contractor and tendering undertakings in process of public procurement and the consequences of such behaviour.

Keywords: internal market – public procurement – conflict of interest – collusion

1. Introduction

One of the basic goals of the European Union is to achieve an internal market, where free movement of goods, services, capital and payments and freedom of establishment is guaranteed. Europe-wide public procurement is the integral part of this goal. EU has an eminent interest on open competition in public contracts market within its territory as this is a tool for sustainable development. This goal is followed also in 2014 Public Procurement Directives[1], which have reacted to differences in public procurement regimes in Member States and therefore

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[1] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28. 3. 2014, p. 65–242), Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28. 3. 2014, p. 1–64), Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28. 3. 2014, p. 243–374).

brought harmonisation and simplification of EU procurement processes. Only well operated competitive tender shall guarantee the effective spending of public finances. On the other side, if the public procurement process lacks the competition, there exist huge potential for ineffective, even abusive use of public funds. Preserving competition is therefore the essential part for effective public procurement.

Uncompetitive practises mostly occur in the form of conflict of interest between the public contractor (his employee) and one of the tenderers, where such tenderer "with the relation" to public contractor gains unfair advantage in procurement process or in the form of uncompetitive behaviour of tendering competitors. The consequence of both situations is deformation of competition, procurement of goods, services or construction work for more expensive prices (not most favourable) and ineffective spending of public sources.

These problems occur also in Slovak republic. European Commission in its *Country report Slovakia 2018*[2] pointed out, that only limited progress has been made in improving competition and transparency in public procurement as best procurement practices are still not widely adopted. A survey carried out by the Commission among company representatives who took part in public procurement recently revealed, that the most widespread anti-competitive procurement practices in Slovakia are collusive bidding, specifications tailor-made for particular companies and unclear selection or evaluation criteria.

2. Conflict of interest

Conflict of interest is a negative phenomenon that is generally prohibited. Where conflicts of interest appear, there a breach of the principle of equality and equal treatment due to links between the various parties to the proceedings exists. Conflict of interest in public procurement may arise in the relationship between the contracting authority and the supplier of the goods, services or construction works to be financed by public sources, whereby the relation between the contracting authority and tendering supplier will confer on that supplier an uncontested advantage over other tenderers, the result of which the best bid will not win.

OECD provides the definition of conflict of interest, as *"conflict between public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance*

[2] Available at: https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-slovakia-en.pdf (26. 12. 2018)

of their official duties and responsibilities."[3] Conflict of interest may then appear as actual, potential and apparent. The actual conflict of interest between the public duty and the private interests of a public official occurs when a public official has private-capacity interests that could have a detrimental effect on the performance of his duties. A potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future. An apparent conflict of interest can be said to exist where it appears that a public official's private interest could improperly influence the performance of their duties, but this is not in fact the case.

The EU law defines the concept of conflict of interest for the purposes of implementing the general budget of the EU and this definition applies to all types of public procurement financed with EU funds.[4] Under Article 61(3) of the Financial Regulation[5] conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person including national authorities at any level, involved in budget implementation under direct, indirect and shared management, including acts preparatory thereto, audit or control, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest. Under Article 24 of the Public Procurement Directive 2014/24 the concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

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[3] OECD: „*Managing Conflict of Interest in the Public Service. OECD Guidelines and Country experiences*". OECD Publication Service, Paris, 2003. Available at: http://www.oecd.org/corruption/ethics/48994419.pdf (26. 12. 2018), p. 24–25.

[4] European Commission and European Anti-Fraud Office (OLAF): Identifying conflicts of interests in public procurement procedures for structural actions. A practical guide for managers elaborated by a group of Member States' experts coordinated by OLAF's unit D2Fraud Prevention". Available at: https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/guide-conflict-of-interests-SK.pdf (26 December 2018), p. 9.

[5] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30. 7. 2018).

Under the Slovak Public Procurement Act[6] contracting authority is obliged to ensure that there is no conflict of interest in a process of public procurement which could distort or restrict competition or violate the principles of transparency and the principle of equal treatment. "*Conflict of interest then includes, amongst other, a situation where a concerned party who may influence the outcome or the course of a procurement has a direct or indirect financial interest, an economic interest or any other personal interest which may be considered as threatening its impartiality and independence in public procurement.*" In this context, the concerned person shall be understood to mean an employee of a contracting authority engaged in the preparation or execution of a public contract or another person who provides public procurement support and who participates in the preparation or implementation of a public procurement or has decisive powers and may affect the result of the public procurement without necessarily being involved in its preparation or implementation. In the case of a conflict of interest, the concerned party shall immediately notify the contracting authority of any conflict of interest in relation to the economic operator involved in the preparatory market consultations, the tenderer, the tenderer, the participant or the supplier, and the contracting authority shall take appropriate measures and remedy. These include, for example, the exclusion of a concerned party from the process of preparation or implementation of the procurement procedure or the modification of its duties and responsibilities in order to avoid the persistence of a conflict of interest.

In this relation, a case ***Vakakis kai Synergates***[7] shall be put to the attention. The General Court dealt with conflict of interest between the employee of the winning consortium, who participated in preparation of tendering procedure by providing certain information, in particular the Terms of Reference. The Court in its judgement then held, that contracting authority is required to ensure at each stage of a tendering procedure equal treatment and, thereby equality of opportunity for all tenderers. Under the principle of equal treatment of tenderers, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions. Moreover, the principle of equal treatment means that tenderers must be on an equal footing both when they prepare their tenders and when those tenders are evaluated by the contracting authority. If a person who is a tenderer for the public contract at issue may, without even intending to do so, influence the conditions of the contract in a manner favourable to himself, that person may

[6] Act No. 343/2015 Coll. on public procurement and on change and amendment of certain legislation, Article 23.

[7] Judgement of the General Court of 28 February 2018 in Case *Vakakis kai Synergates v European Commission*, T-292/15, ECLI:EU:T:2018:103, points 94–102.

be in a situation which may give rise to a conflict of interests. Such a situation is liable to distort competition between tenderers and is characterised by an infringement of the principle of equal treatment between tenderers. There is a risk of a conflict of interests where a person responsible for the preparatory work for the award of a public contract participates in that procedure since, in such a situation, that person may be in a situation which may give rise to a conflict of interests. However, although (under Article 94 of the Financial Regulation) the candidates or tenderers who, at the time of the procedure for the award of a public contract, are in a situation of a conflict of interests are excluded from the award of that contract, that provision permits exclusion of a tenderer from a procedure for the award of a public contract only if the situation of a conflict of interests to which it refers is real and not hypothetical. Accordingly, a risk of a conflict of interests must actually be found to exist, following a specific assessment of the tender and the tenderer's situation. Therefore, it is for the contracting authority to determine and verify the existence of a real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers and to allow the tenderer who risks being excluded from the procedure the possibility to demonstrate that, in its case, there is no real risk of such a conflict of interests. Nevertheless, despite the lack of an absolute obligation imposed on the contracting authority to exclude systematically tenderers in a situation of a conflict of interests, the exclusion of a tenderer in a situation of a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency.

Therefore, application of principle of proportionality balances the rigidity of above-mentioned legislation. This postulate is conforming with earlier case law of the Court of Justice[8]. The existence of a conflict of interest must lead the contracting authority to exclude the tenderer concerned, where that approach is the only measure available to avoid an infringement of the principles of equal treatment and transparency, which are binding in any procedure for the award of a public contract, that is to say, that no less restrictive measures exist in order to ensure compliance with those principles. It must be stated that a conflict of interest is, objectively and in itself, a serious irregularity without there being any need to qualify it by having regard to the intentions of the parties concerned and whether they were acting in good or bad faith. However, exclusion could not be applied in any event, the alleged conflict of interest was still uncertain and hypothetical.[9]

[8] See for example Judgement of the Court of Justice of 3 March 2005 in Fabricom SA v **État belge**, joined cases C-21/03 and C-34/03, ECLI:EU:C:2005:127, point 34.

[9] Judgement of the General Court of 27 April 2016 in *European Dynamics Luxembourg SA and Others v European Union Intellectual Property Office*, T-556/11. ECLI:EU:T:2016:248, points 46, 57.

OLAF identified in exemplificative way uncompetitive risks linked to a conflict of interests, which have effect on procedure or result of public procurement in its Guidelines on managing the Conflict of Interests by description of various model situations together with risk indicators, for example: someone who takes part in drafting the documents may directly or indirectly try to influence the tender procedure to allow, say, a relative, friend, or commercial or financial partner, to take part;[10] information on the tendering procedure may be leaked;[11] the bids received may be tampered with to conceal a bidder's failure to meet the deadline or to provide all the documentation required or when a member of the evaluation committee may try to mislead or put pressure on the other members to influence the final decision, for example by giving a wrong interpretation of the rules;[12] the contract is not drafted according to the rules and/or the technical specifications and tender documents or is poorly executed or monitored.[13] The list is just illustrative and is dynamically developing.

3. Collusion

As said earlier, ineffective public procurement realized in uncompetitive environment means ineffective use of public funds. Compliance of procurement procedure with competition rules is therefore essential for the goals of public

[10] Indicators of such risk may be, for example, if the person in charge of drafting the tender documents insists on hiring an outside firm to help draft the documents although it is not necessary, or organises the procedure in such a way that there is no time to revise the documents carefully before the tender procedure is launched, or when a negotiated procedure is chosen, even though an open procedure is possible

[11] Indicators of such risk may be, for example, unusual behaviour of an employee insisting on getting information on the tendering procedure although he is not in charge of this procedure or when an employee of the contracting authority worked for a firm which may bid, just before joining the contracting authority.

[12] Indicators of such risk may be, for example, if the official documents and/or certificates of receipt of the documents have obviously been changed, or some obligatory information from the winning bidder is missing, or Few of the companies that bought the bidding documents submit bids, especially if more than half of them drop out, or unknown companies with no track record win the contract.

[13] Indicators of such risk may be, for example, if standard contract clauses (audit, remedies, damages, etc.) are changed, In international projects, there is a long, unexplained delay between the announcement of the winning bidder and the signing of a contract (this may indicate that the contractor is refusing to pay or is negotiating on a demand for a bribe), labour hours are increased, with no corresponding increases in the materials used, There are any changes to the quality, quantity or specification of goods and services in the contract that deviate from the bidding document (terms of reference, technical specifications, etc.).

procurement. As Court of Justice held in ***Lloyd's of London***[14] the EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition. It is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders, as only competition with many independent competitors brings desirable results – winning of the best bid.

Collusion in public procurement is uncompetitive behaviour of tenderers, which not only deforms the functioning of competition, but also distorts the fair course of public procurement. By its nature, collusion is covered by legislation on cartel agreement, which at the EU level is in Article 101 of the Treaty on Functioning of the European Union (TFEU) and alongside at the Slovak level in Competition Act[15] (Article 4). By its judgement in ***Lombard club***[16] Court of Justice established the possibility of affection of the trade between Member States even in case, when cartel is implemented only in one Member state. Therefore, the EU competition law is applicable even to uncompetitive behaviour of "domestic" competitors inside the Member States.

Frequent meeting of tenderers in public procurement can lead to a loss of a mutual competition, which will be replaced by their cooperation. The cooperation of tenderers is characterised by a sharing of tender victories. Cooperation brings them profits form supplies for artificially increased non-market prices and possibilities to create market barriers for entry of new competitors. The behaviour of cartelists in public procurement is highly sophisticated, difficult to detect and usually lasts for a long period of time.

Collusion in public procurement has mostly the form of price agreements, agreements on division of market, limit production or the exchange of information. The core of the collusion is any expression of the will of the tendering competitor to behave and proceed in public procurement in certain way, written form is not the relevant condition. To conclude a cartel, it is sufficient, for example, to notify one of its competitors on its intention to participate or not to participate in the procurement or to announce its specific bid to a competitor without the need for a mutual recognition of a competitive bid. The purpose of such behaviour is explainable only by the fact that entrepreneurs manipulate or attempt to manipulate

[14] Judgement of the Court of Justice of 8 February 2018 in *Lloyd's of London v Agenzia Regionale per la Protezione dell'Ambiente della Calabria*, C-144/17, ECLI:EU:C:2018:78, point 33

[15] Act No. 136/2001 Coll. on protection of competition and on changes and amendments of Act No. 347/1990 Coll on organization of ministries and other central bodies of state administration of Slovak republic as amended.

[16] Judgement of the Court of Justice of 24 September 2009 in *Erste Group Bank AG (C-125/07 P), Raiffeisen Zentralbank Österreich AG (C-133/07 P), Bank Austria Creditanstalt AG (C-135/07 P) and Österreichische Volksbanken AG (C-137/07 P) v Commission of the European Communities*, joined cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, ECLI:EU:C:2009:576, points 38.

the outcome of public procurement. An entrepreneur who receives such information from a competitor receives the opportunity to adapt his bidding process, for example by not submitting a bid or by deliberately submitting a bid that is higher than the competitor's bid published by him. Cooperating tenderers pretend towards the contracting authority a competitive struggle and healthy competition; in reality, however, the tender is inefficient, and the low price is non-market.

Above mentioned practices may be realized, for example, by cover bidding. This practise exists where competitors submit only formal bid, which is uncompetitive to cooperating competitor because its higher or contains conditions unacceptable for public contractor, or purposely does not meet some conditions for participation. Such practices were identified, for example, in case ***Commission v Stichting Administratiekantoor Portielje and Gosselin Group***[17] where the Commission found out, that one of the aims of the cartel was to establish and maintain high prices and to share the market, and the cartel itself took various forms: agreements on prices, agreements on sharing the market by means of a system of false quotes, known as 'cover quotes'and agreements on a system of financial compensation, known as 'commissions', for rejected offers or for not quoting at all. As regards 'cover quotes', the Commission stated in the contested decision that, through the submission of such quotes, the removal company which wanted the contract ensured that the customer paying for the removal received several quotes. To that end, that company indicated to its competitors the total price that they were to quote for the planned removal, which was higher than the price quoted by the company itself. Thus, the system in operation was one of fictitious quotes submitted by companies which did not intend to carry out the removal. The Commission took the view that that practice constituted a manipulation of the tendering procedure to ensure that the price quoted for a removal was higher than it would have been in a competitive environment.

In case ***Diaľničná výstavba***[18] the collusive behaviour of the carteling tenderers was reflected in the submission of bids showing, that basic unit prices of individual items of the tenderers were set at different levels but maintained a constant ratio to the other bidders' prices, practically for all items. The Antimonopoly Office in the Slovak Republic in the proceedings showed that such pricing is not possible to be explained other way than by the agreement of tenderers and therefore in the public procurement procedure they have coordinated their behaviour in an anti-competitive way in order to secure the victory of the intended tenderer.

[17] Judgement of the Court of Justice of 11 July 2013 in *European Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, C-440/11 P, ECLI: ECLI:EU:C:2013:514, points 10 and 12.

[18] Judgement of the Supreme Court of the Slovak republic of 2 November 2016 in *Diaľničná výstavba*, No. 5Sžh/2/2015.

Other form of collusion is the bid rotation. It's a scheme, which is implemented in long-time cartel covering the important part of market. Cartelists regularly bids in tenders (pretending the fair competition), but the victory in tender is always predicted for particular member of cartel on a rotating principle determined by the criterion of awarding the same volume of winning contracts to each member of the cartel or the volume of cartel contract size.

This scheme was implemented, for example, in ***Marine Hoses***[19] case. In this case Commission found out that eleven companies in the period 1986-2007 within EEA territory in the relevant market of marine hoses, participated in anticompetitive arrangements which consisted of allocating tenders; fixing prices; fixing quotas; fixing sales conditions; geographic market sharing; exchanging sensitive information on prices, sales volumes and procurement tenders. Evidence uncovered shows that at least since 1986 members of the marine hose cartel ran a scheme to allocate among themselves the tenders issued by their customers. Under the scheme, a member of the cartel who obtained a customer inquiry would report it to the cartel coordinator, who would in turn allocate the customer to a 'champion', which means the cartel member who was supposed to win the tender. In order to ensure that the tender was allocated to the 'champion' in the tendering procedure, the cartel members adopted a reference price list and agreed on the prices that each of them should quote so that all bids would be above the price quoted by the champion. Moreover, evidence shows that the cartel members agreed to several measures to facilitate this process. They agreed to reference prices, quotas and sales conditions as well as a system of penalties to compensate cartel members who lost a tender which the cartel had allocated to them, but which was won by other cartel members.

This enumeration of collusive practices is illustrative only and does not cover all forms of collusion that are constantly evolving due to inventiveness of competitors.

4. Conclusion

As we can conclude from the text above, unfair uncompetitive practices in public procurement have serious negative consequences. Therefore, a key question is, how can we fight against them? The answer is not easy, as there exist several possibilities with different legal regimes.

In the regime of public procurement, the Slovak Public Procurement Office, when identifying the conflict of interest, has right to cancel the procedure of

[19] Commission Decision of 28 January 2009 in Marine Hoses, COMP/39.406 (2009/C 168/05).

procurement, or order to restore the unlawful situation. The Public Procurement Office is for this kind of infringement entitled to impose a fine of amount up to 30 000 EUR.

Specific sanction can be imposed, when the conflict of interest was identified with relation to grants from EU funds. If the granting agency finds, that the applicant, beneficiary, partner, user or the contractor is in conflict of interest, the grantor may, by applying the proportionality principle with respect to the gravity of the conflict of interest conflict, recognize the expenditure in the approved project partially or totally unjustified; terminate the contract; examine the decision approving the grant application; or refer the case to the law enforcement authorities. Also, criminal penalties can be considered for the possible commission of a crime[20] with sentence of up to five-years imprisonment.

As regards the fight against the collusion a prevention shall be applied through the Slovak Public Procurement Act (Art. 32) and conditions governing the personal status of competitors, which excludes from tenders those persons, who have imposed ban on participation in the public procurement. Another possibility is the application of Art. 40 of the Public Procurement Act, whereby the contracting authority excludes from the tendering procedure a competitor if, on the basis of credible information, it has reasonable grounds for suspecting that the competitor has entered into an anti-competitive agreement with another competitor. However, the suspected tenderer has the possibility to demonstrate that he has taken adequate remedies.

In addition to prevention, due to the effects of the collusion, it is also necessary to focus on the punishment of cartelising tenderers. In this respect, there is a single sanction in the Slovak Public Procurement Act, namely the cancellation of public procurement. From the competitor's point of view, this means a loss of expected profit. Since, until the announcement of the "victory" of his offer is just a potential gain, this sanction is highly inefficient.

The solution in this case we can find in competition law which allows the competition authority (the Antimonopoly Office of the Slovak Republic or the Commission) to impose a fine for a collusion in the public procurement procedure up to 10% of the competitor's total turnover for the previous closed accounting period and the sanction of the prohibition of participation in public procurement for three years . However, the length of the procedure, especially in Slovakia, is the weak points of this arrangement.

[20] Under Article 262 of Criminal Code who violates or fails to fulfil an obligation arising from his employment, occupation, position or function while managing or controlling the activity of persons under his management, and thereby allowing by this action the commission of fraud or illegal retain of finances form the budget of the EU, he or she shall be sentenced to a term of imprisonment of up to five years.

This "weakness" is equally negative in the case of possible criminal prosecution for the crime of manipulation of public procurement procedures.

However, as the public procurement as a tool of sustainable development raises on its importance, activity of both EU and national legislators and public authorities is to fight against these negative factors more and more effectively.

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Data Protection Reform in the EU as a Part of the Forming Digital Single Market

Daniela Ježová*

Summary: The article deals with the first milestone of the digital market formation which is the very discussed data protection reform and GDPR. I highlighted the most important changes in the protection of personal data in the European Union.

Keyworlds: Data protection – reform – changes – GDPR – Digital market

1. Introduction

European Union founds important to extend the current EU single market, which consist of free movement of goods, services, labour and capital. The single market makes the EU territory without any barriers. Currently four freedoms included in the internal market needs to reflect the development of the society and the digital era. After creating the Digital Single Market, the European Union can enjoy its full potential. The creation of a Digital Single Market is definitely a priority of the Union. Data protection reform is an important part of the formation of digital single market where the goal is to make the covers the European Union without any digital barriers. For reaching this goal firstly we need to make our date safe.

The Personal Data Protection Reform includes General Data Protection Regulation adopted in April 2016 and will apply from 25 May 2018 and the Directive that Member States have to transpose into their national law by 6 May 2018.[1] The Regulation replaces the original Data Protection Directive

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[1] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation and directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

no. 95/46/EC from 1995. This unified legal regulation at European Union level will replace the current non-uniform national regulation of the Member States of the Union.

2. General Data Protection Regulation

The Regulation is primarily aimed at strengthening the rights of individuals to protect their personal data and to reduce the administrative burden associated with their protection. Another aim is to enable the free flow of personal data in the digital single market area. The Regulation also has a positive impact on increasing consumer legal certainty and improving competition in the European Union.

The aim of the Regulation is to guarantee a consistent level of protection of individuals throughout the Union and to avoid differences which impede the free movement of personal data within the internal market. The Regulation provides legal certainty and transparency for economic subject, including small and medium enterprises. The Regulation also provides individuals with the same level of protection of rights in all Member States and, on the other hand, sets equal sanctions in all Member States. On the contrary, the Regulation does not apply to the processing of personal data of legal persons. The purpose of the Regulation is to harmonize national laws on the personal data protection across the EU while addressing new technological developments without the need for implementation into national rules.

2.1. The most important changes in the personal data protection

2.1.1. Definition of the personal data

Personal data is defined in the Regulation as any information concerning an identified or identifiable natural person (hereinafter referred to as „the data subject"); identifiable natural person is a person who can be identified directly or indirectly, in particular by reference to an identifier such as name, identification number, location data, online identifier, or a reference to one or more elements specific to physical, physiological, genetic, mental , economic, cultural or social identity of that individual. Under this term can be understood, for example, an online identifier such as the IP address of the natural person, localization data. This is an expanding definition of personal data in order to ensure the protection of any identifiability of a natural person.

The regulation does not tell us about the entity that identifies a natural person based on the data in question, it is essential that identification is possible. Identification can also be done by combining multiple data, not all data must be necessarily available to the operator. It is necessary to consider whether there are absolute or relative criteria for determining the possible identifiability of a natural person based on data. If we used the absolute criterion to determine the possible identifiability of a natural person[2], it would mean that it would be data if anyone could associate this data with a particular person. The Court of Justice in its decision Breyer[3] stated that the possibility of a personal data with the other information at the disposal of this person is a mean that can reasonably be used to identify the data subject. However, this does not happen when the identification of the data subject is prohibited by law or virtually impossible, for example because it would require a disproportionate amount of time, finance or human resources, so that the probability of identification actually appears to be negligible. However, this decision relates to old legislation but it isa introduction of relative criteria for the purpose of defining the possible identifiability of a natural person on the basis of a particular data. The General Regulation also contains in recital 26 indications that this method of interpretation should also be applicable to this new regulation. Under the above recital, the data protection principles should apply to all information relating to an identified or identifiable natural person. Personal data that has been pseudonymized and could be attributed to a natural person by the use of additional information should be considered as information about an identifiable natural person. In order to determine whether a natural person is identifiable, all means where there is a reasonable probability that the operator or any other person will use it should be taken into account for example by specific selection, for the direct or indirect identification of the natural person. In order to determine whether it is reasonably probable that the means will be used to identify a natural person, all objective factors such as costs and time for identification with regard to the technology available at the time of processing as well as technological developments should be taken into account.

If the obtention of additional information about the person will be able to the operator on the basis of his or her ability, to identify the person without any inappropriate effort, which in order to obtain the additional information will exert there are the personal data protected by the Regulation.

The regulation changes the definition of personal data to reflect changes in technology and the way that organizations or firms collect and store information.

[2] See also Voigt, P. Datenschutz bei Google, MMR 2009, p. 377–382.

[3] Judgment of the Court of Justice of the EU from 19. 10. 2016, Breyer vs. Federal Republic of Germany, C-582/14.

Under the definition of personal data, and thus under the data protected by the Regulation, there are no data anonymized and the data of the deceased.

Data anonymization is the process of modifying personal data, with the result that there is no possibility of connection of the data in question with a particular person. Anonymous data is, on the one hand, information that does not contain data for the possible identification of a particular person, or personal data that can no longer be attributed to a particular person. It can be achieved in two ways: randomisation or generalization. Randomization represents a change in the accuracy of the data in order to remove the connection between the data and the person. If the data becomes inaccurate, it is not possible to connect them further with a particular person. Generalization is a generalization of data. Anonymization is commonly used for statistical purposes.

Pseudonymisation is a common tool to remove the possible connection between an individual and a data. According to the definition of the regulation, it is the processing of personal data in such a way that personal data can no longer be attributed to the particular data subject without the use of additional information unless such additional information are kept separate and are subject to technical and organizational measures to ensure that personal data are not assigned to an identified or identifiable natural person. The use of pseudonymisation of personal data can reduce the risks for the relevant data subjects and help operators and brokers to meet their data protection obligations. The explicit introduction of "pseudonymisation" in this Regulation is not intended to exclude any other data protection measures.[4] Pseudonymisation is mentioned in several places in the Regulation, namely Article 6 Paragraph 4 (e), Article 25 Paragraph 1 of the Regulation under which the operator must take appropriate technical and organizational measures, for example if there is a pseudonymisation, Article 32 Paragraph 1 under the security rules for the processing of personal data.

2.1.2. Territorial validity of the Regulation

The most important change that this regulation brings is about ithe protection of the personal data of Union citizens and residents, which is binding on all companies and operating systems processing EU citizens 'and residents' data, regardless of where they are located and where they have their registered office or place of server. The General Data Protection Regulation extends, upgrades and clarifies the scope of the EU data protection jurisdiction. The term "supply of goods or services" under the various provisions of the Regulation obliges companies outside the EU providing services to consumers in the EU and processing data

[4] Recital 28 of the regulation.

of data subjects of the EU. Article 3[5] of Recital 22[6] of the Regulation clarifies the territorial scope so that the Regulation is applied "whether or not the processing itself takes place within the Union".

It is a change to the concept in the law of personal data protection, which replaces the concept of placement relevance by the concept of people within the EU, ie the personal concept. It can be said that the concept of territoriality has been replaced by the concept of personality when the determining factor is the person whose data is being processed and not the location of the data processor or the data itself. The General Regulation applies to processing about the activity of company in the EU where processing is taking place (eg cloud storage abroad). The general regulation will apply to the activities of a data controller or data processor when goods or services are offered to the data subjects or their persons, behaviour is monitored within the EU [Art. 3 Paragraph 2, recital 23].

2.1.3. New rights of the individual

Right to data portability to another service provider means that the data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided. The data subjects should be able to exchange a service provider, including the transfer of their personal data directly from one operator to the other operator, as far as technically possible and without loss of data (such as contacts or previous emails) and the need to re-enter them.

The right of data transfer is entirely new and includes the right to receive personal data in a structured, commonly used and machine-readable format, and the right to transmit this data to another operator without hindrance from the operator to which the personal data have been provided. The right includes the right to transfer data directly from one operator to another. This means that data controllers who externally process data or process data together with other controllers must have clear contractual terms for assigning each party's responsibility in responding to data portability requests and implementing specific procedures in that regard. The right consists of a) the right to obtain and reuse personal data

[5] This Regulation applies to the processing of personal data in the context of a operator's or a brokers establishment in the EU, whether or not the processing takes place in the Union or not.

[6] Any processing of personal data in the context of an operator's or an broker's establishment in the Union should be carried out in accordance with this Regulation, regardless of whether the processing itself takes place in the Union. An establishment means effective and real performance through fixed arrangements. The legal form of such arrangements, whether it is a branch or a subcompany with legal personality, is not a determining factor in this respect.

for further personal use (eg contact list, etc.), b) the right to transfer personal data from one operator to the other at the request of the data subject. This right creates an indirect obligation for data controllers not to impose any transmission barriers; c) the right to control, which means that the directors responsible for the data portability request have a specific obligation to check and verify the quality of the data prior to the transfer. On the other hand, the data recipient is responsible for ensuring that the portable data provided are relevant and not excessive in relation to the new data processing. The Regulation also stipulated that data portability based on the regulation would be provided without any requested payments unless the exemption applies.

The right of data portability has more practical challenges in the practical way. The right of data portability applies to data provided to subjects on the basis of the wording of Article 20 of the Regulation. This could limit the current development of the cyberspace if the data added by others could also be an important part of the data in question that the legitimate subject could have been interested in. On the other hand, the data added by the subject may also contain third party data. It remains to be asked whether these data should also be transmitted on the basis of the wording of Article 20 of the Regulation. Until now, the issue of the practical application of the right of data transfer is questionable. The costs and technical support needed to realization of this right are not yet known. Under the wording of Article 20 there is only the word 'technically feasible'. The explanation of the working group lies rather in the fact that no obligation is imposed on the data controller, which would only require them not to create obstacles in the transfer. In practice, this could lead to blocking the real use of the right with the indication of the operator that the transfer is not technically feasible. The Union should provide more practical guidance on technical support for real application of law, otherwise it may happen that the right will not be practiced in practice because of technical issues.

Profiling is any form of automated processing of personal data that consists of the use of such data to evaluate certain personal aspects relating to a natural person, in particular the analysis or anticipation of aspects of the individual concerned related to performance at work, property, health, personal preferences, interests, reliability, behaviour, position or movement. The data subject shall have the right not to be covered by a decision which is based exclusively on automated processing, including profiling, and which has legal effects which affect him or her or affect him or her in a similar significant way. The new rules introduced by the Regulation limit the use of profiling without the prior consent of the data subject. Profiling must not discriminate against the person whose data is being processed, and profiling must not be based on data that are defined as.

2.2. Other important changes

Penalties for violating the rules of the regulation are serious and up to twenty million euros. Generally speaking, the sanction model is based on the worldwide market turnover of an enterprise, as is known in antitrust law.

The consent and its terms have been changed in order to simplify and make granting of a consent and its download simply and comprehensibly as possible. The processing of sensitive personal data is prohibited unless the exception applies (for example, a person publishes such data voluntarily (in social media or otherwise or on a separate consent basis).) Separate consent to profiling is also required. The debate on consent is terminated in a regulation stating that consent should not be a condition for concluding a contract if the data are not necessary for the preliminary conclusion of the contract. The Regulation further defines the „consent of the data subject" as any free, specific, informed and clearly manifestation of the will of the data subejct by which with the form a statement or a clear confirmatory act, agrees with the processing of the personal data relating to him or her. Under this consent, we can also include publishing personal data and publishing them on the social network. On the other hand, everyone has the right to withdraw his or her consent to the processing of personal data. There is a particular importance of the Article 9 Paragraph 2 (e) of the General Regulation according to which there is no prohibition on the processing of personal data of so-called specific category (eg political opinion, religion, genetic data, data related to the health, sexuality, etc. if the data subject demonstrably publish them.

One contact mechanism has been set up to make it easier to contact public authorities. The Supervisory Authority is the only authority with which the processors and operators will work. In the case of multinational companies, they deal with the powers based on its establishment as well as the supervisor.

3. Conclusion

The impact of the establishment of the Digital Single Market will be on grow will be on all areas of life, law, technology, medicine, research, education, etc. To reach this goal the European Union has lots of work ahead of it. The first base stone was already laid down and that is the personal data protection reform. Personal data protection reform enables people "to move" in the digital world safely having specified clear rules, rights and a clear mechanism of supervision was set.

The General Data Protection Regulation has brought several important changes to the perception of the personal data protection. The article addresses several changes brought by the regulation in question and begins with the definition of

personal data. The definition itself is significantly changed, and as a result, more data are considered to be a personal data subject to the regime and protection of the regulation as compared to previous regulation. The article addresses absolute or relative understanding of the term of the identifiability of a natural person on the basis of information, while I incline to the relative understanding of that term. Anonymization and pseudonymisation are data protection tools, the first term means that data are not under the directive regime. The second term relates rather to the security and interconnection of other processed data. The article deals with a fundamental change in the area of the perception of obligatory subjects, where the change from the principle of territoriality to the principle of personality has occurred. Last but not least, it deals with the individual aspects of data transfer right and the challenges associated with this right.

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Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, 119/1.

Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHADecision of the Court of Justice of the EU dated 19. 10. 2016, Breyer vs. Germany, C-582/14.

REVIEWS

ŠIŠKOVÁ, Naděžda (ed.). The European Union – What is Next? A Legal Analysis and the Political Visions on the Future of the Union. Köln: Wolters Kluwer Deutschland, 2018, 350 p. ISBN 978-3-452-29186-8

Reviewer: Václav Stehlík*

Nowadays the European Union is facing challenges and pressures in various areas. This concerns not only the influx of migrants or Brexit. The calls for changes and shifts in directions of European integration are visible also in other areas which are crucial for finding solutions to current problems. This includes division of competences between the EU and its Member States, reforms of EU institutions and various procedures where they participate, the area of freedom, security and justice, human rights protection or EU external actions.

The newly published book was edited by Naděžda Šišková from the Faculty of Law, Palacky University in Olomouc, and was published under the auspices of the Jean Monnet Centre of Excellence in Olomouc created thanks to the support of the corresponding research grant attributed by the European Commission. The preface was written by Věra Jourová, the EU Commissioner responsible for justice, gender and equality. The book itself analyses various areas where reforms are needed, proposes solutions of current problems and predicts scenarios of the future development. It consists of six parts divided into individual chapters which focus on various areas of EU integration.

The first part is focused on the analysis of general issues of the EU law reform. In the opening chapter Tibor Palánkai from Corvinus University in Budapest rethinks the EU-integration and posts it in the overall theoretical context. Among others he evaluates the multi-speed Europe and variable geometry which is presented as a realistic option even in the long-term run. The next chapter deals with the institutional aspects of the EU integration and necessity for reforms of EU institutions. Pavel Svoboda – actually serving as a chairman of the European Parliament Legal Affairs Committee – analyses reasons for the institutional

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change. He also highlights various external challenges which cannot be solved by an individual Member State, the process of Brexit or citizens' lack of confidence in the EU. He attempts to search for the challenges particularly in relation to the European Parliament, including the "one seat" requirement, fusion of the EP with the Council, elections to the EU and supranational candidates and, prominently, also the revision of powers of the EP. He also deals with the alternations in the EU external activities and the powers of the EU in this area. In a similar stanza he proposes changes to the European Commission, European Council or Council. In relation to the CJEU he discusses changes in 258 TFEU procedure and possible broadening thereof to include systematic infringement of EU values or to include also breaches of the EU Charter of Fundamental Rights.

A separate chapter is devoted to the institutional changes after Brexit where Lenka Pítrová from the Faculty of Law in Prague looks for answers on the question whether these changes should be conceived as a challenge or threat. She focuses on the reforms of the EU budget *vis-à-vis* current challenges in the developments in the EU and abroad. Then she deals with the EU institutions and changes which might be expected after Brexit. She supposes that Brexit can be a catalyst for the change and can push EU leaders to reform the EU. At the same time she supposes that substantial changes can be done also by small well-targeted steps.

A fine analysis may be found in the chapter which deals with the future of national parliaments in the institutional system. Jan Grinc from the Faculty of Law in Prague deals – among others – with the subsidiarity check procedure and the search for the common language. In this regard he deals with the interpretation of the principle of subsidiarity as well as the problematic length of the period in which national parliaments may express their opinion. He also evaluates the interparliamentary cooperation and the idea of a chamber of national parliaments. The next chapter written by David Petrlík, from the Faculty of Law in Prague, focuses on the intergovernementalism as a response to EU challenges. He tries to answer whether it is more a threat for the EU unity or a real and effective solution of the problems. He concludes that intergovernmentalism may be considered as an appropriate tool to respond to some EU challenges. On the other hand, he also thinks that a proliferation of the intergovernmental method into the EU law is eroding the very nature of the EU law based on the supranational method.

The **second part** of the book is focused on the enhancement of democratic values, including human rights and the rule of law. The opening chapter of this part, written by Rainer Arnold from Faculty of Law in Regensburg, deliberates on the anthropocentric constitutionalism in the European Union. He opens issues such as constitutionality and social coherences, anthropocentrism and values which constitute supranational legal order and control national orders. Thereby

prof. Arnold tries to search for the core elements of EU constitutionalism. Next chapter written by Peter-Christian Müller-Graff from the Faculty of Law in Heidelberg, analyses the authority and future of EU law in the light of current changes. He searches for current phenomena which can potentially challenge authority of EU law and asks whether these challenges are of specific nature and what are their potential effects on the future of the EU law.In his analyses prof. Müller-Graff focuses for example on the budget problems of some Euro-states, migration crisis or Brexit. Next chapter written by the editor of the book, Nadežda Šišková from Faculty of law in Olomouc, focuses on the EU legal instruments to strengthen the rule of law as they are currently employed in relation to some EU member States. She not only evaluates the actual legal regulation and practice but also proposes alternation of the enforcement mechanisms for the future.

The **third part** of the book is devoted to the visions on the creation of the fiscal union. Correspondingly Jiří Georgiev from Faculty of Law in Prague analyses in detail the OMT decision of the German Federal Constitutional Court as well as the corresponding case-law of EU Court of Justice. Specifically he analyses the role of the German Constitutional Court as guardian of German constitutional system in general as well as in relation to this case. Another chapter written by Michal Petr from Faculty of Law in Olomouc uncovers current trends and future of the EU economic and monetary union. He reflects the theoretical approaches to the EMU, amendments adopted so far and also the possible developments in the future.

The **fourth** part of the book deals with the actual challenges in the EU area of freedom, security and justice. The sole chapter in this part is written by Jörg Monar from College of Europe in Bruges in which he analyses the content of the AFSJ as a constitutional objective and its restrictions. Prof. Monar is definitely aware of the constitutional implications of freedom, security and justice regulation but he concludes that the AFSJ is delivering a real added value compared to purely national measures of the Member States and he finds it as an important element of freedom of EU citizens within the EU.

The **fifth** part is dedicated to possible modifications in the field of external relations with the first chapter written by Vladimír Týč from Faculty of Law in Brno. Prof. Týč analyses the enhanced cooperation and international treaties between Member States and their role as possible means to overcome the increased heterogeneity of the European Union. He is aware on the increasing heterogeneity in the EU integration and the decline of sympathies for the European idea among the EU population. Prof. Týč analyses the White Paper of the European Commission on the Future of Europe and tries to answer the question how the diversity of EU Member States' interests might be overcome. His solution is based on the partial return to the intergovernmental method which he broadly

evaluates. The next chapter written by Eva Cihelková and Hung Phuoc Nguyen from Pan-European University in Bratislava focuses on EU-China Comprehensive Partnership and the corresponding responses to the globalised world. They deal, among others, with the Belt and Road Initiative, China investment plans for Europe and further cooperation in the area of financial systems and industrial cooperation. In the closing chapter of this part Victor Muraviov from Kiev National University analyses the EU-Ukraine relations and the Europeanisation of national legislation in Ukraine.

The **sixth part** is devoted to the visons and prospects of the EU integration and evaluation of various political proposals. The first chapter in this part – written by Petra Měšťánková and Ondřej Filipec from Faculty of Law in Olomouc – focuses on the debates on the future of the EU and tries to find a balance between expectations and reality. They focus on the visions in relation to the EU institutions, diverging position of Member States expressed by their political representatives. The authors try to answer the question whether there should be more or less Europe as it is reflected in positions of individual Member States. Another Chapter written by Tanel Kerikmäe and Evelin Pärn-Lee from Tallinn Law School deals with the digitalisation and automatization as a challenge to the European Union. It covers the early regulation in this area as well as various EU action plans, initiatives and agendas; separately it deals with the EU state aid rules and EU digital initiatives. The next chapter in this part written by David Sehnálek from Faculty of Law in Brno is dedicated to the future of the EU asking whether the proper answer to current challenges of European integration should be the Darwinism or intergovernmentalism. He applies the evolutionary theory on law including the EU law as well as he opens the debate on the role of inter-state bargaining and its role in the EU integration. The book is closed by common conclusions summarising individual chapters.

It is not possible to fully evaluate each chapter and individual conclusions separately as it would require a thorough knowledge and expertise thereof and subsequent contextual analysis. However, in general it may be concluded that the book, written by a strong research team from internationally respected universities, is an interesting source of ideas on the past, current state and predictable future of EU integration. It shows the complexity of the supranational entity and its relations to national legal orders and their often differing visions of the common integration project. Correspondingly, even though one will evaluate suggested solutions or theoretical visions with own apprehension of the EU integration, the book will be thought-provoking for each reader in this regard. We may share the hope of the editor that at least some of the ideas in this book will enrich current debates both at the national and European level and will contribute to the future developments of the EU.

GRILLER, Stefan, OBWEXER, Walter, VRANES Erich (eds.). Mega-Regional Trade Agreements: CETA, TTIP, and TiSA. New Orientations for EU External Economic Relations. Oxford: Oxford University Press, 2017, 368 p. ISBN: 9780198808893[*]

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On 21 September 2017, the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada entered into force provisionally. For the EU, it is considered a milestone in its trade policy. The agreement represents the first material outcome of the shift, which commenced in 2006 by the EU's admitting its re-orientation of its Common Commercial Policy from multilateral negotiations under the framework of the Word Trade Organisation (WTO) to regional and bilateral ones.[1]

It was only natural for the movement to be towards "mega-regional" agreements and to deeply integrated partnerships in the form of regional free trade agreements between countries or regions. Beyond market access, this process of integration emphasises the quest for regulatory compatibility and a harmonisation of various rules possibly affecting trade and investments. And the EU as one of the dominant trading blocks has started vigorously to pursuit this negotiating agenda. The EU Commissioner for Trade Cecilia Malmström stated on the occasion of CETA entering provisionally in force that "[i]t helps us shape globalisation and the rules that govern global commerce."[2] And the ambitiousness of this goal cannot be overstated in the context of studying mega-regionals.

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[1] European Commission. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Global Europe – Competing in the world – A contribution to the EU's Growth and Jobs Strategy*, COM (2006) 567, 4. 10. 2006.

[2] European Commission. *Press release: EU–Canada trade agreement enters into force*. Brussels, 20 September 2017.

Further, this is also the rationale behind the "rush" in negotiations all over the world. At the same time, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entered into force in December 2018 and the Regional Comprehensive Economic Partnership (RCEP) is in the final stages of negotiations.

At the same time, mega-regionals raise serious concerns and complex legal, political, economical and methodological questions. Accordingly, they have recently become the subject of several studies[3] as well as the subject of higher public scrutiny. Many observers ask if this attention is deserved and what the real implications will be for the world trade system. There are indeed divergent views on the consequences of such treaties and the uncertainty over costs and benefits of mega-regionals remain a point of concern for the general public.

The topic of the book at hand is thus pertinent for the current and future development of the multilateral trading system and the EU trade policy. The volume itself presents a collection of sixteen contributions edited by Stefan Griller, Walter Obwexer and Erich Vranes. The book is divided into three parts: I) Fundamental and introductory issues; II) Selected sectoral issues; and III) New challenges for politics, law and legitimacy. In adopting this broad approach, it offers comprehensive analysis which employs a socio-legal approach.

The unifying theme of the book is the current EU trade policy based on negotiations of mega-regional agreements, the already mentioned CETA, but also the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States, and finally the Trade in Services Agreement (TiSA), a possible treaty among almost fifty members of the WTO. While CETA and TTIP are well known even among the public, the TiSA negotiations have remained in their shadow for 21 negotiation rounds by November 2016 before it was suspended due the Trump administration coming into office.

The significance of topics covered in this book cannot be overemphasised and the authors successfully demonstrate a relevance of their examined issues. For instance, Ernst-Ulrich Petersmann persuasively presents the challenges arising from mega-regionals from a conceptual perspective of international economic law. Mega-regionals, he explains, are political responses to "governance failures" in WTO practices, reflecting legal fragmentation and methodological disagreements over how to liberalise and regulate trade (p. 22, 33). Despite pursuing beneficial economic convergence, the negotiators should not disregard the EU's

[3] RENSMANN, T. (ed.). *Mega-Regional Trade Agreements*. Cham: Springer International Publishing, 2017; CHAISSE, J., GAO, H., LUO, Ch. (eds.). *Paradigm shift in international economic law rule-making: TPP as a new model for trade agreements?*. Singapore: Springer-Verlag, 2017; World Economic Forum, *Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?* 2014.

"cosmopolitan trade policy constitution" committing the EU to protection of its citizens, the rule of law and parliamentary and participatory democracy.

Stephan W. Schill focuses on an important and controversial component of trade and investment agreements: dispute settlement rules. After an analysis of the inter-state procedures envisaged in mega-regional agreements he takes rather an unconventional approach towards investor-state dispute settlement. In his view, CETA or TTIP will influence the structures of these disciplines in international economic law. He puts the development in the context of the EU proposal for a permanent investment court which may lead to a constitutional moment in international economic governance (p. 148). This is indeed a compelling conclusion which will deserve further attention. One of the most interesting chapters is certainly Lorand Bartels' part on human rights, labour and environmental standards. His contribution focuses on "non-trade" issues which are incorporated in trade agreements recently. Despite their growing status in trade negotiations, Bartels remains rather critical of real progress in this area based on the CETA text (p. 215) which is quite the opposite view to the EU and Canada's public proclamations.

These three briefly introduced contributions are only an appetizer for the whole high-quality volume subjected to the review. To conclude, *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA*, based on well-researched analysis of the examined EU trade and investment negotiations, is remarkably timely scholarly piece of work not only on the EU trade policy.

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THE EUROPEAN UNION – WHAT IS NEXT?
A Legal Analysis and the Political Visions on the Future of the Union
Assoc. Prof. et Assoc. Prof. Naděžda Šišková, Ph.D. (ed.)
Wolters Kluwer Germany, 2018, 348 p.,
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The monograph, published in English, is focused on the prospects of future development of the European Union and of European law taking into account account the already declared reform of the Union and in reflection of the concrete political scenarious. Thematically the book is dealing with analysis of the changes in the main fields of the Constitutional and substantive law of the EU, which are relevant from the point of view of the envisaged reform of the Union. Especially the text does the analysis of the deep motifications of the EU institutions (for instance the merger of the European Parliament and the Council into a single legislative body and other institutional changes (the effectivity of European legal instruments for strenghten the rule of law (including the novelisation of Art. 7 TEU), future development of the Area of Freedom, Security and Justice (including the migration issues), the destiny of Euro, etc. The essential part of the monograpf is dedicated to the critical avaluation of the actually discussed political and legal proposals and the approaches to them from the side of the Member States. The eventualities of the future development of the Union in the connection with the legal regulation in the field of modern technologies also creates an integral part of the book. The preface of the monograpf was written by the Member of the European Commission responsible for justice, gender and equality Věra Jourová. The publication was prepaired by the international team of authors from the leading European Universities from Germany (University in Heidelberg, Regensburg University), Belgium (College of Europe in Bruges), Czech Republic (Charles University in Prague, Palacky Univesity in Olomouc, Masaryk University in Brno), Hungary (Corvinus University in Budapest), Estonia (Tallinn Univesity of Technology), and Ukraine (Schevchenko National University in Kiev). The publication was created in the framework of the project in the category of Jean Monnet Centre of Excellence with the title „Reform of the Union and the Related Issues“ granted to the Palacky Univesity.