EUROPEAN STUDIES

The Review of European Law, Economics and Politics

VOLUME 6

2019

Wolters Kluwer

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Published once a year by **Czech Association for European Studies** – Czech ECSA and **Jean Monnet Centre of Excellence in EU Law at Faculty of Law, Palacký University Olomouc**, tř. 17. listopadu 8, 771 11, Olomouc, Czech Republic in **Wolters Kluwer**, U Nákladového nádraží 10, 130 00 Praha 3, Czech Republic.

Volume VI, 2019
Evidence number of periodicals: 2338

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ISSN 1805-8809 (Print)
eISSN 2464-6695 (Online)
ISBN: 978-80-7598-718-1 (Print)

European studies – The Review of European Law, Economics and Politics is edited in the framework of the Jean Monnet project no. 611293-EPP-1-2019-1-CZ-EPPJMO-NETWORK, granted by the European Commission.

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ABOUT THE JOURNAL

European Studies – The Review of European Law, Economics and Politics is a peer-reviewed periodical in the form of year-book of the Czech Association for European Studies and Jean Monnet Centre of Excellence in EU Law at Faculty of Law, Palacký University Olomouc. The presented journal reflects the interdisciplinary character of this scientific society, therefore it does not limit to only one discipline within the European studies, but on the contrary, it pursues for a multi-disciplinary approach and analysis of various aspects of the European integration. That is why the concept of the journal accounts with the scientific articles and expertise not only from the field of European law, but also from European economy, European political science, EC/EU history and other relevant disciplines relating to the analysis of supranational entities as well.

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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Publication Ethics rules of the **European Studies – The Review of European Law, Economics and Politics** are based on the Best practice guidelines for journal editors and Principles of transparency and best practice in scholarly publishing developed by the Committee on publication ethics (COPE).

European Studies – The Review of European Law, Economics and Politics is indexed as a peer-review journal by the European Reference Index for Humanities and Social Sciences (ERIHplus).

ARTICLES

Europeanization of Fight Against Disinformation and Propaganda at the Times of New Russian Hybrid Warfare*

Ondřej Filipec**

Summary: After Russian aggression against Georgia, annexation of Crimea and war against Ukraine international community of experts in academia, state administration and civil society were increasingly reflecting the issue of hybrid warfare and information war. This is also the case of the EU which developed structures addressing hybrid warfare, especially disinformation and propaganda. The main aim of this article is to analyse the process of creation of these structures in the context of Europeanization concept and reveal reasons for inadequacy and inefficiency of the newly established institutions. Despite EU succeeded in creation of policy instruments their effectiveness is far from being enough vis-à-vis Russian efforts.

Keywords: Europeanization – Disinformation – Propaganda – Hybrid Threats – Hybrid Warfare – Russia – EU

1. Introduction

The main topic of this article is the attempt of the EU to fight disinformation and propaganda. For this purpose EU developed new structures and institutions with the aim to address new threat. This article is analysing this process in the context of Europeanization process which is for almost 30 years linked with EU studies. The main aim of this article is to put EU attempts into the context of Europeanization and reveal possible limits of EU activities with proposals for strengthening.

The main research question of this article is that related to the process of change: what is the nature of Europeanization in the field of fight against disinformation and propaganda? This question is not aimed at simple description

* This article has been written under the grant scheme of Jean Monnet Network Project 611293-EPP-1-2019-1-CZ-EPPJMO-NETWORK "European Union and the Challenges of Modern Society (legal issues of digitalization, robotization, cyber security and prevention of hybrid threats" awarded in 2019 to the Faculty of Law, Palacký University in Olomouc.

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of activities and mechanisms at the EU level but shall contribute to deeper understanding of reasons why EU attempts are limited in its results. Author of the article is persuaded that the concept of Europeanization can help to reveal factors influencing EU inefficiency to fight disinformation and propaganda. In this sense article will enrich existing literature on Europeanization and its theoretical aspects. Moreover, it will serve as overview of EU activities conducted by the EU institutions between March 2013 and September 2019 on relatively new and increasingly important field.

The article is divided into three parts. First part is introducing the concept of Europeanization. Because it is not the aim of the article to provide comprehensive introduction into the well known concept, this part focuses on the introduction of the most usable parts of the concept. Author believes, that concept of Europeanization is well known and for this reason it is not necessary to provide full details which might be easily found in the works of "classical scholars" referred in the first part.

Without any prejudice this article deals disinformation and propaganda linked with Russia or its proxies supporting pro-Russian world view. Despite there many states with well developed propaganda systems, Russia is for Europe most concerned state. This is due to close geo-political position to the EU, diverging interests in many important areas (Crimea, territorial integrity of Ukraine, the status of human rights in Russia, Russian intelligence operations in Europe, Russian involvement in Brexit campaign etc.) and misperception over values, principles and policies, (e. g. sanctions over Russia, Eastern partnership, Energy security etc.). Former Belgian Minister of Foreign Affairs once reportedly said, that the "EU is economic giant, political dwarf and military worm".[1] This asymmetry of roles is reflected also in the relationship with Russia. While in the economic area both subjects seem to be partners (despite sanctions), in the political space both subjects are merely adversaries and militarily potential enemies. This cautious attitude is reflected also in official Russian documents and politico-military doctrines which are based or realist principles of power. In other words, EU is natural adversary for Russia in many areas especially where power interest is overlapping and essential for Russian security.

For decades, EU lack real military capacities and is associated with inability to act at the times of conflict (most visibly the incapacity to act during the war in Yugoslavia, internal division over war in Iraq or impotent reaction on the Russian invasion into Georgia). EU has been associated mainly with "soft power". In the words of Joseph S. Nye: with *"the ability to get what you want trough*

[1] THE NEW YORK TIMES. *War in the Gulf: Europe*; *Gulf Fighting Shatters European's Fragile Unity*. The New York Times, 25. 1. 1991 [online]. Available at: http://www.nytimes.com/1991/01/25/world/war-in-the-gulf-europe-gulf-fighting-shatters-europeans-fragile-unity.html?pagewanted=1

attraction rather than coercion or payment".[2] Moreover, EU is not classical state actors but rather subject *sui generis*, in which the culture of consensus is imprinted in the genetical code. This is especially valid in the areas sensitive to national sovereignty. Diverging interests of its members easily lead to inability to act or consensual, but partially effective, decisions. This makes EU potentially vulnerable target against new forms of warfare, including hostile disinformation and propaganda.

Disinformation, propaganda or simply "information warfare"[3] are not new parts of the warfare. For decades methods were "cultivated" by the Soviet Union as a part of *Agit Prop* element (tools designated to influence and mobilize targeted audience) of the warfare[4] which was considered important part of military doctrines. Disinformation and propaganda are part of the information war, which was defined by the Ministry of Defence of the Russian Federation as: *"the confrontation between two or more states in the information space with the purpose of inflicting damage to information systems, processes and resources, critical and other structures, undermining the political, economic and social systems, a massive psychological manipulation of the population to destabilize the state and society, as well as coercion of the state to take decisions for the benefit of the opposing force."*[5]. Above definition is well applicable also on the EU which serves as the umbrella entity influencing quality of political, economic and social systems of the EU member states and contributes to peaceful coexistence of all members. As a soft power example, source of prosperity and stabilization (also in the former Soviet space) it is potential target of information war aimed at Russian geo-political aspirations. As warned by the EU Hybrid Fusion Cell *"disinformation by the Russian Federation poses the greatest threat to the EU. It is systematic, well-resourced, and on a different scale to other countries"*[6].

In other words, information warfare is not new. What is new are the methods and geo-political context which were reflected in new geo-political course set

[2] NYE, J. *Soft Power: The Means to Success in World Politics*. New York: Public Affairs, 2004, p. x.

[3] For further specification of information and cyber warfare see VALUCH, J., GÁBRIŠ, T., HAMUĽÁK, O. Cyber Attacks, Information Attacks and Postmodern Warfare. *Baltic Journal of Law & Politics*, 2017, vol. 10, no. 1, pp. 63–89.

[4] PALMER, D. R. A. *Back to the Future? Russia's hybrid warfare, revolutions in military affair, and Cold War comparisons*. Research Paper no. 120 – October 2015. Research Division – NATO Defense College, Rome, p. 9.

[5] Ministry of Defence of the Russian Federation. *Russian Federation Armed Forces' Information Space Activities Concept*, 2019 [online]. Available at: https://eng.mil.ru/en/science/publications/more.htm?id=10845074@cmsArticle

[6] European Commission. *Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan against Disinformation (JOIN(2018) 36 final)*. Brussels, 5. 12. 2018 [online]. Available at: https://ec.europa.eu/digital-single-market/en/news/action-plan-against-disinformation

by Yevgeny Primakov and Valery Gerasimov. While motivations for employing information war might be explained by classical realism or in the context of constructivist theories, means of information war is possible to explain in the liberal context: EU is composed of democracies and as a such might be disrupted by its downfall to flawed forms of states or by alienation of its members seeking exit. For this reason, it is best interest of the EU to seek defence against hostile disinformation and propaganda which is targeted against legitimacy of European unification project and its essential feature: EU membership of participating states.

2. The Concept of Europeanization

Because the concept of Europeanization is well known among scholars dealing with EU studies this part will present main standing points of the concept in relation to the EU attempts to deal with disinformation and hybrid warfare. There are many definitions of Europeanization which over the last almost thirty years varied in their scope from more general to very tight definitions. Definitions also presented great variety of views on what Europeanization is. As a result there is no universal definition of Europeanization and definition of the concept still remains unsatisfactory struggle. However, various definitions might be found in the works of "classical authors" who contributed in build up of the concept.[7] Despite slightly different shades and logic of the definitions, it seems that there are several common aspects may be derived. Europeanization is process and it is a process of change. This implies, that there must be at least two states: original state of affair and resulting state. Because it is Europeanization, EU or Europe is part of this process: in the form of actor or as a subject. In over almost thirty years the attitudes varied and led to attempts of conceptualization reflecting different logic of Europeanization.

Johan P. Olsen (2002) is thinking about Europeanization in five different forms. First, as the change in external boundaries of the EU in the terms of

[7] See For example: LADRECH, R. *Europeanization and National Politics*. Basingstoke: Palgrave Macmillan, 2004, p. 69; BULMER, S., BURCH, M. Organizing for Europe: Whitehall, the British State and the European Union. *Public Administration*, 1998, vol. 76, no. 1, p. 602; BÖRZEL, T. Towards Convergence in Europe? Institutional Adaptation to Europeanization in Germany and Spain, *Journal of Common Market Studies*, 1999, vol. 39, no. 4, p. 574; BULLER, J., GAMBLE, A. Conceptualizing Europeanization. *Public Policy and Administration*, 2002, vol. 17, no. 2, p. 17; RISSE, T., COWLES, M. G., CAPARASO, J. Europeanization and Domestic Change: Introduction. In: COWLES, M. G., CAPARASO, J., RISSE, T. (eds.). *Transforming Europe: Europeanization and Domestic Change*. Ithaca, NY: Cornell University Press, p. 3, RADAELLI, C. M. Europeanisation: Solution or problem? *European integration online Papers,* 2004, vol. 8, no. 16, p. 5; LADRECH, R. Europeanization of Domestic Politics and Institutions: The Case of France" *Journal of Common Market Studies*, 2010, vol. 32, no. 1, p. 2.

enlargement; Second, as the development of institutions at the EU level, associated mainly with build up of institutions at the centre; Third, as the penetration of national and sub-national systems of governance by the EU norms; Fourth, as export of the EU norms and forms of political organization beyond EU borders; and Fifth, as the EU unification project.[8] Above mentioned understanding of Europeanization seems not to be exclusive and sometimes may overlap due to shallow borders of the concept. This is also the case of this article which deals mainly with second attitude mentioned by Olsen: it will analyse development of measures against disinformation and propaganda at the EU level. However, development of such measures sometimes has also implications for member states which are influenced by EU policies.

This reality of many policy areas was reflected also in the definition provided by Claudio Radaelli (2004) who claims that: *"Europeanization consists of processes of a) construction, b) diffusion and c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, "ways of doing things" and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and sub-national) discourse, political structures and public policies"*[9]. First part of the definition is very true also for the attempts of the EU to fight disinformation and propaganda. However, comparing to other policy areas the influence of the EU member states might be limited due to several reasons. First, disinformation and propaganda are related to interior issues, security and intelligence. These are in general areas with strong involvement of national sovereignty and hesitancy of deeper cooperation. Second, in areas touching national sovereignty is dominant intergovernmental and informal cooperation, which sometimes prevents effective multilateral decisions due to necessary consensus in order not to compromise national interests. Third, due to intergovernmental nature it might be expected that contrary to the European Parliament and European Commission it will be especially Council of Ministers who will be dominant institution in this agenda.

Next to the nature of Europeanization it might be worth to explore various forms of activities designed by fight disinformation and propaganda. In this sense Europeanization has been enriched by institutionalist perspective. Similarly to Europeanization also Institutionalism is very complex term having three very important steams in the form of rational choice institutionalism, historical institutionalism and sociological institutionalism. As pointed out by Simon Bulmer (2008) all three streams allows us to develop different aspect of Europeanization. For

[8] OLSEN, J. P. The Many Faces of Europeanization. *Journal of Common Market Studies,* 2002, vol. 40, no. 5, p. 923–924.

[9] RADAELLI, C. M. Europeanisation: Solution or problem? *European integration online Papers,* 2004, vol. 8, no. 16, p. 5.

example rational choice institutionalism offers look inside the states for analysing the factors enabling Europeanization. Historical institutionalism allows to focus on time: how integration in time developed or focus on timing or different pace of Europeanization. Lastly, sociological institutionalism contributes to reference to the culture, ideas and attitudes which are also influencing cooperation of actors who stand often behind Europeanization.[10] Institutionalist insight may greatly contribute to revealing and analysing forces behind Europeanization and for this reason in the following part special attention will be paid to background decisions.

3. The EU Response on Disinformation and Propaganda

3.1. Initial Steps

The European Council recognized the threat of online disinformation in 2015 when High Representative was asked to address the ongoing disinformation campaigns conducted by Russia[11] and prepare action plan on strategic communication. As a result one of the first steps in the fight against disinformation and propaganda was establishment of the EEAS East StratCom Task Force in March 2015, followed by the Joint Communication on Countering Hybrid Threats,[12] establishment of Hybrid Fusion Cell and Member States were invited to consider establishment of the European Centre of Excellence for Countering Hybrid Threats with the aim to share best practices of the EU and NATO in the fight against disinformation and propaganda.[13]

Out of the three newly established bodies EEAS East StratCom had good potential, however the new body was from the early beginning understaffed (only 16 people) and lacked resources with allocation only 1,1 million Eur. Moreover, its mandate was limited to communicate Eu policies instead of directly addressing core of disinformation. According to the Action Plan on Strategic Communication from June 2015 its mandate was 1) Effective communication and promotion

[10] BULMER, S. Theorizing Europeanization. In: GRAZIANO, P. R., VINK, M. P. (eds.). *Europeanization: New Research Agendas*. London: Palgrave Macmillan 2008, p. 51.

[11] European Council. *European Council meeting (19 and 20 march 2015) – Conclusions.* Brussels, 20 March 2015 [online]. Available at: https://www.consilium.europa.eu/media/21888/european-council-conclusions-19-20-march-2015-en.pdf

[12] European Commission. *Joint Communication of the European Parliament and the Council. Joint Framework on countering hybrid threats: a European Union response*. Brussels, 6. 4. 2016 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:-52016JC0018&from=EN

[13] Ibidem.

of Union policies towards the Eastern Neighbourhood; 2) Strengthening the overall media environment in the Eastern Neighbourhood and in Member States, including support for media freedom and strengthening independent media; and 3) Improved Union capacity to forecast, address and respond to disinformation activities by the Russian Federation.[14] Staff underrepresentation and little budget became immediate source of criticism by security experts who urged Juncker and Mogherini to call out Russia for its hostile disinformation activities and provide EEAS East StratCom at least another 30 staff and 5 million Eur.[15]

There are at lest two supportive facts to the criticism. First, Russia spends every year 400–500 million[16] USD for foreign information efforts (Strobel 2015) and thus the budget of East StatCom is just little contribution in fight with disinformation and propaganda. And second, even with limited resources, StratCom succeeded in creation of very successful web *EU vs Disinfo*, and crated database of Russian disinformation which today (January 2020) counts 7306 cases of pro-Kremlin disinformation collected and debunked (EU vs. Disinfo 2020). On the other hand activities of the East StratCom might be not fully consistent with the EU soft power normative as mentioned Wagnsson and Hellman (2018). They warns that *"To engage with a counterpart who abuses discursive standards might lead to one's own compromising of these standards. The empirical analysis demonstrates that a normative power's ambition to treat the other as abject and without judgmental attitude is easily ruined or at least harmed by the communications and performances of the other"*[17]. In other way, authors are afraid that activities of the East StratCom may lead to the compromising of the EU normative power due to increasing involvement and adoption to communication closer to Russian strategic communication. That is why debate over East StratCom raises more important long-term strategic question. Shall EU protect its resources of normative power or be more explicit and address threats more directly? And isn't departure from normativity one of the goals of the other to increase ideological content of the EU behaviour which might lead to delegitimization?

Even second body, isn't less controversial. The EU Hybrid Fusion Cell was situated with EU Intelligence and Situation Centre (EU INTCEN) of the EEAS

[14] EEAS. *Questions and Answers about the East StratCom Task Force*. European External Actions Service, 5. 12. 2018 [online]. Available at: https://eeas.europa.eu/headquarters/headquarters-homepage/2116/-questions-and-answers-about-the-east-stratcom-task-force_en

[15] European Values. *Open Letter by European Security Experts to President of the European Commission J. C. Jucker and High Representative for Foreign and Security Policy Frederica Mogherini*. 2018 [online]. Available at: https://www.europeanvalues.net/openletter/

[16] Estimations vary: 500 million USD seems to be lower estimation as some estimations are about 1 billion USD. This might be due to different methodology and subjects involved in calculation.

[17] WAGNSSON, Ch., HELLMAN, M. Normative Power Europe Caving In? EU under Pressure of Russian Information Warfare. *Journal of Common Market Studies*, 2018, vol. 56, no. 5, p. 1172.

with the aim to analyse hybrid threats and to receive, analyse and share classified and open source information related to hybrid threats. This Europeanization in the form of institutional development turned also to have implications for the Member States as they had obligation to establish National Contact Points connected to Hybrid Fusion Cell.[18] Due to work with confidential information the activities of the centre are hidden behind EU classified information and data protection rules.

In April 2017 also the "Hybrid CoE" was established as a result of above mentioned Joint Communication and Common set of proposals for the implementation of the Joint EU/NATO Declaration endorsed by the Council of the EU and NATO on 6 December 2016. The Hybrid CoE turned to be hub for expects with the aim to assist member states and its institution to defend against hybrid threats. It is a place for share of best practices, ideas and doing exercises.[19] CoE was initially established by nine member states and as of 2019 it has 27 member states including USA, Canada, Montenegro or Norway. While some non-EU states are members, several EU states are missing: for example Belgium, Bulgaria, Ireland, Malta or Slovakia.[20] From the theoretical perspective Hybrid CoE is hybrid also in the term of Europeanization as it is situated between EU and NATO.

In late 2017 the Commission set up a High-Level Expert Group ("the HLEG) to advise about this issue and develop policy measures to counter disinformation and propaganda. It was an intersectoral group composed of 39 expert from various spheres including academia journalists, press, NGOs etc who were working under the leadership of Prof. Dr. Madeleine de Cock Buning.[21] It is important to mention, that part of the HLEG were also representatives of internet "giants" including Google, Facebook, Twitter or people from Journalist federations. In this sense European Commission succeeded to bring together very skilled and influential expert all around the Europe which contributed to creation of comprehensive report. It is important to note, that almost all ideas, approaches and activities reflected in the upcoming documents (e.g. Communication or Action plan) have roots in the HLEG Commission.

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[18] European Commission. *Joint Communication of the European Parliament and the Council. Joint Framework on countering hybrid threats: a European Union response*. Brussels, 6. 4. 2016 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:-52016JC0018&from=EN

[19] CoE. *What is Hybrid CoE? The European Centre of Excellence for Countering Hybrid Threats* [online]. Available at: https://www.hybridcoe.fi/what-is-hybridcoe/

[20] COE. *Joining dates of the Hybrid CoE Member States. The European Centre of Excellence for Countering Hybrid Threats* [online]. Available at: https://www.hybridcoe.fi/wp-content/uploads/2019/12/Joining-Dates-Alfabetic-Order-1.pdf

[21] European Commission. *A multi-dimensional approach to disinformation. Report of the independent High level Group on fake news and online disinformation*. DG Comm. Luxembourg: Publication Office of the European Union, p. 5.

Next to the establishment of HLEG European Commission launched public consultation process, initiated structured dialogue with relevant stakeholders and conducted Eurobarometer survey. Public consultation resulted in 2986 replies from 2784 individuals and 202 organizations.[22] Initial results proven that disinformation is related mainly to social media and has potential to undermine democratic processes and health policies[23] in Europe. Structured dialogue was conducted in February 2018 with five experts[24] who were asked six questions. This High-Level Hearing entitled "Preserving Democracy in the Digital Age" helped to put the issue of disinformation and propaganda into deeper context and also to evaluate European Commission initiatives to deal with the disinformation and propaganda. It is not surprising, that especially East StratCom come under criticism due to understaffing, lack of resources and aims of the activities. And even possibility of taking East StratCom outside of EEAS was discussed.[25] The fourth important information input was the Flash Eurobarometr survey which confirmed some trends already discovered during on-line consultation but also discovered expectations of the EU citizens. In relation to this article it is interesting, that relative majority of EU citizens (45 %) think, that it is responsibility of journalist to act to stop spread of fake news. On the second place are national authorities (39 %). EU institutions were placed on fifth place (21 % of people), behind press and broadcasting management (36 %), citizens themselves (32 %) or online social networks (26 %).[26] In other words there is not high expectations to take Acton at the EU level. This is contrary to the potential EU institutions have.

Following the work of HLEG and other inputs the European Commission in spring 2018 published the Communication of the European Commission on tackling online disinformation: A European approach was issued. The Communication informed about scope and cause of online disinformation and communicated overarching principles and objectives which should guide actions to tackle disinformation: in short (1) transparency regarding the origin of information and the way of production; (2) promoting the diversity of information; (3) fostering

[22] European Commission. *Summary report of the public consultation on fake news and online disinformation*. European Commission, 12. March 2018 [online]. Available at: https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-fake-news-and-online-disinformation

[23] Health is one of the areas heavily affected by disinformation with great potential of negative impact, especially in relation to vaccination against serious and easily transmissible diseases.

[24] Anne Applebaum, Philip Howard, Rasmus Kleis Nielsen, Philip Lelyveld and Keir Giles.

[25] European Commission. *High-Level Hearing: Preserving Democracy in the Digital Age.* European Commission, Berlaymont Building, Brussels, 22. February 2018 [online]. Available at: https://ec.europa.eu/epsc/events/high-level-hearing-preserving-democracy-digital-age_en

[26] European Commission. *Fake News and Disinformation Online*, 2018. Flash Eurobarometer no. 464 [online]. Available at: https://data.europa.eu/euodp/en/data/dataset/S2183_464_ENG

information credibility; and (4) to fashion inclusive solution.[27] The communication is rich of technical details (of which many were already elaborated on HLEG meetings) and is also including commitment in reporting on made progress.

In September 2018 Package of measures securing free and fair European elections was enacted, followed by Code of practice against disinformation. During State of the Union Jean-Claude Juncker stressed contribution to free, fair and secure elections in the EU, including for example a Recommendation on election cooperation networks, online transparency, protection against cybersecurity incidents and fighting disinformation campaigns; Guidance on the application of EU data protection law; or a legislative amendment to tighten the rules on European political party funding.[28] From the perspective of Europeanization measures proposed by European Commission it represent some obligations for the Member States who are "encouraged" to adopt certain measures which will influence other actors (e. g. political parties). At the EU institutional level Europeanization next to creation of guidelines and principles led the institutional development as one of the measures anticipated creation of a new European Cybersecurity Competence Centre to boost cooperation in the area.

In November 2018 the Observatory for Social Media Analysis (SOMA) was launched. It is a collaborative verification platform coordinated by Athens Technology Center. The main purpose is to map European social media, establish a European centre for social media stakeholders and develop Source Transparency Index to immediately verify resources. In other words SOMA will contribute to media literacy and create platform to detect and analyse disinformation.[29] In practice SOMA is platform bringing together important actors having expertise in fact-checking (e. g. Pagella Politica), social media, large data analysis (Aarhus University or Luiss Guido Carli Centre) or technology (Athens Technology Center or T6ECO). From the Europeanization point of view EU contributed to institutional development and provided opportunity for civil society actors.

3.2. Action Plan and Beyond

Important measure was the adoption of the Action Plan against disinformation in December 2018. Action plan is providing set of activities with the aim to build-up

[27] European Commission. *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions. Tackling online disinformation: a European Approach*. Brussels, 26. 4. 2018. COM(2018) 236 final.

[28] European Commission. *State of the Union 2018: European Commission proposes measures for securing free and fair European elections*. European Commission, 12. 9. 2018 [online]. Available at: //ec.europa.eu/commission/presscorner/detail/en/IP_18_5681

[29] SOMA. *About us. Social Observatory for Disinformation and Social Media Analysis*, 2020, 2018 [online]. Available at: https://www.disinfobservatory.org/about-us/

EU's capabilities and strengthening cooperation between Member States in four relevant areas: 1) Improving detection, analysis and exposure to disinformation; 2) stronger cooperation and joint responses to threats, 3) enhancing collaboration with online platforms and industry to tackle disinformation; and 4) raising awareness and improve societal resilience.[30] In total 10 actions were identified to be implement. Actions and their purposes are summarized in the Table 1.

Table 1: Actions of the EU against disinformation and propaganda

No.	Action	Purpose
1	Strengthening of Strategic Communication Task Forces and Union Delegations (more resources)	To detect, analyse and expose disinformation activities
2	Review of mandates of the Strategic Communication Task Forces for Western Balkans and South	To enable them to address disinformation effectively in these regions
3	Establishment of Rapid Alert System	For addressing disinformation campaigns
4	Set up EU institutions' communication on EU values and policies	Better communication
5	Strengthening the strategic communication in the EU neighbourhood (Commission and High Representative)	Better communication
6	Monitoring implementation of the Code of Practice	Higher effectiveness of the Code of Practice
7	Targeted campaigns for public, media and public opinion shapers trainings	Support work of independent media and promote quality journalism
8	Creation of independent team of fact-checkers and researches	Capacity development
9	Launch Media Literacy Week in March 2019 and promotion of rapid implementation of Audio-visual Media Services Directive	Promotion of media literacy
10	Ensuring follow-up of the Elections Package (Recommendation)	Smooth European Parliament Elections of 2019

Source: Author, based on Joint Communication… from. 5. 12. 2018.

[30] European Commission. *Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan against Disinformation (JOIN(2018) 36 final)*. Brussels, 5. 12. 2018 [online]. Available at: https://ec.europa.eu/digital-single-market/en/news/action-plan-against-disinformation

The actions in the plan are interesting from the Europeanization perspective. While some activities are defined as a task for EU institutions, some are (e. g. action 1, 3, 5, 7 and 9) "in cooperation with Member States". Some are directly addressing Member States. For example: *"Member States, in cooperation with the Commission, should support the creation of teams of multi-disciplinary independent fact-checkers and researchers …"* or *" In view of the upcoming 2019 European elections, Member States should ensure effective follow-up of the Elections Package, notably the Recommendation."*[31] Some even offers self-regulatory measures for other subjects, such as audio-visual companies (e. g. action 6). Here we come back to the second part of the definition of Europeanization as presented by Radaelli: *"… and then incorporated in the logic of domestic (national and sub-national) discourse, political structures and public policies."*[32]

The first half of the 2019 was in line with implementation of the Action plan. In January 2019 there was Inaugural meeting of the European cooperation network for elections in order to secure smooth elections into the European Parliament and in between January and May 2019 online platforms of reporters was activated. In March 2019 the initiative "European Media Literacy Week" was launched to promote media literacy in Member States and during same month the Rapid Alert System was set up. Moreover, in May 2019 European Commission contributed to the informal meeting in Sibiu organized under Romanian presidency of the EU. At the meeting EU Strategic Agenda for years 2019–2024 was debated and disinformation and propaganda continues to play important role in safeguarding democracies and protecting citizens and freedom.[33]

Above presented Action plan brought several important measures of which some were involved especially because of upcoming elections to the European parliament but have long term potential as electoral process is a key issue in each member state and potential target of disinformation campaigns aimed at outweighing the political equilibrium in the EU institutions. That is why elections in bigger states are of key importance for EU institutions and are important source of information. That is why EU institutions request specialized studies on disinformation and data-driven propaganda as in the case of Joint Research Centre.[34] As mentioned in the Report on the implementation of the Action Plan

[31] Ibidem.

[32] RADAELLI, C. M. 2004: c. d., p. 5.

[33] European Council. *Leaders' Agenda. Strategic Agenda 2019–2024 – outline*. 9. 5. 2019 [online], p. 2. Available at: https://www.consilium.europa.eu/media/39291/en_leaders-agenda-note-on-strategic-agenda-2019-2024-0519.pdf

[34] See for example FLORE, M., BALAHUR, A., PODAVINI, A., VERILE, M. *Understanding Citizen's Vulnerabilities to Disinformation and Data-Driven Propaganda. Case Study: The 2018 Italian General Election*. JRC Technical Reports. Luxembourg: Publication Office of the European Union, 2019.

Against Disinformation, EU measures contributed to preserve integrity of the elections to the European Parliament.[35]

European Parliament contributed with several documents. First, it adopted Resolution on foreign electoral interference and disinformation in national and European democratic processes where it expressed *"deep concern over the highly dangerous nature of Russian propaganda in particular, and calls on the Commission and the Council to put in place an effective and detailed strategy to counteract Russian disinformation strategies in a swift and robust manner"*.[36] European Parliament issued a briefing document about the foreign influence operations in the EU[37] and overview about Online disinformation and the EU's response.[38] Also European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested special study about the impact of disinformation and propaganda on the functioning of the rule of law in the EU and its Member States.[39] Study formulates several important recommendations aimed at strengthening democratic resilience and improvements in the media policy, especially in the field of social media. Due to overview of measures in some member states (e. g. Annex III) and policy recommendations the study may serve as the guideline for further direct and indirect Europeanization in the field. It is necessary to note, that having enough relevant information and initial analysis of measures in force is important point in search for comprehensive policy and next to the tools used by European Commission may provide important impulse for policy development.

As mentioned in the section dedicated to theory linked to Europeanization interesting issue is also time, timing and tempo of Europeanization as introduced

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35 European Commission. *Joint Communication to the European Parliament, the European Council, The Council, The European Economic and Social Committee and the Committee of the Regions. Report on the implementation of the Action Plan Against Disinformation*. Brussels, 14. 6. 2019 JOIN(2019) 12 final [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=JOIN:2019:12:FIN&from=EN

36 European Parliament. *European Parliament resolution of 10 October 2019 on foreign electoral interference and disinformation in national and European democratic processes (2019/2810(RSP))* [online]. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0031_EN.html?redirect

37 European Parliament. *Foreign influence operations in the EU*. European Parliament, PE 625.123 – July 2018 [online]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625123/EPRS_BRI(2018)625123_EN.pdf

38 European Parliament. *Online disinformation and the EU's response*. European Parliament, PE 620.230 – February 2019 [online]. Available at: https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/620230/EPRS_ATA(2018)620230_EN.pdf

39 European Parliament. *Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Members States*. Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union. PE 608.864 – February 2019 [online]. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU(2019)608864_EN.pdf

by Simon Bulmer (2008). EU (respectively High Representative) started to develop first activities after request made by European Council in March 2015. One year after Annexation of Crimea. In this sense EU Member States could have acted much more smoothly as Russian disinformation were already for years present and intensified during annexation of Crimea and war against Ukraine in which cyberspace was seriously abused.[40] As shown above, initial response was insufficient, especially in relation to East StratCom. The Europeanization intensified in 2018 and it might be due to three facts. First, High-Level Expert Group provided guidelines, basic principles and directions for new policy, that it why it was much more easier for European Commission to develop formal structure, and second, it was Sergei Skripal affair which was followed by another wave of disinformation campaign. And third, first effects of disinformation started to appear: analysis showed, that Brexit referendum was influenced by disinformation and that is why there was real and serious impact on the state of the EU. In other words, there was increased pressure to intensify the fight with disinformation which led to increased tempo leading to adoption of action plan. However, as mentioned before, the issue of disinformation and propaganda is developing very fast. People working to create and spread the fake news are searching new ways, techniques and methods and will try to be one step in advance than those trying to build defences and resilience. That is why we can expect constant evaluation and reformulation of the EU policy tools in this field.

4. Conclusion

There are several conclusions regarding Europeanization of the fight against disinformation and propaganda. First, the analysis conducted supported the notion that Europeanization is interactive process: after measures are developed at the EU level there are also some implications for the member states or other actors. This was demonstrated on the cases of various communications (e. g. actions plan) which had some provisions "encouraging" member states, or stated that member states "should" take some action. Overall, the langue used had also implications for Europeanization and its nature as communications are not legally binding contrary to regulations, directives or decisions.

Second, previous hypothesis that dominant role will be that of Council of Ministers due to link of disinformation and propaganda to national security and state sovereignty proven to be wrong. It was European Council in 2015 which

[40] VALUCH, J., HAMUĽÁK, O. Abuse of Cyberspace Within the Crisis in Ukraine. *The Lawyer Quarterly*, 2018, vol. 8, no. 2, pp. 94–107.

gave first impulse and entrusted High Representative to adopt first measures. From the early beginning Europeanization was shaped by the High Representative and European Commission which developed several input gates for new policy, with the dominant role of the High Level Expert Group.

Third, the issue of time in the context of institutionalism is important to understand timing and different pace of Europeanization. The war against Ukraine, Brexit and Sergei Skripal poisoning seems to have some influence on the EU efforts. However, this process might be also explain in the terms of path dependency (that policy build up is line of consequential logical steps) or the phenomenon of securitization of disinformation and propaganda.

Fourth, EU reacted in a way characteristic for policy set up and its development. A Group of experts (epistemic community) formulated key principles and set of activities, then aspiratory plans and documents were created, new institutions were established and tasks for relevant actors including member states were addressed under supervision of the European Commission. In the area of disinformation and propaganda is well visible that European Commission is playing the role of the "engine of the European integration", contrary to European Parliament and Council. This is given by the function and nature of institutions.

Fifth, despite EU succeeded to launch new policy, formulate key principles and activities or to create appropriate institutional structure, there are still visible limits. First of all, EU is offering the palate of high-quality of tools but it will be up to member states how much the tools will be utilized in fight against disinformation and propaganda. Due to nature of the EU its institutions to play secondary role to member states who holds real power to deal with the issue. This does not, however mean, that EU could not do more. From improving resources status of East StatCom, increasing transparency of Hybrid CoE to the development of SOMA potential. Finally, there is always space to improve communication activities about fight against disinformation and propaganda which will also contribute to media literacy. Author of this article is familiar with EU institutions and policies for almost 20 years, however it took him several days to map very complicated landscape of this new policy area which have certainly some implications, however subjective, for communication. And communication in relation to disinformation and propaganda is essential.

It seems that EU is at the crossroad. For decades it was associated with soft power and rather hesitant approach in foreign policy which was reflected also in the attitude of EU High Representative Frederica Mogherini towards Russia. As pointed out by Charlotte Wagnsson and Maria Hellman, EU shall carefully consider future steps not to compromise its own values vis-á-vis the other. However, at the same time it is important to give the cause of the problem true name and fight the roots more directly in the realist manner.

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Reintegration Post-Brexit (2020–2022): European Union Reorganization – Securing The Public Square of Democracy; Creating a New Global Compact

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Summary: In January 2020, the UK Parliament completed the long-awaited ratification process for the 2018 negotiated EU-BREXIT divorce agreement. After four tumultuous years of UK public contestations, including three general elections in less than five years, the forced resignation of two Prime Ministers after multiple internal Parliamentary votes of 'no confidence', the scheduling of an illegal closure of Parliament by the Prime Minister to block BREXIT debates, and the public and divisive 'Get BREXIT done' campaign in the December 2019 general election, the UK Conservative Party finally succeeded in securing a majority in Parliament and in moving the agenda. The UK begins a 2020 transition period for its permanent departure from the European Union. Even though the long list of unresolved demands outlined by UK citizens in the original 2016 BREXIT vote focused on "the politics of resentment" and a perceived breach of the social contract inherent in democracy, it is not clear that those domestic BREXIT concerns about social investments in housing, health care services, jobs, and education will even be addressed as part of the UK-EU scheduled negotiations in the transition period. The transition period and its negotiated agreements will be governed by the parameters of The Political Declaration ratified in January 2020. While not legally binding, The Declaration publishes extensive guidelines to govern negotiation

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processes and outcomes between the parties for regional economic capital and international finance settlements as well as parameters for thirteen sectors for global competition / cooperation including mandatory accession by the UK to certain WTO treaties. Large economic sectors for regional transactions including all transportation /energy sectors, public procurement, intellectual property, financial services and economic capital movement will still be governed by "good faith" requirements embedded in TEU Article 50 moving forward. The domestic BREXIT "politics of resentment" is not unique to the UK as national elections 2016–2018 across the Continent also routinely evidenced this citizen resentment as a widespread phenomenon. Even the EU Parliament elections of May 2019 which had one of the highest voter turnouts across the Continent shifted the internal operation of the EUP for the first time in forty-five years. The European Union as a regional entity is once again faced with issues of differentiated integration as it steps forward to not only reshape economic relations for the Common Market but also to ensure support by its State members for values of participatory democracy and the protection of individual liberty across a range of borders and changing international and regional circumstances. The door is wide open now for EU institutional re-evaluation and re-ordering in this transition period as the UK makes is permanent departure. Former Eastern Bloc States along with Greece and Italy want a more empowered infrastructure for the EU moving forward and putting an end to long standing austerity EU programs imposed by the neoliberal paradigm [c.1980–2010] for capitalist globalization, an ideology that has diminished State sovereignty and eroded democratic societies. These countries are also positioned within the EU to appoint Commissioners and use their influence in new more productive ways that may not always support the EU bureaucracy in Brussels. In December 2019, the Council on the European Union set up a 2020–2024 targeted review process called a Conference on the Future of the EU following extensive 2018 EUP resolutions and citizen reviews demanding more transparency and accountability of EU institutions. The goal is to have needed TEU procedural and treaty changes in place by the 2024 EUP elections. Legitimate expressions of sovereignty and a new paradigm for capitalist globalization for this century are simultaneously in the forefront for the EU even as BREXIT transition negotiations continue. The GeoNOMOS introduced here is a strategic and structural answer for a new EU infrastructure that empowers and supports the 27EU State members and at the same time designs a more balanced compact for capitalist globalization. The EU was created over 45 years ago as a result of a regional treaty agreement and a geographic legal configuration that collaboratively functioned through a scaffolding of "shared sovereignty." State members as sovereign entities voluntarily granted a certain level of ongoing legal competence to the operation of EU structures and its bureaucracy through national level Constitutional ratification. The range

of that "competence" can be amended under the TEU and that process is seriously being evaluated in 2020 by many EU member States. The ripple effect of these institutional challenges to definitions of sovereignty and values of democracy are not confined to the UK alone but rather, suggests that a new definition of the nation State will be required for this century if the State is to remain the sole architect of world order. The GeoNOMOS offers a set of definitions and a strategy for implementation in the post-BREXIT era. It depicts a model of sovereignty for the 21st century based on a framework of liberty and its enterprise of law so that the State at its core can strategically support these two primary functions: [1]secure participatory democracy and individual liberty as it continuously balance all of its essential capital resources [economic, human and social], and [2] participate in the design of a new sustainable global marketplace as a member of the international community of States.

Keywords: Sovereignty – BREXIT – GeoNOMOS Model – Politics of Resentment – The Public Square of – Democracy – Heterarchy – European Union – Framework of Liberty – Enterprise of Law – Legal Constitution for Capitalism

1. Introduction:transition 2020–22. Redressing the politics of resentment

Ratification of the EU-BREXIT divorce agreement was completed in January 2020 by the UK Parliament in what some have hailed both as a considerable victory for Prime Minister Boris Johnson and as the end of a contentious political transition in a long journey of seeking independence from the European Union. And while that statement is certainly true, much of the hard work for the transition period in 2020 to create new regional and global relationships reflect challenges yet to be addressed and economic relationships yet to accomplished.[1]

[1] PAYNE, A. Boris Johnson will not be able to ‚get Brexit done' by the end of 2020 [January 13, 2020]; Available at: https://www.businessinsider.com/why-brexit-will-not-be-done-by-this-year-2020-1 [Boris Johnson is highly unlikely to be able to meet his promise to "get Brexit done" by the end of 2020. A report by the *Institute for Government* think tank published January 13, 2020 spells out the monumental challenges the United Kingdom has to prepare for December 2020 deadlines of replacing all existing custom and trade ties. During this time of 11 months, the UK will continue to follow EU trade rules as both sides adjust to their new relationship. Johnson has indicated there will be no extensions to the transition period beyond December, despite myriad warnings about the little time there is to prepare for life outside of EU structures, including the task of negotiating a new trade deal with Europe. The prime minister has sought to underline this statement by including a block on extending the transition

In particular, the transition agreement sets out two key points of "no return" so to speak – June 2020 which is the last month the UK can petition the EU for an extension to the transition period beyond December 2020; and November 2020 which is the last month the 27EU can meet under TEU Article 50[2] to ratify all the final negotiations and trade agreements that must be completed in the 11 month 2020 UK transition period.[2]

period within the ratification legislation/ Withdrawal Agreement Bill, which will become law before February 15,2020. This limitation will be particularly challenging for smaller businesses, many of which simply don't have sufficient resources and expertise to adapt to new rules and obligations for trading with EU as the country's biggest trading partner in such a short space of time. These businesses will be adjusting to Britain's new relationship with the EU well beyond December 2020]; See also LANDLER, M. and CASTLE, S. And You Thought Brexit Was Tough.[January 8,2020] Available at: https://www.nytimes.com/2020/01/08/world/europe/brexit-united-kingdom.html [Following January 31, 2020, negotiators will then have to agree on terms for trading in goods and services, as well as on regulations covering health, safety, fishing, farming, banking, aviation and transportation – replacing the latticework of rules that entwined Britain and Europe over their four decades together. If the two sides fail to strike a deal by December 31, 2020, it could theoretically trigger something like the "no-deal Brexit" that Mr. Johnson threatened in October 2019 before Parliament passed legislation to thwart his efforts. The more likely scenario, experts said, is a "bare bones" trade deal that will leave many of the issues to be hashed out in 2021 and beyond. Either way for the British voter who thought that Boris Johnson's 'Get BREXIT done" landslide election in December 2019 would end the three-year BREXIT turmoil, the 2020 drama as it unfolds will be a very rude shock. Moreover, Johnson's advisers appear determined to shun close alignment with the European Union in favor of an agile, less-regulated economic model that some have dubbed Singapore-on-Thames. Johnson has banned the word "BREXIT" from all public discourse and official press releases. In the EU, officials in Brussels are preoccupied by the complexity of the looming trade talks and are pushing the British to be pragmatic. They remain weary of Mr. Johnson's insistence on a compressed, time-limited negotiation, which they say could inflict needless damage on Britain's economy]

[2] AMARAO, S.*UK is set to exit the EU next month: Here are some important Brexit-related dates of 2020* [December 30,2019]; Available at: https://www.cnbc.com/2019/12/30/here-are-the-main-brexit-dates-in-2020.html [Setting out these key dates: June 2020 //A EU-U. K. summit is expected to take place. At this point both sides will have to decide whether they can finalize their new trade relationship by the end of 2020. Prime Minister Boris Johnson has said that he does not want to prolong the transition and he has already implemented UK legislation against further delays to the Brexit process. November 2020// European lawmakers have argued that their meeting in late November is the last possible moment for them to sign off on a second agreement, if the transition period is to end by 2020. December 31,2020 – Provided that there has been no extension and a deal has been struck, this day is when new arrangements and a new relationship will officially come to force. Senior EU officials have sounded alarm bells, arguing that 11 months is a challenging timeline. In this context, the new European Commission President Ursula Von der Leyen indicated that the EU will be looking to focus on the most pressing issues first, where there would be no unilateral nor contingency measures to replace current arrangements].

The ratified 2018 negotiated Withdrawal Agreement[3] and its tandem Political Declaration [4] is really just opening the gate so to speak for the regional dynamics of how the UK and the EU will restructure the region and the global markets for decades to come. In addition to the negotiation guidelines listed in The Political Declaration document, there are extensive EU treaty interpretations that will impact the scope and content of 2020 ongoing negotiations between the parties. Those interpretations will always reflect the initial TEU notification process launched by the UK in March 2017 under Article 50 and the subsequent Court

[3] The Withdrawal Agreement Commission to the EU 27,14 November 2018,TF50 [2018]; *Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU and the European Atomic Energy Community* as agreed on 14 November 2018 in *eu.european.eu* [Note: The Political Declaration set out in the framework is also subject to UK ratification and accompanies the Withdrawal Agreement specifically endorses future relations including instructions to negotiators who will deliver the final terms covering the parties/economic relationships at the end of 2020]; See also High Court of Justice,3rd November 2016, *R[Miller] v The Secretary of State for Exiting the European Union* [concluding that Article 50 of the TEU must always be read in conjunction with Article 4 of the TEU requiring full member cooperation] ; Note that while most of the UK Parliamentary discussions 2017–2019 were reflective of the procedural mechanisms around triggering Article 50 TEU many discussions continue as though unilateral termination and withdrawal as a UK process can occur without considerations of Article 4 TEU, the rule of law and underlying legal commitments, other relevant procedures and regulations in the existing UK treaty obligations still in effect during the transition period]

[4] *Revised Political Declaration* [October 17,2019], Available at:https://ec.europa.eu/publications/revised-political-declaration_en [The 26-page *Political Declaration* accompanied the final Withdrawal Agreement and set out the basis for future relations, including economic globalization and trade. It contains thirteen different sections which specify in detail the guidelines for post-ratification negotiations between the UK and EU as part of the 2020 transition period and ensures that outcomes will consistently reflect the WTO commitments ,build on the WTO parameters of Free Trade Agreements, and mandates the UK accession to the WTO Government Procurement Agreement [GPA].The outlined negotiation guidelines on market access include but are not limited to these areas: trade and tariffs in good and services; intellectual property; capital movement and financial transactions, the entire energy sector, all transportation sectors [aviation, roads, train and maritime]; and the fishing industry. On citizen mobility, the Declaration identifies ten specific guidelines for upcoming negotiations between the parties. This Declaration is not legally binding but defends the core principles outlined by each party; namely, [a] the integrity of the single market and customs union for the EU, and [b] the sovereignty for the UK. The Declaration ratification also establishes a mechanism for calculating the financial settlement that the UK owes the EU to meet its obligations with estimates set to be above €40 billion. It also includes contributions to be paid during the planned transition period to end in December 2020. If the transition period is ultimately extended for a second time, of course, more EU payments by the UK would be due]; for historical context on these matters, see also, SANFORD, A. *Both Brexit and Remain MPs Opposed May's Deal and Why* [online] [July 12, 2018]. Available at: https://www.euronews.com/2018/12/07/what-is-in-theresa-may-s-brexit-deal-and-why-is-it-so-unpopular [Accessed 15 Jan 2020] [Noting that the long Withdrawal Agreement (on the terms of the UK's exit) and shorter Political Declaration (on the future relationship) were the result of 18 months of negotiations.]

cases that have interpreted a broad "good faith" requirements embedded within the TEU generally and in the Article 50 process itself.[5] So in addition to the ongoing structured negotiations with the EU which involve primarily economic capital, financial systems and regional trade arrangements, the U.K Parliament, and particularly the Conservative Party in power, will have to come face-to-face now with the underlying domestic conflicts and citizen demands for justice and equity that led to the 2016 BREXIT vote in the first place.[6]

The original 2016 BREXIT vote signaled a *politics of resentment* exemplified by an enraged UK citizenry who demanded separation from the European after a forty-five year partnership[7] and provided a "wake up" call to re-design

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

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

[7] The basis of a "common law of humanity" emerged after the end of the Cold War in the 1980's followed the emergence of independent States in Eastern Europe who were active in the United Nations and demanded equity and fair access into the global marketplace and international

economic domestic policy for a new paradigm for capitalist globalization.[8] The 2016 BREXIT campaign did not focus on matters of participatory democracy and solidarity, but rather on fomenting citizen fears and rumors concerning the longstanding conditions of the entanglement across borders and regional economic financial systems.[9]

finance as well. The World Trade Organization was created in1995 as an evolution of the multilateral General Agreement on Tariff and Trade [1948]. These global trading contractual agreements between States coupled with many regional trade agreements in the late 20th century continued to erode the Westphalian notion of an absolute form and unilateral expression of State sovereignty. However, cooperative behavior increased between sovereign States and seemingly eroded the authoritarian and more traditional Westphalian model of sovereignty, the endorsement of equality among sovereign States is still a primary focus for the EU as it is also foundational to the United Nations Charter and other global institutions such as the International Monetary Fund, the World Bank, and the World Trade Organization.

8 *Here's What Many Journalists Missed in When Covering The Brexit Vote* [online]. Available at: https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/04/heres-what-many-journalists-missed-when-covering-the-brexit-vote/ August 4, 2016. [Noting that welfare states such as UK have had policies that helped free trade losers; pointing to political analyst John Ruggie who often called this system for cushioning blows from the international economic system "embedded liberalism" and argued that the interventionist domestic welfare state made possible today's liberal trade order on a global scale. But these policies are eroding as private corporations gained enormously from globalization using complex financial arrangements to escape domestic taxes and wealthy individuals are doing the same. Economic inequality is increasing in a "winner-takes-all" society where mainstream media that focuses on racism and xenophobia rather than on economic loss and inequality may not be taking into account these political policy shifts. Quoting Larry Summers who had predicted in 2005 that financial markets could not fail, now recognized that the Brexit vote is a "wake up call to elites everywhere on a need to redesign economic policy' that hears the anger expressed in the Brexit vote. The real issue in BREXIT was what did average British voter gets when and how from EU integration]; See also BREXIT Global Recession [online]. Available at: https://www.independent.co.uk/voiceo es/brexit-global-recession-germany-stock-markets-crash-record-closing-highs-a8793401.html [Accessed 25 May 2019][noting that the UK accounts for about 13 % of the EU's trade in goods and services, according to the International Monetary Fund. The IMF warned that economic growth across the remaining 27 EU states would fall by up to 1.5 percent in the long run and employment would fall by 0.7 percent, if the UK fell back on WTO rules to trade with the bloc after Brexit ; discussions about a global recession continue]; See also SWINFORD, S. *Theresa May pledges to Fight Injustice and Make Britain 'A Country that Works for Everyone' in Her First Speech as Prime Minister* [online]. Available at: http://www.telegraph.co.uk/news/2016/07/13/theresa-mays-pledges-to-fight-injustice-and-make-britain-a-count/ [Access 31 July 2019]

9 COHEN, R. *Britain's BREXIT Leap in the Dark* [online] Available at: https://www.nytimes.com/2016/06/25/opinion/britains-brexit-leap-in-the-dark.html June 24, 2016. [Pointing out that fifty-two percent of the British population was ready to face higher unemployment, a weaker currency, possible recession, political turbulence, the loss of access to a market of a half-billion people, a messy divorce that may take as long as two years to complete, a very long subsequent negotiation of Britain's relationship with Europe, and the tortuous redrafting of domestic laws and trade treaties and environmental regulations – all for what the right-wing leader Nigel Farage daftly called "Independence Day]

The focus of most all of the 2017–2019 EU-UK negotiations predominantly related to regional economic capital, its development and utilization, and how deeply interwoven trade, borders, taxes, tariffs, and integrated financial transactions hindered the EU and the UK as they wrestled to reconcile TEU Article 50 and the 2016 populist demand to "reclaim" British sovereignty by divorcing the European Union. There were no underlying propositions throughout the 2017–2019 EU-UK divorce negotiations nor have there been any public UK Parliamentary debates about the citizen complaints that fueled the 2016 BREXIT vote in the first place: re-define the legitimate role of sovereignty for the 21st century; affirm demands placed on the State to create broader social investments and domestic economic development programs for housing, education, employment and health care program; and finally, re-design of a more equitable paradigm for capitalist globalization to support domestic priorities of the State [social contract of democracy] and a 21st century society of global traders.[10]

BREXIT was and remains about a deep and profound sense that somehow in agreeing to the EU regional treaty system that the UK had "lost" its sovereignty and its unique identity as a State.[11] The ongoing public manifestation of the

[10] GREWAL, D. The Legal Constitution of Capital. In: BOUSHEY, H., DELONG, J. B. and STEINBAUM, M. (eds.). *After Piketty: The Agenda for Economics and Inequality*. Cambridge, MA: Harvard University Press, 2017, pp. 470–491. Grewal suggests that this "constitution of capitalism" has a double meaning. First, it reflects the constitutional order that has been adopted by most capitalist societies. The question is whether citizens have a constitutional right to live in a society free of monopolies or what is referenced often as "crony capitalism". This is not the first century where "trade monopolies" have caused revolutions. Perhaps it is time to rethink economic liberty in relation to the legal analysis , eg, rational basis review of times past and to incorporate new 21st century standards for economic liberty and definitions of "monopoly" that reflect the tremendous private accumulation of economic power across the globe so as to prevent legislation that create global or State economic castes or economic classes of citizens.] AUTHOR's NOTE: The bargain underpinning the EU is that compromises in national sovereignty through accession to EU regulatory compliance will bring economic and social benefits. So, creating a common economic market that could rival the American economy would be a boost to lift all boats. Yet while greater access to markets and labor migration accelerated within the EU, EU policy mandated severe public austerity measures produced cutbacks in domestic-level social programs, education and health. These public austerity measures are now at the forefront of domestic political review as evidenced by the politics of resentment and in a growing internal dispute with Member States, eg, Italy, Spain, Greece, Poland and Hungary. For many working people, the benefits of EU membership did not appear to outweigh the stagnation and perhaps even decline in the quality of life they experienced, combined with the loss of economic security]

[11] ERLANDER, S. *Brexit' Opens Uncertain Chapter in Britain's Storied History* [online]. Available at: https:www.ntyimes.com/2016/06/25/world/Europe/Brexit_european-union-uncertain-charpter-in-britains-storied-history.html June 24,2016 [noting that the divisions on BREXIT are just as much cultural as economic, raising serious questions about Britain's political coherence and unity after such a vicious 2016 campaign; BREXIT actually exacerbated tensions within the four countries of the United Kingdom jolting long standing issues about English nationalism and

politics of resentment is best described here as a steady rise of populism across the region that challenges the post-World War II notions of liberal democracy, the values of solidarity, and the traditional role of the "welfare state."[12] National elections in 2016–2018 across the Continent and again, in the European Union Parliament [MEP] elections May 2019 reflected waves of populism echoing the *politics of resentment.* These trends included concerns about the loss of sovereignty, perceived changes in the legitimate expression of sovereignty, the mandatory nature and negative implications of EU austerity budget planning upon State level domestic priorities, and the call for extensive EU institutional

its 'festival of democracy'. The Scottish independence referendum had clearly failed in 2014. In addition to intensifying demands for another referendum on independence for Scotland, the outcome of the European Union vote may also increase demands in England, which makes up 85 percent of the British population, for its own "devolved Parliament" to vote on laws concerning only England, just as Parliaments in Scotland, Wales and Northern Ireland now provide for their regions]

12 The BREXIT 2016 demand to reclaim a "bruised' UK sovereignty sought to return funding the UK had given to EU and invest those monies instead into UK domestic programs to support national health care, access to education, better jobs and more housing. Sustainable funding for these basic domestic programs had suffered enormously in the mind of UK citizens due to consecutive years of mandated State level public sector austerity spending under the conservative political ideology of neoliberalism. These 'losses" were coupled with a campaign stoking fear of immigrants – both EU internal citizens living in the and refugees from external countries immigrating to the UK – all of which was viewed as being mandated by the European Union policy implementation and out of the control of the State as sovereign. This fear encompassed a palpable future angst about decreasing domestic jobs security including the loss of other social benefits, a security concern over terrorism and violence perpetrated by immigrants, and reflected a recognized decline in the social fabric and quality of life for many traditional UK citizens. BREXIT voters articulated a deep national concern over the uneven social and economic benefit distribution under the neoaerliberal paradigm [1980–2010] of capitalist globalization which has not tangibly "trickled down" to their day-to-day living experience. Those mystified by the 2016 BREXIT vote showed contempt deriding it as a demonstration of one of the major shortcomings of democracy, namely when uninformed electorates make crucial decisions which affect everyone else that is to be governed. However, in a participatory democracy the process of respecting individual liberty means a referendum remains the most democratic means of direct, collective decision-making. There are rightful concerns that 2016, 2017 and 2019 BREXIT public deliberation was confused, media coverage was agnostic to facts, and mistrust of expertise was absent. However, even the UK 2019 "GET BREXIT DONE" general election will not fix the underlying problems of economic stratification, withered public safety nets and a national pride injured by its lost investments in imperialism and colonization. The current sovereign State model in general has failed to address the increasingly transnational problems of the world today, including a growing global economic inequality, mass migration, climate change and the whimsical destruction wrought by the transnational finance networks. It is easy to pin these on the institutions like the EU, but many border-defying problems are the direct result of past UK State actions – the same powers of national sovereignty BREXIT supporters are still seeking to bolster.

changes.[13] This wave of populism like a tsunami swept across the Continent in France, Austria, Italy, The Netherlands, Greece, Poland, Hungary, and Germany elections reflected a rising sea of change intended to confront the purposes and goals of the European Union as regional institution and to challenge the legitimate expressions of State sovereignty.[14]

[13] SCHAFER, A. and STREECK, W. (eds.). Politics in An Age of Austerity. Cambridge: Polity Press, 2013 [noting that in a neoliberal world of globalization and its demand for increasing austerity measures, democracy and its politics come under tremendous populist pressures as domestic economic budgets are forced to accommodate financial markets in ways governments have increasing trouble being responsive to voter demands. Many if not all of these mandated austerity programs are permanently legislated in ways at the State level that citizens have difficulty influencing the course of government and its direct domestic policies. As a result, democracy is incapacitated]; see also STREECK, W. Taking Back Control? The Future of Western Capitalism, *Journal of Economic Research* 1[3], 30–47 [2018].[noting that the international system is in turmoil based on current architecture of capitalist-economic globalization; this is particularly evident as States lose the capacity to hold civil society together through economic redistribution from prospering sectors to lagging regions]; AUTHOR NOTE: this issue was broadly evident in the 2016 BREXIT election where citizen rhetoric focused on moving EU membership dues back to domestic budget priorities for healthcare, education, job creation and housing and better regional economic development distribution throughout the UK These priorities have yet to be addressed in the EU-BREXIT negotiations into 2020.

[14] ALDER, K. *European Elections 2019: What Were the Clear Trends?* [online]. Available at: https://www.bbc.com/news/world-europe-48420024 27 May 2019 [Accessed 6 June 2019] [breaks out election results by party and those election implications]; See also *European Elections: Power Blocs Lose Grip on Parliament* [online]. Available at: https://www.bbc.com/news/world-europe-48417744, 29 May 2019 [Accessed 8 June 2019] [noting that generally, voter turnout for EUP elections was the highest for twenty years after decades of declining voter participation. According to EUP post-election reports, just under 51 % of eligible voters across the 28 member states cast their ballots, compared with fewer than 43 % in 2014.; On questions of the legitimate expression of State sovereignty – See FALK, R. Jack Donnelly: State Sovereignty and Human Rights, *Political Science Quarterly*, 1981, vol. 96. [noting that in the late twentieth century, Jack Donnelly proposed a new typology (a four sectioned rectangular box) that balanced State authority and State capabilities with sovereign rule and the State's scope of domination as it intersected effective components of formal sovereignty and material/normative weaknesses; See also work on more legitimate expressions of sovereignty; DENG, F. Frontiers of Sovereignty, *Leiden Journal of International Law,* 1995*,* vol. 8, no. 2, p. 249, [1995] and STACEY, H. Relational Sovereignty, *Stanford Law Review,* 2009, vol. 55, no. 5, p. 210 [Francis Deng and Helen Stacey suggested two different typology arrangements for *sovereignty as responsibility* and *relational sovereignty*. Deng's typology analyzed a range of both internal and external State factors and then, correlated these factors with a new international standard of *responsible sovereignty as an irreversible process*. Helen Stacey suggested that a new typology of *relational sovereignty* was emerging where the sovereign State would be judged by how well and by what means the State concretely and continuously "cares" for its people; see also a fourth typology for sovereignty, at KU, J. G. and YOO, J. Globalization and Sovereignty, *Berkeley Journal of International Law*, 2013, vol. 31, no. 1, p. 210 [2013]; [discussed a *popular sovereignty* based on the idea that people in a sovereign State govern themselves through Constitutional structures and institutions; noting that sovereignty is in decline but the decline in national sovereignty is

It will now be much harder in 2020 than it was in 2014 for the "pro-European" establishment in the EUP to simply dust itself off and carry on as if the 2019 EUP elections have no institutional impact and require no policy changes. The previous 2014 EUP elections took place shortly after the eurozone crisis, when countries were still going from bailout to bailout. The May – July 2019 EUP trending was complicated due to a protracted battle by Germany for the Commission presidency, the realignment of EUP political parties post-election, and the calls for a new approach the old "business as usual" agenda. At least three populist member-state governments – Italy, Poland and Hungary – will have much greater influence for 2020–2024 in the sense that these countries each will not only continue to challenge the legitimate expression of sovereignty in relation to protecting democratic principles. These States will each choose an EU Commissioner, have a more direct influence over the ongoing UK negotiations for the BREXIT transition and play a direct role in designing budget priorities for the EU in general.

The *politics of resentment* has its roots in multiple cultural contexts and is evidenced by a breach of the traditional foundations that uphold the social contract for democracy. A key factor undergirding this dynamic is a revolt against the current neoliberal paradigm [c.1980–2010] for capitalist globalization and the well documented inequality of wealth distribution under its current operating systems, .[15] A core assumption of past regional and global foreign policy – that

not desirable since State maintains decision-making and individual liberties. Suggesting a new form of popular sovereignty with shift away from Westphalian models to the right for people to govern themselves through institutions of the Constitution and its structures In this construct, the State can legitimately share sovereign power with its citizens without compromising the whole system.]

[15] Although overseas trade has been associated with the development of capitalism for over five hundred years, some thinkers argue that a number of trends associated with globalization have acted to increase the mobility of people and capital since the last quarter of the 20th century, combining to circumscribe the room to maneuver of states in choosing non-capitalist models of development. Today, these trends have bolstered the argument that capitalism should now be viewed as a truly world system. However, other thinkers argue that globalization, even in its quantitative degree, is no greater now than during earlier periods of capitalist trade. See POLANYI, K. *The Great Transformation*. Boston: Beacon Press, 1944, p. 87; WOOD, E. M. *The Origin of Capitalism: A Longer View*. London: Verso, 2002, pp. 73–94; DUNSMUIR, L. IMF calls for fiscal policies that tackle rising inequality. *Reuters*. [October 11, 2017 [Retrieved November 4, 2017]; see also International Monetary Fund, *Neoliberalism: Oversold?* IMF Finance & Development Report, vol. 53, no. 2; see also SASKIA, S. *Expulsions: Brutality and Complexity in the Global Economy*. Cambridge: Harvard University Press, 2014; see also HARvEY, D. A *Brief History of Neoliberalism*. London: Oxford University Press, 2005, pp. 165–173; see also FRIEDMAN, W. A. Recent trends in business history research: Capitalism, democracy, and innovation. *Enterprise & Society*, 2017, vol. 18, no. 4, pp. 748–771; see also HILT, E. Economic History, Historical Analysis, and the 'New History of Capitalism'. *Journal of Economic*

a united Europe had overcomes its historical divisions – has been undermined and perhaps changed forever not only by BREXIT but also by national European elections across the Continent that continued to promote populist, progressive and occasionally, the endorsement of right leaning political parties. [16] Add the growing tensions in the European Union Parliament following the May 2019 MEP elections, and the EU is reflecting a more fragmented future where populist's definitions of legitimate expressions of sovereignty, redefining democracy for this century, and the demand for a new paradigm for capitalist globalization will simultaneously be on EU's negotiating table in the 2020–2022 transition period.[17]

The ongoing ripple effect of the BREXIT transition period will continue to bring considerable angst for those remaining 27 EU Members who clamor for broad regional institutional change from within the EU – an angst that suggests they proceed with caution. Yet these nations will ultimately also have to wrestle with the *politics of resentment* in this decade as they collectively redirect the energy of the EU into a 21st century consensus that reflects and effectuates the broader scope of the 1980 post-Cold War doctrine to support a "common law of humanity".[18] These regional challenges are calling for an *enterprise of*

History, 2017, vol. 77, no. 2, pp. 511–536; SCHUMTER, J. A. *Can Capitalism Survive?* New York: Harper Classic, 2009 [reprint].

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

[17] One lesson learned through understanding the *politics of resentment* is that economics is opportunity, power and creator of social well-being, not an end in itself but a means to facilitate economic activity. This translates into the creation of economic capital resource for each State so that opportunities created for a diverse and extended population and societies at large are able to nurture and sustain members of their communities with the aim of securing participatory democracy based on protecting individual liberty and of securing the four cornerstones that anchor the framework of liberty: justice, equity, individual choice and individual capacity and resource development. Economic strategy in this model allows the highest level of human evolution-recognizing that a basic level of resources and a societal openness to change and adapt based of merit lies at the core of democracy – thus the dynamics that support economic capital development and utilization secure the core function of the State in the GeoNOMOS along with human capital and social capital and is thus, is a key to ensuring civil society operates well.

[18] The basis of a "common law of humanity" emerged after the end of the Cold War in the late 1980's followed the emergence of independent States in Eastern Europe who were active in the United Nations and demanded equity and fair access into the global marketplace and international finance as well. The World Trade Organization was created in1995 as an evolution of the

law to support both a participatory democracy based on individual liberty and a sustainable and fair collaboration among global economic traders. Both issues reside firmly in the public square of democracy now. They require intentional institutional engagement to reach a concrete and measurable set of future outcomes – nothing after BREXIT in relation to the core function of the State and its legitimate expression of sovereignty in this century will really ever be the same status quo again. One cannot travel backwards into the future.

2. The challenge: redefine state sovereignty and principles of democracy

Not unlike the UK, the European Union also appears more vulnerable moving into the 2020–2022 transition than at any point since its inception. The populist waves of citizen resentment repeatedly being demonstrated at the ballot box are also translating the European political landscape, shaking EU democratic foundations and governance priorities from within its institutional integrity including the "rule of law" framework for European Union itself. [19] The travails of the euro,

multilateral General Agreement on Tariff and Trade [1948]. These global trading contractual agreements between States coupled with many regional trade agreements in the late 20th century continued to erode the Westphalian notion of an absolute form and unilateral expression of State sovereignty. However, cooperative behavior increased between sovereign States and seemingly eroded the authoritarian and more traditional Westphalian model of sovereignty, the endorsement of equality among sovereign States is still a primary focus for the EU as it is also foundational to the United Nations Charter and other global institutions such as the International Monetary Fund, the World Bank, and the World Trade Organization.

[19] UITZ, R. *The Return of the Sovereign: A Look at the Rule of Law in Hungary – and In Europe*. VerfBlog, 2017/4/05 [online]. Available at: https://verfassungsblog.de/the-return-of-siveireign/ty-a-look-at-the-rule-of-law-in-hungary-and-in-eruope 4 May 2017; also at DOI: https://dx.doi.org/10.17176/20170405-130326. [Accessed 21 January 2018][discussing the National Consulstation direct mail in 2017 designed to survey citizens on 'issues of national importance' ,trying to demonstrate a strong manifestation of support for Hungary's independence; noting that there needs to be a closer debate over how legal rules are envisioned in a rule of law framework that looks at necessity and proportionality and concluding that these shifting political and legal dynamics have significant relevance –if the EU is be a beacon of light for rule of law and human rights when it very foundations are being shaken]; see also PECH, L., SCHEPPELE, K. L. *Poland and the European Commission, Part III: Requiem for the Rule of Law*, VerfBlog, 2017/10/03 [online]. Available at: https://verfassungblog.de/poland-and-the-european-commission-part-iii-requieum-for-the-rule-of-law/DOI:https://dx.doi.org/10.17176/202170303-131734. [last reviewed October 18, 2018] [discussing the EU attempts to address the systematic attacks on the rule of law, and its '*annual rule of law dialogue*' that has been operational since 2014; noting that although the EU Council's annual dialogue has at its purpose to promote and safeguard the rule of law through a more evidence based approach, this process has yet to focus on unifying Member States shared

the tide of immigration (both within the European Union from poorer to richer members and from outside countries), and high unemployment have led to the *politics of resentment* across Europe, including a collective loss of patience, and a weaning memory of a common good based on prosperity and solidarity. These challenges require a new set of values that define democracy for this century.

Koncewicz suggests this *politics of resentment* cannot be fully equated with any single growing EU phenomenon because it never stands alone. It amalgamates and expands political unrest by promoting public debate and creating new, but undefined terms like "illiberal democracy"; denying the established rule of law; and deliberately reordering a mixture of culture, history and domestic politics in a new frame of reference. As Koncewicz elaborates, this amalgamation is being demonstrated by a pattern across the region: BREXIT amplifying and factually distorting anti-European sentiments in the UK; the operation of right wing parties in France, Germany and Austria that defined legitimacy in the spread of hate speech and publicly promoted the exclusion of "the other"; and the "illiberal democracy" confusion most certainly evident in Poland where disabling the rule of law and its Constitutional "checks and balances" have taken over the State [20] All of the challenges impact the institutional integrity of the European Union as a regional entity and how its defines democracy and the role of the nation State in this century.[21]

values; pointing out that in its published EU Council summary documents in 2016, the Council leadership laments the EU's members national government inability to address the backsliding and the denial of the urgent need to address democratic values and the rule of law; reporting how one State did recommend an annual peer review process in 2016 (see EU Council document no.13230/1/16) and one State outlined the need for a more defined mechanism to support the EU Commission and EU Parliament so the existing rule of law documents could be incorporated into a more coherent framework including a permanent State monitoring mechanism but neither recommendation was taken up as part of the 'annual rule of law dialogue' process].

[20] KONCEWICZ, T. Understanding the Politics of Resentment [online]. *Verfblog*, 2017/9/28. Available at: https://verfassungblog.de/understanding-the-politics-of-resentment/ 28 September 2017. [Accessed 22 December 2019]; See also at DOI https://dx.doi.org/10.17176/20170929-135630 [last viewed February 18,2019][noting that the resentment that is sweeping across Europe cannot simply be equated with protest, revolt, and public contestation because unlike the rising *politic of resentment*, these episodes reflect part and parcel of democratic process that supports an open public square. Koncewicz concludes that the rationale of resentment is distrust with varying degrees of intensity and disdain for the liberal status quo. The *politics of resentment* sets up a competing constitutional doctrine ('constitutional capture'] that attacks liberal democratic values with its current stigma (eg, support only for status quo) and offers an alternative to the promise of populist narratives.] See further discussion on the *politics of resentment* in reference to the EU proactively creating a new constitutional regime for capitalism outlined later in this discussion.

[21] BARNHIZER, D. and BARNHIZER, D. *Political Economy, Capitalism, and the Rule of Law*, Cleveland State University, Marshall College of Law, pp. 1–36 [online]. Available at:https://ssrn.

Koncewicz and Hamuľák speak to questions of *institutional integrity* within the European Union. Koncewicz outlines "constitutional capture" as a significant barrier to EU institutional integrity. He asks whether those at the heart of European *disintegration* have actually lost the 'constitutional imagination' required to address the complexity of a 2020–2022 transition given its potential and real negative implications on the underlying TEU and the treaty revisions that will be needed.[22] The goal is not further EU State member departures under Article 50, but rather, as some States have suggested, a revision to the scope of competence outlined in the TEU agreement by State members in an effort to change operation of the EU and its bureaucracy in Brussels.

Hamuľák's legal analysis of the internal EU Treaty as a "federation of States" or a *heterarchy,* points to a deeper EU institutional engagement along a continuum where current questions concerning sovereignty must be answered for this century. [23] If the nation State is to remain the *primary architect of world order*,

com/abstract=2716372 [pointing out that there is a fundamental symbiotic relationship between a society's form of economic activity and the nature of the Rule of Law that supports, facilities and limits that economic activity. The Rule of Law in Western democracies represents a deep set of cultural values where that dynamic interplay defines economic activity by which power is distributed and social goods are created and shared. Suggesting we are a point of transformation that has been occurring over that last decade where capitalist societies will undergo fundamental change, citing SHUMPTER, J. *Capitalism, Socialism and Democracy* [1950]; discussing "Kondratiev Waves" (Nikolai Kondratiev) that impact forms and structures of economic systems where change is not simple change in a degree as a linear model but are dynamic shifts 'in kind' where totally new characteristics of economic systems are reckoned with and replace the previous forms of economic systems]; see also BARNHIZER, D. and BARNHIZER, D., *Hypocrisy ad Myth: The Hidden Order of the Rule of Law*, 2009; see also FULLER, L. *The Morality of Law*, New Haven, CT; Yale University Press, 2nd edition,1969 [addressing the major components of the Rule of Law and its deeply rooted cultural context]

[22] *Supra,* Note 20, KONCEWEIZ [suggesting the EU is now being faced with the "constitutional capture" that has been elevated to new constitutional doctrine so much so that the challenge of "Doing Europe" with its overlapping consensus and tolerance of 'the Other' has never been both so active or so dramatic – the idea that " this will not happen to us" is no longer an option – in his conclusions, he wonders will the EU finally tune in and listen? Member States are key players in the European Union [EU] and while the EU does have some "state-like" features, it is not legally acting as a nation State in the traditional sense of sovereignty and international law as it operates under the auspices of a treaty agreement and not a Constitution] This author notes that it is the ability of member States in the EU to amend the Treaty that will remains an important sign of political and legal preservation of the sovereign position of member States as the EU moves into the 2020–2021 BREXIT transition. Furthermore, this *idea of "reciprocal flexibility"*, or, of each State's supervising function of the EU Treaty Agreement, can be read to mean there is also a *possibility of negative Treaty revisions* beginning in 2020–2022 that might be drafted and could seriously limit or change the competence that EU member States currently have accorded to the EU as a regional institution.

[23] HAMUĽÁK, O. *National Sovereignty in the European Union*, Cham (SUI): Springer Pub., 2016, pp. 47–51. [outlining a detailed summary of the sovereignty issues within the EU that will require

then two institutional matters will need to be addressed. First, the EU as a facilitator of the regional partnership of 27 nation States, will need to structurally update its regional bureaucracy, re-define concepts of solidarity and democracy based on modern 21st century demands, track economic capital and wealth accumulation across its regional boundaries, and intentionally target rules of law and policy change on migration and unemployment throughout the next decade. [24] This shift in focus moves the European Union beyond the doctrinal dysfunction or "constitutional capture" of its current bureaucracy to a more responsive and State member empowerment infrastructure that is simultaneously more transparent and legally accountable.[25] It is this EU empowerment infrastructure that was vigorously discussed at the December 2019 Council of Europe meeting and that will support redefining democracy as well as the legitimate expression of State sovereignty for this century.[26]

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

[24] *Supra*, Note 19, PECH, L.

[25] NIB, J. *EUs Juncker Hails Macron* [online]. Available at: https://jonnib.wordpress.com/2017/09/26/eus-juncker-hails-macron-speech-as-very-european. 26 September 2017. [Accessed December 18,2019] [suggesting that the Euro-zone will need its own budget and finance minister; wanting to address the divisions between EU richer countries in the West and poorer States on the eastern side of the Continent]; NOTE ALSO: European Commission President, Jean-Claude Juncker initially had called for a EU Summit in early 2019 to detail and tackle the programs that will be re-designed after March 2019 exit when the UK was to begin its 2019–2021 transition period. All of these matters remain on hold in the EU until the resolution of BREXIT occurs]; see also KANTER, J. *Far Right Leaders Hate EU Institutions But Like Their Paychecks* [online]. Available at: https://www.nytimes.com/2017/04/27/world/europe/ 27 April 2017 [noting that many alt-right candidates who despite the EU institution use the European Parliament as a protest platform and collect salaries of around $100,000 Euros, a generous per diem and an annual staff and office budget in excess of 340,000 euros. So while working to blame the European institutions for being onerous bureaucracies with no democratic accountability they also seem to enjoy the lavish perks of the office while they shun the daily grind of legislative work , miss votes, mock democratic processes on behalf of the EU]

[26] *Report of the First European Council* [December 2019]. Available at: https://www.europarl.europa.eu/thinktank/en/document.html.reference?=EPRS.BRI(2019)642811 [accessed January 10, 2020][Noting that the first European Council was chaired by the new President, Charles Michel, and the main issues on the agenda were climate change, the next Multiannual Financial Framework (MFF), and the proposed Conference on the Future of Europe for 2020–2022. The

The GeoNOMOS presented here offers a legal strategy and framework of liberty to address the legitimate expression of sovereignty in this century, one that secures participatory democracy based on individual liberty at the core function of the State and supports an enterprise of law for a society of global traders. [Diagram 01] It embeds the core function of the State within a Framework of Liberty [dotted lines], by reflecting its cornerstones [justice and equity, human dignity], and embraces its enterprise of law in support of reciprocity and mutuality designed to undergird a new *legal constitution for capitalism*.[27]

Council on the Future of Europe was noted as a means for engaging the European Parliament and the Commission with a priority to deliver concrete results for the benefits of all citizens and to outline current and future challenges. The idea noted was to engage the past two years of citizen dialogue in a broad consultation with citizens as a more inclusive process so all Member States are involved equally; The President of Croatia is charged with leading this EU empowerment and dialogue process.], see also DRACHENBERG, R. and ANGHEL, S. Outlook for the Meeting December 2019, Available at: https://epthinktank.eu/2019/12/10/outlook-for-the-meetings-of-eu-leaders-on-12-13-december-2019/ [discussing the proposal for a Conference on the Future of Europe. The idea was first suggested by the French President, Emmanuel Macron, in March 2019, and was subsequently supported by the new Commission President, Ursula von der Leyen, before her election by the EU Parliament. She indicated that she would also consider Treaty [TEU] change if the outcome of the conference were to require such a step. The notion of Treaty change elicited little enthusiasm from EU Heads of State or Government when presenting their views on the Future of Europe in the European Parliament in 2018–2019. Recently, France and Germany have made a joint proposal outlining their views. For more information, please see the EPRS Briefing, Preparing the Conference on the Future of Europe. As there is currently no agreed position between the Member States, the European Council is expected to invite the incoming Council Presidency (Croatia) to work towards defining a Council position on the content, scope, composition and functioning of such a conference. This position is likely to emphasize that the conference should as a matter of priority focus on the development of the EU's policies in the medium and long term, building on the recent citizens' dialogues. The European Council is likely to underline the need for an inclusive process and shared ownership by European institutions and Member States. In this context, the European Council is also expected to recall the importance of implementing the prior *Strategic Agenda 2019-24*]

[27] All of the forms of capital and these transitions are highly integrated within the GeoNOMOS core function of the State [see diagram-economic, social and human capital functions] and the GeoNOMOS *framework of liberty* as that State strives to fully integrate and continuously balance its three capital resources along the functionality of its domestic vertical axis and its international horizontal axis. Eliminating the current BREXIT political risk would require a broader recognition by the EU of securing new ways to design, develop and balance the utilization of the State's three primary capital resources [economic, social and human capital] at the core of every EU member State. The *continuum of sovereignty* proposed in this article begins to outline such a process that could be simultaneously accomplished during a 2020–2022 global transition. See also, OROURKE, K.A.C. "Sovereignty Post-Brexit, The State's Core Function and EU Reintegration"; *European Studies: The Review of European Law, Economics and Politics,* 2017, vol. 4, pp. 140–164 [noting in detail the definitions and structure of a State's three forms of capital which must be consistently balanced within the core function of the State at the intersection of its vertical and horizontal axis and within the framework of liberty, its four cornerstones and enterprise of law.]

The key to successfully managing this dynamic beginning in 2020 is a balanced engagement between the EU and its institutional support first and foremost for stability of each and every nation State – and less on building and securing Brussel's bureaucracy. [28][Diagram 01] Shared sovereignty or "models of heterarchy" can support regional operations only if the nation State is secure at its core function within the framework of liberty and its enterprise of law. The GeoNOMOS offers a possible answer to tensions created by the *politics of resentment* because it simultaneously secures the core function of the State at the intersection of its domestic function and its international function.

The GeoNOMOS depicts a *continuum of State sovereignty* which operates along a *vertical axis* as the State engages domestic level issues and simultaneously along a *horizontal axis* as it engages international level issues within the international community of States. [29] The stability of the State core function lies in continuously balancing all three of its capital resources as the foundation for the social contract embedded in democracy. [Diagram 01] This continuum is distinguished from a State whose only focus and all of its predominant activity is to develop and utilize any and all forms of economic capital at any cost.

In contrast to Diagram 01, a State, whose efforts are exclusively linked to economic capital acquisition, accumulation and utilization at any cost, a focus that includes all the entanglements of public austerity and private direct foreign investments mandated under the "one size fits all" approach of the neoliberal paradigm [c.1980–2010], will become so dysfunctional that the State ultimately fails. As massive shifts in public sector funds and program budgets are moved to

[28] The responsibility for securing the four cornerstones that anchor the framework of liberty rest with the State. The State affirmatively creates conditions within its domestic jurisdiction [vertical axis] where justice [ethics] and equity prevail as reflected by these two anchors located on the lower portion of the liberty framework.[see diagram] When the conditions for justice and equity occur routinely as part of the State's single core function and operate in meaningful and consistent way within a domestic jurisdiction, then individual autonomy as an expression of human dignity [comprised of individual choice and individual capability/resource development] is supported and actively anchored by the two cornerstones on the upper half of the framework of liberty. Thus, the partnership depicted by the social contract between a "caring" State and its people [depicted by the vertical axis] and based on the universal principle of mutual benefit, operates as the State's single core function, exists inside the framework of liberty, and continually reflects the operative and proscriptive components in support of the principle of human dignity.

[29] A continuum is referenced as the basis of this new typology for sovereignty because it represents a more flexible set of options given the range of possibilities in terms of how an individual State interacts with some sense of legitimacy on behalf of the people it is governing and interacts as a member of the international community of States; there is no limit to the possibilities offered as part of this proposal for a continuum of State sovereignty so long at it operates within a framework of liberty. See diagram and discussion detailed in this commentary. See definition of *continuum* at http://merriam-webster.com

privatization, there are withering considerations of the social capital and human capital resources needed to continuously support civil society. For the 2016 BREXIT vote, citizens there increasingly felt they were being "left behind" as social programs, job creation and total industries disappeared from the economy with no planned replacements. In this repeated scenario, the search for economic capital and its development and utilization becomes increasingly dysfunctional as the distortion and imbalance at the core function of the State pulls the State away from the Framework of Liberty, and its enterprise of law that supports the social contract of democracy – in essence, the State has failed to protect the promises of democracy. [Diagram 02]

The shifting nature of EU operations and definitions of sovereignty resulting from BREXIT raise old and ongoing debates about *differentiation* and *integration* – how much differentiation is needed to respect national governing structures of State EU members and how much policy and procedural integration is required to operate the EU on a consistent regional basis. BREXIT has forced the issues related to *differentiation* and *integration* [or in the case of BREXIT, *differentiation* and *disintegration*] which has become the new normal in the European Union [EU] and remains one of the most crucial matters in defining the future of the European Union. A certain degree of differentiation has always been part of the European integration project since its early days. The Eurozone and the Schengen area have further consolidated this trend into long-term projects of differentiated integration among EU Member States. A number of unprecedented internal and external challenges to the EU, however, including the financial and economic crisis, the migration phenomenon, renewed geopolitical tensions and BREXIT, have reinforced the belief that more flexibility and possibly TEU changes are needed within the complex EU machinery to redefine the legitimate expression of sovereignty.

The GeoNOMOS outlined in this commentary [Diagram 01] is a graphic representation of the next evolution for the legitimate expression of State sovereignty to protect participatory democracy and individual liberty because of its flexibility – it differentiates several important principles. One, it posits conceptually that for all human activity, enterprise and undertakings, liberty represents the outer boundary or framework [dotted line box] of any and all such endeavors. Beyond this *framework of liberty* nothing can, nor does exist, and all activity with the State falls within the four corners of this frame by the rule of law defined at its outer boundary by liberty. Two, the GeoNOMOS distinguishes, in contrast to other models which seek to develop an economic/legal model, or some other Westphalian models for nation States from times long past, that the nation State and the nation State alone can function as a legal guarantor and can only vouchsafe liberty both toward the individual and also toward other nation States

and supranational organizations who operate with semi-governmental character. Third, the proposed GeoNOMOS presented here designs a *single core function* for the State in relationship: [a] to its citizens [*vertical axis*] from whom it seeks domestic legitimacy in order to govern, and, [b] to its engagement in the global marketplace [*horizontal axis*] from an intentional long term strategic and sustainability perspective as a member of the international community of States. The GeoNOMOS supports the creation of a new *legal constitution of capitalism* designed to replace the first dominant legal constitution of capitalism designed and extensively codified in the UK and across Europe to support colonialism.

3. Affirming democracy and a new legal constitution for capitalism

Democracy and its values and capitalism have a long and tortured, almost parasitic, symbiotic relationship in history of political economies that will need to be confronted around the concept of reciprocity, to be corrected based on notions of mutuality, and to be differentiated into the 21st century.[30] The definition of the democracy established for this century, unlike democracy directly linked to capitalism in the 20th century or colonialism in the 19th century, must be defined separate and distinct from the market dynamics of capitalism for a sustainable global compact to emerge in the 21st century. The EU as a collective and regional institution can best ensure democracy is defined on values that are relevant today. Primarily, this will require new EU policies and practices that are consistent to support continued State access to economic capital development and utilization without the entanglements associated with the neoliberal "ideology", an economic model of the 1980s that became a political ideology applied to every corner of the globe. This also means ultimately a significant rearrangement of the EU's almost forty-year use of linking economic capital development to

[30] *Supra*, Note 21, BARNHIZER [noting that the Rule of Law element used to create a framework for political economy in the 21st century will involve changing political systems of deeply held beliefs and values that do not always function on pure logic. The intersection of economic systems and political beliefs where the rule of law is created must be secured in a way so that citizens can fully participate in their civil societies and have their individual liberty protected. The intertwined relationships of legal, political, business and economic issues form a deeply integrated system and will require an interdisciplinary approach] AUTHOR NOTE: The GeoNOMOS as discussed in this article reflects this integration as part of the State's core function where vertical and horizontal activity supports participatory democracy within a framework of liberty and its enterprise of law. A new Legal Constitution for Capitalism would require taking the political and power realities of this schematic rule of law and build those considerations into strategies for positive adaptation in a new paradigm for capitalist globalization.

severe public sector austerity measures that harmed human and social capital development. For example, an alternative empowerment of the EU "collective imagination" could use its dominant regional presence to establish as one of its 2022 guiding principles, a foundation for a new *legal constitution for capitalism* that regulates capital and referees global tax schematics for the entire region. [31]

The scope of 21st century sovereignty and its legitimate expression is outlined in the GeoNOMOS to reflect the "public square of democracy" where the European Union must strive to redefine and reintegrate the core values of participatory democracy and individual liberty not just for its 27 State members as a regional entity but also for each of the member States and its own civil society configuration. This dialogue is not based on ideals defined from centuries gone by, but reinvigorated by the demands of the 21st century context and the correction of the "politics of resentment". Confronting the falsehood of an "illiberal" democracy with relevant context definitions for this century is essential. Solidarity and liberty as well as the content of the social contract linked to democracy and its rule of law is not the same as it was fifty years ago.[32] The modeling and legal empowerment of a new State level scaffolding could intentionally be a hopeful vision for The Conference on the Future of the EU as announced by the Council on Europe at its December 2019 meeting – articulating a focus on engaging both citizens and national Parliaments alike in a process and review of TEU provisions and definitions of democracy for this century.[33]

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[31] HONT, I., KAPOSSY, B. and SONENSCHER M. *Politics in Commercial Society*. Cambridge, MA: Harvard University Press, 2015; see OXFAM, *Working for the Few: Political Capture and Economic Inequality*. Oxford: Oxfam International, 2014; see also ZUCMAN, G. *The Hidden Wealth of Nations.* Chicago: University of Chicago Press, 2015; see REICH, R. *Saving Capitalism For The Many Not The Few.* New York: Knopf, 2015; see also SOSKICE, D. Capital in the Twenty First Century: A Critique. *British Journal of Sociology,* 2014. Vol. 65, no. 4.

[32] The connection between the Rule of Law as existing in models of democracy and its economic system is that the Rule of Law is a belief system underlying the integrity of the public and private institutions by which society is ordered and operates; it is the quasi-inchoate creed based on values and principles that allow the system to operate and evolve. The inchoate creed of the neoliberal paradigm [c1980–2010] of capitalist globalization was an economic model that become a political ideology, a one size fits all economic system, that gradually no longer respected the democratic function of the State to secure participatory elections and to protect individual liberty including longstanding economic and social human rights. The economic institutions created to support the neoliberal paradigm [c1980–2010] dislocated the traditional power nodes of the nation State and became a "global" institution that remained outside the control and accountability of a globalized State. A new Legal Constitution for Capitalism [and its rule of law] created in this century could begin to self-correct these dynamics.

[33] *Supra*, Note 24, *Report of the First European Council* [December 2019] [these measures to create a process that is more inclusive and representative of citizen concerns is directly related to curbing and redirecting the volatile energy of the politics of resentment and to redefine engagement in a more meaningful way for EU citizen across the Continent. *The Conference on the Future of*

Continued application by EU institutional practices of an outdated neoliberal economic ideology can no longer meet the demands of the "politics of resentment" nor reflect a new democratic scaffolding for the future of the EU. The new *legal constitution for capitalism* can begin to redefine democracy for the 21st century not based on a "welfare state" model from post-World War II or a model of "illiberal" democracy yet to be defined, but based on the 21st century definitions that include the cornerstones of solidarity, mutuality, reciprocity and human dignity. These cornerstones are clearly depicted in the functional GeoNOMOS model as it anchors the core function of the State and the framework of liberty.

The engagement for a re-integrated EU will follow the demands of a *shared sovereignty* in the transition period [2020–2022] but the transition will not be an easy one for the UK nor for the European Union. As noted by Hamuľák, the remainder of 27EU will be forced to reconsider the scope of member interconnectedness to the EU's *heterarchy* [model of "shared sovereignty].[34] This reintegration of EU internal political partnerships will adjust legal TEU treaty

Europe is a political body of the European Commission and the European Parliament, announced in the end of 2019, and since then being prepared to determine new agreements, or amendments to the existing ones, on the future of European democracy during 2020–2022. The Conference consists of the Parliament, the Council and the Commission and is tasked to draft new EU laws and changes to the EU treaties. It should also involve citizens.] [*Not to be confused with Convention on the Future of Europe (2001–2003, officially European Convention), or European Convention (1999–2000)];* See also summarized information on the content and design of the upcoming Conference on The Future of Europe from the December 2019 meeting; Available at: https://www.consilium.europa.eu/en/press/press-releases/2019/12/12/european-council-conclusions-12-december-2019/ [The European Council considered the idea of a Conference on the Future of Europe starting in 2020 and ending in 2022. It asked the Croatian Council Presidency to work towards defining a Council position on the content, scope, composition and functioning of such a conference and to engage, on this basis, with the European Parliament and the Commission. The European Council recalls that priority should be given to implementing the Strategic Agenda agreed in June, and to delivering concrete results for the benefit of our citizens. The Conference should contribute to the development of our policies in the medium and long term so that the EU can better tackle current and future challenges. Conclusions – 12 December 2019 EUCO 29/19 4 EN. The Conference should build on the successful holding of citizens' dialogues over the past two years and foresee broad consultation of citizens in the course of the process. It needs to involve the Council, the European Parliament and the Commission, in full respect of the interinstitutional balance and their respective roles as defined in the Treaties. The European Council underlines the need for an inclusive process, with all Member States involved equally. There should be shared ownership by EU institutions and Member States, including their parliaments]

[34] *Supra,* Note 19, Hamuľák [outlining a detailed summary of the sovereignty issues within the EU noting that the numerous coexisting legal systems and power networks challenge the nature of sovereignty but does not mean that EU member States have no sovereignty; painting a new "grey zone" where sovereignty is treated as a "category" and when EU reintegration occurs there are going to be changes; analyzing the notion of 'late sovereignty' which better aligns with the countries who have only recently in the late 20th century come out from under the Brezhnev

commitments and perhaps even the reordering of Constitutional competence currently accorded to the EU for an entire range of matters. State members want to ensure there is room for relevant and meaningful *differentiation* in EU institutional apparatus that creates a pathway for the uniqueness of each sovereign as it legitimately expresses its role, historical culture and development needs in the region. The implications for human rights; national and regional security; the environment and climate change; financial, tax and economic capital planning systems within the regional bloc will all potentially be affected.[35]

Given the scope of economic capital negotiations for the remaining 27EU that are already delineated in the UK-EU Declaration process, there can be no rational discussion on "*shared sovereignty*" in the 2020–2024 transition without a frank discussion about the uneven hand of the current models of globalization and neoliberal capitalism. Proposals by many economists including Milanovic, Soskice, Streeter, and Krugman for new models of capitalism are not a new phenomenon in economic academic circles.[36] So too as proposed by a range of economic and legal scholars, a new *legal constitution for capitalism* will be required in this century – one that models the rule of law within a framework of liberty designed to strengthen the State core function and its enterprise of law.[37]

Doctrine, and thus, State sovereignty and autonomy are more accentuated by these member States who are more careful about any weakening of their State sovereignty]

35 Within the structures of the EU, even if Article 50 proceedings make a secession of a member nation-state essentially *de jure* possible, we suggest that such a step is *de facto* impractical and perhaps imprudent within the context of a GeoNOMOS model as set forth in this Commentary; and also otherwise, because it would tend to cause a potential ripple effect which might lead to an unraveling and *dis*association of the whole, regardless how great its other resources and forms of capital might be. A region which had shown in history its own weaknesses in co-existing as separate, independent nation-states, where war had raged after war for a long period in history, had, for a period in time, tried to learn how not only to co-exist as one large system of governance, only to return to the old ways of "separate, but equal".

36 MILANOVIC, B. *Capitalism Alone: The Future of The System that Rules the World*. Cambridge: Harvard University Press, 2019 [Arguing that capitalism triumphs because its works but has a huge moral price and the model of liberal capitalism in the West falls apart under the strain in inequality and capital excess; dismissing some single outcome that will solve the problem, he suggests a multifaceted approach that is more State-led] ; see also MILANOVIC, B. *Global Inequality: A New Approach for the Age of Globalization*. Cambridge: Harvard University Press, 2016 [reviews timelines of where global money went between 1998–2008;and a country-by-country analysis; expressing a concern that there is a move now back to 1820 when main source of inequality was class rather than location; making ten reflections for the future including a system of "predistribution" of assets and education as opposed to the traditional "tax and spend" models of the West]; see also MILANOVIC, B. *Worlds Apart: Measuring Global and International Inequality*. Princeton, NJ: Princeton University Press, 2005 [noting the problem with a one size fits all economic analysis in relation to poverty, income distribution and modeling inequality in system where 1% earn twice as much as the bottom 50 %]

37 *Supra*, Note 11, Grewal.

The need for a new "rule book" for economic capital [the new *legal constitution for capitalism*] as discussed here embraces Piketty's definition of capitalism as a 'dynamic legal system' that continually 'transforms society, its social relations and its socio-economic order'.[38]

Piketty has forever changed the nature of economic modeling, statistical analysis, and its legal implication for State level economic capital management and wealth distribution.[39] By necessity and by implication, the transformation Piketty references also redefines the development and utilization of the three essential capital resources depicted at the core of every State within the Framework of Liberty. [Diagram 01] The key configuration in the GeoNOMOS that underpins the social contract of democracy is keeping these three essential capital resources in a continuous state of balance within the core function of the State and inside the framework of liberty. All international public sector and private sector corporations and NGOs must also function within the framework of liberty and work diligently and in good faith to uphold the framework's cornerstones of justice, equity, and human dignity.

In contrast to the neoliberal paradigm [c1980–2010] for capitalist globalization[40], the new *legal constitution for capitalism* would first define the legal

[38] BOUSHEY, H., DELONG, J. B., STEINBAUM, M. [eds.]. *After Piketty: The Agenda for Economics and Inequality*. [Cambridge, MA: Harvard University Press, 2017]; See PICKETTY, T. *Capital in the Twenty-First Century*, *trans* Arthur Goldhammer [Cambridge, MA: Belknap Press of Harvard University, 2014]; see DAVID, M. and MONK, D. B. [eds.]. Evil Paradises: Dreamworlds of Neoliberalism [New York: New Press, 2007]; see OXFAM, Working for the Few: Political Capture and Economic Inequality [Oxford: Oxfam International, 2014]; see SOSKICE, D. "Capital in the Twenty First Century: A Critique", *British Journal of Sociology* [Vol 65; No.4] pg 650–666 [2014]; see STIGLITZ, J. Free Markets and the Sinking of the Global Economy [London: Allen Lane, 2010]; see HARVEY, D. The Enigma of Capital: And the Crisis of Capitalism [London: Profile Books, 2011].

[39] KRUGMAN, P. Why We're in a New Guilded Age. In: BOUSHEY, H., DELONG, J. B., and STEINBAUM, M. (eds.). *After Piketty: The Agenda for Economics and Inequality*. Cambridge, MA: Harvard University Press, 2017, pages 60–75; 61–63 [suggesting that the tracking of concentrations of income and wealth has revolutionized our understanding of long term trends in inequality; noting that Piketty research indicates we are not just on the path to 19th century levels of inequality, we are on the path of patrimonial capitalism where the commanding heights of the economy are not controlled by talented individuals but by family dynasties; and since 1980's a large amount of the economic gains went to the top end of the income distribution with families in the bottom half lagging behind; Krugman attributes the level of uneven distribution to government action related to tax policy and income transfers.]

[40] SCHAFER, A and STREETER, W. (eds.). *Politics in the Age of Austerity*. Cambridge: Polity Press, 2013. [notes that democratic polity comes under significant pressure in the age of austerity promoted by the neoliberal paradigm of globalization. Domestic budgets are squeezed to accommodate financial markets as government responsiveness to voters severely declines. Democracy itself becomes incapacitated when citizen voters cannot influence the course of governments. For three decades now OECD countries have run huge deficit and accumulated

parameters of economic capital development and utilization and then, using those parameters, establish a new sustainable global market paradigm or global

debt which in turn reduces national budgets for discretionary spending and social capital investment]. For context discussions of the last century on neoliberalism]; See STREECK, W, The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State, in *German Economic Review* [August 2013]; Available at: https://doi.org/10.1111/geer.12032 [Rising public debt has been widespread in democratic-capitalist political economies since the 1970s, generally accompanied among other things by weak economic growth, rising unemployment, increasing inequality, growing tax resistance, and declining political participation. Following an initial period of fiscal consolidation in the 1990s, public debt took an unprecedented leap in response to the Great Recession [2008–2010]. Renewed consolidation efforts, under the pressure of 'financial markets', point to a general decline in state expenditure, particularly discretionary and investment expenditure, and of extensive retrenchment and privatization of state functions]; see also CERNY, Phillip. "Globalization and the Erosion of Democracy" in *European Journal of Political Research* [vol 36;Issue 1; pg 30–47] [1999], Available at:https://doi.org/10.1111/1475-6765.00461 [concluding that despite the apparent development and spread of liberal democratic state forms in the 1980s and 1990s, possibilities for genuine democratic governance overall declined. First, the emergence and consolidation of modern liberal democracy was inextricably intertwined with the development of the nation-state and was profoundly socially embedded in that structural context. Secondly, in today's globalizing world, cross-cutting and overlapping governance structures and processes increasingly took the form of private, oligarchic (and mixed public/private) forms; hegemonic neoliberal norms delegitimized state-based governance in general; and democratic states lost the policy capacity necessary for transforming democratically generated inputs into authoritative outputs. Consequently, robust constraints continue to limit the potential for (a) re-institutionalizing the 'democratic chain' between accountability and effectiveness, (b) rearticulating and diminishing the multi-tasking the essential public character of authoritative institutions and (c) renewing the capacity of current authoritative State agents to make the side-payments and to undertake the monitoring necessary to control free-riding and assimilate alienated groups. Rather than a new pluralistic global civil society, globalization led to a growth in inequalities, a fragmentation of effective public governance structures and the multiplication of quasi-fiefdoms reminiscent of the Middle Ages]; See AIDAN, S. Regan. *Political Tensions in Euro Varieties of Capitalism-The Crisis of the Democratic State in Europe*, Working Paper EUI MWP, 2013/14 at European University Institute, Available at: https://hdl.handle.net/181428177 [outlining The EU response to the financial sovereign debt crisis in the Eurozone led to the democratic crisis of the nation State as it exposed a tension between national and supranational power in multi-level polity and opened a conflict between the EU core and the periphery nations of the EU. Shifts by EU member States in internal devaluation also impacted the burden of adjustments to fiscal and labor market policy at the State level resulting in national government cutting public spending and imposition of structural reforms on labor markets. Imposing one-size-fits-all adjustments to a wide variety of economic problems across a variety of national capitalism really is the source of the EU crisis leading to electoral volatility and a crisis in legitimacy for the democratic state in Europe];See also O'ROURKE, K.A.C. "Sovereignty Post-Brexit, The State's Core Function and EU Reintegration"; *European Studies: The Review of European Law, Economics and Politics,* 2017, vol. 4, pp. 140–164 [discussing in depth the demise of the neoliberal paradigm (c1980–2010) of capitalist globalization; providing extensive research]

compact for this century.[41] That international private sector as well as the international public sector trade and capital investment should be a *means to an end*, not an end in itself, is not a radically new idea.[42] As Rodrik and others have noted, capitalist globalization should be a legal instrument for achieving the goals that each State's civil society seeks: prosperity, stability, freedom and quality of life.[43] Furthermore, Rodrik distinguishes a dominant role for the nation State in relation to the principles of democratic decision-making which is the foundation for the international economic architecture and notes that when States are not democratic, the entire scaffolding collapses and one can no longer presume a country's institutional arrangements reflect the preference of its citizens.[44]

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41 *Supra,* Note11, Grewal.

42 RODRIK, D. *The Globalization Paradox : Democracy and the Future of the World Economy* . New York: W.W. Norton & Co., 2011; pp 231–242, 245 [noting that it is time to move beyond the neoliberal paradigm; setting out a series of statements in support of a State's right to protect their owns social arrangements ,regulations and institutions; and suggesting that trade is a means to an end , not an end in itself so that globalization should be an instrument for achieving the goals that a society seeks: prosperity, stability, freedom and quality of life]; see generally MILGATE, M., STIMSON, S. C. *After Adam Smith: A Century of Transformation in Politics and Political Ideology*. New Jersey: Princeton University Press, 2009.

43 Ibidem, RODRIK at 237–239; See also TIROLE, J. *Economics for The Common Good*. New Jersey: Princeton University Press, 2017; [outlining the moral limits of the market at pp 33-50; creating a modern State at pp 155–169, and addressing the challenges to EU function at pp. 265–289]; see also BOUSHEY, H., DELONG, J. B. and STEINBAUM, M. (eds.). *After Piketty: The Agenda for Economics and Inequality*. Cambridge, MA: Harvard University Press, 2017.

44 At the same time, with a focus on economic capital development and utilization, the author begins to outline the struggles at the level of the nation State as it begins to adjust to a more integrated model of capitalism that balances economic capital at its core function with equal measures of financial, policy priority and broad political support for the development and utilization of human and social capital. See also RODRIK, D. *The Globalization Paradox : Democracy and the Future of the World Economy* . New York: W.W. Norton & Co., 2011; pp 231–242, 245 [discussing a dominant role for the nation State in relation to the principles of democratic decision-making which is the foundation for the international economic architecture; noting that when States are not democratic this scaffolding collapses and one cannot presume a country's institutional arrangements reflect the preference of its citizens]; See also RODRIK, D. *The Fatal Flaw of Neo-liberalism* [online]. Available at: https://www.theguardian.com/news/2017/nov/14/the-fatal-flaw-of-neoliberalism-its-bad-economics. [November 14, 2017] [Noting Neoliberalism and its usual prescriptions – always more markets, always less government – are in fact a perversion of mainstream economics. Rodrik suggests that there is nothing wrong with markets, private entrepreneurship or incentives – when deployed appropriately. Their creative use lies behind the most significant economic achievements of our time. He notes as "we heap scorn on neoliberalism, we risk throwing out some of neoliberalism's useful ideas. The real trouble is that mainstream economics shades too easily into ideology, constraining the choices available and providing cookie-cutter solutions. A proper understanding of the economics that lie behind neoliberalism would allow us to identify – and to reject – ideology when it masquerades as economic science. Most importantly, it would help to develop the institutional imagination badly need to redesign capitalism for the 21st century"]; see generally MILGATE, M., STIMSON, S. C. *After Adam*

Piketty's study really is one of "modern" inequality documenting where there is a widening difference in income and wealth among people of *equal juridical standing*.[45] This disparity among people of *equal juridicial standing* will be a primary legal challenge for the EU in re-defining democracy in this century. Piketty clearly has set out three negative implications of economic inequality on the function of democracy, implications that are clearly reflected in the *politics of resentment* and need to be addressed: First, inequality violates the basic *principle of equity* on voice and representation so that when citizens do not have equal voice and influence, the skewed nature of control over economic resources "poisons the promise" of equal representation. Afterall, according to Tomasi, individual *economic liberty* is just as important to freedom as all other liberties embraced by classical liberal thinkers. For Hurst, the corporate charter and what a State Constitution chooses to protect may be two different legal applications of the rule of law in terms of human rights and economic relations.[46] For the 21st century the disparity between corporate charters granted by States and the rule of law enounced in the Constitution needs to be realigned in support of a rule of law that prioritizes the State core function to balance all three forms of capital resources in a secure and consistent manner. In that way participatory democracy that protects individual liberty remains a high priority of the State as the three forms of capital at the core of the State also supports the social investments needed to secure democratic principles first and corporate interests [global trade]

Smith: A Century of Transformation in Politics and Political Ideology. New Jersey: Princeton University Press, 2009.

45 PIKETTY, T. *Capital in the Twenty-First Century*, *trans* Arthur Goldhammer [Cambridge, MA: Belknap Press of Harvard University, 2014].

46 TOMASI, J. *Free Market Fairness*. New Jersey: Princeton University Press, 2012. [defending individual economic liberty from legal or historical perspective of political philosophy; trying to find common ground between John Rawls and Friedrich Hayek the concept of ' free market fairness' aka market democracy]; See also CORRE, J. I. The Arguments and Reports of Darcy v Allen", *Emory Law Journal*, 1996, vol. 45, pp. 1261,1325 [speaking to Darcy v Allen,11Co. Rep. 84b, 77 Rep.1260 [K. B. 1603]; pointing out that the original English Cokes' Report of an enduring nature on the questions of individual liberty arising out of the Darcy case in 1603; also noted the privileged nature of monopoly and its distortion on the common good, ultimately hurting the public square of civil society]; see also NACHBAR, T. B. Monopoly, Merchantilism, and the Politics of Regulation. *91 Virginia Law Review,* 2005, vol. 91, pp. 1324–1345; see also SANDEFUR, T. *The Right to Earn a Living: Economic Freedom and the Law. Washington DC, CATO Institute,* 2010, p. 20; see also SEIGAN, B. H. Protecting Economic Liberties, *Chapman Law Review,* 2003, vol. 6, pp. 43, 50. [relying on notions of substantive due process]; as general reference see JONES, F. D. Historical Development of the Law of Business Competition, *Yale Law Journal*, 1926, vol 36; HURST, J. W. *The Legitimacy of the Business Corporation in the Law of the United States 1790–1970*. New York: The Lawbook Exchange, 2004 [noting at page 16 that what the corporate charter gave and what a Constitution protects is not just an official license but also a pattern for organizing certain human relations].

to follow [and not the other way around as is the case in the neoliberal paradigm (c1980–2010) and its ideology].

Second, as Picketty notes, if inequality means that due to neoliberal mandates for public austerity programs, a democratically elected government is less able to provide public goods, respond to a public problem, or have the capacity to promote broadly shared prosperity, then, there is a deeply negative impact on political processes and democracy.[47] Third, excessive inequality promotes violence, high levels of vitriol and angry sentiments in the public square of democracy, that in turn, ultimately undermines the ability to define emerging legally shared democratic principles and to secure the process of balancing the nation State at its core.[48]

Piketty and other scholars who care about democracy, outline the basic principles of justice and equity that align and point to imbalances in the current global socio-economic order evidenced by the growing wealth inequality and distorted income distribution.[49] Furthermore, they offer several responsive options for a new *legal constitution for capitalism* that could be coupled with global and regional tracking mechanisms on wealth and thus, work in tandem with the rule of law to build a responsive State focused – EU institutional reintegration for this century. [50] Piketty's work and his definition of capitalism has forever changed the

[47] *Supra*, Note 41, Piketty.

[48] *Supra*, Note 11, Grewal at 481–483; AUTHORS NOTE : Terminology and definition of constitutional terminology as noted by Grewal sets the foundation for a new legal constitution for capitalism in this century but what of the public square of democracy at the core of the State in the GeoNOMOS and where the four cornerstones of the framework of liberty [justice, equity, individual choice and capabilities] matter in the daily function of civil society?

[49] Many times the policy imposition at the regional and international levels push aside or "condition" global and regional financial capital and foreign investment on limiting the full exercise of State sovereignty at the domestic [vertical axis] where priorities for social capital, public assets and safety nets , employment and local human capital development issues are contractually forced into the marketplace or are mandated to be legislated to the sidelines within the State government structures in favor of dominance by forces viewed by many States as operating outside the State's *vertical axis* and strictly viewed as an evil necessity for international engagement along the *horizontal axis*. Furthermore, the key issues surrounding these mandatory State level "structural adjustment programs" demanded by non-State actors do not always align within the justice and equity cornerstones of the *Framework of Liberty* or the participatory democratic foundations of the GeoNOMOS as outlined in Part I of this article. This Commentary is not focused on some grand macroeconomic theory or market dynamic strategy. It is the web of politics and certain constitutional regimes that result in the continued dominance of capital over the rest of the State's core function as set out in the GeoNOMOS continuum. This is why a balancing construction of a legal constitution for capitalism would be so beneficial.

[50] *Supra*, Note 41, Picketty [see specifically other tools Picketty discusses such as the *World Wealth Income Database* and the *Global Wealth Register* as supportive EU mechanisms in designing a *peer review monitoring and enforcement system* for member State partners. These ideas will be contested and rightly so – it is one way to begin to address the well documented and ongoing

nature of economic modeling, statistical analysis, and its implication for State level economic capital management and wealth distribution.[51]

The new definition of capitalism as a *dynamic legal system* supports the continual transformation of society, its social relations and its socio-economic order.

The flexibility of the GeoNOMOS allows for each 27 EU member to design its core function within a social contract of democracy along a vertical axis while simultaneously operating along the horizontal axis to structure and referee a society of global traders. By necessity and implication, this transformation also redefines the required balancing of the three essential capital resources at the core of every State. The rule of law establishes the operational boundaries for a *legal constitution for capitalism* within the core function of every State where the vertical and horizontal activity continuously intersect. [Diagram 01] The 2020–2024 regional debates on The Conference for the Future of the European Union must consistently strive to more openly define and address the embedded construction of a *legal constitution for capitalism*, first, as a *"socioeconomic system"* based on the rule of law [and not just a projected economic model or some outdated political ideology] and second, as an *"operation"* that has an autonomous macroeconomic dynamic function within the EU itself regionally that one State acting alone cannot possibly impact.

The divergence that Piketty discusses between return on capital and the average growth rate is a formula each EU State member will need to consider at the crossroads of their respective domestic / *vertical axis* and their international/ *horizontal axis* in the GeoNOMOS. This dynamic evaluation process exists because each of 27EU partners also has a State civil society that consists of global traders who need to operate within an enterprise of law inside the GeoNOMOS *framework of liberty*. The criteria used by Grewal in his work on creating a new *legal constitution for capitalism* can be designed and codified as an enterprise of law operating within the GeoNOMOS framework of liberty.[52] It becomes the

economic capital demands, unemployment, sluggish growth, and wealth disparity]; see also DAVIS, M. and MONK, D. B. (eds.). *Evil Paradises: Dreamworlds of Neoliberalism*. New York: New Press, 2007 ; see OXFAM, *Working for the Few: Political Capture and Economic Inequality*, Oxford: Oxfam International, 2014; see SOSKICE, D. Capital in the Twenty First Century: A Critique, *British Journal of Sociology*, vol. 65 no.4, pp 650–666; see STIGLITZ, J. *Free Markets and the Sinking of the Global Economy*. London: Allen Lane, 2010; see HARVEY, D. *The Enigma of Capital: And the Crisis of Capitalism*. London: Profile Books, 2011.

[51] Ibidem, Piketty.

[52] *Supra,* Note 11, Grewal [noting that the first constitution of capitalism was codified to support colonialism across colonies, local communities and global markets everywhere It is the legal foundation the underpins all social relations or social processes that comprise the economic system of capitalism. Yet, the focus on *how* legal constitutions were written to protect social processes and to secure the economic system of capitalism also incorporates key distinctions that remain important today for any newly drafted legal constitution for capital – the key distinctions

enterprise of law that functions inside the framework of liberty for every EU State member who accedes or reaffirms its legal commitments to the TEU in the post-BREXIT period.

It is at this intersection inside the State core function where the *vertical axis* meets the *horizontal axis* that creates the synergy for a new *legal constitution for capitalism*.[53] This is the crossroads where the increase in accumulation of economic capital in all its forms continues, and where the concentration of the private ownership of capital continues to grows – not only at the State's domestic level along the *vertical axis* where most people are bound geographically and will remain, work and live for most of their lives, but also at the State's international level function along the *horizontal axis* where States routinely intersect with private and public international entities in the global marketplace and beyond.

4. Conclusion

The future of the EU requires a new surge of "constitutional imagination" and a new scaffolding defining principles of democracy. Application of an outdated neoliberal economic ideology to this democratic scaffolding can no longer redress the growing *politics of resentment*. The fabric of EU-State partnership is unraveling from the same *politics of resentment* that fuels BREXIT and will require a more concerted effort to address a two key points: [1] how to outline a new definition or set of values for democracy that includes the primary affirmative duty of the State to secure participatory democracy based on individual

will always remain between the distinguishing definitions of "public" and "private" as well as the terms "sovereign" and "government". However, the challenge remains – a new legal constitution for capitalism will need to define these terms in light of standardized contract law principles and financial transaction centers of the marketplace in the 21st century. Although initially these historical distinctions were designed to move the market from under the rule of the monarchial type of State [including the Church], ramifications of these early legal regimes still regrettably may negatively impact how capital and theories of capitalism function in socio-political settings of today]

[53] Ibidem. Grewal [According to Grewal and others, the first legal constitution for capitalism was based on the rule of law as it was designed historically and then codified to support colonialism in the past. For a modern EU interpretation, by using the term "constitutional imagination" as suggested by Koncewicz, a more relevant legal constitution for capitalism designs and structures the rule of law, definitions of democracy based on affirmatively protecting individual liberty, and details enforceable measures for internal conflict resolution for the remaining 27EU post-BREXIT in 2020. Even if the UK reverses its position, withdraws Article 50 and remains in the EU, these institutional challenges arising from the "politics of resentment" will still need to be addressed.

liberty; and [2] how to establish a new *legal constitution for capitalism* designed and dedicated in this century to create a global compact based first and foremost on the rule of law and not some outdated 1980 economic forecast model and its subsequent ideology.

To begin to shift this imbalance and secure the core function of the State, new perspectives need to be debated at the EU Council, Commission and Parliament during this transition period so that targeted research can be initiated and sustained to support risk taking by States along the *domestic axis* and the *international axis* – that risk taking and modeling of projects in democracy will be needed operationally to balance the State's core function over the next decade. Such research would best be designed to correct the unfettered movement of capital between borders and around the world, and include adjustments that correct the impact of current distortions in the global marketplace – all foundational rules to redefine the parasitic historical relationship between democracy and private capital , and for the creation of a new *legal constitution for capitalism*. Hopefully this agenda will be in line with the work of The Conference on the Future of Europe 2020–2024 so it can move beyond the *constitutional capture* of a bureaucracy in Brussels as noted by Kocewicz, Hamuľák, Rodrik, Piketty and others who are about democracy. There are several immediate interventions proposed here.

In order to better track information about global inequality, Piketty and his collaborators maintain The World Wealth and Income Database [WID] to begin to look at the evolution of wealth and income.[54] A Global Wealth Register [GWR] as proposed by Zucman in the *Hidden Wealth of Nations* could also be initiated and launched regionally by the 27EU as early as 2021. This register would track and coordinate information gathering together regionally about owners of wealth in parts of the world where capital is primarily foreign owned and could be an answer to the problems about capitalism that Mason, Varoufkis and others have articulated.[55] Tracking income and economic capital flow return to the top

[54] ACEMOGLU, D. and ROBINSON, J. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. New York: Crown, 2012; See also *World Wealth and Income Data Base*; Available at: www.wid.world

[55] MASON, P. *The End of Capitalism Has Begun.* London: Allen Lane Pubs, 2015. [notes that Post-capitalism is possible because of three major changes information technology has brought about in the past 25 years. First, it has reduced the need for work, blurred the edges between work and free time and loosened the relationship between work and wages. The coming wave of automation, currently stalled because our social infrastructure cannot bear the consequences, will hugely diminish the amount of work needed – not just to subsist but to provide a decent life for all. Second, information is corroding the market's ability to form prices correctly. That is because markets are based on scarcity while information is abundant. The system's defense mechanism is to form monopolies – the giant tech companies – on a scale not seen in the past 200 years, yet

echelon of a country who may not always support democratic values [oligarchs and military leaders] but who are part of the global elite is a potential asset that the Global Wealth Tax outlined by Piketty could muster in an effort to also begin to re-write the rule of law and concretely identify areas where the new *legal constitution for capitalism* can be initiated.[56]

As the *politics of resentment* continues to impact the public square of democracy, a definition for 21st century democracy and the value of solidarity as it correctly interfaces the rule of law will be needed. The scope of 21st century sovereignty and its legitimate expression as outlined in the GeoNOMOS reflects the challenges where the European Union redefines and reintegrates the core values of participatory democracy and individual liberty, not based on ideals defined from centuries gone by, but reinvigorated by the demands of the 21st century. The legal empowerment of this new State level scaffolding is essential.

Creating a new *legal constitution for capitalism* sustains the enterprise of law as part of the GeoNOMOS. The enterprise of law restructures the affirmative role and duties of public governance over unfettered private sector commercial activity as Piketty suggests so capitalism becomes more of a transformative or *dynamic legal system*. This dynamic legal system has huge implications for supporting democratic social contracts and social investments in civil society which in turn, simultaneously protects individual liberty and human rights.

In the neoliberal paradigm [c.1980–2010] of capitalist globalization, the enterprise of law was always chasing after and reacting to how the "trickle-down"

they cannot last. Third, we're seeing the spontaneous rise of collaborative production: goods, services and organizations are appearing that no longer respond to the dictates of the market and the managerial hierarchy]; see also VAROUFKIS, Y. Capitalism, Democracy and Europe [November 5, 2019]; Available at: https://braveneweurope.com/yanis-varoufakis-capitalism-dee mocracy-and-europe. [Former finance minister for Greece; Challenges the term "neoliberal" that has been used to financialize capital post 1970s including the Cold War geopolitical relations. From the 1870s to the 1920s, democracy gradually became disempowered as the corporate world – a democracy-free zone – emerged. Since the end of the Bretton Woods system in the 1970s, power has migrated to finance. Goldman Sachs suddenly became more important than Ford, General Motors, or General Electric. Even corporations like Apple and Google are increasingly becoming financialized. Apple, for example, is sitting on hundreds of billions of dollars, and it is operating more like a financier than an iPhone producer… So, if you think of capitalism as a voting mechanism, it is anti-democratic in the sense that money determines power. The evolution of capitalism over the last few centuries is a history of the constant transfer of power to the wealthy, including the power to make decisions that affect the distribution of income… We have the tools necessary in order to spend at least five percent of the global GDP on a Great Transition that saves the planet. Technically, we know how to create a new Bretton Woods, a progressive Green New Deal that diverts resources to saving the planet and creating quality green jobs across the globe].

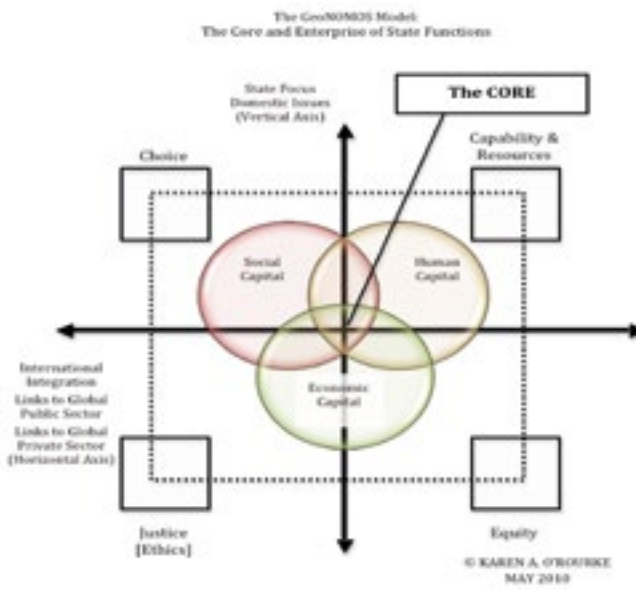
[56] ZUCMAN, G. *The Hidden Wealth of Nations: The Scourge of the Tax Havens* [trans. Teresa Fagan]. Chicago: University of Chicago Press, 2014.

economics of the neoliberal ideology operated in the marketplace. This reactionary model for the rule of law not only diminished, but also actually destroyed the public accountability function and public sector regulatory role of the sovereign State. Establishing a working *legal constitution for capitalism* that is more proactive and offers a broader platform in the sense of predictability can support a rule of law that protects the core function of every State [balancing all of its capital resources] as delineated in the GeoNOMOS.

Other non-state actors and international corporate entities that engage within the State must also abide within the GeoNOMOS Framework of Liberty, its four cornerstones, and enterprise of law. In this way, the four cornerstones of the Framework of Liberty [justice, equity, individual choice, and individual capability/resource development] are consistently incorporated within the geographic operation of each of EU State Members. This in turn, ultimately supports broader EU regional democratic principles and defined values of solidarity such as reciprocity, mutuality and human dignity for this century.

States can no longer cling to the 18th century "invisible hand" theory or the moral sentiments espoused by Adam Smith. Nor can dominant States memorialize or revert back to a 19th century market theory based on an older constitution for capitalism that codified and modeled colonialism. The 20th century economic models that supported the "welfare State" are now merely reflective reference points for this century. Just as the "international community of States" no longer rely on an outdated 17th century Westphalian notion of sovereignty, there are demands in the current 2020–2022 marketplace context to redefine solidarity, mutuality and reciprocity. [57] Addressing this transition at the crossroads of the rule of law and globalization may be the greatest opportunity that the European Union has this century to intentionally redefine democracy based on the underlying values of protecting individual liberty and then, using those new principles of democracy, to design a new *legal constitution for capitalism*. Only then, can a new market paradigm create a global compact that [a] engages a web of economic traders in a 'transformational system' that focuses on sustainability, mutuality and reciprocity; and [b] where capitalist globalization becomes an instrument for achieving goals that a democratic civil society seeks in this century – prosperity, stability, freedom and quality of life.

[57] Some States want to design monetary and tax policy in support of full employment of those residing in their State. Other States design domestic programs to advantage only the moneyed elite condoning corruption in government and community as a routine practice. Somewhere in between there is balance that promotes participatory democracy based on individual liberty. It has yet to be defined and operationalized. In the GeoNOMOS it is the cornerstones of the framework of liberty and the enterprise of law operating inside that framework that offers some insight into the ongoing public debate on new forms and legitimate expressions for State sovereignty.



The GeoNOMOS Model:
The Shifting of Economic Capital – Extreme Condition A / The Loss of State Core

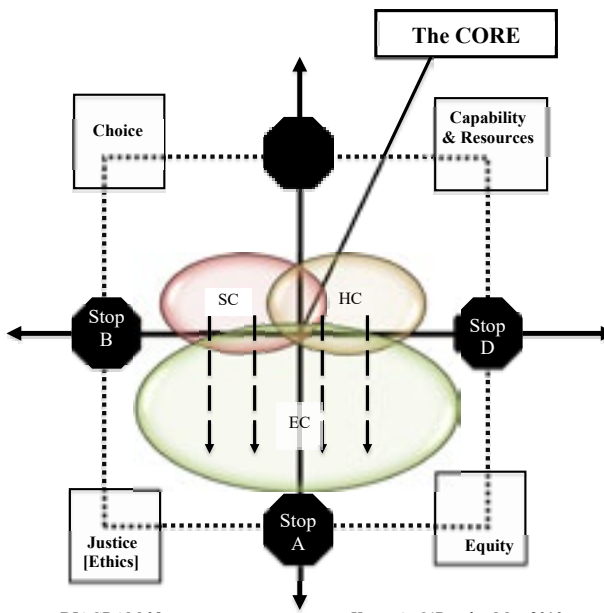


DIAGRAM 08 © Karen A. O'Rourke, May 2010

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Principles and Values of the European Union as a Legal Basis for European Integration

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Summary: The article is devoted to the analysis of the legal nature of principles and values of the European Union, their ethimology and genesis, as well as their place and role in the legal order of the EU. One can argue that in the contemporary legal order of the European Union principles and norms that are enshrined in the founding documents of the European Union, stipulate the founding basics of the legal system of the EU. Besides, they execute the regulatory function in the relations between an individual and society. It is pointed out in the work, that principles and values appeared in the European Union law not at the same time. If principles were fixed in the first founding treaties when they were concluded, then the provisions on values were included in the founding treaties only recently that is in the latest Lisbon edition of 2007. It is underlined that the infringement by an EU Member State of values may result into imposing of sanctions against the infringer. However, EU principles and values acquire the particular importance in the course of the conclusion of international agreements with the third countries. With this regard the provisions of the Association agreement between Ukraine and the European Union and its Member States. Special attention is paid in the article to the investigation of the legal mechanism of the implementation of the EU-Ukraine Association agreement in the legal order of Ukraine as well ae the effect of principles and values on the process of legal reforms in Ukraine.

Keywords: principles – values – Constitution of Ukraine – EU law – Association Treaty – implementation – legal mechanism

1. Introduction

The European Union is a constitutional entity based on the principles and the determined values, which constitute a legal basis for the EU legal order. The EU

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principles and values are enshrined in the Treaty on the European Union[1] as well as specified in the EU Fundamental Rights Charter and have internal and external dimensions. The Association agreement between the EU and Ukraine, as many other EU international agreements, contains EU principles and values.[2] By means of the conclusion of the association agreements the EU law extends its effect on the internal legislation of the associated countries. Thus the EU principles and values become an integral part of the national legislation of third states. In this connection, the study of the peculiarities of the Association of Ukraine with the EU becomes topical for Ukrainian science of European law. Unfortunately, the legal problem of influence of the EU law on the nature and content of the association agreements, which creates preconditions for expansion of the Union acquis in the internal legal order of third countries, has not given sufficient attention in the Ukrainian and foreign literature on European law. The study of these issues is the actual problem of modern science of international and European law and its solution will be of considerable practical importance for Ukraine.

2. The Significance of Principles and Values in the European Union legal order

The European Union law is a separate legal order the legal bases of which is formed by the principles and values. The principles and values can be treated as a kind of a 'grund norm', the foundation of the whole EU legal system. However, these phenomena are not the same. As not the same is their role in the EU legal order.

In terms of etimology a principle (principum) means the main source, initial, guideline for the EU activities. Values are some phenomena of social consciousness in the form of the notions of good and evil, justice, moral considerations, principles. With the help of values people give an assessment of the phenomena of reality, require their implementation. Thus, values exercise regulatory functions in relation to an individual and society. Values designate moral and ethical aspect of a legal phenomenon. Where did these principles and values come from? Most of them found their consolidation in the national constitutions of European states.

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 // Official Journal of the European Union, 2007/C 306/01, vol. 50.

[2] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part // Official Journal of the European Union, 2014/ L 161/3, vol. 57.

Before that, they were formed in the era of enlightenment and were politically declared during the Great French Revolution. After the Second World War, the establishment of democratic values and, along with it, the development of civil society, its institutions in the states of Western Europe gained a special weight. Similar constitutional foundations for democratic values and human rights and freedoms have been and continue to be characteristic of the European states of developed democracy.

In the European Communities the provisions on the protection of human rights were included in the founding treaties in the process of democratization of the EC. In the preamble to the Single European Act the Member States expressed their determination to work together to promote democracy on the basis of fundamental rights.

In Article F (2) of the Maastricht Treaty the Member States made commitments to respecting fundamental rights, as guaranteed by the European Human Rights Convention and the constitutional traditions common to the Member States. This is confirmed by the Treaty on the European Union (TEU), which states that the fundamental rights guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms and provided for by constitutional traditions common to all member states form the general principles of the law of the Union (Article 6).

For the first time common values were added to the principles and were enshrined in the Lisbon treaties on the European Union. The principles and values of the European Union pose the highest position in the hierarchy of the sources of the EU law. Many of them then are fixed in international agreements between the European Union and the third countries. Very often the EU agreements on cooperation with third countries contain provisions concerning the requirement to respect human rights and democracy in these countries (so-called essential element of international agreements – Bulgarian formula).[3] In addition to the principles democracy and human rights the respect for the principles of market economy is also related to the essential elements of cooperation agreements.

The aim of consolidating and support democracy, the rule of law, human rights and the principles of international law is included in Article 21(2) of the Treaty on European Union among the key objectives that define the Union's common policies and actions.

The most important is art. 2 of the Treaty on European Union It states: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of

[3] INGLIS, K. The Europe Agreements Compared in the Light of their Pre-accession Reorganization. *Common Market Law Review*, 2000, vol. 37, no. 5, p. 1191.

persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

In the European Union the violation of the values by a Member State may result in the imposition of sanctions upon it in the form of suspension of certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council (Article 7 TEU).

However, it should be borne in mind that the practical realization of all those principles and values substantially depends on their interpretation of each of these by the states. The Member States may have different standards concerning national values and fundamental rights. At the same time, those distinctions should not influence on the efficiency of their realization.[4]

To prevent possible differences regarding the interpretation of these principles and values political dialogue has been established within the framework of the majority of the EU agreements on cooperation.

In the EU the Court of Justice has accumulated extensive practice concerning interpretation and realization of the principles and common values. It concerns primarily democracy, rule of law, human rights, equality.

While speaking about democracy in the EU and its Member-States one should bear in mind that in both cases the content of it is different. So that it is not correct to compare the European democracy to a national democracy, even though the EU democracy draws aspiration from national democracies in the member-states.

The EU is not a state nor is a traditional international organization. It is a sui generis entity which differs from a state and from an international institution. At the same time the EU has many features of a state but for sovereignty. It allows us to conclude that democracy as phenomenon can be attributed to the EU. We can call it *"supranational democracy"*.[5] The same applies *mutatis mutandis* to other EU common values.

The national and supranational democracies are interconnected and dependent on each other. For instance, it is impossible for non-democratic states to form a democratic union. On the other hand, supranational democracy is not all sufficient. It supplements national democracies and at the same time in some clearly designated cases can even intervene and make corrections to its functioning in the member-states. The member-states have endowed the EU with limited powers

[4] SHUIBHER, N. Margins appreciation: national values, fundamental rights and EC free movement law. *European Law Review*, 2009. vol. 32, no. 2, p. 254.

[5] ARNOLD, R. Anthropocentric Constitutionalism in the European Union: Some Reflections. ŠIŠKOVÁ, N. (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, pp. 117–118.

for this. The Court of Justice of the European Union (CJEU) strives to place national and supranational democracies in a mutually reinforcing relationship.

Beyond this sui generis political power, the European Union also has a singular institutional scheme which is, despite the similarities to national-level counterparts, different from the typical national-level system. For instance, it is impossible to compare the Commission to a government since the executive power in the EU is shared with the European Council and the Council of the EU. The same applies to the Council. The European Parliament has much limited legislative powers than national Parliaments etc.

The CJEU has understood the principle of democracy in a way which is based on two sources of democratic legitimacy at EU level, namely the Member States and the peoples of Europe.

At the very beginning of its functioning the EU suffered from so-called "democratic deficit", since almost all powers were concentrated in the executive institutions – Commission and Council. At that time the present European Parliament was called the Assembly, which has only consulting powers in legislative process. What is more, the provisions of the founding treaties did not contain any references to the democracy and rule of law.

However, step by step the situation with the democratic deficit in the EU radically changed. The EU Court of Justice was the mastermind of those changes. The crucial role was played by the CJEU, as an institution of the EU which is not bound by the political constraints that limit the action of the European Commission. The decisions of the CJEU covers the whole spectrum of democracy on the supranational and national levels.

The effect of the Case Van *Gend en Loos*[6] was to give the Community law to the people taking it out of the hands of politicians and bureaucrats. Of all the Court's democratising achievements none can rank so highly in practical terms. Moreover, the Court recognised in Van *Gend en Loos* that the two aspects of democratic legitimacy – namely, the right of the people to participate in the law-making function through representative bodies and the ability of individuals to vindicate their rights in judicial proceedings – are intimately linked: one of the reasons given for upholding direct effect was that 'the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In the Case Roquette *Freres*[7] the EU Court of Justice came to the conclusion that the consultation provided for in the Treaty is the means which allows the

[6] Case 26/62, Van Gend en Loos [1963] ECR 1.

[7] Case 138/79, Roquette Freres v Council [I980] ECR 3333.

Parliament to play a part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament therefore constitutes an essential [procedural requirement] disregard of which means that the measure concerned is void.'

In the 'Chernobyl case (Case *Parliament* v *Council*)[8] the Court held that, in order to maintain the institutional equilibrium created by the Treaty as amended by the Single European Act, the Parliament should be able to safeguard its newly won prerogatives and therefore have standing to commence proceedings against acts of the Council and Commission.

In its decision in the Case Associação Sindical dos Juízes Portugueses v Tribunal de Contas[9] the ECJ has affirmed that judicial independence (i.e., judges' responsibility to deliver justice independently, making impartial decisions based solely on fact and law) is a fundamental principle that has to be safeguarded all over the Union.

However, for the recent time the EU faces the problem of providing protection of the principle of Rule of Law on the Member States level. What is striking is that the with the protection of the Rule of Law has arisen in the countries that have joined the EU in the different times and have their own history of democratic development – Austria, Hungary, Poland – to name the most prominent examples. To avoid such problem, the EU has invented a legal mechanism for the protection of the Rule of Law in its Member States which includes political and legal instruments.

Article 7, which was enshrined in the Amsterdam Treaty on the European Community contains 3 three-stages procedures for providing sanctions against the Member State that breaches the Rule of Law. So, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

This mechanism was partly used in attempt to resolve the Haider case[10] in Austria and Polish judicial reform case.[11]

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8 Case C-70/88, Parliament v Council [I990] ECR 1-2041.

9 Case C64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas. Judgment of the Court (Grand Chamber) of 27 February 2018.

10 ŠIŠKOVÁ, N. European Union's legal instruments to strengthen the rule of law, their actual reflections and future prospects. ŠIŠKOVÁ, N. (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, p. 157.

11 Ibidem.

In practice this mechanism has proved to be not very efficient, although some positive steps have been made to alleviate the crises.

In case of Austria the crisis was resolved by the formation of the ad hoc Committee of the Tree Wise Man, who reported that common values in Austria are respected. This mechanism was partially improved after the Nice conference by lowering the threshold for triggering the procedures of the application of sanctions against the Member State offender.

In case of Poland the crisis has been resolved in 2018 when a new legislation was adopted that alleviated some Commission`s concerns about the Justice Ministry`s ability to fire the heads of Courts without consultations, the equal retirement age for male and female judges, the publication of three Constitutional Court rulings from 2016 blocked by the Government). Under the Commission opinion, although, the progress reached is not satisfactory.

The EU Court of Justice with the involvement of the Commission turned out to be more efficient legal instruments for the protection of the rule of law. It was clearly proved in case of Hungary. The Hungarian Government also, as Poland, carried out Constitutional reform to consolidate its power at the expense of other branches of government. By carrying out this reform the common European values enshrined in the Article 2 of the TEU have been breached (rule of law, democracy, equality, respect for human rights etc.).

At that time the Member States were reluctant to use Article 7 for making Hungary to comply with the common values. The Commission brought the matter before the EU Court of Justice after the Commission found out that Hungary failed to fulfil its obligations under the EU law Directive 2000/78 on processing of personal data and on free movement of such data[12] and Directive 96/46 on the protection of individuals with regard to the establishing a general framework for equal treatment in employment and occupation[13]. So, there was not the case concerning the violation of article 2 of the TEU. In both cases rule of law was partially protected in linkage to the norms of the EU secondary legislation. It seemed that the Commission and the EU Court of Justice were not willing to initiate procedure for the alleged breach of the rule of law, since they were afraid that the protection of individual rights and independence of judicial power are the constitutional principles that are beyond the scope of the EU law. Instead they have chosen the simplest solution possible and the Commission brought the case before the Court on the bases of article 258 of the TFEU according to which in case when the Commission considers that a Member State has failed to

[12] Directive 2000/78 on processing of personal data and on free movement of such data. OJ. L303/16.

[13] Directive 96/46 on the protection of individuals with regard to the establishing a general framework for equal treatment in employment and occupation (No longer in force).

fulfil an obligation under the Treaties, it may bring the matter before the Court of Justice of the European Union[14].

The situation has not change afterword. Now the European Parliament endorsed the draft of the new regulation, according to which the Member States that threaten the Rule of Law, that is the governments of which are imputed in interference with the judicial system, corruption, fraud etc. will be deprived from access to EU funds.

The adoption of such a regulation may result in the broader application of article 263 for judicial protection of the Rule of Law in the Member States[15].

In our opinion, however, this protection will be a fragmentary one as in case of the infringement by Hungary of two directives.

The EU Court of Justice developed the Rule of law concept at the EU level. In the Case Parti écologiste "Les Verts" v European Parliament [16] the EU Court of Justice stated that the Community is based on the Rule of Law, "inasmach as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. Herewith, the EU Court of justice recognized that the EC Treaty is an EC Constitution and it should be judicially protected as well as the common values enshrined in it. That is, the Rule of law connotes judicial review of the EU legislation.

The EU Court of Justice also develops jurisprudence in the field of fundamental rights. In the area of the protection of human rights the EU Court of Justice relies on the catalogue of fundamental rights by reference to which the Court reviews the legality of the Community's legislative and administrative acts. The Court's case law on fundamental rights is founded on the constitutional traditions of the Member States, natural law and the common legal heritage of western civilisation.

In the early stages of its evolution the European Community did not pay much attention to human rights. It was believed that such issues were outside the goals of economic integration and that the list of human rights should thus not be included in the founding treaties of the European Community. Furthermore, in the decisions of the Court of Justice in the Case Friedrich Stork & Cie v High Authority of the European Coal and Steel Community,[17] the provisions of

[14] ŠIŠKOVÁ, N. European Union's legal instruments to strengthen the rule of law, their actual reflections and future prospects. ŠIŠKOVÁ, N. (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, p. 157.

[15] Member states jeopardising the rule of law will risk losing EU funds. European Parliament. Press Releases. Plenary session 17-01-2019.

[16] Case 294/83, Parti écologiste "Les Verts" v European Parliament [1986] ECR 01339.

[17] Case 1/58, Friedrich Stork & Cie v High Authority of the European Coal and Steel Community [1958] 36–38, 40.

the EU law were interpreted as having primacy over the provisions of national constitutions of the Member States regarding human rights and freedoms. This caused fear on the part of EU institutions that Member States might be required to bring the provisions of EU law in accordance with their domestic law for the protection of human rights.

This achievement which was initiated by the CJEU with its judgment and has continued step by step to the present day, is one of the greatest contributions that the CJEU has made to democratic legitimacy in the European Union.

For the first time, principles of human rights law in the European Communities were recognized by the EU Court of Justice in the Case Stauder v City of Ulm[18]. In this case, a German citizen protested that his fundamental right to human dignity, protected by Article 1 of the German Grundgesetz (the German Constitution) was being infringed by having his name on his coupon when claiming reduced-price butter by the Community. The Court of Justice held that the Commission's decision in 1969 that had given the Member States permission to establish preferential prices for certain categories of the population, did not contain anything that could violate the basic human rights protected by the Court of Justice and enshrined in the general principles of Community law. So there was no infringement of fundamental human rights by the EU institutions. The activities of the national authority to amend its legislation according to the provisions of the adequate Community law were the reasons for violation. The requirement to indicate personal data on the coupon, which violated human rights, was not necessary. Thus, the concept of basic human rights was in this instance recognized as a general principle of European Community law for the first time.

In the Case Internationale Handelsgesellschaft[19] which dealt with the introduction of licenses for the export of agricultural products within the common agricultural policy, the Court of Justice held that fundamental human rights are part of the constitutional principles common to the Member States of the European Community. The Court of Justice was therefore supposed to protect basic human rights by applying the relevant provisions of the constitution and international agreements on human rights to which both the Member States were party. In this case, the Court of Justice decided that it should protect fundamental rights, taking into account the basic principles of the Community. Protection of these rights, in accordance with the common constitutional traditions of the Member States, should be provided within the structure and goals of the European Communities. The Court of Justice further stated that the source of the validity of the concept of human rights was the legal framework of the European Communities. In such

[18] Case 29/69, Stauder v City of Ulm [1970] ECR 419.
[19] Case 11/70, Internationale Handelsgesellschaft [1972] ECR 1125.

instances, the Court of Justice should apply national constitutions and international treaties of the Member States relating to the protection of human rights, not as the source of European Community law, but as the source of cognition of law to educe the fundamental rights taking into account interests of Communities.

In the Case National Panasonic v Commission of the European Communities[20], the Court of Justice held that although the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 was not the part of the EU legal order, its provisions should nevertheless be implemented. Therefore, any measures adopted within the EU would not be valid if they were contrary to the provisions of the Convention. So by virtue of the practice of the Court of Justice human rights were attributed to the general principles of European Community law.

The principle of equality is interpreted by the CJEU in close connection with the protection of human rights. In the decisions CJEU proceeds from the priority of the EU principles and common values, including the principle of equality, over national legislation.[21] At the same time, in its practice the CJEU shows respect for the constitutional traditions of the Member States.[22]

For Ukraine such EUCJ practice is of utmost importance since it clarifies many things with which such a young democracy as Ukraine constantly faces in the process of it development.

3. Legal grounds for the implementation of the Association Agreement in Ukraine

The implementation of any international agreements, including the AA, depends to a great extent on the approaches in the particular state to the correlation between international and municipal law. The policy of integrating Ukraine into the European Union, pursued since Ukraine acquired independence, generated the need to crate in the domestic legal order respective legal prescriptions for the effectuation thereof. Although Ukraine is not a candidate for joining the integration structures of the European Union, the state has already established deep and comprehensive legal ties with the European Union by the Association Agreement and new legal instruments are being added to the Association Agreement

[20] Case 136 /79, National Panasonic v Commission of the European Communities [1980] ECR 2033.

[21] Case 43/75, Defrenne v Société Anonyme Belge de Navigation Aerienne. (SABENA) [1976] ECR 455.

[22] Case 36/02, Omega Spielhalten- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn ECR I-9609.

to regulate the relations of the parties. The development of integration relations with the European Union requires of Ukraine the creation of a legal base for regulating cooperation with the European Union.

The legal prerequisites for realization of the provisions of the law of the European Union within the legal order of Ukraine are created by the Constitution of Ukraine and other legislative acts adopted during the existence of the independent Ukrainian State in which fundamental principles have been established of the operation of norms of international law in its domestic legal order; these have significance in principle for the fulfillment of the Association Agreement.

According to the 1996 Constitution of Ukraine (Article 9), international treaties duly ratified by the Supreme Rada of Ukraine become part of the national legislation of Ukraine.[23] Norms of international treaties approved by the Supreme Rada acquire the status of norms of national law by means of bringing this constitutional mechanism into operation. This means that Article 9 of the Constitution of Ukraine establishes the legal basis for the respective application of norms of international treaties in the national legal order of Ukraine. However, Article 9 of the Constitution formally did not determine the absolute priority of norms of international law relative to norms of national law. The question arises in this connection: do the provisions of Article 9 affect international treaties ratified before the entry of the Constitution into force?

Article 18 of the Constitution of Ukraine, which provides that Ukraine shall be guided in its foreign policy activity by generally-recognized principles and norms of international law, also does not resolve the problem of the primacy of international law: on one hand this provision contains a clear reference to the priority of international-legal norms; on the other, this priority concerns only generally-recognized principles and norms of international law. Thus, a certain contradiction exists between Articles 9 and 18 of the Constitution: the first does not contain a provision on the incorporation of generally-recognized principles and norms of international law in the domestic legal order of Ukraine. The inadequacy of this constitutional mechanism is that neither the Constitution of Ukraine nor other legislative acts say anything about customary norms of international law or acts of intergovernmental organizations; that is, do not determine their status in the domestic legal order, although the significance of these acts in the legal regulation of international relations is constantly growing and cannot be ignored by the international legal practice of any State.

Endowing international treaties with the status of norms of national legislation causes numerous problems connected with the application of these norms into the domestic legal order of Ukraine. One of them, in particular, may arise

[23] Herald of the Supreme Rada of Ukraine, 1996, no. 30, item 141.

in connection with granting norms of international treaties the status of national norms: the adoption of a national norms of law which is contrary to obligations assumed that entails the suspension of the fulfillment of particular treaty provisions and, consequently, may be a violation of international legal obligations. All countries adhering to a dualist approach to the correlation of international and domestic law, including the members of the European Union, encounter this problem in practice. In order to resolve the question of the operation of norms of European Union law in their national legal orders, as European integration law requires, the great majority of these countries have been forced to insert in their constitutions respective changes establishing the priority of European Union law with respect to norms of international law.[24] Such international legal practice is extensively applied in countries applying to join the European integration structures.[25]

As noted above, granting norms of international law the status of norms of domestic law creates the legal foundation for the direct application of such norms in the domestic legal order of Ukraine. This legal approach may be regarded as *de facto* monism in resolving problems of the interaction of international law with domestic law, on condition of the existence in the country of a stable tradition of the direct application of norms of international treaties in the domestic legal order with the granting of priority significance to such norms relative to norms of national law which are adopted after their ratification.[26]

Such a tradition did not exist in Ukraine previously because the doctrine and practice of the USSR excluded the direct operation of norms of international law in the domestic legal order of the country. This position existed despite the incorporation in the fundamental legislative acts of the USSR providing that if an international treaty or international agreement in which the USSR or a union republic takes part establishes other rules than those which are contained in Union legislation or union republic legislation regulating the determined sphere of legal relations, the rules of the international treaty or international agreement apply (Article 129, Fundamental Principles of Legislation of the USSR and Union Republics; Article 64, Fundamental Principles of Civil Procedure of the USSR and Union Republics; Article 3, Statute on Diplomatic and Consular Representations of the Union of Soviet Socialist Republics; Article 425, Code of Civil Procedure of Ukraine, and others).

[24] MURAVIOV, V. I. *Law of the European Union*. Kyiv, 2014; RIDEAU, J. *Droit institutionnel de l'Union Européenne.* Paris: Parution, 2010, pp. 1119–1423.

[25] TANCHEV, E. National Constitutions and EC Law: Adapting the 1991 Bulgarian Constitution in the Accession to the European Union. *European Public Law*, 2000, vol. 6, no. 2, pp. 229–241.

[26] ISAAC, G. M., BLANQUET, M. Droit général de l'Union Européenne. Paris: Sirey, 2012, pp. 370–373.

In view of this, the provisions concerning the priority of international-legal norms in the event of a conflict with norms of municipal law were treated in a limited meaning: this rule might be applied within the framework of the domestic legal order as a means of the fulfillment by the State of its international obligations, the grounds for which was the right of the State to exercise jurisdiction on its own territory, being the sovereign right of any State irrespective of whether it recognized or did not recognize the primacy of international law.[27]

As the international-legal practice of many States with regard to the application of norms of international law in domestic legal order shows, the very fact of the recognition of the priority of international legal norms in regard to norms of national law still does not guarantee the effectuation of this principle in reality. Often resolved is the question of determining the legal status of norms of an international treaty, especially whether these norms become domestic law with all the legal consequences arising or whether they operate ad hoc, retaining the legal significance of a norm of international law.[28] Thus, the proclamation of the primacy of international law in and of itself does not guarantee the effective fulfillment of international legal norms as international obligations of the State so require.

In the course of acquiring independence Ukraine took certain steps which changed to a great extent the traditional Soviet approach to international law as an instrument of the regulation of relations between States, the use of which requires sanctions on the part of the State. Accordingly, a number of legal acts were adopted directed towards affirmation of the priority of international law and the creation of legal foundations for the application of norms of international law in the domestic legal order, especially with regard to the principles of international law. The Declaration on the State Sovereignty of Ukraine of 16 July 1990 recognized the priority of universal human values over class values and the priority of generally-recognized principles and norms of international law over norms of municipal law. As was indicated, the priority of generally-recognized principles and norms of international law is regulated more precisely in the 1996 Constitution of Ukraine (Article 18). However, unlike the provisions of many constitutions of European States concerning the status of generally-recognized principles and norms of international law (Article 24, Constitution of Germany; Article 11, Constitution of Italy, and others), there is no express indication in the legislation of Ukraine to the incorporation of these principles and norms in domestic law.

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[27] KUDRIAVTSEV, V. N. et al. (eds.). *Course of International Law in Six Volumes*. 1967, vol. 1, pp. 235–236.

[28] DENISOV, V. N. Development of the Theory and Practice of the Interaction of International and Domestic Law. In: DENISOV, V. N., EVINTOV, V. I., DZUD, J. and BOKOR-SZEGO, H. (eds.). *Realization of International Legal Norms in Domestic Law*. Kyiv, 1992, p. 20.

The provisions concerning the primacy of norms of international law relative to national law were elaborated in the Law of Ukraine "On the Operation of International Treaties on the Territory of Ukraine" of 10 December 1992. The preamble of the Law established the general principle of the primary of international law over domestic legislation set out as follows: "Proceeding from the priority of universal human values and generally-recognized principles of international law, endeavoring to ensure the inevitability of the rights and freedoms of man, and to become involved in the system of legal relations between States on the basis of mutual respect for State sovereignty and democratic foundations of international cooperation, the Supreme Rada of Ukraine decrees to establish that international treaties concluded and duly ratified by Ukraine shall comprise an integral part of the national legislation of Ukraine and shall be applied in the procedure provided for norms of national legislation".[29]

This status of international treaties was confirmed in national legislation in the 2004 Law of Ukraine "On International Treaties of Ukraine".[30] This Law precisely formulated the provisions with regard to the primacy of international law:

1. International treaties of Ukraine concluded and duly ratified shall comprise an integral part of the national legislation of Ukraine and shall be applied in the procedure provided for norms of national legislation.
2. If other rules have been established by an international treaty of Ukraine whose conclusion occurred in the form of a law than those which have been provided by legislation of Ukraine, the rules of the international treaty of Ukraine shall apply".

It seems that the provision recognizing the primacy of international norms over national legislation are relegated to fundamental provisions and should not be limited by regulation at the level of an ordinary law and have the legal force of an ordinary law.

The Constitution of Ukraine consolidated merely a provision to include part of international agreement in national legislation, and says nothing about the primacy of international norms with respect to norms of national law in the national legal order of Ukraine.

Provisions exist in other laws of Ukraine which refer to the operation of certain international treaties in the domestic legal order thereof. The Law "On the Police" (Article 4), adopted 20 December 1990, relegated to the legal foundations of police activity the Universal Declaration of Human Rights and international agreements ratified in the established procedure. Nonetheless, it does not follow

[29] Herald of the Supreme Rada of Ukraine, 1992, no. 10, item 137.
[30] Herald of the Supreme Rada of Ukraine, 2004, no. 50, item 540.

from Article 4 of the said Law that the provisions of these international legal acts will have priority significance if contradictions arise between them and the provisions of national legislation.

In other legislative acts Ukraine uses the formulate traditional for many Soviet normative acts concerning the application of norms of an international treaty in the event of a conflict with norms of national law (for example, Article 17, 1991 Law of Ukraine "On International Treaties"; Article 27.4, 2014 Law of Ukraine "On Standardization",[31] and others). However, one should bear in mind that these conflicts concern only specific laws; they do not resolve problems of the interaction of norms of international law with the national law of Ukraine as a whole.

As regards the status of acts of international organizations in the domestic legal order of Ukraine, the Law of Ukraine "On Postal Communication" (Article 27), adopted 4 October 2001, provides as follows: "The national operator in the procedure determined by legislation of Ukraine shall support cooperation with operators of postal communications of other States and ensure the fulfillment of decisions determined by normative acts of the Universal Postal Union, consent to the bindingness of which is granted by the Supreme Rada of Ukraine".[32] It follows from this that reference is being made to ensuring the fulfillment of acts of the Universal Postal Union adopted in the form of decisions. However, the question arises with respect to these decisions: which legal basis determines the powers of the Supreme Rada with respect to consent and bindingness of such acts, because the Constitution of Ukraine only regulates the status of international treaties. On the other hand, this formulation of the Law of Ukraine 'On Postal Communcation" (Article 27) testifies to changes in the approaches to determining the status of decisions of organs of international organizations in the national legal order of Ukraine; that is, the possibility of their application by national agencies in the procedure established by legislation of Ukraine.

Despite the absence in the Constitution of Ukraine of precise provisions concerning the priority of international law with respect to norms of domestic law, the Constitution and the Law of Ukraine "On the Operation of International Treaties on the Territory of Ukraine" and other legislative acts created the legal basis for the operation of norms of international treaties and norms of international customary law in its domestic legal order, which serves as evidence of the fundamental revision of the doctrine and practice of the problem of the correlation of international and domestic law, bringing Ukraine closer in this respect to European rule-of-law States.

[31] Law of 5 June 2014, No. 1315-VII.

[32] Herald of the Supreme Rada of Ukraine, 2002, no. 6, item 39.

But not all questions of the interaction of international and domestic law have been resolved in the said legal acts, which under certain circumstances may complicate the proper fulfillment by Ukraine of its international obligations. Evintov justly emphasized that under the existing formulations of his problem the question remains unresolved in legislative acts of Ukraine as to on what grounds preference may be given to one of two norms of national law in the event of their being in contradiction.[33]

In member countries of the European Union which adhere to a dualist approach to the correlation of international and national law, doctrine refers to the general principle of law, *lex posterior*. In Ukraine, as noted, a dualist approach applies to the correlation of international and domestic law, but no legislative acts, judicial decisions, or generally-recognized doctrine exist indicating the means of resolving conflicts between norms of international agreements which have become part of national legislation and norms of national law which should be resolved by means of applying the rule *lex posterior*.

One effective means of ensuring the fulfillment by Ukraine of its international legal obligations may become the direct application of international legal norms by national courts of the country.

One argument in favor of including national judicial institutions in the process of applying international agreements in the national legal order may be that the European choice of Ukraine should be based on taking into account the doctrines and practices of national courts of members of the European Union, which have a key role in the effective functioning of European integration structures. Recognition of the primacy of law of the European Union with respect to the national law of member countries and the direction operation of its provisions in the national legal orders of these countries means taking measures ensuring the operation of the norms thereof. It should be pointed out that the doctrine of the direct operation of the law of the European Union extends to international agreements. This especially concerns international agreements which are concluded by the European Union with nonmembers if, proceeding from the content of such an agreement, the purposes and tasks thereof contain a precise and clear duty to fulfill it and for this the adoption is not required of any implementation measures, including special legal acts.[34]

Doctrines of the primacy and direct operation of the law of European integration structures of the European Union are directed towards effectively ensuring the operation of this law by all agencies of member States, but the principal role

[33] EVINTOV, V. I. Ukraine in the International Community. In: DENISOV, V. N., EVINTOV, V. I., AKULENKO, V. I., VYSOTSKIY, O. F. and ISAKOVYCH, S. V. *Sovereignty of Ukraine and International Law*. Kyiv, 1995, p. 52.

[34] Case 12/86, Demirel [1987] ECR 3719.

in this process belongs to national courts because they chiefly and not the judicial institutions of the European Union effectuate the defense of the rights of natural and judicial persons, relying on the means of direct application of European law. National courts thereby act as one of the legal guarantors of the realization of the tasks and purposes of European integration within the framework of European Union structures. A result of such extensive use of national judicial agencies called upon to ensure the fulfillment of European law as a law of direct operation is the high degree of legal certainty and legal stability of the functioning and development of the European Union integration structures.[35]

The question arises to what extent the legal order of the European Union, for which the practice of applying the law of European integration structures by national courts of member countries is characteristic, may influence the legal order of Ukraine. One of the most effective instruments of the influence of European Union law on the domestic law of Ukraine is the said Association Agreement, which, on one hand, is an integral part of European Union law and, on the other, is part of the legislation of Ukraine operating on the principles established in the Constitution of Ukraine (Article 9).

Given that certain provisions of this Agreement influence the movement of persons, freedom of the provision of services, and the development of entrepreneurial and investment activity in Ukraine by means of the clear consolidation of the rights and duties of natural and juridical persons with respect to their rights, such as the right to employment (Articles 17, 18, 19); nondiscrimination against companies, including those providing services through a commercial presence (Articles 87, 8, 92, 93, and 94), right of companies to hire key personnel (Article 98); right of access to the market of sea and air carriage and carriages on a commercial basis (Article 87), the problem inevitably arises of ensuring these rights in the domestic legal order of Ukraine, especially in the courts.

As regards the Association Agreement, it makes provision for the creation of an international-legal mechanism to settle disputes between Ukraine and the European Union; the basis for this is Article 477, establishing a Council for Cooperation, within whose competence is the consideration of appeals of natural and juridical persons. The Council, however, may consider only appeals if one of the parties raises a particular question during a meeting of their representatives. As practice of fulfilling the Agreement on Partnership and Cooperation shows, the overwhelming majority of recourses concerning violations of the obligations of the parties assumed in accordance with the Agreement were appropriate for the said mechanism of resolving disputes between Ukraine and the European Union.

[35] Treaty on Partnership and Cooperation between Ukraine and the European Community: Foundation and Activity of Companies. Kyiv, 1999.

At the same time, the Agreement contained provisions which, proceeding from the practice of the Court of the European Union, might be interpreted as conforming to the requirements of acts of European Union Law of direct operation. During the operation of the Agreement, however, neither party to the Agreement had recourse to the Court of the European Union concerning the application of certain of its provisions as having direct operation.

The Association Agreement, however, contains provisions which potentially make it possible for natural and juridical persons participating in the fulfillment thereof to apply to the courts of Ukraine in order to defend the aforesaid rights. Article 471 of the Association Agreement provides:

Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access that is free of discrimination in relation to its own national to its competent courts and administrative organs, to defend their individual rights and property rights.

As a consequence of this, although the aforesaid cautious approach of the European Union to the direct operation of the provisions of the Agreement continues to exist, in principle one cannot exclude the possibility of the defense of the said rights of natural and juridical persons in the national courts of Ukraine.

Consequently, one may say that the incorporation of the Association agreement in the domestic legal order of Ukraine created merely the prerequisites for the consideration by courts of Ukraine of its provisions, and for this a special implementation act was not required. However, the realization of these possibilities depends directly on an understanding by the courts of Ukraine of the importance and necessity from a legal point of view of accepting for consideration this kind of recourse. In addition, one cannot exclude the adoption by Ukraine of a special implementation act establishing mechanisms for the application of international treaties, including the said Agreement of Ukraine with the European Union, in the national courts of Ukraine. There are certain legal grounds for this already in the present legal order of Ukraine, especially the 1991 Law of Ukraine "On Foreign Economic Activity" (Article 6), which provides that a foreign economic contract may be deemed to be invalid in a judicial or arbitration proceeding unless it meets the requirements of a law or international treaties of Ukraine. It is necessary to stress that Soviet doctrine and practice permitted the possibility of the application by national judicial agencies of norms of international law when resolving disputes in a judicial proceeding, in particular, in such spheres as ensuring the operation of international agreements concerning the carriage of passengers and cargo.[36]

[36] BASKIN, I. U. A., KRYLOV, N. B., LEVIN, D. B et al. *Course of International Law in Seven Volumes*. 1989, vol. I, pp. 299–300.

The possibility of the application by courts of the provisions of international agreement is contained in the Constitution of Ukraine (Article 9), proceeding from the recognition of international treaties in force, consent to the bindingness of which was given by the Supreme Rada of Ukraine, as a part of the national legislation of Ukraine. In addition, the direct operation of constitutional norms (Article 8) is consolidated in the Constitution, which should be interpreted in connection with Article 9 as a direct application of norms of international law in the event of their being contrary to norms of national law. It would be desirable to precisely determine the mechanism for the application of such treaty obligations of Ukraine in a law or to affirm this by judicial practice. Judges should receive the right and duty consolidated by a procedural law to turn to and apply international law. The conditions and procedure for such application should be elaborated. No less important is the task of providing the judge, the central figure in the application of law, with all the necessary sources of law, instructing him in international law, and inculcating in him the habit of the realization thereof. When deciding the question of the application by courts of Ukraine of international agreements, including the Association Agreement, criteria should be established relating particular provisions thereof to norms of direct operation which may be applied directly by courts.

The creation of legal prerequisites for the integration of Ukraine into the European Union require the resolution in its domestic legal order of the problem of choice of the means of the realization by Ukraine of its international obligations. It should be noted that Soviet doctrine and practice on matters of the application of international legal norms always delimited the sphere of operation of international and national law. It was believed that norms of international law create rights and duties for States, whereas norms of national law regulate the behavior of natural and juridical persons. Therefore, in order to enhance the effectiveness of the fulfillment by Ukraine of its international obligations it is necessary to transform norms of international law into norms of national law. In so doing, the transformation is regarded as a "means of the fulfillment of international law by means of the issuance by the State of domestic normative acts (laws, acts of ratification and publication of international treaties, administrative decrees, regulations, and so on) with a view to ensuring the fulfillment by the State of its international obligation or in the interests of the use by it of its international power".[37] This conception proceeds from an understanding that transformation includes any means of implementation and does not distinguish between transformation and national legal implementation.

[37] USENKO, E. T. Theoretical Problems of the Correlation of International and Municipal Law. *Soviet Yearbook of International Law* 1977, p. 69.

Other conceptual means of implementing international-legal obligations respectively are renvoi, incorporation (reception), and transformation. Renvoi occurs when a State includes in its legislation a norm sanctioning the application of international legal provision in order to regulate municipal relations. Incorporation (reception) is the incorporation of international legal norms into the national legal order without a change of their content. Information (reception) may be general, if international law is incorporated into the national legal order as a whole, or special, if one refers to the incorporation of individual international-legal norms. Transformation means that norms of international law are transformed into norms of national law by means of the publication of a special law or other normative act which regulates the same question as the respective norms of international law. But both conceptions in essence differ little one from the other because they deny the possibility of the direct operation of international-legal norms as an integral part of national law.

Ukrainian doctrine and practice as a whole on the question of the implementation of international-legal norms in the national legal order understandably did not differ from all-union, although Ukrainian scholars expressed original ideas relative to resolving this question.[38]

After Ukraine became an independent State, conditions emerged autonomously and on the basis of democratic principles of a rule-of-law State to resolve the problems connected with the implementation of norms of international law in the domestic legal order, comprehending in so doing the many years of experience of other States in the international community as a whole. The logical step after recognition of the priority of international law with respect to national legislation, which marked a certain departure from the approach traditional for Soviet doctrine and practice to the means of implementing international law in the national legal order in the form of transformation became the general incorporation (reception) of norms of international treaties by means of the inclusion of respective provisions in the Constitution and legislative acts, especially the laws of Ukraine "On International Treaties of Ukraine" and "On the Operation of International Treaties on the Territory of Ukraine", where provided that duly ratified international treaties are deemed to be part of national legislation. We refer not only to international treaties primarily in the sphere of private international law, as occurred in the Soviet Union, where certain legislative acts (Fundamental Principles of Civil Legislation of the USSR and Union Republics, Fundamental Principles of Civil Procedure of the USSR and Union Republics, and others) included a conflicts norm on the application in the event of a conflict with the rules of Soviet legislation of the rules of the

[38] BUTKEVICH, V. G. *Correlation of Municipal and International Law*. Kyiv, 1981.

international treaty, and this concerned all international treaties duly ratified. On the basis of incorporation with the adoption of a special law the norms of European Union law were introduced into the domestic legal order of European Union member States who adhered to the dualist conception of the correlation of international and municipal law.

4. Conclusion

One may therefore say that in Ukraine certain legislative activity is being carried out that is directed towards resolving the problem of the interaction of international law with domestic law, and in so doing priority is accorded to the operation of norms of treaty international law in national legislation, the means of which, however, require further improvement and universalization. However, the problem least resolved remains the application of generally-recognized principles and norms of international law in the domestic legal order of Ukraine and especially in its judicial practice. Possibly here too it is necessary to adopt a special law guaranteeing the application of this category of norms of international law in law enforcement agencies. It is essential to fill the gap in the legislation of Ukraine and include within it provisions relating to the operation of norms of customary international law in the legislation of Ukraine.[39]

What has been said relates entirely to the application of norms of European Union law in the domestic legal order of Ukraine. Norms of European Union law, just as the Association Agreement, have not acquired priority significance over norms of domestic law because the application of these norms depends partially upon the position of the Ukrainian legislator and completely on the practice of national courts. The further development of integration processes of Ukraine with the European Union require changes to be made in national legislation in order to create in its domestic legal order conditions for the operation of therein of legislation of the integration structures of the European Union.

The material gap in the legislation of Ukraine, including in the Constitution, is the lack of a solution to the status of acts (or decisions) of intergovernmental organizations. However, the further development of the integration of Ukraine into the European Union necessarily requires the making of respective changes in domestic legislation with a view to the creation of the legal prerequisites for the operation of secondary European Union legislation in the domestic legal order

[39] DENISOV, V. N. Role of International Law in the Foreign and Domestic Policy of Ukraine. In: SHEMSHUCHENKO I. S. (ed.). *State-Creation and Law-Creation in Ukraine*. Kyiv, 2001, p. 602.

of Ukraine because such operation is provided for by the Association Agreement (Articles 56, 96, 153).

The formation of the effective national mechanism for the implementation of norms of international and EU law in the domestic legal order of Ukraine will result in the Europeanization of the country's legislation, which may bring it closer to achieving the strategic purpose – integration into the European Union.

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A General Summary on Geo-Blocking in the EU*

Lilla Nóra Kiss**

Summary: Geo-blocking is the new phenomenon of the current digital era, which affects our everyday lives. Geo-blocking is a modern form of discrimination which is considered a geographically based restriction for consumers that may be a ban for free movements and therefore affect the single market of the European Union, too. The European Commission adopted the Digital Single Market (DSM) Strategy in 2015 by which a new path forward to innovation was taken down. The new EU Commission led by *Ursula von der Leyen* aims not only the continuation of the development of the DSM to improve our digital welfare, but introduced the concept of the *promotion of European way of life* which is strongly interlinked with the digital aspects, too. As the human perspectives of our lifestyles came up to a higher level of policymaking, digital readiness, skills, and geo-discrimination might also be part of current debates. The research intends to present the geo-blocking as a new issue for the society, politics and economy, then broadly summarizes its definitions and the latest solutions for the treatment of unjustified restrictions in the EU.

Keywords: geo-blocking – Digital Single Market – geo-discrimination – digitalization – digital readiness – innovative society

1. Introduction: the phenomena and its possible effects

The cross-border market activities in our innovative societies gave birth to a new phenomenon, which is called geo-blocking. The geo-blocking is generally related to digital economies, even if it also has an "offline version". Geo-blocking is considered a geographically based restriction for consumers that may be a ban

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** This research was supported by the project nr. EFOP-3.6.2-16-2017-00007, titled *Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy*. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

for free movements and therefore affect the single market of the European Union (hereinafter referred to as: EU).

Due to the cross-border nature of digital issues, geo-blocking does not stop at the borders of the European Union; it is a worldwide phenomenon that affects both consumers and companies. Geo-blocking might be considered as the new aspect of the "equal treatment family" (and non-discrimination requirements) as it may have a different kind of effects in our innovative societies and economies for our consumer rights. On the one hand, geo-blocking has an economic sense for both consumers and companies; on the other hand, it may be considered as the non-provision of equal treatment for consumers.

The research intends to present the geo-blocking as a new issue for the society and economy, then broadly summarizes its definitions and the latest solutions for the treatment of unjustified restrictions in the EU. It is evident that geo-blocking is not purely a European issue; however, the scope of this essay is limited to the regional aspects of the topic. I hypothesize that well-functioning EU solutions might have an extraterritorial effect on the treatment of the legal problem arising from geo-blocking that may breach equal treatment of consumers on the ground of their location. The extraterritoriality of EU law could be examined in relation to the single market issues as EU standards reach non-European market players, too. This is undoubtedly true for digital goods and services.

The EU has realized the problematic aspect of unjustified geo-blocking and its effects; therefore, it became a policy program point of Digital Single Market (hereinafter referred to as: DSM) strategy adopted in 2015. The unjustified geo-blocking is a discriminative situation between (EU) customers as it segments markets along national borders and increases profits to the detriment of foreign customers according to the European Commission (hereinafter referred to as: Commission).

The Commission decided to put an end to unjustified discrimination on the ground of the geographic location of consumers because these kinds of restrictions undermine the single market. It is especially true in relation to the functioning of the DSM, having particular regard to online shopping and cross-border sales. The Commission proposed the 2018/302/EU Regulation (hereinafter referred to as: The Geo-blocking Regulation)[1] on geo-blocking, which entered into force on 22 March 2018 in all EU Member States (hereinafter referred to as: MSs) and applicable from 3 December 2018. Due to the nature of digital issues,

[1] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Text with EEA relevance.).

the geo-blocking is a relatively new phenomenon of the digital economies and societies. Since e-commerce and e-services are available, geo-blocking evolved.

The DSM strategy[2] adopted in 2015 in the EU has several program points that intend to abolish the bans in the free flow of digital content and make everything possible that is available in the tangible single market. It could be considered as a prime objective; however, the abolishment of bans in the digital era might be harder than in the physical single market.

The economic effects of the geo-blocking were realized at the beginning of the implementation of the DSM. According to the impact assessment done by the Commission before the adoption of the Geo-blocking Regulation, the problem is that "customers, notably consumers but also small businesses, show an increasing interest in shopping cross-border. However, they increasingly experience traders operating in the other Member States refusing to sell to them or adapting their price as a consequence of the customer being from another Member State. In 2015, a Mystery Shopping Survey revealed that only slightly more than a third of attempted cross-border purchases were successful (37 %). There may be good reasons for not selling cross-border (e.g., differences in consumer laws, VAT, bottlenecks in cross-border delivery channels, etc.). Nevertheless, a significant number of restrictions may be unjustified."[3] This leads us to the economic aspects of geo-blocking, which entitles the EU to act as the phenomenon that affects the single market.

Secondly, the aspect of the topic for the equal treatment came hand-in-hand with the economic perspectives, due to the fact that economic advantage for the companies based on the location of the consumers creates a disadvantage on the side of the latter that could be justified or unjustified. Besides – to show the complexity of the topic – the location of the consumer is data that enjoys protection. The geo-discrimination is based on specific data of a consumer, which might make the case more complicated from a legal point of view. The problem is with the unjustified geo-blocking. In the following, I sum up what is considered geo-blocking.

[2] See amond others: CHOCHIA, A., KERIKMÄE, T. Digital Single Market as an Element in EU-Georgian Cooperation, *Baltic Journal of European Studies,* Volume 8: Issue 2, pp. 3–6.

[3] European Commission: Commission Staff Working Document Executive Summary Of The Impact Assessment, Accompanying the document proposal for a Regulation Of The European Parliament And Of The Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market {COM(2016) 289 final} {SWD(2016) 173 final}.

2. What is geo-blocking?[4]

Under the term geo-blocking, we understand the different treatment of consumers due to their nationality, place of residence, or place of establishment. The problem affects consumers as well as businesses when they purchase goods and services for their own use. As it is already mentioned, it exists both in the online environment and in the physical world.

The definition of geo-blocking is not determined in the Geo-blocking Regulation. In my view, the reason behind that is maybe the fact that the concept of geo-blocking is comprehensive. Geo-blocking is a form of discrimination that is rather a result of different kinds of acts and/or omissions that lead to the discrimination of consumers on the ground of their location regardless of the fact of whether this happens in the online or offline world.

Geo-blocking is a phenomenon, a result of unfair trade conduct aiming profit-maximizing by which the trader/service provider discriminate consumers in an unjustified manner. According to *Aikaterini Mavropoulou*, geo-blocking is the technology that does not allow a user from a certain geographic location to access a website, to buy a product online, or to use an online service.[5] For me, geo-blocking is much more than technology. Of course, it is a technological method for discrimination, which results in the breach of equal treatment of consumers on the base of their certain personal data, namely: their location.

We might already have experienced the geo-discrimination at least several times during our online presence. Geo-blocking refers to practices used mostly by online sellers that result in the denial of access to websites from other MSs. For example, when YouTube signs that "this content is not available in your country" or when the price of a good / service is different on another website of the company related to the location of the consumer, but we are not able to consider (unless we use incognito-window or a location-blocker, e.g., VPN) as the website automatically navigates to the Hungarian page of the company and does not let us browse on the foreign one. It also includes situations where access to a website is granted. Still, the customer from abroad is prevented from finalizing the purchase or e.g., being asked to pay with a debit or credit card issued in a certain country. This is a kind of *"geo-discrimination"*. This also may take

[4] Terms and definitions colledted from the presentation of PERESZTEGI-NAGY, I. held on 19 October 2019 at ELTE EU Business Law course, and ont he official webpage of the EU Commission. Available at: https://ec.europa.eu/digital-single-market/en/faq/geo-blocking-faq (downloaded: 10 December 2019).

[5] MAVROPOULOU, A. *Geo-blocking of the audiovisual services in the EU: an indispensable measure or a barrier to a modern Europe?* Tilburg Law School Master's Thesis, Available at: http://arno.uvt.nl/show.cgi?fid=148183 (downloaded on 10 December 2019).

place when the consumers are buying goods and services offline, e.g., when a consumer is physically present at the trader's location but is either prevented from accessing a product or service or being offered under different conditions. Several actions result in geo-discrimination. Thus a taxative and exhaustive list of them cannot be concluded.

3. The problematic aspect of geo-discrimination and its possible legal and social solutions

First, geo-discrimination is an economic problem that affects the objectives of the single market. The number of online shopping and e-commercial issues shows an increasing tendency.[6] We can conclude that blocking the activities of consumers affects the EU's economy and the single market. This, in the short-run, may be good the companies that are blocking the consumers, but in the long run, it may results in the loss of trust, reduction of e-shopping and the decrease of cross-border services and purchase of goods that finally leads to economic loss.

Secondly, geo-blocking affects the rights and financial interests of the consumers, too. As the profit is higher for the companies when they decide where the consumer buys the product as they limit the access to other MSs' market for them, it influences the consumers' habits and has a result also on their wallet. On the one hand, influencing might not serve the consumers' interest. Of course, online mechanisms may serve the convenience of the consumers, but by using out this, it also has a financial aspect to them. E.g., by limiting their access to a certain seller's foreign websites, the companies restrict the choices of the consumer, especially, they are manipulating the consumers' free, uninfluenced

[6] For example, according to the statistics, "68 % of internet users in the EU shopped online in 2017; almost 7 out of 10 internet users made online purchases in 2018; Traders often still refuse to sell or supply to customers from another MS without any objective reason or to offer equally advantageous prices compared with local customers. Only 37 % of websites allow customers from another MS to reach the final step up to a point just before pushing the order confirmation button. Overall, the share of e-shoppers in internet users is growing, with the highest proportions being found in the 16–24 and 25–54 age groups (73 % each). The proportion of e-shoppers varies considerably across the EU, ranging from 26 % of internet users in Romania to 87 % in the United Kingdom." The economic aspect of e-commerce is evolving. The habits of e-shopping are spreading thanks to the time- and cost-effective nature of it. "Most purchases, by a third or more of e-shoppers, involved clothes and sports goods (64 %), travel and holiday accommodation (53 %), household goods (45 %), tickets for events (39 %) and books, magazines and newspapers (32 %). Fewer than one in five e-shoppers bought telecommunication services (20 %), computer hardware (17 %), medicines (14 %) and e-learning material (7 %). For more information, see the slides of Imola Peresztegi-Nagy.

choices which might not be justified under EU law. The lack of information or the dezinformation transforms the consumers' decision.

On the other hand, the limitation of the consumers' decision-making is based on their location, which is a personal data. According to the General Data Protection Regulation (EU) 2016/679 (GDPR)[7] Article 4 (1), the concept of personal data includes the location of a person. Article 5 of the GDPR expresses that the personal data shall be processed in a lawful, fair and transparent manner which includes the declared permission of the *owner* of that data.[8] This leads us to the liability of different searching engines that forwards our location data without asking a permit.[9]

Thirdly, the Intellectual Property (hereinafter referred to as: IP) law is also applicable. In the digital era, it is easy to breach IP Laws, too, however, this falls outside of the scope of this paper.

It is obvious that geo-blocking is a coin with two sides: there is the economic interest of market players on the one hand and personal data, rights of consumers and EU level economic interests on the other. The two-folded issue has a kind of solution in practice from both sides. The conscious consumers use incognito pages of the browsers and/or different virtual private networks (VPNs). VPNs are location-blocking programs, by which a consumer can hide himself or mask his location. There are plenty of VPNs available on the market under different conditions, such as: *NordVPN, UR Browser, HideMe, BullGuard, Surfshark, VPN+*, etc. By these, the foreign webpage of a company becomes available, but when the consumer intends to order, the shipping is might not possible to the country of the consumer, or other problem occurs.

The European Union realized these problems and incorporated a solution into the DSM strategy. The legislative pack for DSM consists of several documents. The most important legal source for this issue is the Geo-blocking Regulation that aims to provide for more opportunities to consumers and businesses within the

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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).

[8] About the topic, see: MAKSÓ, B. Adatvédelmi kihívások a digitális gazdaságban, In: Miskolczi, Bodnár Péter (szerk.) XII. Jogász Doktoranduszok Országos Szakmai Találkozója, Budapest, Magyarország: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, (2018) pp. 242–251; MAKSÓ, B. Concepts and Rules in the General Data Protection RegulatIn: Kékesi, Tamás (szerk.) MultiScience – XXXI. microCAD International Multidisciplinary Scientific Conference, Miskolc, Magyarország : Miskolci Egyetem, (2017) pp. 1–7, Available at: http://www.uni-miskolc.hu/~microcad/publikaciok/2017/e2/E2_2_Makso_Bianka.pdf (downloaded: 10 December 2019).

[9] About the topic, see also: NYMAN-METCALF, K., PAPAGEORGIOU, I. F. The European Union Digital Single Market – Challenges and Impact for the EU Neighbourhood States, *Baltic Journal of European Studies,* Volume 8: Issue 2, pp. 7–23.

internal market. In particular, it addresses the problem of (potential) customers not being able to buy goods and services from traders located in a different Member State for reasons related to their nationality, place of residence or place of establishment, hence discriminating them when they try to access the best offers, prices or sales conditions compared to nationals or residents of the traders' MS.

The Geo-blocking Regulation is only one element of the DSM strategy, which is a very complex policy. Besides the abovementioned regulation, other legal acts have some provisions related to the geo-blocking, too. These are mostly EU acts of consumer protection law. The following documents are strongly related to the issue geo-blocking:

- Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.
- Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).
- Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.
- Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

The Geo-blocking Regulation purposes of contributing to the proper functioning of the internal market by preventing unjustified geo-blocking and other forms of discrimination based, directly or indirectly, on the customers' nationality, place of residence or place of establishment, including by further clarifying certain situations where different treatment cannot be justified under Article 20(2) of Directive 2006/123/EC. This objective is declared in Art. 1 of the Regulation.

The Regulation negatively determines its scope, expresses what not belong under itself, such as the activities referred to in Article 2(2)[10] of Directive

[10] Thus, the Geo-blocking Regulation does not apply either to the following type of services: (a) non-economic services of general interest; (b) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC; (c) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC

2006/123/EC on Services. The Regulation does not apply to purely internal situations, where all the relevant elements of the transaction are confined within one single Member State. Thus, a cross-border element is necessary to apply the Regulation. The Regulation shall be without prejudice to the rules applicable to the field of taxation. Besides, the Regulation shall not affect the rules applicable in the field of copyright and neighboring rights, notably the rules provided for in Directive 2001/29/EC of the European Parliament and the Council. This exclusion of the territorial licensing of copyrighted audiovisual works from this strategy is interesting and raises the question of why does this field is excluded.[11] May the intention of the MSs was missing to incorporate the copyrighted audiovisual works? If yes, why?[12] By this exclusion, certain geo-discrimination may remain consequence-less. However, this could be justified from a purely economic point of view if we consider that different prices are applicable for audiovisual content in the MSs. There are economically more developed MSs where higher prices – based on e.g. the minimum wages – could be issued while there are less-developed EU economies where the application of the same circumstances would lead to discrimination and not the application of different prices.[13]

and 2002/58/EC; (d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty; (e) services of temporary work agencies; (f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private; (g) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting; (h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions; (i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty; (j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State; (k) private security services; (l) services provided by notaries and bailiffs, who are appointed by an official act of government.

[11] See among others: Europe's Geoblocking Decision: What You Need to Know, Bloomberg, Retrieved 1 February 2017; and Netflix, Amazon given quotas for EU-produced video, face new tax, Ars Technica, 25 May 2016, Retrieved 25 May 2016.

[12] See, VEZZOSO, S. Geo-blocking of Audio-visual Services in the EU: Gone with the Wind? Available at: https://www.competitionpolicyinternational.com/geo-blocking-of-audio-visual-services-in-the-eu-gone-with-the-wind/ (downloaded 10 December 2019)

[13] For example, *Spotify* applies to alter prices on the base of the origin country of the users. In Hungary, a premium account costs 4.99 EUR/month, a family pack is 7.99 EUR/month, while a student premium acc is only 2.49 EUR/month. In Romania, only one type of premium account is available, which costs 5 EUR/month. The same services in Germany or France and Luxembourg cost double (9.99 EUR / month for a person, 14.99 EUR/ month for a family and 4.99 EUR / month for a student). In Denmark, it is also possible to purchase duo-pack, for two persons, which is not available in all MSs. In Malta, the premium acc for a single person is 6.99 EUR/ month, while the family pack is 10.99 EUR/ month and there are no other options as the student

On the one hand, from the perspective of those countries where the incomes are higher, it could be seen as a discriminative measure for the advantage of those countries where the wages are lower. However, it would be unfair in my view to apply the same prices where the wages are much lower. Thus, the discrimination in this aspect might be justified. However, if the audiovisual services would be incorporated into the Geo-blocking Regulation, and the prices would become equal everywhere, I presume that the base of harmonizing the prices would not be taken to e.g. the Hungarian level. Thus, the harmonization or unification of this field was perhaps not the interest of the MSs, yet.

Regulation complemented with other acts related to consumer protection provides a relatively complex framework.

The Geo-blocking Regulation defines three specific situations of unjustified geo-blocking:

- The sale of goods without physical delivery.
- The sale of electronically supplied services.
- The sale of services provided in a specific physical location.

There might also be justified reasons for traders not to sell cross-border. Such as the need to register at a tax authority in the country of destination, higher shipping costs or costs arising from the application of foreign consumer law. While outside barriers create additional complications and extra costs for the trader, differences in the treatment of customers are based on objective criteria. The Geo-blocking Regulation applies to unjustified restrictions that affect the DSM.

In the following period, within two years after the entry into force of the Regulation, the Commission will carry out the first evaluation of their impact on the internal market, which also includes the evaluation assessment of the scope of the rules. This includes possible application of the new rules to certain electronically supplied services that offer copyright-protected content such as music, e-books, software and online games, as well as of services in sectors such as transport and audio-visual.

Besides the legislation, the EU institutions started to deal with the questions arising from geo-blocking and geo-discrimination. Especially, the Court of Justice of the European Union (CJEU) addressed some aspects of the topic in its recent case-law, however, mainly regarding IP law. In C-403/08, *Football Association Premier League and Others* case the CJEU expressed that *"A system of licences for the broadcasting of football matches which grants broadcasters territorial exclusivity on a Member State basis and which prohibits television*

discount. In Estonia, the same prices are applicable as in Malta, but the difference is that student discount is available, the service costs 3.49 EUR/ month for students.

viewers from watching the broadcasts with a decoder card in the other Member States is contrary to EU law".[14] This judgement is from 2011 that shows that before the DSM, geo-blocking was already an existing phenomenon and the CJEU examined the case without highlighting this. The Court examined the discriminatory effect of the system of licences in this case, and the requirement of equal treatment was breached on the ground of the territoriality. In the recent judgment in case C-28/18, *Verein für Konsumenteninformation v Deutsche Bahn AG* case[15], the Court decided that the option to pay by SEPA direct debit cannot be subject to a condition of residence in the national territory, because these kinds of clause which require residency in a certain state in order to use a kind of paying method is not respecting equal treatment of EU consumers. Thus such a contractual clause is contrary to EU law. In the points 35–36 of the judgement, the Court reflects the Geo-blocking Regulation, even if the case started earlier than the act entered into force.

Both the legislation and the jurisdiction pays attention to the phenomenon of geo-blocking, and from now on, further cases are expected, too.

4. Closing remarks

To sum up, in my view, it could be applauded from the perspective of the European legal development that the EU adopted the Geo-blocking Regulation within the framework of the DSM. By this, the EU is in an advanced situation regarding the legal readiness for the digital era compared to other actors, such as the USA[16], the Russian Federation or China, or other supranational organizations, such as the Eurasian Economic Union. In addition, the level of protection ensured in consumer rights and IP law is higher in the EU than in the abovementioned countries and organizations. In addition, the new EU Commission introduced the concept of *promoting our European way of life,* which is strongly interlinked to the digital readiness and skills among other areas. This raises attention to the importance of consumers and equal treatment of them regardless of their location.

There is still a lot to do in the next periods; however, different levels of economic readiness also should be respected in this framework. Until the economic advantages – such as the application of varying prices – ensured to the consumers

[14] C-403/08, *Football Association Premier League and Others* case, ECLI:EU:C:2011:631.

[15] C-28/18, *Verein für Konsumenteninformation v Deutsche Bahn AG* case, ECLI:EU:C:2019:673.

[16] See: TRIMBLE, M. Geoblocking, Technical Standards And The Law, University of Nevada, Las Vegas – William S. Boyd School of Law; working paper. Available at: https://pdfs.semanticscholar.org/4aba/7b51ac63ae3de8775bda97cee6f4860faf8c.pdf (downloaded: 10 December 2019)

on the base of their location, e.g., on the field of audiovisual services are higher than the disadvantage of the unification of the area would cause, I think that unification is not necessary. The reason behind that is, in my view, is the difference between the social and financial circumstances of the consumers residing in different MSs and not their location. Their location is just a circumstance that proves the presumption that countries of lower-income rates may deserve lower prices for the same service than those countries where the salaries are much higher. Of course, the issue is complicated as it would be hard to link this issue with monetary aspects as the EU has no common Social Division, as the social questions belong to the competence of the MSs. Nevertheless, in this case, I assume that the reason for altering prices originates in the market demand that strongly interrelated with the salaries of the consumers in a certain state.

However, I find it a right solution that the Geo-blocking Regulation is intended to revise after two years of its entering into force, as economic development may change during the time.

I presume the fast development of the legal field of geo-blocking as the technology develops fast and the legal framework should follow it, or – it would be better – to keep the pace of with that. The CJEU might treat more and more cases related to geo-blocking; therefore, the case-law also has a great chance to evolve; by that, the legislation may also fasten up.

On the one hand, it is a paradox that the EU introduces legal development for the DSM strategy which functions as a generator of the single market as it intends to abolish all the obstacles from the way of the free movement – which sometimes created by those market actors whose marketing activities are intended to be facilitated by the EU – and on the other hand, at the same time, the EU intends to ensure the equal treatment of consumers regardless of their location – whose interest sometimes is not to be treated equally (e.g., in the audiovisual aspects). Besides, Intellectual Property rights should also be respected and protected on a high level, which again gives a new aspect to the topic, which should be fitted well into this framework.

The coin has – by now – more than two sides. All the interests should be harmonized on the base of economic development and social progress, besides respecting individual rights, too. The role of the CJEU might increase in the elaboration of the checks and balances of this field.

The role of third countries could also be an interesting question related to geo-blocking. How could the geo-discrimination be abolished and the consumers protected well, at the same time? Geo-blocking Regulation does not apply to third countries. Here, the new question could be the UK's situation after the transitional period provided in the withdrawal agreement. However, this is only problematic from the perspective of UK consumers. For EU citizens, no

change is excepted as the UK traders have to fulfil the Regulation if they want to enter into the EU's market. The Regulation applies to all traders operating within the EU, regardless of whether those traders are established in the EU or a third country.

Moreover, in case the Regulation (and the DSM strategy as a whole) is accepted as an adequate solution by foreign players who intends to enter into the EU's single market, the extraterritorial effects of EU law may reach other dominant players, too.

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Mobile Applications for Administrative Purpose in the EU and V4 – with Special Regard to Document Management

Balazs Szabó*

Summary: The growing popularity of smartphones is undoubtedly one, if not the most important factor in widening the administrative application process for smartphone use. The widespread use of smartphones has changed the way that people communicate, which has also allowed governments the opportunity to create a new channel alongside traditional ways of connecting with citizens. In my opinion, people are less and less likely to use their smartphones to make phone calls classically, but instead to connect via email, social media services (e.g. Facebook, Twitter, etc.) and use their smartphone features, applications to manage their daily tasks (e.g. banking transactions). Therefore, I believe that m-administration (mobile/smartphone-based) can be a much more convenient way for the state and public administrations to connect with citizens. In this study, I intend to study mobile applications for administrative purposes made by the European Union and a V4 country, Hungary.

Keywords: ICT – smart-phone application – m-administration – government – advantage

1. Introduction

Smartphone applications can also be considered as new practices in mobile e-government or m-government[1]. Although smartphone applications are not yet used by most governments, governments that have already tried them have given positive feedback. The reason for this satisfaction is that these "new solutions" have an extra advantage over many other communication channels, such as increasing time and cost efficiency by reducing (eliminating) personal administration, and increasing customer involvement in the process. All this can

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1 TÓZSA, I. Jövőbe mutató közigazgatási megoldások In: *Budai Balázs Benjámin, Tózsa István E-közigazgatás.* Debrecen: DE AMTC AVK, 2007, pp. 123–158.

promote[2] "more open governance" by increasing efficiency, transparency and civic engagement.

The use of mobile technologies for service and information provision is referred to in the literature[3] as mobile government (m-government)[4], which can be considered as part of e-government. While e-government has access to public services at all times, m-government enables citizens to access government services at any time and from anywhere. Numerous research shows that eGovernment can bring significant benefits to governments, including improving efficiency and accountability, reducing costs, strengthening state-to-citizen relations, and promoting civic engagement and democracy. Expected effects of the application of eGovernment include increasing civic participation and cooperation, which can fulfill the principles of well-functioning[5] open government. However, it is also a fact that many e-government solutions do not meet the prior expectations, which may be client/citizen expectations and those of the state. M-administration is a new initiative, the potential of which, especially the application of smartphone applications in public administration, is still under investigation. Most of the studies undertaken so far are not explicitly based on the concept of mobile e-government, but focus on 'classical' IT developments focusing on the provision of information and services[6].

It is essential to distinguish this technology from e-administration because smartphones are equipped with a variety of – additional – sensors, such as cameras and GPS, which allow users to capture real-time information and environment data, not only to access and view it. When combined with Web 2.0 technologies, smartphone users (users) become data processors. This is especially true for spatial information, where data collection and analysis can be unprecedented, not only by specialists who are specialized in this area, but also by smartphone owners. This is the case, for example, with a system of voluntary geographical information (VGI[7]) based on personal experiences and statements, for which data is provided by smartphone users via web technologies. The VGI, and thus

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2 PIERRE, J., PETERS, B. Guy. *Governance, Politics and the State*. New York: University of New York Press, 2000.

3 See furthermore: QUINTANILLA, G. Exploring the M-Government. *Encyclopedia of Information Science and Technology*. Third Edition, 2015, DOI: 10.4018/978-1-4666-5888-2.ch266.

4 See furthermore: LEE, S. M., TAN, X., TRIMI, S. (2006). M-government, from rhetoric to reality: learning from leading countries. *Electronic Government, an International Journal*, 3(2), pp. 113–126.

5 See furthermore: DEMKE, C., MOILANEN, T. *Effectiveness of public service ethics and good governance in the central administration of the EU-27*. Frankfurt am Main: Peter Lang, 2012.

6 TÓZSA, I. *Jövőbe mutató közigazgatási megoldások*…, p. 125.

7 Volunteered Geographic Information – defined by MICHAEL F. G. "A system for the creation, collection and dissemination of geographically voluntarily provided individuals by exploiting technological tools."

the citizens who upload data to it, can play a very important role in many areas, including emergency management, by facilitating real-time communication and information sharing between government agencies (e.g. disaster management, police) and citizens. All of this can be key to saving life and property (prevention) or even mitigating damage.

It can be said that the use of smartphone applications in the public sector, in public administration, is still in its infancy, which may be due to several reasons. Among other things, the legal framework for applications is currently not perfect, but there are also shortcomings in terms of resources. I believe that empirical research is needed to identify potential applications and then develop the actual implementation. In addition to information gathering and needs assessment, this can also help to better understand the role and potential of smartphone applications in the development of e- and thus m-administration[8].

These services are, in fact, applications of mobile e-government services available. M-administration is facilitated by the ever-expanding range of mobile communication features, while traditional e-administration focuses on non-mobile (e.g. computer-based) services. One of the reasons for this is the willingness of the citizenry. On the one hand, trust must be built in the new solution (in terms of security, 'can they trust') and on the other hand, the introduction of new technology also requires user knowledge. Therefore, the customer who appears as a user must be digitally trained to use the service and must also have the appropriate technology device (smartphone). On the other hand, you need to trust in your device and application, have secure information that your data is be secured, your procedural fee will actually be transferred to the acting agency, and the program cannot be hacked to steal the personal and financial data it contains and there is stored data.

The significant advantage of m-administration over e-administration is that it can be accessed anywhere, anytime, from any device with an Internet connection. This feature, from the point of view of public administration, provides an opportunity for the government to be everywhere present and able to serve. In addition to the many advantages mentioned above, it can, of course, also have disadvantages, which, as it is not organically related to the subject of this dissertation in terms of the efficiency of public administration, are not discussed here. E-Government is responsible, among other things, for managing and managing government processes electronically while being able to address government mobility objectives[9]. For example, even a committee meeting can be held on the train using mobile devices.

[8] TÓZSA, I. *Jövőbe mutató közigazgatási megoldások*…, p. 127.

[9] CSÁKI-HATALOVICS, B. Guy. *Az elektronikus közigazgatás tartalma és egyes gyakorlati kérdései* HVG-ORAC, Budapest: 2010. ISBN: 978 963 258 092 0, p. 381.

Another significant benefit is the ability of public administrations to provide relevant information to citizens on time. GPS-enabled smartphones allow you to provide personalized information and services based on real-time user information. Mobile devices can establish real-time communication between citizens and governments/administrations, which can effectively serve those who need essential and verified, authenticated information. An important point of use may also be the use of real-time information transmitted through mobile applications in case of an emergency, as traditional data and information may be less useful in the event of a disaster due to their slower spread. Such real-time positioning is especially important for law enforcement agencies in the event of an accident or disaster where location time can be greatly improved (more accurately reduced) by using modern ICT tools, contributing to increased rescue efficiency and reduced potential for loss of life and property, or reduce the amount of damage that may occur. Part of this is now that mobile network operators can use GPS to identify the source/location of emergency calls so they can forward calls to the nearest security answering service[10].

While smartphone apps provide more flexible and personalized services with GPS location and mobility features, they also pose a risk to users by collecting real-time location data from service providers. Accumulated field data, coordinates can be used to re-identify and subsequently track the privacy of individuals/users. These security issues are, therefore, at the heart of almost all public administration development programs, strategies, and projects. It should be emphasized that e-administration and thus m-administration services can be affected by many different cyber-attacks if they are not adequately protected, including eg unauthorized access, phishing, etc. To reduce these risks, it is essential to build and operate the appropriate hardware and software infrastructure to ensure the security of e- and m-administration services and to employ highly qualified IT staff.

2. Positive effects of the usage of mobile applications

One of the most important benefits of keeping in mind people's smartphone usage habits is that smartphone applications make their everyday lives more comfortable. We can think about communication activities, information transfer, photo taking and GPS positioning, navigation services[11].

Also besides, the information coming from the smartphone app is more structured, more precious than that received through other channels, especially the

[10] CSÁKI-HATALOVICS, B. Guy. *Elektronikus közigazgatás*..., p. 383.
[11] TÓZSA, I. *Közigazgatási mobil alkalmazási tartalomfejlesztések*…, p. 220.

email channel. The free text style of email channels usually provides incomplete information about governments and administrations, so it may often be necessary to ask for additional information through a channel or even in person[12].

Lower costs compared to telephone calls also represent a significant advantage for smartphone applications, which is also a matter of prime importance given a large number of potential customers (citizens with smartphones). If you compare the use of applications to a telephone contact service, you can quickly see that, due to the growing number of service issues, the workload of the clerks may also increase. In contrast, the mobile application is a quasi "self-service" channel that is fully integrated into the system. This integration into the central system provides additional cost savings as collecting rich and structured data and information in this way also saves the customer money by eliminating the need for on-site presence and the evaluation of problems that may arise[13].

Smartphone applications allow citizens to initiate, request, begin a procedure at any time, from anywhere, with significant benefits, mainly in terms of time and cost, over other communication channels. Citizens can report problems immediately if they are detected and do not have to wait for them to be at home or visit the website of the body in question. It can also be a kind of attitude in people that they have a smartphone and can "do it" locally. If they need to go back to their home, work, and log on to their computer or make a phone call to contact various authorities, they are less likely to do so. By combining the benefits of mobile phones and web applications, online services can be accessed without geographic restrictions, which can also mean expanding the service area of public administrations. We can also ask if it can be faster through service applications?

There is a time advantage in dealing with applications, as there is no waiting time for citizens compared to the telephone communication channel[14]. Just think, waiting for the clerk in the case of telephone administration and processing of requests all take time. As smartphone applications are integrated into the central system (s), applications can be sent directly to the competent authority immediately, thus not only saving costs but also speeding up the processing of applications. This can be of immense importance, especially in the case of an emergency or disaster, but it is not the last aspect in everyday instances either.

[12] TÓZSA, I., ANCSIN, L. *A mobilkommunikáció alkalmazása az ügyfélszolgálati munkában.* In: KÁKAI, L. (ed.). *20 évesek az önkormányzatok: születésnap, vagy halotti tor?* p. 630 Konferencia helye, ideje: Pécs, Magyarország, 2010.03.19-2010.03.20. Pécs: IDResearch Kft.; Publikon, 2010, p. 490.

[13] TÓZSA, I., ANCSIN, L. *A mobilkommunikáció*…, p. 492.

[14] TÓZSA, I. *Közigazgatási mobil alkalmazási* …. , p. 225.

3. Mobile applications in the institutional system of the European Union[15]

As I stated earlier, mobile applications (or "applications") are software applications designed/developed specifically for smartphones or tablet operating systems (Apple, Android, Windows, BlackBerry, etc.) that are useful for common tasks (including administrative tasks) and can also be used to target communication with specific audiences. The European Union is well aware of this kind of utility and advantage, and it supports it accordingly, both professionally and financially, through tender sources. However, for an application to be applicable in practice, it must be only implemented after a proper design process.

To ensure that the application fits in with the Commission's mobile strategy and the directive[16] to ensure the smooth development of the application and to avoid "unpleasant surprises," it is crucial that the start-up organization consults all relevant stakeholders in the Commission in particular. Directorate-General for Communication with the EUROPA group and those who may be interested in the application.

Before making any budgetary commitment to the application service, you must enter into a contract and submit a formal application to the EUROPA team of DG Communication before starting any development work.

The Head of the Communication Unit of the competent DG must approve the application/content development request, before being sent to the Europa team.

Accordingly, it can be stated that the practical implementation is only possible after successful passing of serious pre-filters.

At present[17], there are thirty-six mobile applications related to the Institutions of the European Union in various application stores, which have been developed for various purposes by various EU institutions. Of these, I would like to briefly mention and introduce mobile applications relevant to the subject of the study.

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[15] Source online. Available at: https://publications.europa.eu/en/applications?p_p_id=101_INSTANCE_I9vpiqUfqVn6&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=maintop&p_p_col_pos=1&p_p_col_count=2&_101_INSTANCE_I9vpiqUfqVn6_delta=20&_101_INSTANCE_I9vpiqUfqVn6_keywords=&_101_INSTANCE_I9vpiqUfqVn6_advancedSearch=false&_101_INSTANCE_I9vpiqUfqVn6_andOperator=true&p_r_p_564233524_resetCur=false&_101_INSTANCE_I9vpiqUfqVn6_cur=1 (last download: 2019. 10. 5.).

[16] *Directive on the protection of personal data in mobile applications operated by the Institutions of the European Union*. Source online. Available at: https://edps.europa.eu/sites/edp/files/publication/16-11-07_guidelines_mobile_apps_en.pdf (last download: 2019. 9. 25.).

[17] Source online available at: https://publications.europa.eu/en/applications (last download: 2019. 10. 2.).

EU Parliamentary Positioning APP[18]

The purpose of the application, released by the EU Parliament, is to provide navigation assistance through the phone's GPS unit in the organization. Following the navigation, arrows allows us the opportunity to view all of the EP's attractive and innovative activities[19], which will play a refreshing role in European democracy. The staff will be introduced to the fascinating buildings and personalities of the European Parliament that have been named, as well as to the remarkable historical facts of the area.

EUROSTAT – "My Region" App[20]

The "Own Region" application released by the Statistical Office of the European Union allows mobile access to select annual regional indicators at NUTS 2 level for the EU-28, EFTA and candidate countries. The application is available in three languages: English, French and German.

SenseEurAir App[21]

This application allows citizens (amateurs or professionals) to receive information on ambient air quality and notify them when the preset pollutant threshold is exceeded. Displays air sensor networks that publish their data using INSPIRE-compliant sensor monitoring services.

My Natura 2000 App[22]

The application, released by the EU Commission, provides information on protected areas in the Natura 2000 network. This allows users to send photos of each location and provide comprehensive feedback on the protected area. Natura 2000 is the world's largest network of coordinated protected areas. It covers more than 18 % of the EU's land area and almost 6 % of its marine areas and provides shelter for Europe's most valuable and endangered species and habitats. In my

[18] Source online available at: https://publications.europa.eu/image/journal/article?img_id=5284575&t=1543935032036 (last accessed 2/10/2019).

[19] See furthermore: RHODES, R. A. W. *The New Governance: Governing without Government*. (source online available at: http://law.hku.hk/gl/rhodes.pdf (last download: 2018.09.12.).

[20] Source online. Available at: https://publications.europa.eu/image/journal/article?img_id=4862198&t=1535003675299 (last accessed 10/1/2019).

[21] Source online. Available at: https: //publications.europa.eu/image/journal/article? Img_id = 4174459 & t = 1522229500992 (last viewed: 9/30/2019).

[22] Source online. Available at: https: //publications.europa.eu/image/journal/article? Img_id = 4174452 & t = 1522229472536 (last accessed 5/10/2019).

opinion, the applicator contributes to increasing the efficiency of environmental protection, as users can provide the authorities with up-to-date information on the current state of protected areas utilizing photographs and data recorded on the sites.

ECDC Threat Reports App[23]

The European Center for Disease Prevention and Control (ECDC) is an EU agency that aims to strengthen European control against infectious diseases. Their 'ECDC Threat Reports' application gives the EU direct access to major updates and infectious disease threat reports. Searching for a specific disease or virus – from bird flu to Zika – or nowadays especially for the Crown virus – or by particular report type, including the Weekly Infectious Disease Threat Report (CDTR), quick risk assessments and epidemiological updates. The app is free to use and available to anyone. ECDC partners can access additional reports by logging in with their ECDC credentials.

'EU Resettlement' App[24]

The application, issued by the EU Commission, provides information on the transfer of asylum seekers from Greece and Italy to another European state, who need international protection. The purpose of this application is to assist those already in Greece and Italy regarding the resettlement procedure and their rights and obligations when applying for a resettlement. This application contains clear and concise information in various non-EU languages, as well as a section of frequently asked questions. The app is equipped with an interactive map showing the location and availability of hotspots in Greece and Italy.

The European Union is also trying to take advantage of the "weapon" that smartphones are the most widespread information communication device in the world. Therefore, it is advisable to place great emphasis on their development and make more services available through this platform. Existing applications are predominantly for information and exchange purposes, which can be of particular benefit to citizens and EU institutions.

In the following, I will focus on some of the good practices introduced by the V4 countries.

[23] Source online. Available at: https: //publications.europa.eu/image/journal/article? Img_id = 417 4466 & t = 1522229542852 (last viewed 9/19/2018).

[24] Source online available at: https: //publications.europa.eu/image/journal/article? Img_id = 417 4357 & t = 1522228796507 (last accessed 10/1/2019).

4. Czech Republic[25]

On 27 August 2014, the Strategic Framework of the Development of Public Administration in the Czech Republic for 2014 – 2020 was approved by the government by Government Resolution No. 680 of 2014. This strategy of public administration development formulated four targets to be further elaborated by the Government Council and achieved within the six years. Specified priorities covered public administration modernisation, which included the evaluation of its current functioning, proposing and implementing performance improvement measures, improvement of services availability via eGovernment tools, and continuous human resources professionalisation and development.

The implementation of individual measures and activities leading to the implementation of both specific and strategic objectives was, to a certain extent, interconnected.

In respect of the strategic objective No. 1, the modernisation of the public administration, a key task was to optimise and streamline the performance of individual (selected) agendas, primarily via their initial mapping and subsequent standardisation. These activities would, at the same time, contribute to the reduction of the regulatory burden. The established quality management systems and the system of public administration evaluation subsequently identified the potential for further optimisation of the public administration system.

Currently, there is a preparation of new conceptual material for the development of public administration called Client-Oriented Public Administration 2030, which will follow the currently valid Strategic Framework for the Development of Public Administration in the Czech Republic for 2014-2020.

The following are some of the most important developments in recent years, the CzechPoint system, the new Technology Center, the "What to do if ..." application, and the digital map of the administration.

Czech POINT network

The Czech POINT system is a network of one-stop access points to eGovernment services intended to prevent citizens from visiting several offices, thus significantly reducing excessive administrative burden. Through these one-stop points, the general public can access all public records and to obtain transcripts/extracts, as well as information statements from the national registers.

[25] Source online available at: *DIGITAL GOVERNMENT FACTSHEET 2019 Czech Republic*: https://joinup.ec.europa.eu/sites/default/files/inline- files/Digital_Government_Factsheets_Czech%20Republic_2019.pdf (last download: 2020. 2. 9.).

The Czech POINTs are primarily located at post offices, municipal authority offices, registry offices and Czech embassies. As of December 2018, the network is comprised of 7,461 local and regional physical contact points. An interactive map on the website serves as a Czech POINT location finder. By the end of 2018, the number of issued excerpts reached 21,021,279 million.

In the future, the accessibility of Czech POINT remotely from the Public administration portal will make it possible to obtain required documents from home. In this light, the Act on Electronic Actions and Authorised Document Conversion, which gives electronic records the same legal status as traditional stamped hardcopy equivalents, will have a significant impact on the effectiveness of the network. Since July 2009, Czech POINTs have been in charge of converting paper-based administrative documents into electronic form, processing applications for the establishment of personal Data Boxes and terminating/re-creating these Boxes, when needed and upon request.

Gradually more services are introduced, such as:

- Validation of the Czech citizens identity is made possible at the Czech-POINT@office interface at the embassies of the Czech Republic abroad;
- New map service makes it possible to find Czech POINT offices on the map, including the address and office hours;
- E-mail alert service of the crime register is for those who applied for the extract from the crime register. The applicant can provide his email, to which an alert message is being sent when the excerpt is ready;
- The Validation of the cadastral map image at the public administration contact point (i.e. any of the CzechPOINT offices), as well as on the CzechPOINT@ office interface for clerks;
- Excerpt from the Driver's Point Account as a free service for the Data Box holders at the CzechPOINT@home interface and more.

New Technology Centre

Through its new Technology Centre, the Vysočina region provides several ICT services to the regional administration, its municipalities and organisations financed by the region. The center is in two locations connected by two separate optical fiber cables. Among the services offered by the regional technology center are a document management service, secure storage management, spatial information system, interface to central registers, and videoconferences for the regional and local administrations, eProcurement system, eHealth services and the services for the national integrated rescue system. The technology centre also provides a security dashboard of the region for the cybersecurity administrators of the regional information systems and the public wi-fi hotspots supporting the EDUROAM project.

Services 2.0

The next phase of modernisation of the public administration communication infrastructure took place, and its central element is the central place of services 2.0. It ensures mutual, controlled and secure interconnection of public and state administration entities, it also ensures communication of public and state administration entities with other entities in external networks such as the Internet or the EU communication infrastructure.

"What to do, when…"

The mobile application "What to do, when…" provides information on key government services for life situations of citizens. The application includes solutions to the following situations and related agendas:

- newborn baby
- change of residence
- loss of documents
- family deaths
- property transfer
- location of the nearest CzeCz Point
- My Office

Digital Map of Public Administration

The Ministry of the Interior began implementing a project to create Digital Government Maps (DMVS). The digital map of Public Administration unifies data from various geographic information systems in one application. The project aims to facilitate the exercise of public administration and accessibility of spatial data for the authorities and the public in line with Smart Administration, promoting efficient and user-friendly public administration, and development of eGovernment in the country.

5. Poland[26]

In the sense of Poland, the key objectives include increasing the wealth of Polish citizens and reducing the number of persons at risk of poverty and social exclusion by 2020. The most important goal will be to achieve an increase in the

[26] Source online available at: *DIGITAL GOVERNMENT FACTSHEET 2019 Poland* https://joinup.ec.europa.eu/sites/default/files/inline-files/Digital_Government_Factsheets_Poland_2019_4.pdf (last download: 2020. 2. 9.).

average household income to 76–80% of the EU average by 2020, an approximation to the EU average by 2030, while reducing income disparities between individual regions. Among the main objectives still to be implemented include eGovernment measures, particularly those involving the effective use of information and communication technologies in public administration.

The concept of eGovernment and digital public services imply that high-quality services for citizens, including entrepreneurs, are to be provided by modern IT solutions supporting a logical and coherent government IT system, developed and maintained with the cooperation of all actors at various levels of public administration.

A priority task in the field of eGovernment is to allow the broadest possible range of public services to be provided digitally, thereby enabling citizens to handle their business remotely. It will be necessary to ensure the interoperability of public IT systems and to computerise the internal processes of the administration.

Act on the Digital Accessibility of Websites and Mobile Applications of Public Sector Bodies The Act on the digital accessibility of websites and mobile applications of public sector bodies regulated rules on digital accessibility for persons with disabilities. This act specified how to complain about the unavailability of information and explained how to monitor digital availability. This Act fully implemented Directive 2016/2102 of the European Parliament and of the Council of 26 October 2016, on the accessibility of the websites and mobile applications of public sector bodies.

eID and Trust Services

Polish National Electronic Identification (eID) Scheme Poland aligned its national legal system with the eIDAS Regulation through the adoption of the National Act on Trust Services and Electronic Identification (see also below). The Polish National Electronic Identification (eID) Scheme was established. The purpose of this project was to allow Polish citizens, companies and other entities to identify themselves online to access the public administration's electronic services. This target will be achieved through the integration of different, currently functioning eID systems to create a single, standardised access point to eID services. Moreover, the Polish eIDAS Node will be linked to the national eID nodes of the other EU Member States. Since March 2017, a few new eServices concerning eID have been introduced in Poland, as listed below:

- The Ministry of Digital Affairs launched mDocuments – a pilot version of a service enabling citizens to confirm their identity (or rights, e.g.: for driving a car) through a mobile device (mobile phone or smartphone), instead of paper documents;

- The so-called Trusted Profile, an eIdentification method ensured by the public administration, was integrated with the seven biggest banks operating in Poland;
- The e-ID project (former pl.ID project) was initiated. Its primary purpose was to replace traditional plastic ID cards with new e-cards. eID cards became available in March 2019. The implemented eID card included an integrated electronic layer which contained the same data as those available at the graphic layer. The electronic layer included 3 certificates: presence confirmation (only tap needed), identification and authorisation (4 number PIN needed) and personal signature authorisation (6 number PIN needed). Furthermore, additional space for qualified certificate of personal signature was provided. The implementation of this last certificate was voluntary.

mCitizen

mCitizen is a public mobile application for Polish citizens launched on Android and iOS platform. It is designed as a container for mobile documents. Currently, it has implemented mobile ID based on national citizens registries and mobile school ID.

Mobile School ID – The responsible authority is the: Ministry of Digital Affairs [27] Description: Mobile version of the pupils' card implemented in public mobile application mCitizen. The solution is fully deployed and available for willing schools and pupils.

Mobile Student ID – The responsible authority is the Ministry of Digital Affairs [28] .Mobile version of the student card implemented in public mobile application mCitizen. A pilot project at two Polish Universities will be launched in 2019.

6. Hungary

In Hungary, a comprehensive record-keeping process is underway between government agencies, which will hopefully lead to greater transparency, easier administration of the case and ultimately more efficient administration – at least for clients. To this end, the legislator is also working to develop mobile applications so that the simpler, more convenient administration and the services it provides can be felt in practice. One of the key elements of this is OkmányApp.

It is an easy-to-use, customer-friendly solution that, based on the structure of the Web Attorney, allows you to handle a large portion of your document

[27] Source available at: https://www.gov.pl/web/mobywatel/mlegitymacja-szkolna (download time: 2020. 2. 9.).

[28] Source avalaible at: https://www.gov.pl/web/mobywatel/mlegitymacja-studencka (download time: 2020, 2. 9.).

matters through your mobile phone. Mobility is an important part of this, as it eliminates the need for the client to work in person at the document offices for several document management.

Of course, a significant number of cases also require some form of authentication, which the developers wanted to solve with a Mobile Gateway-enabled Client Gateway. So, with the application download, all you need is a "Gateway Client Registration" (which is nowadays provided to more and more clients) and you can begin to manage your documents through your smartphone. As in the case of documentary bureaus, in some cases, we will encounter types of cases that are subject to a fee / procedural fee. In these cases, we can also pay by credit card or bank transfer. The latter will be an advantage for those who are reluctant to enter their credit card information online. I myself have made many successful transactions with the option of paying by credit card, to my highest satisfaction, as I have been able to deal quickly and efficiently.

Source: http://www.kekkh.gov.hu/okmanyapp/ (last download: 2020. 2. 9.)

The main features available, as shown in the picture above, can be divided into six broad groups. In the first group, we find personal documents. This includes the ability to invalidate your ID if it is lost, stolen from us, or destroyed. We are required to report this knowledge within three business days of acquiring it, which may be done electronically. This 'transaction' is reported free of charge and automatically, immediately. The following feature allows you to replace your passport if it has been stolen or destroyed. This service already entails a cost. The law also allows you to apply for a so-called "Second Private Passport" at

an appropriate fee, which we can also do through the Documentary Book. It can also be a practical and useful function to check the validity of your existing documents without taking it in your hand. I do not always carry all my documents (e.g. passports), so this service can be helpful when planning travel outside the European Union, for example.

The second major group of cases concerns vehicle administration. As part of this, we have the opportunity to file, free of charge, a change of ownership as a previous owner, as well as issues relating to the recall of a vehicle and subsequent (feasible) restitution. These services are complemented by the Vehicle Data Inquiry Service, which you may need when buying a vehicle. This service allows you to query certain technical details (data request option/tab) of one or more vehicles for a fee and to check their conformity (data equivalence). The information requested shall be based on the officially recorded data contained in the vehicle register of the public road traffic register maintained by the BM. This will tell us what kilometer-hours the car has been registered to, whether it is in the process of being circulated, or whether it is in circulation with a valid technical test. From my own experience, this feature has proven to be extremely useful for my friends and me. On many occasions, it has been proven within a few minutes that the odometer values in the ad details of the vehicles we want to buy are untrue or backward.

In the third group of cases, the client currently has the possibility of replacing passports in the framework of document replacements.

In the fourth group of cases, the so-called "Other Matters" group, you can apply for a Moral Certificate or check the validity of a previously requested Moral Certificate. For these services, it is essential to emphasize that issuing a moral certificate is free of charge to all clients four times a year. Fifth or more proceedings were instituted under Section XCIII of 1990 on Fees. General procedure for the payment of first instance administrative proceedings, as defined by law

You have to pay a fee (3000 HUF), which can also be done immediately through the application – by choosing a credit card payment method.

In the fifth issue, you will find the "Document Status Query" where you can get information on when the documents we request are completed. By specifying the number of vouchers on the application form that you received from the document office, we are able to inquire about the status of our document exhibitions. We can retrieve your ID, passport and driver's license information.

In the sixth menu item of the Application, the authority provides the means to check the applications and declarations, where we can continue the previously started but abandoned/suspended applications.

In my opinion, as a handy and modern feature, the application has been designed with Contact Center integration to support administration, whereby the

application combines the ideal combination of self-service (mobile application) and customer service with Contact / Call Center. In practice, this means that customers will have access to the Government Customer Line 24 hours a day, free of charge, from their application, free of charge, by dialing 1818 from their application, where trained officers will "live" seek to resolve emerging situations. ''.

The Government Window app was created to complement the features of the Docs Book and to create additional convenience features. The purpose of its creation was "the Government wants trust-based, efficient and fast administration". The most important function of the application is to map all the government windows of the country anywhere on the screen of the smartphone and inform the user how long it can handle the particular case type in the nearby government window. Currently, the program is 1.0. version is available on Google Play and App Store web stores, but further improvements are expected that will allow developers to resolve the issue by dropping the app immediately. As a result, if the user enters the steering wheel, his serial number would directly flash on the screen, and he would be able to start administration immediately, as the program would also calculate the time it takes to reach the steering wheel.

In the application, almost all case types (except ID card cases) can be selected, such as the car dealerships that have already been discussed, the map in the vast majority of the country is green, meaning this case type can be completed within 15 minutes in most government windows. Depending on the load, the application uses different colors, marked with orange or red if the waiting time is longer than 15 minutes. I have to note that through the application, the citizen does not see how many people wait for a particular administration, but how much time he has to wait for it to occur (which, of course, may contain inaccuracies). The application monitors, among other things, which government window, what type of case, there are reserved times for a particular case type, how many clerks are working on that case type and how much the clerk's average time is, and then calculates the waiting time accordingly. It is important to emphasize that due to the complexity of the administration processes, the waiting period can change continuously, which the system strives to follow with an update every 5 minutes.

In my opinion, with the launch of the Government Window application, citizens' (satisfaction) feelings of satisfaction with public administration will continue to increase, as the administration process will be more planned and predictable with the help of the program. This is a great help for every client when planning their day (e.g. scheduling working hours, parking time at the Government Window ... etc.), as we can manage our business even at lunchtime.

Of course, in a number of other administrative areas, including but not limited to construction, health, law enforcement, nature protection, etc. – applications

have already been developed to make life easier for both authorities and clients, the presentation of which could be the subject of a forthcoming study.

7. Closing thoughts

I believe that the increased demand for smart devices, as well as the rapid increase in the proliferation of devices, prove that the population is increasingly ready to receive and use these devices. Day by day, we can see in our immediate environment that smartphones have become a part of our everyday lives, with little exaggeration that most citizens cannot imagine their existence without them.

Today, we may not even consider these devices as luxury items, but rather as objects of use, which is why more and more people have at least one. According to research, this can reach up to 70 % of the total population, but they are almost certainly not equipped with a 'traditional computer. In my view, this is such a high rate that it certainly makes it clear to us that smartphones – and the applications running on them – are the best tools for public authorities (states and their administrative systems) to address this large percent quickly and efficiently.

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The Global Compact for safe, orderly and regular Migration and the Global Compact on Refugees – origins and effects

Michael Griesbeck*

Summary: Tracing back the roots of the Global Compact for Migration and the Global Compact on Refugees, from the Sutherland Report, the New York Declaration, the Platform on Disaster Displacement and the Nansen Initiative, back to the Balkan wars, which led to the Temporary Protection Directive, one can identify two challenges, which combine, especially taking into account increasing mixed migration: One root is the wish to cope with situations of mass influx, when large numbers of people start to move across borders as refugees, displaced people or migrants. The other source is the climate change, which also could lead to migration and displacement of people. These two challenges were brought into a structure by the two compacts. This article describes the development, which led to the compacts, analyses, that the compacts do not create new obligations for the states and new individual rights, but give suggestions how to improve migration management, and shows, what the next steps could be.

Keywords: Global Compacts – New York Declaration – Sutherland Report – mixed migration – refugees – environmentally displaced persons – non-legally binding framework

1. Introduction

In 2019 there were 272 Mio migrants worldwide, 3.5 per cent of the global population and 51 Mio more than 2010[1]. Migration includes international as well as national migration processes. It includes labour migration, academic mobility, family migration and displacement by war and conflict. UNHCR registered almost 70.8 Mio people forcibly displaced at the end of 2018. 41.3 Mio were internally displaced people, 25.9 Mio were refugees and 3.5 Mio were asylum

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1 United Nations Department of Economic and Social Affairs, press release 17 September 2019.

seekers[2]. Furthermore mixed migration increases[3]. People want to escape from war and persecution, but they also look for a better economic perspective. Environmental changes and climate change can be drivers of migration, too. Both groups, refugees and those, who look for a better economic perspective start to move and apply for asylum in the countries of destination, not being informed that the asylum system grants a status only for those who fulfil the conditions, for example need of protection because of individual persecution.[4]Existing regulations can only insufficiently cope with that situation. Especially the Convention relating to the Status of Refugees adopted on 28 July 1951 together with the Protocol of 31 January 1967[5] does not capture the full scope of todays migration challenges. The attempts to create new instruments reach back to the Balkan wars in the nineties. One result was the Temporary Protection Directive of 2001[6]. A debate about possible solutions first requires a close look at the relevant groups. This is a prerequisite for the understanding, why we have two compacts and not only one[7].

2. Definitions and clarifications

2.1. Mass influx and large movements

The difference between migration and strong migration is not defined. But in many European or international law regulations there are definitions of mass influx or large movements.

The Temporary Protection Directive of 2001 presents the following definition: "mass influx" means arrival in the community of a large number of displaced persons, who come from a specific country or geographical area, whether

[2] UNHCR Global Trends, released 19 July 2019.

[3] HAILBRONNER, K., THYM, D. *EU Immigration and Asylum Law – A Commentary.* Baden-Baden, second edition, München: C. H. Beck/Hart/Nomos, 2016, Part D I MN 37 ff., p. 1041 f; ANGENENDT, St., KIPP, D., MEIER, A. Mixed Migration – Challenges and options for the ongoing project of German and European asylum and migration policy, German Institute for International and Security Affairs (SWP), Bertelsmann, Gütersloh, 2017, p. 10 ff.

[4] HAILBRONNER, K., THYM, D., (sub 3) Part A, MN 53, p. 26, Part B1, MN 36 f., p. 48 f.

[5] hereinafter: 1951 Geneva Convention.

[6] Council Directive 2001/55/ EC of 20 July 2001, OJ L 212, p. 12-23; HAILBRONNER, K, THYM, D., (sub 3), Part D II, MN 7 ff., p.1058 f.; INELI-CIGER, M. Time to activate the temporary protection Directive, *European Journal of Migration and Law*, 2016, vol. 18, pp. 1–33, 13.

[7] One of the points of criticism is indeed, that there are two compacts and that the compacts look at migrants and refugees as seperated groups, see FERRIS, E., MARTIN, S. The Global Compacts on Refugees and for Safe, Orderly and Regular Migration: Introduction to a Special Issue, *International Migration,* vol. 57, December 2019, p. 5, 14.

their arrival in the Community was spontaneous or aided, for example through an evacuation programme."[8]

The Conclusion on International Cooperation and Responsibility Sharing in Mass Influx Situations[9] of the UNHCR Executive Committee of 2004 defines mass influx as follows: "mass influx is a phenomenon that has not been defined, but that, for the purposes of this Conclusion, mass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers."[10]

The New York Declaration for Refugees and Migrants[11] uses the term "large movements" and defines it as follows: "Large movements" may be understood to reflect a number of considerations, including the number of arriving, the economic, social and geographical context, the capacity of a receiving State to respond and the impact of a movement that is sudden or prolonged. The term does not, for example, cover regular flows of migrants from one country to another. "Large movements" may involve mixed flows of people, whether refugees or migrants who move for different reasons but who may use similar routes."[12]

2.2. Refugees

The leading document of international refugee law is the Convention relating to the Status of Refugees adopted on 28 July 1951 together with the Protocol of 31 January 1967[13]. It is not only the centrepiece of international refugee law but also serves as a central point of reference for the EU asylum aquis[14]. According to the 1951 Geneva Convention a refugee is a person owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside

8 Council Directive 2001/55/EC of 20 July 2001, article 2 (d); HAILBRONNER, K., THYM, D., (sub 3) Part D II, MN 21 ff. p. 1067; PEERS, St., GUILD, E. et al. *EU Immigration and Asylum Law (Text and Commentary)*, *Volume 3: EU Asylum Law*, second revised edition, Nijhoff, Leiden, Bosten 2015, p. 571 ff., INELI-CIGER, M. (sub 6), p. 15.

9 No. 100 (LV) – 2004 of 08 October 2004, United Nations General Assembly document A/AC.96/1003

10 Lit (a).

11 Resolution adopted by the General Assembly on 19 September 2016, A/RES/71/1

12 Para 6.

13 1951 Geneva Convention, Article 78 TFEU is refering to the 1951 Geneva Convention.

14 HAILBRONNER, K., THYM, D. (sub 3), D I, MN 47, p. 1046.

the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[15]

The 1951 Geneva Convention does not give a right to chose a country of destination. The 1951 Geneva Convention doesn`t even give an individual right for asylum, but only prohibits states from returning refugees to countries in which their lives and freedom may be threatened (prohibition of refoulement Art. 33).[16]

Above all the status according to the 1951 Geneva Convention always requires an individual examination. So it is not the adequate instrument for mass influx. We are facing more and more situations, that are not always covered bat he 1951 Geneva Convention[17].

Also subsidiary protection according to directive 2011/95/EU[18] , that gives protection to a "third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm"[19], requires an individual need of protection and an individual examination and interview. Rejected asylum seekers have to leave the country. The wish for a better economic future for oneself and one's family is no basis for a positive decision and a status according to the 1951 Geneva Convention or subsidiary protection, which only have to take into account the situation of persecution or danger in the country of origin.[20]

Crossing borders is a condition for protection under the regime of the 1951 Geneva Convention or subsidiary protection. If this is not the case, those migrated are internally displaced persons (IDPs). In 2018 there were – according to UNHCR – 41.3 Mio IDPs.[21]

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[15] Article 1 A of the 1951 Geneva Convention.

[16] No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[17] HAILBRONNER, K., THYM, D. (sub 3) Part D I, MN 19, p. 1033.

[18] Directive 2011/95/EU of 13 December 2011, OJ L 337, p. 9–26; HAILBRONNER, K., THYM, D. (sub 3) Part D III, p. 1108 ff: PEERS, St., GUILD, E. (sub 8) p.133 ff.

[19] Art. 2 (f); serious harm is defined in Article 15 and contains also protection for victims of internal armed conflicts.

[20] KOTZUR, M. in: GEIGER, R., KHAN, D., KOTZUR, M. (eds.). *European Union Treaties*, München: C. H. Beck/Hart, München 2015, Art. 78, MN 8.

[21] UNHCR Global Trends (released 19 July 2019); for the IDPs in 1998 the *Guidelines on internal displacement* were developed. The legally non binding guiding principles provide protection for those who have not (yet) crossed borders. As the refugee definition of the 1951 Geneva Convention is not valid, also environmentally displaced persons are protected. The guiding principles for example give the right to leave a camp or a right for education, the right to cross borders and to apply for asylum in another country.

2.3. Environmentally displaced persons

Both slow-onset processes, for example sea-level rise, salinization and land degradation, and sudden-onset events, for example flooding and intense storms, can cause cross-border movement of individuals looking for protection from climate-related harm. But environmentally displaced persons are not refugees according to the definition of the Geneva Convention. The main reason is that in most cases there is no persecution, because there is no individual that can be identified causing danger and harm.[22] Even the Temporary Protection Directive, which covers not only refugees, but also displaced persons in general, does not include environmentally displaced persons.[23] By the Global Compacts environmentally displaced persons are not seen as refugees, but as migrants[24], This not only reflects the reluctance of States to deal with that topic in the context of refugee law, but also suggests that the migration compact will play a leading role in the debate about disaster- and climate change-related mobility.[25]

3. The New York Declaration for Refugees and Migrants

The assignment for the Global Compact of Migration and the Global Compact on Refugees was created in the New York Declaration of 2016[26] which contained the aim, to present two contacts until the end of 2018, one on refugees and one for safe, orderly and regular migration[27]. Already in the first sentence of the Declaration the motive is formulated: "We, the Heads of State and Government and High Representatives, meeting … to address the question of large movements of refugees and migrants, have adopted the following political declaration". The

[22] See also Recital 29 of the Directive 2011/95/EU; Exeptions may be cases, where the state does not help specific groups in case of sudden-onset events or where the state itself persecutes by devastating the livelihood of a specific group; see also NÜMANN, B. Kein Flüchtlingsschutz für "Klimaflüchtlinge", *Zeitschrift für Ausländerrecht und Ausländerpolitik* – ZAR, 2015, p. 165; HENTSCHEL, Klimaflüchtlinge und das Völkerrecht, *Zeitschrift für Ausländerrecht und Ausländerpolitik* ZAR, 2017, pp. 1–7.

[23] HAILBRONNER, K., THYM, D. (sub 3) II Art 2. MN. 19, p. 1067.

[24] In the Global Compact for Migration there is a special chapter dealing with natural disasters, the adverse effects of climate change, and environmental degradation (para 18 h–i); this chapter was inserted as a symbolic recognition the particular importance oft he topic: KÄLIN, W. The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons, *International Journal of Refugee Law*, 2018, vol 30, pp. 664–667, p. 665.

[25] KÄLIN, W. (sub 24), p. 667.

[26] Resolution adopted by the General Assembly on 19 September 2016, A/RES/71/1

[27] Para 21.

challenge is concretized in para 7 of the Introduction: "Large movements of refugees and migrants have political, economic, social, developmental, humanitarian and human rights ramifications, which cross all borders. These are global phenomena that call for global approaches and global solutions. No one State can manage such movements on its own (….) Greater international cooperation is needed to assist host countries and communities."

In the New York Declaration refugees and migrants are considered as separate groups and their treatment is governed by separate legal frameworks, but they have the same universal human rights and fundamental freedoms[28]. Following the introduction (I.) there is a part with commitments that apply to both refugees and migrants (II.), afterwards commitments only for migrants (III.) and commitments only for refugees (IV.). Annex I concerns the Comprehensive refugee response framework (CRRF), Annex II the global compact for safe, orderly and regular migration.

The New York Declaration doesn't create legally binding obligations. It only refers to commitments: "We have endorsed today a set of commitments that apply to both refugees and migrants, as well as separate sets of commitments for refugees and migrants. We do this taking into account different national realities, capacities and levels of development and respecting national policies and priorities. We reaffirm our commitment to international law and emphasize that the present declaration and its annexes are to be implemented in a manner that is consistent with the rights and obligations of states under international law."[29] The introduction also shows that the compact is more a description of reasons, situations, aims and standards[30]. In Annex II. aims and contents of the global compact for migration are lined out: "The global compact would set out a range of principles, commitments and understandings among Member States regarding international migrations in all its dimensions. It would make an important contribution to global governance and enhance coordination on international migration.[31].

In the "Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration" of 6 April 2017[32] it is recalled, that the compact "would set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions…". The aim was a zero draft "on the basis of the views, summaries

[28] Para 6.

[29] Para 21.

[30] For example para 12: "We are determined to adress the root causes of large movements of refugees and migrants …", see also para 43.

[31] Annex II, I.2.

[32] A/Res/71/280.

and recommendations provided by Member States" (para 27). The zero draft plus was presented on 5 March 2018, the final draft on 11 July 2018.

4. New approaches since 2012

Being aware of the fact that more and more people start to migrate looking for a better future, some needing protection but unable to use the known legal instruments of protection, the international community and the United Nations tried even before the New York Declaration to find answers and solutions.

4.1. The Nansen Initiative

The Nansen Initiative was founded in October 2012 by Switzerland and Norway. It aimed at the improvement of the protection of people which migrate because of natural disasters and are on that way crossing borders. A global protection agenda was developed in 2015, that deals with "people displaced across international borders by natural hazards, including the effects of climate change."[33] For the implementation of the agenda 2016 the Platform on Disaster Displacement (PDD) was created.[34] The Global Compact for Migration refers to it in para 18 l).

4.2. Resolution A/RES/68/4

The "Declaration of the High-Level Dialog on International Migration and Development"[35] was adopted on 3 October 2013 by the General Assembly. In 34 paras a lot of commitments can be found, which were later repeated by the New York Declaration and the Global Compact of Migration. Examples are the analysis in para 1 referring to the interdependence of migration and development, the commitment to protect the human rights of migrant children (para 13), the need to promote international labour standards (para 14), the commitment to prevent and combat trafficking in persons (para 17) and the obligation of states, that their returning nationals are duly received (para 24).

[33] The Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Desasters and Climate Change, Band 1, 2015. The protection agenda is not legally binding. It is more a sort of "toolbox": KÄLIN, W. Klimaflüchtlinge oder Katastrophenvertriebene? *German Review on the United Nations,* VN 2017, pp. 207–212, p. 210 f.

[34] KÄLIN, W. (sub 33), VN 2007, p. 210 f.

[35] Resolution A/Res/68/ 4 adopted on 3 October 2013.

4.3. The Sustainable Development Goals

Also the "Sustainable Development Goals" of 25 September 2015[36] dealt with migration management. Target 10.7 – which is part of target 10 (Reduce inequality within and among countries) states: "Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies." The New York Declaration explicitly refers to that in para 16, and the Global Compact of Migration in para 2. Researchers give the hint, that the wording of the heading of the Global Compact of Migration is almost the same as the wording of target 10.7.[37] The document aims at a better management of migration: "We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses."[38] In para 38 the Sustainable Development Goals underline the necessity of territorial integrity and political independence of the states. The Sustainable Development Goals are not legally binding.[39]

4.4. The Sutherland Report

The Sutherland Report plays an important role. Both the New York Declaration (in para 62) and the Global Compact of Migration (in para 6) refer to it.

Peter Sutherland (1946-2018) was since 2006 Special Representative on Migration of the United Nations. He is one of the architects of the New York Declaration.[40]

The Sutherland-Report[41] wants to improve the management of international migration by international cooperation. The Secretary-General of the United

[36] Sustainable Development Goals, A/RES/70/*, Resolution of the General Assemby, adopted 25 September 2015, see HUCK, W., KURKIN, C. Die UN-Sustainable Development Goals im transnationalen Mehrebenensystem, *Zeitschrift für ausländisches Recht und Völkerrecht* – ZaöRV, 2018, pp. 375–424.

[37] KOCH, A. Ein Jahr nach den New Yorker Gipfeln, *German Review on the United Nations*, VN 2007, 195, (198), GUILD, E., ASARAN, T. ALLISON, K. From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (CGCM) *International Migration*, 2019, pp. 43–59, p. 45, KLEIN SALOMON, M., SHELDON, S. The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration, *International Journal of Refugee Law*, 2018, vol. 30, p. 584–590, p. 586.

[38] Para 29 of the SDGs.

[39] HUCK, W., KURKIN, C. (sub 36), ZaöRV 2018, pp. 375–424, p. 384 f.

[40] GUILD, E. et al. (sub 37), p. 45.

[41] A/71/728 v. 3. 2. 2017.

Nations writes in his introductory note, that the report is a "roadmap for improving the governance of international migration."[42]

The Sutherland-Report is divided into an introduction and a following agenda for action with three sets of *commitments* (Commitments of States towards migrants, Commitments between States and Commitments between States and other stakeholders). 16 recommendations are assigned to five sectors (Managing crisis-related movements and protecting migrants at risk; building opportunities for labour and skills mobility; ensuring orderly migration, including return; fostering migrants' inclusion and development; strengthening migration governance capacities).

The aim of the Sutherland-Report is "to show, that migration need not be a source of fear and conflict, within nations or between them" (para 88). Especially those in need of protection are in the focus: "The most urgent task is to clarify the responsibilities of States towards migrants who are in vulnerable situations and may not be able to return home, but do not qualify for protection under the 1951 Refugee Convention" (para 19). Also the Sutherland-Report stresses the sovereignty of states to decide their migration policy. This is stated in para 23 ("States have no obligation to open their borders to all migrants, but they do have an interest in seeing migration occur legally and safely, respecting the human rights of migrants. To achieve this, each government needs to work out, and articulate clearly, on what terms it will allow migrants to enter, stay and work or facilitate their departure and return – in other words, its migration policy") and in para 38:

"Return, readmission and reintegration are essential elements of a well-ordered migration system. When a migrant does not have a legal right to remain in a country of destination – whether they arrived or stayed irregularly, because their legal stay was on the temporary basis (e.g. as a seasonal worker) or because – after a fair hearing – their application for asylum has been denied, it is within a State's discretion to remove that person from its territory. When this happens, countries of origin have an obligation to recognize and admit their nationals, out of respect both for migrants' human rights and for the principle of reciprocity of obligations among States."

The Sutherland Report uses the term *"commitment"*, but also the term *"obligation"*. Para 18 shows beneath the headline "Commitments of states towards migrants" a clear distinction between obligations and commitments: "States have obligations towards migrants and refugees under existing international law that they must implement. In addition they have all signed politically binding commitments contained in the outcome documents of the second United Nations

[42] See Note by the Secretary-General.

High-Level Dialogue on International Migration and Development (2013) and the 2030 Agenda (2015), as well as in the New York Declaration (2016)." So obligations refer to still existing legally binding documents and commitments call for the creation of new regulations.

5. The Global Compact for Migration

The Global Compact for Safe, Orderly and Regular Migration is divided into five parts: It starts with an introduction ("Preamble") where also the difference between refugees and migrants is described[43]. The preamble is followed by a chapter "Our vision and guiding principles" (including international cooperation, national sovereignty, rule of law and due process, sustainable government and human rights) and a chapter with 23 objectives and commitments. These objectives are for example: enhance availability and flexibility of pathways for regular migration (objective 5), prevent, combat and eradicate trafficking in persons in the context of international migration (objective 10), manage borders in an integrated, secure and coordinated manner (objective 11), provide access to basic services for migrants (objective 15), empower migrants and societies to realize full inclusion and social cohesion (objective 16), cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration (objective 21), strengthen international cooperation and global partnerships for safe, orderly and regular migration (objective 23). The Global Compact closes with a chapter "implementation" and a chapter "Follow up and review".

The Global Compact for Migration was adopted on 19 December 2018 at the UN General Assembly. 194 states voted in favour, five voted against and seven abstained from voting[44].

In the discussion after the final draft and before the vote the most controversial question was whether new obligations were created by the Global Compact for Migration[45].

[43] Para 4.

[44] UN-GA Res. 73/185, 19 December 2018, GUILD, E. et al. (sub 37), p. 44; FERRIS, E., MARTIN, S. The Global Compacts on Refugees and for Safe, Orderly and Regular Migration: Introduction to a Special Issue, *International Migration*, vol. 57, December 2019, pp. 5–18, p. 8.

[45] DIAS, E., ESCARCENA, P. The European Union and the Background of the Global Compacts, *International Migration*, 2019, pp. 273–285, p. 275; GUILD, E. et alt. (sub 37), p. 44; FERRIS, E., MARTIN, S. (sub 44) p. 8, THYM, D. Viel Lärm um Nichts? – Das Potential des UN-Menschenrechtspakts zur dynamischen Fortentwicklung der Menschenrechte, *Zeitschrift für Ausländerrecht und Ausländerpolitik – ZAR, 2019*, pp. 131–135, pp. 132 ff.

In international law it is accepted, that states have the sovereignty to decide over the entry and stay of foreigners[46]. A right for immigration does not correspond with the right to emigrate.[47] Only the own citizens have the right to enter whenever they want. [48] Another exception is the right of entry based on Art. 45 EUCFR, Art. 21 TFEU[49]. The 1951 Geneva Convention only establishes the principle of non-refoulement[50].

The Global Compact for Migration does not change this rule. The New York Declaration already reaffirmed, "that everyone has the right to leave any country, including his or her own, and to return to his or her country. We recall at the same time that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations."[51]

The Global Compact for Migration distinguishes between regular and irregular migration and wants to reduce and prevent irregular migration and combat trafficking (for example para 9, 10, 11, 25c).

The Global Compact for Migration states in para 7 that the compact upholds the sovereignty of states and their obligations under international law. In para 15 a whole paragraph deals with national sovereignty: "The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law."[52] The only obligation to accept migrating people refers to own nationals (para 37). Especially concerning those, who have to return, because they have no right to stay in the country of destination, clear expectations are expressed towards the countries of origin.

The compact is a non-legally binding cooperative framework that recognizes that no state can address migration on its own.[53] It does not create new legal obligations for the signatories, but reinforces already existing ones.[54] and provides

[46] HAILBRONNER, K., THYM, D. (sub 3) Part B I, MN 32, p. 47; KOTZUR, M.,(sub 20), p. 295 ff., 300, 306 f.; KLUTH, Migrationsgerechtigkeit, *Zeitschrift für Ausländerrecht und Ausländerpolitik* – ZAR 2011, pp. 329–335, p. 331.

[47] KAU, M. Ein Recht auf Migration?, in: Uhle, A. *Migration und Integration*, *Die Migrationskrise als Herausforderung des Rechts,* 2017, p. 19–56, p. 28 ff.; UERPMANN_WITTZACK, R. Ordnung und Gestaltung von Migrationsbewegungen durch Völkerrecht, in: Berichte der Deutschen Gesellschaft für internationales Recht, Band 49, 2018, p. 215–246, p. 219; KOTZUR, M. Migrationsbewegungen als Herausforderungen für das Völkerrecht, ibidem, p. 295–324, p. 306.

[48] KAU, M. Ein Recht auf Migration? (sub 47), p. 31.

[49] KAU, M. Ein Recht auf Migration? (sub 47), p. 32.

[50] Art. 33 of the 1951 Geneva Convention; KAU, M. Ein Recht auf Migration? (sub 47) p. 31.

[51] Para 42.

[52] See also for sovereignty and the compacts DIAZ, E., ESCARCENA, J. (sub 45) p. 275 f.

[53] Para 15.

[54] MELIN, P. The Global Compact for Migration: Lessons for the Unity of EU Representation, *European Journal of Migration and Law,* 2019, vol. 21, pp. 194–214 p. 201.

evidence of a political commitment by states to uphold pre-existing human rights obligations[55]. It is no treaty, not legally binding and does not produce legal effects[56]. It also doesn't create customary international law.[57]

The aim of the Global Compact for Migration is cooperation and dialogue leading to better migration management: Para 15 shows, that international, regional and bilateral cooperation and dialogue is required. The chapters "Implementation" and "Follow-Up and Review" show, that the aim is a process, taking into account different national realities, capacities, and levels of development, and respecting national policies and priorities. The compact is to be implemented in a manner that is consistent with the rights and obligations under international law[58]. An important role plays the exchange of knowlege, statistics, best practices and innovative approaches.[59] So the Global Compact for Migration is an instrument for better communication between countries of origin and countries of destination.

6. The Global Compact on Refugees

The Global Compact on Refugees is also based on the New York Declaration. The situation here was easier because of the already existing rules of international law. It is grounded in the international refugee protection regime [60]. The Global Compact on Refugees refers to the 1951 Geneva Convention but does not intend to change it. Also the Global Compact on Refugees doesn't contain new obligations and is not legally binding[61].

The Global Compact on Refugees is divided into four parts: The first part is an introduction setting out the background, outlining the guiding principles and introducing the objectives of the global compact. The objectives of the Global Compact on Refugees according to para 7 are: ease the pressures on host countries; enhance refugee self-reliance; expand access to third-country solutions and support conditions in countries of origin for return in safety and dignity. Those four objectives are seen as interlinked and interdependent. In the last part of the introduction the compact underlines the importance of prevention and addressing root causes (para 8 and 9).

[55] GUILD, E. et alt (sub 37), p. 44.

[56] MELIN, P. (sub 54) p. 200; see also for Germany the constitutional court decision BVerfG 2 BvQ 105/18, 7 December 2018, Nr. 16, NVwZ 2019, 161.

[57] THYM, D. In: Legal Tribune Online 25 November 2018.

[58] Para 41.

[59] Para 51.

[60] Para 5.

[61] Para 4, for the norm-preserving role of the Refugee Compact and its role to preserve the status quo see GAMMELTOFT-HANSEN, Th. The normative Impact oft he Global Compact on Refugees, *International Journal of Refugee Law*, 2018, vol 30, pp. 605–610, pp. 609 f.

The second chapter is the comprehensive refugee response framework (CRRF) as adopted as Annex I of the New York Declaration. It is an integral part of the Global Compact[62].

The third part is a Programme of action establishing a Global Refugee Forum, national and regional arrangements for specific situations, and key tools for effective burden- and responsibility sharing. In the following chapter areas in need of support are identified, for example reception and admission or communities with their tasks in the fields of education and health. The part "Solutions" deals with support for countries of origin and voluntary repatriation, resettlement initiatives as a tool of protection as well as a mechanism of burden- and responsibility-sharing and a demonstration of solidarity, complementary pathways for admission to third countries like grant of scholarship and student visas, and local solutions. The compact closes with a chapter about follow up and review (for example by the Global Refugee Forum taking place every four years and the High Commissioner's annual Report to the General Assembly).

The Global Compact on Refugees is a framework for more responsibility-sharing, recognizing that a sustainable solution to refugee situations cannot be achieved without international cooperation. It provides a model for governments, international organizations, and other stakeholders to ensure that host communities get the support they need and that refugees can lead productive lives. It constitutes a unique opportunity to transform the way the world responds to refugee situations, benefiting both refugees and the communities that host them.

The General Assembly adopted the Global Compact on Refugees on 18 December 2018 with 181 votes in favour, two opposed, three abstentions and seven, who did not vote.[63]

7. Conclusion

Already the predecessor documents of the compacts have in common, that they do not create new legal obligations or new individual rights. New international norms and treaties may be a task for the future but are not implemented by the compacts themselves [64]. The intention is to point to a better migration management, to demand better coordination and to formulate clear objectives. Like

[62] Para 10.

[63] FERRIS, E., MARTIN, S. (sub 44), p. 8.

[64] For example the Sutherland-report para 87: "The global compact could … identify areas in which States seek to work towards the conclusion of new international norms and treaties", and para 52 of the New York Declaration: "We will consider developing non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable

the early documents also the Global Compact for Migration and the Global Compact on Refugees do not create new individual rights or new obligations for the signataries. They aim at the recognition of existing obligations and individual rights and are implementing objectives to be better prepared for large movements, to implement standards and to share information and concepts[65]. They don`t question the rule, that there is no right for a free choice of the country of destination without the consent of the concerned state. On the contrary they confirm the sovereignty of states and their freedom to chose their own migration policy[66].

The Global Compact for Migration and the Global Compact on Refugees contribute to an answer to the question how to manage migration and especially how to cope with large movements, how to combat the causes of flight and how to deal with refugees and legal and illegal migration. They point at the increasing migration and the increasing mixed migration. The solution of these questions will be a key issue for the future of our globalized world.

It could be expected, that the development of a new legally binding instrument of international law, that protects, where protection is needed – no matter whether in the country of origin, the transit state, the country of destination or the country of resettlement – and on the other side improves migration management for those who are not refugees, is accelerating. If the 1951 Geneva Convention and its definition of refugee shall continue to exist there must be a way to manage migration for those, who don't fulfil the criteria of the 1951 Geneva Convention or subsidiary protection without creating pull factors.

The compacts show how this could be done and give important ideas for better cooperation.

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situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance."

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[65] For the Refugee Compact see GAMMELTOFT-HANSEN, Th. (sub 61) pp. 605–610, p. 610.

[66] Global Compact for Migration, para 15 c; DIAZ, E., ESCARCENA, J. (sub 45) p. 275 f.

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The Human Rights Protection in the EU-Brazil Relations: Structural Considerations and Current Legal Developments

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Summary: Brazil and European Union have been developing common trade relations since the 70's and over the years they have strengthened them through agreements and open dialogues. Both actors are promoters of human rights at the global level. At the same time human rights issues are present in their mutual relations including the most current documents such as currently forming Association Agreement. The main goal of the paper is to outline and evaluate the developments of the legal framework with an emphasis on how the human rights issues have been streamlined in Brazil and EU relations.

Key words: European Union – Mercosur – Brazil – human rights – association agreements

1. Introduction

The trade relations between the European Union (EU) and Brazil are rooted in long-term interactions between European countries and their former colonies. European states kept their influence in the newly born Latin American countries due to the shared history, language and culture, which also facilitated development of traditional trade relations as well as relations with other European countries grouped in the European Union.[1] The creation of the EU helped to increase European influence in the world as the EU could more easily negotiate agreements

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[1] *HISTORY of the European Union*. 2018 [online]. Available at: https://europarlamentti.info/en/European-union/history/

with third countries and had a strong bargain power. This was especially due to the huge EU internal market attractive for importers as well as common commercial policy in relation to third countries.

In this context, **Brazil** had set up trade relations with the EU quite early with the first trade agreement concluded already in 1974.[2] Both parties considered it beneficial to enhance their cooperation in a broader framework and started further negotiations in the 80's. A subsequent agreement was concluded in 1982 and became a part of a group of agreements that helped to intensify the relations between the EU and developing countries.[3]

Nowadays, the EU is the second-biggest trading partner of Brazil[4] and covers more than 18 % of its total trade. At the same time Brazil is the largest economy in Latin America as in 2016 it represented over 30 % of EU's total trade with the Latin America.[5] The EU exports especially machinery, chemical products and transport equipment to Brazil, while Brazil exports mainly primary products, such as vegetable and mineral products, and is the biggest exporter of agricultural products to the EU worldwide.[6]

Since the late 90's the European Union and Mercosur (Southern Common Market), a bloc which Brazil is part of, have been negotiating an Association Agreement that could help further to enhance the relations between the blocs. Although the possible agreement covers mainly economic issues including the free trade, it also has a special concern about human rights, this being increasingly a crucial topic for the EU. The protection of human rights has become a central goal of the EU external policy.[7] Along the years, the EU started to include human rights clauses in its agreements with third countries thereby highlighting the importance given to the promotion, protection and respect for human rights. These human rights clauses have been present in all EU agreements since the 90's and influenced Brazil and EU relations, even in the most recent negotiations, including the EU-Mercosur Association Agreement. In the paper we will try to show the development of human

2 *PRESS Releases Framework Cooperation Agreement*. November 3, 1989 [online]. Available at: http://europa.eu/rapid/press-release_MEMO-87-106_en.htm. Accessed on January 23, 2019.

3 Ibidem.

4 *Countries and Regions – Brazil*. 2018 [online]. Available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/brazil/

5 Ibidem.

6 *Countries and Regions – Brazil*. 2018 [online]. Available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/brazil/

7 See esp. Art. 3 para. 5 TEU: *(5) In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*."

rights clauses in the international treaties between the EU and other countries and blocs, especially in EU-Brazil and EU – Mercosur relations.

2. Human rights clauses and their development in the EU

2.1. Origin of human rights clauses in EU external agreements

Although the original treaties founding European Communities/European Union did not include any reference to fundamental rights and left their protection to the EU Member States,[8] later the approach changed and the EU started to promote human rights not only at the supranational level, but also at the global level. According to the present wording of the founding treaties the EU is founded on human rights, as seen in article 2 of the EU Treaty (TEU),[9] and can be regarded as one of the leading organizations promoting respect to human rights both internally and externally. The importance of protection of human rights in the EU external relations is nowadays explicitly reflected in article 3 TEU.[10]

However, in the late 70's and 80's, the EU was bound by treaties with countries responsible for violation of human rights. Even though it was against the new EU policy, these treaties could not be easily suspended. The only way to suspend them was to invoke the *rebus sic stantibus* clause in situations of fundamental and unforeseeable changes in the circumstances compared to those when the treaty was concluded, making the treaty to lose its binding effect. Correspondingly, the EU could suspend the agreement in cases where the circumstances seen

[8] VELUTTI, S. *The Promotion and Integration of Human Rights in EU INTERNATIONAL AND EUROPEAN LAW External Trade Relations*. Utrecht Journal of International and European Law, 2016 [online]. Available at: https://utrechtjournal.org/articles/10.5334/ujiel.342/

[9] Article 2 TEU: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*." European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002 [online]. Available at: https://www.refworld.org/docid/3ae6b39218.html

[10] Art. 3 para 5 TEU: *„(5) In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*."

at the time of the conclusion of the treaty changed in an unpredictable way or were predictable with unpredictable consequences.

One example in that regard concerns the EU-Turkey relations. After one of the military coups d'état in Turkey and subsequent allegations of serious violations of human rights, the EU continued to apply all the terms of the EU-Turkey Association Agreement, but it suspended the financial assistance.[11] The consolidation of mutual relations was conditioned by a restoration of the civilian government and civil liberties.[12] Consequently, since the 90's the EU started to include human rights clauses in its agreements as the human rights violations not necessarily change the circumstances in which the agreement was concluded and the denouncement under *rebus sic stantibus* doctrine could be difficult.

2.2. Examples of human rights clauses in agreements with Mercosur countries

As concerns the South-American region, one of the first agreements with a human rights clause was the **Framework Agreement with Argentine**[13] that mentions human rights in its Article 1(1).[14] However, for example Bartles is not sure about the enforceability of this clause and deems that *"this [human rights] clause does not actually commit the parties to comply with democratic principles or human rights. Rather, it states an assumption on which the continuing application of the agreement is based."*[15] In other words, the human rights clauses added a conditional element to these agreements – the agreement would only continue to apply if the clause would not be violated. The idea was to create circumstances where *rebus sic stantibus* doctrine could be used, yet the clause was not effective: paradoxically the inclusion of the human rights clause in the agreement makes the use of *rebus sic stantibus* principle *stricto sensu* impossible because this principle applies only to unforeseen changes in the treaty circumstances and the clause already predicted a change.

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[11] *PRESS Releases. April 25*, 1996 [online]. Available at: http://europa.eu/rapid/press-release_MEMO-96-42_en.htm

[12] Ibidem.

[13] *FRAMEWORK Agreement for Cooperation between the European Economic Community and the Argentine Republic.* October 26, 1990 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A21990A1026%2801%29

[14] "Article 1(1) Cooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina." – Framework Agreement.

[15] BARTELS, L. *A model human rights clause for the EU's international agreements* [online]. Available at: https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf, p. 12.

Consequently, the *rebus sic stantibus* principle was abandoned and a different rule was introduced, namely the suspension or termination of a treaty in case of "*violation of a provision essential to the accomplishment of the object and purpose of the treaty*".[16] This new clause was introduced in the **Framework Agreement between EU and Brazil from 1995**[17] where both parties affirmed *"the importance they attach to the principles of the United Nations Charter, to democratic values and to respecting human rights",* as outlined in Article 1 of the Framework Agreement.[18] Nevertheless, this type of clause did not create an enforceable obligation for the parties, since there were no provisions regulating the consequences of human rights' violations.[19] Consequently, the human rights clause was not yet fully applicable and the EU did not have clear remedies in the treaty if human rights violations would take place.

The **modern human rights clause**, included in all agreements nowadays is called a **non-execution clause** and it is expressed in the EU standard safeguards clause. It permits that either parties in case of human rights violations or any violation of the essential elements take appropriate measures and, sometimes, even suspend the agreement.[20] However, the EU usually suspends agreements as an ultimate means[21] and only after trying to stop the violations with dialogue, since the suspension of the agreement would possibly be the worst solution for both parties and their future relations. Those clauses not only recognize human rights as an essential element of the agreement, but also bring the possible consequences of those violations. One example of an agreement containing the modern human rights clause is the **Interregional Framework Cooperation Agreement with Mercosur**,[22]

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16 Ibidem.

17 *FRAMEWORK Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil*. November 1, 1995 [online]. Available at: https://investmentpolicyhub.unctad.org/Download/TreatyFile/3101

18 Article 1: "*Democratic basis for cooperation: Cooperation ties between the Community and Brazil and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and international policies of both the Community and Brazil and which constitute an essential component of this Agreement*".

19 Comp. BARTELS, L. *A model human rights clause for the EU's International Agreements* [online]. Available at: https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf

20 Ibidem.

21 Usually, when EU suspends an agreement, it does not mention human rights issues but uses as a justification a political event, such as a *coup d'état*.

22 *INTERREGIONAL Framework Cooperation Agreement between the the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part*. April 29, 1999 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:r14013

concluded in 1999. Its article 1[23] reaffirms the importance of human rights in the agreement and Article 35 (1)[24] includes consequences for the party that violates human rights.

3. EU-Brazil relations with the perspective of human rights protection

3.1. Bilateral Framework Agreement

As was already mentioned, in 1995 Brazil signed the Bilateral Framework Agreement[25] mentioning human rights as an essential element in Article 1[26] with a lack in the determination of consequences of their violations. Yet, the article 35(1)[27] showed a clear willingness of the parties to expand their trade relations and also to take into consideration the importance of human rights for both parties. The EU continued a parallel dialogue with Brazil which led both actors to reconsider the approach towards their bilateral relations.[28] The EU perceived Brazil as a partner with whom it could conclude a strategic partnership. Similarly, Brazil

[23] Article 1 of the Interregional Framework Cooperation Agreement: *"Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights inspires the domestic and external policies of the Parties and constitutes an essential element of this Agreement."*

[24] Article 35(1) of the Interregional Framework Cooperation Agreement: *"The Parties shall adopt any general or specific measure required for them to fulfil their obligations under this Agreement and shall ensure that they attain the objectives laid down in that Agreement. If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures."*

[25] *FRAMEWORK Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil*. November 1, 1995 [online]. Available at: https://investmentpolicyhub.unctad.org/Download/TreatyFile/3101

[26] Article 1 of FRAMEWORK Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil: "Cooperation ties between the Community and Brazil and this Agreement in its entirely are based on respect for the democratic principles and human rights which inspire the domestic and international policies of both the Community and Brazil and which constitute an essential component of this Agreement." (emphasis added).

[27] Article 35(1) of the FRAMEWORK Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil: *"The contracting parties may by mutual consent expand this agreement with a view to enhancing the levels of cooperation and supplementing them by means of instruments on specific sectors or activities."*

[28] See PAVESE, C., WOUTERS, J., MEUWISSEN, K. The European Union and Brazil in the Quest for the Global Diffusion of Human Rights: Prospects for a Strategic Partnership. *Utrecht Journal of International and European Law*, August, 2014 [online]. Available at: https://ghum.kuleuven.be/ggs/publications/working_papers/2014/143pavesewoutersmeuwissen, p. 7.

itself saw it as an opportunity to increase its role at the international scene and to strengthen its bilateral relations with both old and new partners.[29]

3.2. Strategic Partnership

Consequently, both the EU and Brazil shared interests in promoting human rights globally and in 2007 they concluded the Strategic Partnership,[30] reaffirming that they intended to establish dialogues and reach a consensus on the actions which should be taken in relation to human rights in the next years through a multilateral approach.[31] The Strategic Partnership could be seen as a recognition of Brazil's emerging power worldwide and was a substantial step for both parties. The EU was already trying to approach Brazil through Mercosur, nevertheless, it saw a good opportunity to enhance its relations with Brazil using also a bilateral approach, since it was expected that their partnership would bring more advantages for both parties. Consequently, the Strategic Partnership covers many other areas of cooperation at different levels and across several areas.[32]

In addition, both parties agreed to hold **annual summits** to promote a dialogue about human rights. These summits should strengthen their positions in United Nations Human Rights Council because they could discuss various issues in advance and, consequently, could coordinate EU and Brazil's position about the issues discussed.[33] Since 2007 until 2014 the summits occurred annually and the parties discussed important issues – including human rights.

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[29] Comp. PAVESE, C., WOUTERS, J., MEUWISSEN, K. *The European Union and Brazil in the Quest for the Global Diffusion of Human Rights: Prospects for a Strategic Partnership*. Utrecht Journal of International and European Law, August, 2014 [online]. Available at: https://ghum.kuleuven.be/ggs/publications/working_papers/2014/143pavesewoutersmeuwissen

[30] *EU-BRAZIL Strategic Partnership*, March 12, 2009 [online]. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0140+0+DOC+XML+V0//EN

[31] During Lula's government a reciprocal multilateralism approach was adopted; it was defined by Meuwissen, Pavese and Wouters as "*the existence of rules to ensure a fair and equal engagement of all the parties and the contribution of all international actors in the agreement of these rules*". (p. 7).

[32] PAVESE, C., WOUTERS, J., MEUWISSEN, K. *The European Union and Brazil in the Quest for the Global Diffusion of Human Rights: Prospects for a Strategic Partnership*. Utrecht Journal of International and European Law, August, 2014 [online]. Available at: https://ghum.kuleuven.be/ggs/publications/working_papers/2014/143pavesewoutersmeuwissen

[33] In practice, however, Brazil and EU's members vote usually diversely, see in this regard MEUWISSEN, PAVESE and WOUTERS, op. cit., 2014 (p. 15–17).

3.3. Joint Action plans and informal dialogues

Moreover, in 2008 and 2013 during summits the EU and Brazil also concluded **Joint Action Plans**[34]. In the first Join Action Plan (2008), they defined some goals to achieve through cooperation, allowing them to carry out a frequent dialogue about human rights. The second Join Action Plan (2011) reaffirmed the first one and accentuated that Brazil should promote human rights paying a special attention to vulnerable groups, such as kids, homosexuals, poor and disabled people.[35]

Brazil and the EU also promote **informal dialogues** that consist for example in lectures given by experts from both Brazil and the EU, debating about currently important issues with the society, including human rights. These dialogues should give a chance for "ordinary" citizens to debate and give their opinion about issues considered important for the development of EU and Brazil partnership.[36]

Last but not least, in 2009, the **European Parliament issued a recommendation** to the EU Council about the Strategic Partnership concluded in 2007. According to the European Parliament *"the Strategic Partnership should be a tool to promote democracy and human rights, the rule of law and good governance at global level; the partners should further cooperate in the UN Human Rights Council and the Third Committee of the UN General Assembly to promote worldwide human rights."*[37] In other words, both parties wanted to increase its influence in the United Nations' Human Rights Council and other international organizations to promote the respect, protection and fulfilment of human rights globally.

4. EU – Mercosur relations with the perspective of human rights protection

4.1. Introductory remarks

The EU-Brazil relations have been modified also due to Brazil's membership to Mercosur (Southern Common Market), an economic bloc created by Argentina,

[34] Joint Action Plan is a cooperation between government institutions on policy issues that underpin mutual cooperation.

[35] *SECTOR Dialogues Human Rights*. 2017 [online]. Available at: http://www.sectordialogues.org/sector-dialogues/human-rights#

[36] Ibidem.

[37] *RECOMMENDATION on the European Union-Brazil Strategic Partnership*. March 12, 2009 [online]. Available at: http://www.europarl.europa.eu/delegations/en/dmer/product/20181204D-PU20582

Brazil, Paraguay and Uruguay. In brief, the Mercosur treaty was important for the economic integration in Latin America and attracted investments and trade opportunities from other countries and supranational entities around the world. It established a common market among the parties, as mentioned in Article 1[38] of Treaty of Asunción – an important tool for maintaining good relations among Latin America countries.

It may be added that in the 90's, the EU was trying to intensify bilateral relations with Mercosur countries and proposed bilateral agreements to all of them. Argentina's agreement was concluded in the 1990,[39] Uruguay's[40] and Paraguay's[41] agreement in 1992 and – as already mentioned – the bilateral agreement with Brazil was concluded in 1995.[42] A common characteristic of these agreements is the presence of human rights clauses, even though they do not have the same wording and may produce different legal effects.

4.2. Interinstitutional Cooperation Agreement

From the multilateral perspective, the political dialogue between Mercosur and the EU started in 1992, when Brazil, Argentina, Uruguay and Paraguay, as members

[38] Article 1 of the Treaty of Asunción: "*The States Parties hereby decide to establish a common market, which shall be in place by 31 December 1994 and shall be called the "common market of the southern cone" (MERCOSUR). This common market shall involve: The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures; The establishment of a common external tariff and the adoption of a common trade policy in relation to third States or groups of States, and the co-ordination of positions in regional and international economic and commercial forums; The co-ordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the States Parties; The commitment by States Parties to harmonize their legislation in the relevant areas in order to strengthen the integration process*."

[39] See f.e. *FRAMEWORK Agreement for Cooperation between the European Economic Community and the Argentine Republic*. October 26, 1990 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A21990A1026%2801%29

[40] See f.e. *FRAMEWORK Agreement Cooperation between European Economic Community and the Eastern Republic of Uruguay*. March 16, 1992 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31992D0205

[41] See f.e. *FRAMEWORK Agreement for Cooperation between the European Economic Community and the Republic of Paraguay*. October 19, 1992 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31992D0509

[42] *FRAMEWORK Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil*. November 1, 1995 [online]. Available at: https://investmentpolicyhub.unctad.org/Download/TreatyFile/3101

of Mercosur,[43] concluded the Interinstitutional Cooperation Agreement[44] whose main goal was to exchange information between parties to help Mercosur in the integration process. Also, it established a joint advisory committee consisting of representatives of the European Commission and Mercosur's Common Market Group. The aim of the advisory committee is to enhance and intensify the interinstitutional dialogue, and to promote and monitor cooperation.[45] Yet, as a political agreement, it does not directly mention human rights, but only the exchange of information, staff, training, technical assistance and institutional support.

4.3. Interregional Framework Cooperation Agreement

In 1999, the European Community and Mercosur signed the Interregional Framework Cooperation Agreement.[46] The agreement is based on democratic values, the rule of law and human rights.[47] It reassures the binding effect of human rights in Article 1: *"Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights inspires the domestic and external policies of the Parties and constitutes an essential element of this Agreement"*,[48] thereby recognizing the respect of human rights as an obligation for the parties and as an essential part of the agreement.

Furthermore, the Article 35[49] talks about the fulfilment of obligations present in the agreement and confirms that the parties could adopt necessary measures

[43] Mercosur was created in 1991 after Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción.

[44] *PRESS releases.* October 19, 1994 [online]. Available at: http://europa.eu/rapid/press-release_MEMO-94-62_en.htm?locale=en

[45] Ibidem.

[46] *INTERREGIONAL Framework Cooperation Agreement between the the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part*. April 29, 1999 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:r14013

[47] See f.e. Preamble of the Interregional Framework Cooperation Agreement: *"CONSIDERING their full commitment to the content and principles of the Charter of the United Nations and to democratic values, the rule of law and promoting and respecting human rights."*

[48] *INTERREGIONAL Framework Cooperation Agreement between the the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part*. April 29, 1999 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:r14013

[49] Article 35 (1) of the Interregional Framework Cooperation agreement: *"The Parties shall adopt any general or specific measure required for them to fulfil their obligations under this Agreement and shall ensure that they attain the objectives laid down in that Agreement. If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. […] (3) The Parties agree that the 'appropriate measures' referred to in this Article are measures taken in accordance with international law. If a Party takes a measure*

including the suspension of the agreement. Still, it may be assumed that the parties would hardly adopt extreme measures as it would be against interests of both of them. This agreement is very broad and has as a main goal the development of closer relations between the EU and Mercosur with indefinite duration.[50]

4.4. EU–Mercosur Association Agreement

In addition, the Interregional Framework Agreement envisaged the conclusion of an Interregional Association Agreement between Mercosur and EU.[51] The EU has consolidated trade relations with Mercosur along the years and has a huge interest in a complex agreement. Just to demonstrate the economic significance to this region, it was the destination for the EU-origin goods worth of 42 billion euros (2016) and EU services worth 22 billion euros (2015).[52] The objective of the envisaged agreement is to enhance Mercosur and EU trade by cancelling trade barriers between the countries as well as, among others, the promotion of the sustainable development, respect to rights of indigenous people and the promotion of human rights (explicitly labour rights).[53]

The negotiations between Mercosur and the EU have been in progress since 2000 covering political dialogue and cooperation.[54] In 2004, after an exchange of market offers revealed substantial differences between the parties concerning the level of liberalization of trade in agricultural goods, services and public procurement markets,[55] the negotiations were suspended. In 2010, negotiations were relaunched, but in 2012 they were suspended again because of economic issues. In 2016 new presidents who supported business and market access took power both in Brazil and

in a case of special urgency as provided for under this Article, the other Party may ask that an urgent meeting be called to bring both Parties together within 15 days."

50 See Article 34 (1) of the Interregional Framework Cooperation agreement: *"This Agreement shall be valid indefinitely."*

51 See also Preamble of the Interregional Framework Cooperation Agreement *"MINDFUL of the terms of the Joint Solemn Declaration in which both Parties propose to conclude an Interregional Framework Agreement covering commercial and economic cooperation and preparing for gradual and reciprocal liberalization of trade between the two regions as a prelude to the negotiation of an Interregional Association Agreement between them".*

52 *EU-MERCOSUR Association Agreement: A vast economic potential, building bridges for open trade and sustainable development*. 2016 [online]. Available at: http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156465.pdf

53 For details see EU-MERCOSUR Association Agreement: A vast economic potential, building bridges for open trade and sustainable development. 2016. Available at: http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156465.pdf. Accessed: January 29, 2019.

54 LEGISLATIVE train schedule, 2016 [online]. Available at: http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-mercosur-fta

55 Ibidem.

Argentina, the negotiations resumed and made a considerable progress afterwards. Actually, the political consent on the free trade agreement was reached in June 2019.[56]

It is significant that the preparatory materials on the agreement mentioned not only trade, but other issues such as sustainable development, provisions for civil society, responsible business conduct or rights of indigenous communities.[57] It could have justly been expected that the agreement would include a modern human rights clause, mentioning human rights as an essential element and bringing consequences for their violation. However, such a general clause seems missing in the final text.[58] It is also not sure how the human rights and sustainable development will be effectively enforced. The EU officials claim that the final agreement *"addresses issues like the environment and labour rights, as well as reinforcing sustainable development commitments we have already made, for example under the Paris Agreement."*[59]

However, there appeared also negative evaluations in this regard. Critics assert that the new agreement gives preference to trade to the detriment of protection of forest and human rights.[60] There is also a threat that the agreement will have problems with the ratification in some EU Member States[61] as such a ratification is a precondition for the treaty to enter into force. The same may be valid also for the European parliament which has a traditionally good record in streaming human rights in its activities.[62]

We assume that at present all scenarios are possible including non-ratification of the agreement in the EU Member States or a postponement thereof conditioned by safeguards for human rights protection in Mercosur countries.

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[56] For more see: https://ec.europa.eu/trade/policy/in-focus/eu-mercosur-association-agreement/

[57] *EU-MERCOSUR Association Agreement: A vast economic potential, building bridges for open trade and sustainable development.* 2016 [online]. Available at: http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156465.pdf

[58] Actually the LSE report indicates that the Mercosur countries themselves do not include human rights clauses in their free trade agreements as illustrated on a number of such agreements. For more see: *Sustainability Impact Assessment in support of association agreement negotiations between the European Union and Mercosur Inception Report*, 24 January 2018, p. 84. Available at: https://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156631.pdf

[59] The EU Commissioner for Trade Cecilia Malmström. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3396

[60] See https://www.fern.org/news-resources/eu-mercosur-deal-sacrifices-forests-and-rights-on-the-altar-of-trade-1986/

[61] Such assertions have already appeared in relation to Austria, France and Ireland. See for example: https://www.theguardian.com/world/2019/sep/19/austria-rejects-eu-mercosur-trade-deal-over-amazon-fires

[62] For a survey of main constraints see BALTENSPERGER, M. and DADUSH, U. The European Union-Mercosur Free Trade Agreement: prospects and risks, pp. 13–14. The paper also makes a thorough analysis of expected effects of the agreement. Available at: https://bruegel.org/wp-content/uploads/2019/09/PC-11_2019.pdf

5. Conclusions

The promotion of human rights by the EU over the years was important not only for the development of these rights at the EU level, but also at the international scene. Many countries, including Brazil, are influenced by the EU, its decisions and legislation. Once the EU decided to have the promotion of human rights as a main goal and put the respect for them as an essential element in every trade agreement since the 1990's, many countries also decided that this was a key issue and others, like Brazil, started to increasingly support that goal.

It is also important to highlight that the regular insertion of human rights clauses in EU agreements was a huge step and that without them – even with uncertainty about the real legal consequences of human rights violations in relations with EU – human rights would not be taken as seriously as they are nowadays.

Over the years Brazil became an active and important promoter of human rights as a leader in Latin America and also an emerging power worldwide. However, its approach to internal violations of human rights appears contradictory as not all of them were satisfactorily investigated.[63] For example, during the military dictatorship in Brazil (1964–1985) there were many evidences about tortures, killings and other violations of human rights and none of the responsible persons were punished once an amnesty law pardoning the crimes was signed in 1979.[64] Also, after the re-democratization of the country in 1988, the problems have not been fully solved, yet.[65] Brazil was also criticized for example by the Inter-American system of human rights in that regard for not applying transitional justice domestically[66] including the investigations about the Araguaia guerrilla.[67]

This approach is particularly controversial because externally Brazil acknowledges the importance of human rights and democracy for other countries

[63] SANTORO, M. *Will Brazil ever become a credible Human Rights promoter in South America?* In: VAN LINDERT, T.; VAN TROOST, L. (eds.). Shifting Power and Human Rights Diplomacy. Netherlands: Amnesty International Netherlands, 2014, pp. 67–76 [online]. Available at: https://www.amnesty.nl/content/uploads/2016/11/rising_power_brazil.pdf?x19843

[64] BRASIL. Lei nº 6.683, de 28 de agosto de 1979. Concede anistia e dá outras providências. Brasília, 1979 [online]. Available at: http://www.planalto.gov.br/ccivil_03/leis/L6683.htm

[65] See especially the work of the National Truth Commission that investigated the crimes committed by the military dictatorship.

[66] "*Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response*"; for more, see https://www.ictj.org/about/transitional-justice

[67] During the late 1960's in the region known as 'Bico do Papagaio' a left-wing guerrilla was established. The military forces went to the region and killed the people living there. They were decapitated and sometimes even thrown alive from helicopters. Until today the military force denied that this happened, the government has not investigated either.

in Latin America. Also, the United Nations and the EU are not usually rigid with Brazil's deficits in this area, once they see the country as an important ally in the promotion of human rights and for trade relations. Therefore a proper emphasis on human rights in agreements with the EU may play an important role in supporting good practice in Brazil.

Definitely over the years, EU-Brazil relations have strengthened, whether through bilateral relations or through regional agreements. It concerns not only economic, but also political issues. This helped Brazil to engage even more in the promotion of human rights internationally. Also, the human rights clauses present in previous EU-Brazil agreements and partnerships were evolving and becoming more easily enforceable against the parties that violate them. This could be seen for example in the Interregional Framework Agreement from 1999.

From this perspective the recent finalisation of the negotiations on the Association Agreement between Mercosur and the EU does not seem to be fully confirming previous developments. It lacks a clear human rights clause and does not offer an overall guarantee for the protection of human rights. It just refers to certain rights connected to trade, environmental issues as well as sustainable development. Also, environmental and human rights groups had demonstrated their concerns, once the deal could have massive implications on environmental and climate change.[68]

However, it will much depend on the practice of mutual relations and whether the EU will be ready to enforce these rights in individual cases. The scope of manoeuvre for the EU will probably be rather limited as a suspension of a "big" trade agreement might seem a high price. The question is whether – except the possible hard core legal consequences – the political negotiations and dialogues[69] will turn to be a sufficient tool. On the other hand, it may be expected that the importance of good relations with the EU would also put a real pressure on Brazil as well as other Mercosur countries to avoid or at least eliminate human rights violations in their internal policies.

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[68] For more see: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640138/EPRS_BRI(2019)640138_EN.pdf

[69] For example provisions of the agreement called Dialogues presumes in art. 1 a dialogue in several areas, namely, animal welfare matters, issues related to the application of agricultural biotechnology, combating antimicrobial resistance and scientific matters related to food safety, animal and plant health. For more see: https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158156.%20Dialogues.pdf

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EU-Ukraine Association Agreement's Effective Implementation into the Legal Order of Ukraine. Challenges and Successes

Roman Petrov*

Summary: This article focuses on challenges and successes of the implementation and application of the EU-Ukraine Association Agreement, which triggered unprecedented political, economic and legal reforms in Ukraine. This article focuses on the constitutional challenges that have arisen for Ukraine in the course of implementing the Association Agreement into its legal system. Two issues form the core of the paper. The first issue is effective implementation and application of the Association Agreement within the Ukrainian legal order. The second issue is compatibility between the Association Agreement and the Ukrainian Constitution. The latest political and legal developments in Ukraine are analyzed through the prism of effective implementation of the Association Agreement and the rise of pro-European judicial activism in Ukraine. In conclusion it is argued that the EU-Ukraine Association Agreement enhanced the adaptability of the national constitutional order to the European integration project and European common values.

Keywords: Association Agreement – Ukrainian Constitution – international law – European common values case law – constitutional amendments

1. Introduction

Ukraine's road towards the signature and entry into force of the EU-Ukraine Association Agreement (the Association Agreement) was highly dramatic.[1] Following unprecedented economic and political pressure from Russia, on 21 November 2013 the Government of Ukraine decided to suspend the process of

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[1] VAN ELSUWEGE, P., VAN DER LOO, G., PETROV, R. The EU-Ukraine Association Agreement: a New Legal Instrument of Integration without Membership? *Kyiv-Mohyla Law and Politics Journal*, 2015, vol. 1, pp. 1–19.

preparation for signature of the Association Agreement.[2] Further events led to the 'Maidan' revolution, which claimed more than 100 victims and led to the dismissal of President Victor Yanukovich on 22 February 2014, the annexation of Crimea by Russia in March 2014, and bloody military conflict in the Donbass area. However, the Association Agreement instigated far-reaching economic, political and profound constitutional reforms in Ukraine which will determine its future geopolitical orientation and economic stability.

Taking the above as a starting point, the aim of this chapter is to highlight the constitutional challenges that have arisen for Ukraine on the road of the implementation of the Association Agreement into its legal system. The paper focuses on two major features of this intricate process. The first feature is effective implementation and application of the Association Agreement within the Ukrainian legal order. The second feature is compatibility between the Association Agreement and the Ukrainian Constitution.

2. Impact of the EU-Ukraine Association Agreement on the Ukrainian legal system

The Association Agreement is destined to have a profound effect on the Ukrainian legal system for several reasons. First, it has already triggered and is likely to trigger further constitutional amendments aimed at ensuring that Ukraine effectively shares common EU democratic values and implements the Association Agreement. Second, the provisions of the Association Agreement and the relevant EU *acquis* must be effectively applied by the Ukrainian judiciary, raising the issue of direct effect within the Ukrainian legal system. Third, decisions by the common institutions set up under the Association Agreement will become part of the national legal system and find effective application by the national executive and judiciary.

2.1. Objectives and specific features of the Association Agreement with Ukraine

The AA is the most voluminous and ambitious among all EU association agreements with third countries (7 titles, 28 chapters, 486 articles, 44 annexes on about 2000 pages). This is comprehensive mixed agreement based on Article 217 TFEU (association agreements) and Articles 31(1) and 37 TEU (EU action

[2] Decision of the Ukrainian Cabinet of Ministers No 905-p of 21 November 2013. Available at: http://zakon0.rada.gov.ua/laws/show/905-2013-%D1%80

in area of Common Foreign and Security Policy). There are many novelties introduced to these agreements. Most prominent of them are strong emphasis on comprehensive regulatory convergence between the parties and possibility for the application of the vast scope of the EU acquis within the Ukrainian, Moldovan and Georgian legal orders. Of particular significance of the AA is the ambition to set up a Deep and Comprehensive Free Trade Areas (DCFTA), leading to gradual and partial integration of Ukraine into the EU Internal Market. Accordingly, the AA belong to the selected group of 'integration-oriented agreements', i.e. agreement including principles, concepts and provisions which is to be interpreted and applied as if the third country is part of the EU. It is argued that the AA is unique in many respects and, therefore, provide a new model of integration without membership.

The AA is characterised by three specific features: *comprehensiveness*, *complexity* and *conditionality*. The AA is *comprehensive framework agreement* which embrace the whole spectrum of EU activities from setting up deep and comprehensive free trade areas (DCFTA) to cooperation and convergence in the field of foreign and security policy as well as cooperation in the area of freedom, security and justice (AFSJ).[3]

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

Furthermore, the AA is founded on a strict *conditionality* approach which links the third country's performance and the deepening of its integration with the EU. In addition to the standard reference to democratic principles, human rights and fundamental freedoms as defined by international legal instruments (Helsinki Final Act, the Charter of Paris for a New Europe, the UN Universal Declaration on Human Rights and the European Convention on Human Rights and Fundamental Freedoms) (Art. 2 EU-Ukraine AA), the AA contains common

[3] VAN ELSUWEGE, P., VAN DER LOO, G., PETROV, R. (eds.). The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument, *EUI Working Papers (Law),* 2014/09.

values that go beyond classical human rights and also include very strong security elements such as the "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery" [Art. 2 EU-Ukraine AA].

Apart from the more general 'common values' conditionality, the AA contains a specific form of 'market access' conditionality, which is explicitly linked to the process of legislative approximation. Hence, it is one of the specific mechanisms introduced to tackle the challenges of integration without membership. Of particular significance is a far-reaching monitoring of Ukraine's efforts to approximate national legislation to EU law, including aspects of implementation and enforcement [Art. 475 (2) EU-Ukraine AA]. To facilitate the assessment process, the government of Ukraine is obliged to provide reports to the EU in line with approximation deadlines specified in the Agreements. In addition to the drafting of progress reports, which is a common practice within the EU's pre-accession strategy and the ENP, the monitoring procedure may include "on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed." [Art. 475 (3) EU-Ukraine AA].

2.2. Enhanced Conditionality in the Association Agreement with Ukraine

Conditionality is one of the key strategic tools of the ENP and it is, therefore, no surprise that this instrument also occupies a prominent place in the AA. Two different forms of conditionality can be distinguished in these agreements. On the one hand, the AA include several provisions related to Ukraine's commitment to the common European values of democracy, rule of law and respect for human rights and fundamental freedoms ('common values' conditionality). On the other hand, the part on the DCFTAs is based on an explicit 'market access' conditionality implying that Ukraine will only be granted additional access to a section of the EU Internal Market if the EU decides, after a strict monitoring procedure, that these countries successfully implemented its legislative approximation commitments. Both forms of conditionality bear some revolutionary features in comparison to other external agreements concluded between the EU and third countries.[4]

[4] PETROV, R. Implementation of Association Agreements between the EU and Ukraine, Moldova and Georgia: Legal and Constitutional Challenges'. In: KERIKMAE, T., CHOCHIA, A. (eds.). *Political and Legal Perspectives of the EU Eastern Partnership Policy.* Cham: Springer International Publishing, 2016, pp. 153–165.

2.2.1. 'Common values' conditionality

International agreements concluded on behalf of the EU include standard conditionality clauses. In general, an 'essential element clause' defining the core common values of the relationship is combined with a 'suspension' clause including a procedure to suspend the agreement in case of violation of those essential elements. Such a mechanism is also included in the AA (Art. 2 in conjunction with Art. 478 EU-Ukraine AA). Yet, the common values conditionality in the AA differs from similar provisions included in, for instance, the SAA with the Western Balkans. First, in addition to the standard reference to democratic principles, human rights and fundamental freedoms as defined by international legal instruments (Helsinki Final Act, the Charter of Paris for a New Europe, the UN Universal Declaration on Human Rights and the European Convention on Human Rights and Fundamental Freedoms), a specific reference to human rights and fundamental freedoms is included in the AA's provisions on "dialogue and cooperation on domestic reform" and in the AA's provisions dealing with EU cooperation with Ukraine on justice, freedom and security (Art. 7 EU-Ukraine AA). Second, the essential elements of the AA contain common values that go beyond classical human rights and also include very strong security elements such as the "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery". Third, "the principles of free market economy" as well as a list of other issues such as "rule of law, the fight against corruption, the fight against the different forms of trans-national organised crime and terrorism, the promotion of sustainable development and effective multilateralism" are not included in the definition of essential elements. Rather, they are considered to "underpin" the relationship between the parties and are "central to enhancing" this relationship. In other words, a distinction is made between hard core common values related to fundamental rights and security and a range of other general principles that are deemed crucial for developing closer relations but which cannot trigger the suspension of the entire agreement (Art. 478 EU-Ukraine AA).

2.2.2. 'Market access' conditionality

Apart from the more general 'common values' conditionality, the AA entail a specific form of 'market access' conditionality, which is explicitly linked to the process of legislative approximation in Ukraine. Hence, it is one of the specific mechanisms introduced to tackle the challenges of integration without membership. Of particular significance is a far-reaching monitoring of these countries'

efforts to approximate national legislation to EU law, including aspects of implementation and enforcement [Art. 475 (2) EU-Ukraine AA]. To facilitate the assessment process, the Ukrainian government is obliged to provide reports to the EU in line with approximation deadlines specified in the Agreement [Art. 475 (3) EU-Ukraine AA]. In addition to the drafting of progress reports, which is a common practice within the EU's pre-accession strategy and the ENP, the monitoring procedure may include "on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed." Arguably, the latter option is a new and far-reaching instrument introduced precisely to guarantee that legislative approximation goes beyond a formal adaptation of national legislation.[5]

2.3. Protection of EU Values in the Association Agreement with Ukraine via EU's sanctions towards third countries

Principles of sovereignty and territorial integrity, inviolability of borders and independence considered as core values of the AA and must be shared and respected by the EU and Ukraine. Furthermore, in case of the EU-Ukraine AA, these principles constitute essential elements of the agreement.

The overall security situation in the EU's neighbouring countries for the last decade has gradually deteriorated. Currently Moldova and Georgia have unresolved border security conflicts either with other EU's neighbouring countries or with third countries (mainly with the Russian Federation). Ukraine has been plunged into flames of bloody civil conflict since April 2014.

Moldova experiences prolonged conflict with its breakaway part Transnistria (so called Pridenstrovian Moldovan Republic). This territory is not recognised by any of the UN members and formally constitutes part of the Republic of Moldova (Transnistria autonomous territorial unit with special legal status). However, *de facto,* Transnistria is an independent state with strong presence of Russian military troops. The EU is engaged in solving the Transnistrian conflict via the European Border Assistance Mission to Moldova and Ukraine (EUBAM). This structure as part of the EU Common Security and Defence Policy helps to control traffic on borders between Moldova and Ukraine around Transnistria in order to prevent illegal movements of people and goods from and to Transnistria.[6]

Georgia went through a military conflict with Russia over the breakaway areas of Abkhasia and South Ossetia. The conflict took place August 2008 and

[5] VAN DER LOO, G. *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area*. Brill/Nijhoff, 2015.

[6] KUROWSKA, X., TALLIS B. Border Assistance Mission: Beyond Border Monitoring? *EFARev,* 2009, vol. 14, no. 1, pp. 47–64.

led to many casualties and loss of control of Georgia over Abkhasia and South Ossetia. Currently Russian military troops are stationed in Abkhasia and South Ossetia and *de facto* control their territories.

The EU played quite modest role in settling the conflict in the Caucasus allowing some EU Member States to lead the peace process in the region.[7] No sanctions were applied by the EU in the aftermath of the Georgian-Russian conflict.

However, the next security challenge within the country which was on the road of signing the AA compelled the EU to act and to apply sanctions against one of the leading geopolitical players on the European continent – the Russian Federation. It happened after self-proclaimed authorities the Autonomous Republic of Crimea hold unrecognised referendum under Russian military presence in March 2014. As a result of this the integral part of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – were annexed by the Russian Federation and incorporated by the Russian Federation as own federal subjects on March 21, 2014. The fact of annexation is not recognised by Ukraine and the United Nations UN [General Assembly Resolution 68/262 (2014)] and is universally considered as blatant violation of international public law by the Russian Federation.[8]

Following turbulent events in Crimea the EU decided to apply wide scale sanctions against Russia. The EU sanctions led to a complete halt in the EU-Russia relations (suspension of bilateral talks on visa matters and on new EU-Russia agreement, cancellation of the EU-Russia summit) and to imposing measures against 'certain persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine' (travel bans and asset freezes). The list of these persons is constantly increasing and covers leading Ukrainian, Russian and Crimean politicians related to the fact of the Crimea's annexation. The EU had to extend the scope of sanctions against Russia after the security situation in Ukraine has drastically deteriorated by the end of the summer 2014. The world was shocked when Malaysia Airline flight MH17 was shot down above the part of Eastern Ukraine controlled by pro-Russian separatists. This incident caused the loss of 298 lives and drastically deteriorated security situation in the region and in the EU. Bloodshed conflict between Ukraine and armies of self-proclaimed 'peoples republics' of Donetsk and Lugansk led to several thousand casualties and about a million refugees from the East of Ukraine (UN Report on the human rights situation in Ukraine in 2017). The EU Member States had to speak with one voice in order to show their solidarity against direct

[7] VASILYAN, S. The External Legitimacy of the EU in the South Caucasus. *EFARev,* 2011, vol. 16, no. 3, pp. 341–357.

[8] MARXSEN, C. The Crimea Crisis – An International Law Perspective. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, vol. 74, no. 2, pp. 367–391.

Russian involvement into civil conflict in Ukraine. As a result, the EU Member States agreed on new level of sanctions against Russian and Ukrainian officials and nationals involved in supporting the separatists' movement in the Donbass region of Ukraine. Hitherto, the EU's sanctions against Russia concerned the following issues: diplomatic measures (cancellation of the EU-Russia political dialogue and dismantling of G8); restrictive measures (asset freezes and visa bans of persons and entities responsible for actions against Ukraine's territorial integrity); restrictions for Crimea and Sevastopol; "economic" sanctions against Russia (prohibition of exports of arms, energy and military related technologies and dual use goods, freezing economic cooperation).

The EU sanctions were issued upon unanimous decision of all the EU Member States on basis of Article 215 TFEU as part of the Common Foreign and Security Policy (CFSP). This fact represents evident solidarity of all EU Member States facing a violation of territorial integrity of one of its nearest neighbours which is about to enter into association relations with the EU.

It is hoped that the procedure of political dialogue and institutional framework of the AA will be effectively used to protect the principles of sovereignty and territorial integrity, inviolability of borders and independence considered as core values of the AA.

3. Constitutional Amendments Caused by the Implementation of the EU-Ukraine Association Agreement

One of the first 'post-Maidan' constitutional amendments took place in June 2016 when the *Verkhovna Rada* adopted the 'Law on amending the Ukrainian Constitution (as to justice)'.[9] These constitutional amendments were proposed by President Poroshenko in light of the fight against corruption and the independence of the judiciary in Ukraine. The constitutional amendments sparked considerable public debate in Ukraine and beyond. Externally, the European Commission for Democracy through Law (Venice Commission) twice scrutinized the draft amendments for their compliance with European standards and issued several important reservations.[10] Internally, on the one hand, the draft amendments were

[9] Ukrainian Law 'On amending the Constitution of Ukraine (as to justice)' Zakon Ukrainy "Pro Vnessennia Zmin do Konstitutsii Ukrainy (shodo pravosuddia)" (02 June 2016) No 1401-VIII, VVR (2016) No 28.

[10] The reservations mainly concerned the scope of judges' immunity and preserving the balance of power in the procedure for appointing judges and prosecutors (election of the Supreme Law

criticized for giving extended powers to the President of Ukraine to influence the appointment of judges, narrowing the scope of judges' immunity, and for keeping a complicated system of specialized courts in Ukraine. On the other hand, the position of the Office of the President of Ukraine was that the constitutional amendments were crucial to achieve the objectives of the Association Agreement in terms of sharing common values, fighting corruption and improving access to the judiciary. In particular, the constitutional amendments ensure that Ukraine observes the essential elements of the Association Agreement, such as respect for the principle of the rule of law,[11] and meets the objectives of Title III of the Association Agreement on justice, freedom and security, which call on Ukraine to consolidate the rule of law, to improve the efficiency of the judiciary, to safeguard the independence and impartiality of the judiciary, and to combat corruption.[12]

The official position of the EU institutions regarding constitutional reform in Ukraine was rather supportive. The annual report on progress in implementing the Association Agreement hailed the constitutional amendments of 2016 as legislation that "strengthens judicial independence and [reorganizes] the court system, by streamlining the judicial instances (from four to three) and by subjecting the sitting judges to examinations and mandatory electronic asset declarations".[13] Furthermore, it should be acknowledged that the most recognized impact of the Association Agreement[14] on constitutional reform in Ukraine can be seen in revised Article 124 of the Constitution, wherein it is stated that "Ukraine may recognize the jurisdiction of the International Criminal Court (ICC) as provided for by the Rome Statute of the International Criminal Court". This amendment overrules a decision of the Ukrainian Constitutional Court in 2001 which explicitly considered recognition of the jurisdiction of the ICC as incompatible with the national Constitution, thus ruling out ratification of the former by the Ukrainian Parliament.[15] The wording of revised Article 124 of the Ukrainian Constitution

Council, which is responsible for appointing judges (qualified majority voting) and the right of the Ukrainian Parliament to veto the appointment and removal of Ukraine's General Prosecutor). European Commission for Democracy through Law (Venice Commission), Opinion №803/2015 of 26 October and 3 December 2015.

11 Preamble, Art. 1(2)(e) and Art. 2 Association Agreement, *OJ,* 2014, L 161/1.

12 Art. 14 Association Agreement, *OJ,* 2014, L 161/1.

13 Joint Staff Working Document 'Association Implementation Report on Ukraine' [SWD(2016) 446 final].

14 Art. 8 Association Agreement, *OJ,* 2014, L 161/1.

15 Vysnovok Constitutsiynoho Sudu Ukrainy shodo Vidpovidnosty Constitutsii Ukrainy Rymskomu Statutu Mizhnarodnogo criminalnogo sudu (Decision of the Ukrainian Constitutional Court on the Statute of the International Criminal Court) (July 11, 2001), Case No 1–35/2001, where the Ukrainian Constitutional Court stated that in accordance with the Rome Statute the International Criminal Court complements the system of national judiciaries. For example, the International Criminal Court may exercise its jurisdiction on the territory of States Parties to the Rome Statute.

opens a possibility for the Ukrainian Parliament to ratify the Rome Statute in the near future. However, ratification of the Rome Statute is likely to be postponed until eventual implementation of the 'Minsk II Agreement' regarding the military conflict in Eastern Ukraine (Donbass area) which directly or indirectly involves multiple actors. In particular, those involved in the conflict must ensure an effective ceasefire, effective control by Ukraine of its eastern border with Russia and guarantee an amnesty for illegally armed belligerents. These actions must take place before ratification of the Rome Statute in order to avoid entrenching a legal war between the government of Ukraine and the Russian government and the governments of the self-proclaimed separatist republics in eastern Ukraine.[16]

Another test of Ukraine's devotion to common EU values as enshrined in the Association Agreement took place in September 2017, when the Verkhovna Rada adopted a new education law. This immediately sparked a controversial reception and protests by representatives of national minorities (mainly the Hungarian minority) in Ukraine.[17] This law foresees a reduction in the scope of instruction in the mother tongue of a national minority at secondary education level. According to the new education law, only primary school education can be given in the mother tongue of a national minority in Ukraine. Secondary and higher education must be offered only in the official language (Ukrainian) with the possibility to study the mother tongue as one of the courses. The Hungarian government fiercely protested against the new educational law on the ground that it violates the rights of the Hungarian minority in Ukraine.[18] Furthermore, the Hungarian government asserted that the Ukrainian education law is in conflict with the objectives and human rights commitments by Ukraine in the Association Agreement.[19] In order to prevent the escalation of tension with some EU Member States, the Ukrainian authorities submitted Article 7 of the education law for assessment by the Venice Commission. In its assessment issued on 11 December 2017, the Venice Commission noted the vague nature of the relevant provisions

This contradicts Title VIII "Judiciary" of the Ukrainian Constitution, under which (Art. 124) "delegation of the competences of the national judiciary is not permitted".

[16] Briefing of the European Parliament "Ukraine and the Minsk II agreement: On a frozen path to peace?". Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573951/EPRS_BRI(2016)573951_EN.pdf

[17] Law of Ukraine "On Education", Zakon Ukrainy "Pro Osvity" (05 September 2017) No 2145-VIII, VVR (2017) No 38–39.

[18] "Hungary Threatens to Block Ukraine's EU Approach", *EU Observer* (27 September 2017). Available at: https://euobserver.com/tickers/139173. HRYNEVYCH, L. Ukraine Education Law Does Not Harm Minorities, *EU Observer* (20 October 2017). Available at: https://euobserver.com/opinion/139550

[19] "Hungary seeks to recognize Ukraine violator of Association Agreement over educational law". Available at: https://www.unian.info/politics/2190089-hungarian-foreign-minister-to-put-ukraines-education-law-on-agenda-of-ua-eu-association-councils-meeting.html

of the national education law and recognized the narrowing of access by national minorities to obtaining secondary education in their mother tongue. The Venice Commission recommended adopting further implementing legislation in order to ensure a sufficient level of teaching in languages of the EU Member States in Ukraine. However, the Venice Commission recognized discrimination against the languages of national minorities that are not official languages of the EU (Russian) and called on Ukraine not to endanger "the preservation of the minorities' cultural heritage and the continuity of minority language education in traditional schools".[20] The Ukrainian government welcomed the findings of the Venice Commission and agreed to follow most of them in the course of drafting and adopting further education legislation and to ensure a transitional period for implementation of the education law until 2020.[21] Meanwhile, the EU's reaction to the language issue in the education law and its compatibility with the objectives of the Association Agreement remains neutral.[22] However, it is possible that the Venice Commission's recommendations may be taken on further board by EU institutions and become part of the EU conditionality requirements towards Ukraine in the process of further implementation and application of the Association Agreement in area of protection of human rights.

One of the most significant constitutional developments caused by the implementation of the EU-Ukraine Association Agreement is the introduction of so-called "European integration clauses" in February 2019.[23] These clauses were amended to the preamble and provisions of the Ukrainian Constitution on the competences of the President of Ukraine, the *Verkhovna Rada* and Cabinet of Ministers of Ukraine. The aim of the "European integration clauses" is twofold. On one hand, these clauses formalize the irrevocability of the strategic course of Ukraine and its legislature, executive and judiciary towards the full membership in the EU and NATO. Furthermore, these clauses may encourage and legitimize

[20] Opinion of the European Commission for Democracy Through Law (Venice Commission) 'On the Provisions of the Law of Education of 5 September 2017', 11 December 2017, Opinion No 902/2017.

[21] Statement of the Ukrainian Ministry of Education and Science on the findings of the Venice Commission, 11 December 2017. Available at: https://mon.gov.ua/ua/news/poziciya-mon-shodo-opublikovanogo-visnovku-venecijskoyi-komisiyi-ministerstvo-dyakuye-za-robotu-komisiyi-ta-gotove-implementuvati-rekomendaciyi

[22] Joint Staff Working Document, Association Implementation Report on Ukraine, (07 November 2018), SWD(2018) 462 final.

[23] Law of Ukraine "On Amendment to the Constitution of Ukraine (regarding strategic course of the state towards the acquisition of the full membership in the EU and NATO)", (07 February 2019), No 2680-VIII. The amended relevant provision of the preamble of the Constitution of Ukraine reads as "strengthening civil accord on the Ukrainian soil and confirming the European identity of the Ukrainian peoples and irrevocability of the European and Euroatlantic course of Ukraine".

the pro-European activism of the Ukrainian judiciary that implies application of the relevant CJEU's case law. On the other hand, the "European integration clauses" were adopted on the eve of the presidential and parliamentary elections in Ukraine in March 2019 that led to the arrival into the office of a new President of Ukraine, political newcomer, former comedian Volodymyr Zelenskiy. Therefore, these clauses were introduced as a constitutional guarantee with a purpose to prevent possible change of course of Ukrainian foreign and domestic policies caused by potential change of the ruling political power and elite in Ukraine as a result of the presidential and parliamentary elections in 2019.

4. Application and Direct Effect of the EU-Ukraine Association Agreement in the Ukrainian legal order

The Ukrainian judiciary already occasionally referred to the fundamental principles of EU law and some elements of the EU *acquis* as well as to CJEU case law before signature of the Association Agreement.[24] A combination of external and internal factors may explain this observation. First, since 2004 Ukraine's pro-European foreign policy has been underpinned by a national program for approximating Ukrainian legislation to EU law. This has served as vital encouragement for the few Ukrainian judges with expertise in EU law to refer to the relevant EU *acquis* in their decisions. Second, the EU has been offering result-oriented, technical and financial support to the Ukrainian judiciary. This support has resulted in significant internal institutional reforms within the Ukrainian judiciary, such as establishment of a system of administrative courts. According to the case law of the Ukrainian courts, mostly administrative judges have been inclined to pioneer application of the EU *acquis* within the Ukrainian judiciary.[25] A third factor is the increased transparency of the Ukrainian judiciary. A national registry of Ukrainian case law was launched in 2006 and drew positive feedback from among the Ukrainian legal community. Judges and lawyers are regularly informed about developments in EU law via workshops and courses in Ukrainian higher legal education institutions. The law 'On the All State Program on the

[24] PETROV, R. Regulatory Convergence and Application of EU Law in Ukraine. In: VAN ELSUWEGE, P., PETROV, R. (eds.). *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* Oxford: Routledge Press, 2014, pp. 137–158.

[25] PETROV, R., KALINICHENKO, P. The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine. *International and Comparative Law Quarterly*, 2011, vol. 60, no. 2, pp. 325–353.

adaptation of Ukrainian legislation to EU laws' of 2004 encouraged the Ukrainian judiciary to use the EU *acquis* as an important source of reference.[26] This law, which is already outdated today, envisages export of the whole 'accession *acquis*' into Ukraine's legal system.[27]

There is a long track of the Ukrainian judiciary (including the Ukrainian Constitutional Court) applying the EU *acquis* as a persuasive source of law even before signature of the Agreement. For example, the Ukrainian courts recognized the priority of the Association Agreement's predecessor (the EU-Ukraine PCA) over conflicting provisions of national law.[28] Furthermore, in cases related to state liability, the Ukrainian administrative courts imported from the EU legal system the concept of legal certainty, previously unknown to the Ukrainian legal system. For example, in the *Person v Kiev City Centre for Social Assistance* case,[29] the Kiev District Administrative Court held that the rights of the disabled to claim social and financial assistance from the state flow from the principle of legal certainty. This means that a state cannot justify its failure to guarantee constitutional rights by the absence of a specific national law. For this purpose, the Kiev District Administrative Court referred to the CJEU judgment in *van Duyn v the Home Office*,[30] wherein it was held that nationals may rely on the state's obligations, even in cases when those obligations are contained in a law without direct effect. Furthermore, the Ukrainian courts developed the principle of legitimate expectations in the case of *Person v Darnitsa District of Kiev Center for Social Assistance*,[31] concerning the right to benefits of those who took part in the liquidation operation during the Chernobyl catastrophe. The Kiev District

[26] Law of the Verkhovna Rada of Ukraine 'About the All State Programme of adaptation of Ukrainian legislation to that of the EU' (official translation) Zakon Ukrainy "Pro Zagalnoderzhavnu Programu Adaptatsii Zakonodavstva Ukrainy do Zakonodavstva Evropeyskogo Soyuzu" (18 March 2004) No 1629-IV, VVR (2004) No 29.

[27] The main objective of this law is 'alignment of the Ukrainian legislation with the *acquis communautaire*, taking into consideration criteria specified by the EU towards countries willing to join the EU'.

[28] Ukrainian High Commercial Court judgment of 2 February 2005, No. 12/267. Also Ukrainian High Commercial Court judgment of 25 March 2005 *(Closed Stock Company 'Chumak' v Kherson Custom Office)* No. 7/299. Also Ukrainian High Commercial Court judgment of 22 February 2005 *('Odek' LTD v Ryvne Custom Office)* No. 18/303.

[29] Kiev District Administrative Court judgment of 25 November 2008, No. 2/416. Apparently, this judgment became a pattern for subsequent decisions by Ukrainian administrative judges, see: Kiev District Administrative Court judgment of 24 November 2008, No. 5/503. Kiev District Administrative Court judgment of 1 December 2008, No. 5/451. Kiev District Administrative Court judgment of 10 November 2008, No. 5/435.

[30] Case 41/74 *van Duyn v Home Office,* EU:C:1974:133 (on free movement of workers between EU Member States and direct effect of EU Directives).

[31] Kiev District Administrative Court judgment of 26 June 2008, No. 4/337.

Administrative Court held that the principle of state liability to offer compensation to those involved in the liquidation of the Chernobyl disaster also flows from the same CJEU case *van Duyn v Home Office*. Therein, the Kiev District Administrative Court found that if the state formally acknowledged its commitment to offer compensation to those involved in the Chernobyl disaster, it could not refer to its own failure to fulfil its commitments in order to avoid liability, which would also violate the legitimate expectations of Ukrainian nationals.

Such bold judicial activism of administrative judges, previously unknown for a post-Soviet legal system, was not welcomed by all representatives of the Ukrainian establishment. In response to a growing number of similar decisions by the administrative courts, the Ukrainian government under President Yanukovich went to the Ukrainian Constitutional Court to question the compensation-related case law of the administrative courts concerning those involved in liquidation of the Chernobyl disaster. In its judgment of 25 January 2012, the Constitutional Court overruled the established case law of the administrative courts on the ground that social support for Ukrainian nationals guaranteed by the Ukrainian Constitution must be provided in line with the financial capacities of the state in accordance with the principles of proportionality and justice.[32] The Constitutional Court did not consider the relevance of the principle of legal certainty at all but referred to selected decisions of the ECtHR in justifying its own position. This controversial decision by the Constitutional Court was widely criticized – by the expert community in Ukraine and even by some Constitutional Court judges in their special opinions – for lack of reasoning, a pro-governmental position and misleading references to ECtHR case law.[33] The situation became even worse when the Supreme Disciplinary Body for judges in Ukraine opened a disciplinary procedure against those administrative judges who referred to CJEU case law in their compensation-related decisions concerning those involved in the Chernobyl disaster.

Further dramatic political events in Ukraine and the *Maidan* Revolution in 2013–2014 – which led to signature of the Association Agreement in June 2014 – reinvigorated the debate on application of the CJEU case law by the Ukrainian judiciary. At the end of 2014, the Ukrainian High Administrative Court decided to intervene and to fill this gap in a traditional way for post-Soviet courts – to issue an announcement (information letter), to all administrative judges in Ukraine, [34] in which the Ukrainian High Administrative Court stated that the EU founding

[32] Ukrainian Constitutional Court decision of January 23. 2012, Case No 1–11/2012.

[33] For example, see Special Opinion of Constitutional Court Judge Viktor Shishkin in Ukrainian Constitutional Court decision of 23 January 2012, Case No 1–11/2012.

[34] Announcement by the Ukrainian High Administrative Court on 18 November 2014, No 1601/11/10/14-14.

treaties do not bind Ukraine and, therefore, EU law and the case law of the CJEU cannot be considered as part of the Ukrainian legal system. Additionally, the Ukrainian High Administrative Court confirmed that 'legal positions as they are formalized in decisions of the CJEU can be taken into consideration by administrative courts as argumentation, reflection regarding harmonious interpretation of Ukrainian legislation in line with established standards of the EU legal system, but not as a legal foundation (source of law) of a situation that caused a legal dispute'.

This statement by the Ukrainian High Administrative Court played a dubious role. On the one hand, it repudiated any formal grounds for Ukrainian judges to apply various sources of the EU *acquis* in their decisions. On the other hand, it gave a green light for Ukrainian judges to refer to general principles, doctrines and case law of the CJEU as a persuasive source of interpretation in their decisions. Unfortunately, the Ukrainian High Administrative Court did not go far and kept silent on the issues of application of the EU *acquis* referred to in the text of the Agreement and of binding decisions of the EU-Ukraine Association Council. Ironically, new constitutional amendments of 2016 envisage abolition of the system of high specialized courts in Ukraine, thereby undermining the value of the announcement by the Ukrainian High Administrative Court to the Ukrainian judiciary.

Beyond any expectation, this clarification by the Ukrainian High Administrative Court on applying CJEU case law found wide support among judges of common and administrative courts in Ukraine. In the period 2015–16, Ukrainian general, specialized and high courts referred to the Agreement and case law of the CJEU in dozens of decisions.[35] In most cases, Ukrainian judges who already possess considerable experience and knowledge in applying the ECHR and ECtHR case law strengthened their argumentation with frequent references to the EU *acquis* and the Association Agreement, in particular in decisions concerning protection of fundamental human rights in Ukraine. For instance, since 2015 most decisions by administrative courts on rights of pensioners provide a standard statement that the court applies the principle of rule of law in line with ECtHR and CJEU case law. In these cases, Ukrainian judges cite the announcement by the Ukrainian High Administrative Court on taking into account CJEU case law as a source of argumentation concerning harmonious interpretation of Ukrainian law with the EU *acquis*.[36] Some judges went even further and considered the

[35] Detailed information on the case law of the Ukrainian judiciary is Available at: http://www.reyestr.court.gov.ua. For example, analysis of decisions by the Ukrainian courts issued in 2014 and 2016 indicates a significant rise in references to the Association Agreement and various sources of the EU *acquis* (e.g., fundamental principles, secondary acts, case law of the CJEU).

[36] For example, Chernigyv District Court judgment of 26 June 2016, No. 750/5197/16-a.

entry into force of the Association Agreement in Ukraine as an obligation to apply EU common values in Ukraine.[37] References to the Association Agreement and relevant EU *acquis* found application in cases regarding Ukrainian natural persons and companies that claimed direct effect of these provisions in cases concerning paying customs duties when crossing the Ukrainian border;[38] supply and trade of natural gas;[39] defining the origin of goods (honey);[40] or the legality of legislative drafts by the Ukrainian president.[41] However, the Ukrainian courts have not yet recognized (or have mainly avoided recognizing) the direct effect of provisions of the Association Agreement in their decisions. In particular, the issue of direct effect of the Association Agreement may find particular relevance in the case of possible litigation on the correspondence of Ukrainian laws and other legal acts with the objectives, principles and 'essential elements' of the Association Agreement before the Constitutional Court and general courts. Among the most recent examples are the Executive Order of the President of Ukraine on banning Russian social networks (in the matter of national security and sanctions against the Russian Federation caused by the annexation of Crimea in 2014 and military intervention in eastern Ukraine)[42] and the Law of Ukraine on banning the St. George (Guards') Ribbon. This was widely used by paramilitary separatist groups and Russian army units in the Donbass area and during the annexation of Crimea and thus may be considered as propaganda for Russian military intervention in Ukraine.[43] However, these legislative acts raise some concerns regarding their compliance with the objectives of the Association Agreement in general, and freedom of expression and the principle of proportionality (as

[37] For example, the Kolomya City Court judgment of 07 July 2016, No. 346/3499/16-c contains a rather emotional passage 'The Court notes that after the signing of the Association Agreement with the European Union by the President of our country, and after the ratification by the supreme legislative body (the Verkhovna Rada Ukraine, author), Ukraine, as a state aspiring to full membership in the EU, must respect the private property rights of every person as a basic tenet and a cornerstone of European values and inviolable foundation of the EU, which must by complied with by all Member States and by associated countries.' (Translation by the author)

[38] Lviv Regional Appellate Court judgment of 06 April 2016, No. 33/783/241/16.

[39] Kiev District Administrative Court judgment of 13 April 2016, No. 826/594/16.

[40] Tsyrypinsk District Court judgment of 29 April 2016, No. 664/906/16-c.

[41] Ukrainian High Administrative Court judgment of 26 April 2016, No. 800/251/16.

[42] Executive Order (*Ukaz*) of the President of Ukraine of 15 May 2017, No. 133/2017.

[43] Law of Ukraine 'Amending the Administrative Code regarding the ban on production and propaganda of the St. George (Guards') Ribbon' Zakon Ukrainy "Shodo Zaborony Vygotovlenya i Propagandy Georgievskoy (gvardiyskoy) Strychky" (16 May 2017) No 2031-VIII, VVR (2017) No 26.

applied and interpreted within the ECHR and the EU Charter of Fundamental Rights) in particular.[44]

In the course of implementation of the EU-Ukraine AA the Ukrainian judiciary increased references to the relevant CJEU decisions within the scope of the EU-Ukraine sectoral cooperation. Most of such references are in the field of competition law. For instance, the Supreme Commercial Court of Ukraine and Appellate Commercial Courts referred to the Case C-8/08 *(T-Mobile Netherlands BV and Others v Raad)*[45] with the purpose to apply the concept of 'concerted practice' that means a causal connection between concerted action and the market conduct of undertakings in competition law. Furthermore, Ukrainian administrative courts (regional appellate level) made numerous references to the CJEU case C-255/02 ***Halifax*** *plc and Others* ***v***. ***Commissioners*** *of Customs & Excise.*[46] These references concerned the application of the doctrine of 'business purpose' in the course of exemption from paying the VAT.

5. Application of Decisions of the EU-Ukraine Common Institutions

The Association Agreement established a specific institutional framework (the Association Council, the Association Committee, and the Parliamentary Assembly), characterized by the competence to issue decisions and legal acts of a binding nature. The prime objective of the Association Council is to supervise and monitor the Association Agreement within the "framework of regular meetings between the representatives of the Parties."[47] For this purpose, the Association Council has the power to take decisions which are binding upon the parties. This power can be delegated to the Association Committee which assists Ukraine in achieving the results of the association.[48]

The binding force of decisions and acts by joint EU-Ukraine institutions is new for the Ukrainian legal system, so that their legal effect is not as yet clarified. Hitherto, neither the EU-Ukraine Association Council nor other common

[44] VAN ELSUWEGE, P. "Ukraine's Ban on Russian Social Media: On The Edge Between National Security and Freedom of Expression", *VerfBlog,* (6 February 2017). Available at: http://verfassungsblog.de/ukraines-ban-on-russian-social-media-on-the-edge-between-national-security-and-freedom-of-expression

[45] Case C-8/08, *T-Mobile Netherlands BV and Others v Raad,* ECR 2009 I-4529.

[46] Case C-255/02, *Halifax plc and Others v. Commissioners of Customs & Excise,* ECR 2006 I-1609.

[47] Art. 463(1) Association Agreement, *OJ* 2014, L 161/1.

[48] Art. 465(2) Association Agreement, *OJ* 2014, L 161/1.

institutions have so far issued any decisions of a binding nature. Therefore, there has been no reason for the Ukrainian judiciary to clarify their position on this complicated issue. In the meantime, the Ukrainian Parliament and the government are working on a draft law to regulate all legal issues related to implementation and application of the Association Agreement. Unfortunately, this draft law has not yet been proposed even for a first reading in the Ukrainian Parliament. According to the draft law, decisions by common EU-Ukraine institutions will not be directly applicable but will be enforced similar to international agreements. In particular, the draft law considers binding decisions by common EU-Ukraine institutions either as international agreements,[49] or as national laws, or as secondary acts – depending on their content. In the former two cases, binding decisions of common EU-Ukraine institutions must be regarded as part of the national legal system, which takes precedence over conflicting national legislation but not over the Constitution. In the latter case, it will be regarded as a secondary legal source for the Ukrainian legal system. The draft law obliges the Ukrainian judiciary to apply these decisions as sources of law. Non-binding recommendations by common EU-Ukraine institutions can be used as a source for interpreting Ukrainian legislation and Ukraine's international obligations.

6. Conclusion

The objective of effective implementation of the Association Agreement was to enhance the adaptability of the national constitutional order to the European integration project and European common values. Internally, Ukraine went through a dramatic transformation from a country which pursued a multi-vector foreign policy aimed at appeasing two conflicting integration projects (European and Eurasian) to a country with a firm pro-European policy as cemented in the Association Agreement. Externally, Ukraine committed itself to the demanding conditionality and monitoring processes envisaged in the Association Agreement in return for better access to the EU internal market, establishing a Deep and Comprehensive Free Trade Area and abolishing the visa regime with the EU.

The Association Agreement established a sustainable institutional and legal framework for application of the EU *acquis* including CJEU case law and comprehensive legislative approximation between Ukrainian and EU law. However,

[49] Within the issues related to political, territorial, human rights, participation in international unions and organizations, collective security, usage of Ukrainian territory and natural resources, military assistance and deployment of Ukrainian troops abroad (Art. 3(2) of the Ukrainian Law on International Treaties).

the institutional reforms that have already taken place cannot be regarded as fully sufficient. The Ukrainian Parliament has failed to establish substantive and procedural foundations for applying and implementing the Association Agreement in the Ukrainian legal order. However, this gap is being partially filled by a surprising judicial activism in Ukraine. The Ukrainian judiciary has already started referring to the Association Agreement and relevant parts of the EU *acquis*, thereby laying a foundation for regular application of general principles of EU law in applying the provisions of the Association Agreement. Undoubtedly, this is a great challenge for the Ukrainian legal system. A significant role in this process is expected from the Ukrainian Constitutional Court, which must eventually clarify the status of the Association Agreement within the Ukrainian legal order, and the newly formed Ukrainian Supreme Court, which has recruited EU-minded judges and academics.

Furthermore, the Ukrainian Constitution has already been amended in order to encompass specific requirements of the Association Agreement (such as ratification of the Rome Statute and access to the judiciary). Besides, further amendments related to implementing the Association Agreement may be expected, such as strengthening the role of international law within the Ukrainian legal system, reference to common EU values – languages of national minorities in the new education law – along with acknowledging and formalizing the potential transfer of some of Ukraine's sovereign powers to supranational international organizations. Moreover, pressure by some EU Member States with reference to the Association Agreement may persuade Ukraine to amend the education law related to minority languages.

Looking more widely at the pattern of adaptability of the Ukrainian constitutional order to the European integration project, we may conclude that external factors – such as the aims of EU-Ukraine relations, including potential membership in the EU, and introduction of a visa-free regime – play a catalytic role for constitutional change.

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"Going Global" and Regionalization in EU-China Relationship: Perspective from the Baltics

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Summary: This paper outlines the complex trends of the EU-China relationship. The EU and China have an extensive and growing economic engagement. China's "going global" and the Belt and Road initiative may provide further opportunities for cooperation. However, considerable challenges, concerns and uncertainty exist. There is a divergence of values and diversity of interests. The wider frameworks and regional formats, such as 17+1 have mixed results. Moreover, tense relations between the US and China complicate even further complex and delicate balance of interests and expectations between the EU and China. This study identifies the existing trends and add the new contributing impetus to EU-China relations from the Baltic perspective.

Keywords: European Union – China – Belt and Road Initiative – Going global – Regionalization – 17+1 – Baltic countries

1. Introduction

China and the EU have an extensive and growing economic relationship. On the European level the cooperation is growing rapidly in terms of trade and investment. The state of EU – China economic relations is a direct consequence of the EU policies, China's "Go Global" strategy and Belt and Road Initiative (BRI), and the accelerated internationalization process of large Chinese corporations.

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It is apparent that untapped trade and investment opportunities exist between China and the EU. China's size and dynamism mean that these opportunities are likely to grow with time.

However, the relationship faces considerable challenges due to perceived distortions caused by China's state capitalist system and the diversity of interests of the EU Member States. China's investments in European countries raise a series of question marks regarding international trade, international decision-making process, sustainability of large projects, managerial capabilities, and cooperation in innovation-driven sectors. These opportunities of cooperation and concerns of diverging interests and practices are particularly visible in regional formats such as Cooperation between China and Central and Eastern European Countries, more commonly known as "17+1". Moreover, wider frameworks and developments may have significant implications for EU-China interaction.

This paper outlines the complex trends of EU-China relationship. It identifies both opportunities and risks within different formats from the Baltic perspective. The article specifically examines two important "semi-outside" and "semi-inside" factors, respectively wider and regional dimensions of EU-China engagement. The characteristics and developments of these formats contribute to the mutual dynamic and prospects of cooperation.

2. EU-China: from trade and investment to multilateral partnership?

The European Union and China have an increasingly intensive, multifaceted and complex relationship. Convergence of mutual interests and perceived opportunities contributes to a developing notion of partnership. The EU and China have long been steady trading partners. The Union's trade relations with China are worth 1 billion daily and growing. The EU's trade with China hit a 10-year high last year, with exports increasing by 5,5 % and imports by 6,4 % since 2018.[1] China is now the EU's second-biggest trading partner behind the United States and the EU is China's biggest trading partner. In time of technology developments, business innovations, and decreasing trade costs, China has become a hub of global supply chains. Although the shift in global value chain puts economies heavily involved in the "Asia value chain" under competitive pressure, an interest in mutual economic relations between Europe and China remains strong.

[1] Eurostat. Main trading partners – EU28. In: *Euro area international trade in goods surplus €20.7 bn*, November 2019 [online]. Available at: https://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_151969.pdf

The mutual investment is relatively modest, the large volume of trade notwithstanding. According to the European Commission, the Chinese foreign direct investment (FDI) accounted for 2 % of total FDI in the EU, while the EU's investment accounted for 4 % of total FDI in China in 2016. What has changed in the last decade is China's increased footprint in European investment. Chinese FDI in the European Union has increased by almost 50 times in only eight years, from less than $840 million in 2008 to a record high of $42 billion (35 billion euro) in 2016.[2] For years, European companies sought to benefit from cheap labour by building factories in China, but today that trend is reversing. Chinese investors are now eyeing Eastern Europe and the Mediterranean, where the Eurozone crisis had pushed labour costs down and created hunger for foreign investment. Several European governments have updated or established their FDI screening regimes in 2017 and 2018, and several more are in the process of doing so. This strengthening of review mechanisms has already impacted Chinese investment patterns in 2018, including the first ever instance of a blocked Chinese acquisition in Europe and several delayed transactions.

As the result, Chinese FDI in the EU had reached a peak of EUR 37 billion in 2016 and since then are declining: in 2018 the decline is amounted to 40 percent from 2017 levels and over 50 percent from the 2016 peak. This decline is very much in line with a further drop in China's global outbound FDI. This trend can be attributed to continued capital controls and tightening of liquidity in China as well as growing regulatory scrutiny in host economies. A new EU-level screening framework will further catalyse the convergence of FDI review rules. While the EU will remain on the liberal end of the spectrum, the new FDI screening framework will generally increase scrutiny of foreign acquisitions – and could affect Chinese investors in particular. Moreover, a lack of a comprehensive EU-China Investment Agreement complicates mutual investment.

Diversity among the EU member states and stakeholders has complicated further the trade and investment relationship with China. The complexity of interests within the EU vis-à-vis China is omnipresent. There is a growing need to find an internal synergy to balance business interests of stakeholders within the Member States with the EU strategic interests.[3] This has been recently exemplified by the decision of German city authorities of Duisburg to develop a "smart city" in cooperation with Chinese technological giant of Huawei. Only 14 of the EU's 28 members had national investment-screening measures in place in 2019. Germany is particularly instrumental in defining the trajectories and notions of cooperation

[2] ZENELI, V. Mapping China's Investments in Europe. *thediplomat.com*, 14. 3. 2019.

[3] SPRŪDS, A. Towards a balanced synergy of visions and interests: Latvia's perspectives in 16+1 and Belt and Road initiatives. *Croatian International Relations Review*, November 2017, 37–56.

between the EU and China. The German EU presidency priorities apparently will include the EU's relations with China. China is Germany's biggest trading partner with trade surplus for the latter. However, an increasing apprehension with China's investment and protectionist policies has led the German leadership to add the notion of "systemic competitor" to the previously declared "comprehensive strategic partnership" with China.[4]

The interaction between the EU and China is not limited to only trading and investment figures. European debates about risks from economic engagement with China now extend far beyond FDI reviews. EU institutions and member states are re-thinking past "naïve" approaches and calling for a new approach toward economic and political engagement with China, including scrutiny of data security compliance of Chinese service providers, sanctions in response to possible cyberattacks and enforcement of compliance with money laundering. As a result of these debates and following actions one can expect growing divergence in the EU and China partnership. However, more streamlined European position on trade and investment with China should also take into consideration certain similarity of challenges in the EU and China.

Convergence of similar challenges, strategies and respective policy approaches exist. They are very much in the same boat as both have to deal with formidable challenges in their domestic environment. The EU faces challenges to boost growth, create jobs, overcome populism and cope with a wave of refugees from a chaotic neighbourhood. China needs to come to terms with slowing economic development and at the same time ensure sustainable development and protect the environment. In response to its economic slowdown, China is seeking to achieve a "new normal" characterised by economic and social reforms, leading increasingly to more service and technology-oriented economic growth, where market forces should be playing a more decisive role.

In a world of complex interdependence, domestic growth can only be successfully taken up in a stable and predictable international environment. The EU and China both have an interest in supporting an open multilateral trading system. The question is whether the EU and China are willing to jointly support the multilateral system as the US steps back from its dominant role and, if so, whether they can act in a coordinated manner.[5] Coordinated efforts offer a prospect for the EU and China to demonstrate their shared commitment to safeguarding rules-based multilateral trading system and to conquering protectionism, while pressing forward with free trade, which is a powerful tool for sustainable

[4] SMITH, J., TAUSSIG, T. The Old World and the Middle Kingdom: Europe Wakes Up to China's Rise. Foreign Affairs Journal, September/October, 112–124.

[5] GEERAERTS, G. The EU and China: Modest signs of convergence? *Security Policy Brief*, Egmont Institute, No. 101, December 2018.

economic growth and prosperity. Divergences, however, remain. The EU has concerns about trade and investment relations with China, which include the lack of reciprocity and market access as well as the absence of a level playing field in China for foreign investors. No free trade agreement can be considered before the conditions are right. A comprehensive and ambitious mutual investment agreement is long overdue.[6]

3. Going global: Belt and Road Initiative and other frameworks

The character and dynamics of EU-China relationship is influenced by wider global developments, frameworks and initiatives. China particularly has looked beyond direct EU-China framework and supported Asia-Europe Meeting format (ASEM). From the Chinese perspective, ASEM is seen as a rather convenient platform to engage with the EU. There are no major controversies surrounding ASEM's agenda, thus keeping the political risks to a minimum. Hence, China has been particularly active in stressing the role of ASEM. To exemplify this, the EU as a political entity is not mentioned in China's main document regarding the Belt and Road Initiative: "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road"[7]. ASEM, in turn, appears to be the main channel of Sino-European exchanges, as the document states that the role of multilateral cooperation mechanisms should be enhanced and existing mechanisms such as ASEM need to be used in full to strengthen communication with relevant countries.[8]

The connectivity issue is among the priorities of ASEM. The first ASEM Pathfinder Group on Connectivity meeting was hosted by the EU in 2017 and has had multiple meetings since.[9] Also, the EU-China 2020 Strategic Agenda for

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[6] SAARELA, A. A new era in EU-China relations: more wide-ranging strategic cooperation? European Parliament, July 2018 [online]. Retrieved at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2018)570493

[7] Chinese text: "《推动共建丝绸之路经济带和21世纪海上丝绸之路的愿景与行动》发布," 中华人民共和国国家发展和改革委员会, http://xbkfs.ndrc.gov.cn/qyzc/201503/t20150330_669161.html

English text: "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road," National Reform and Development Commission, People's Republic of China, March 28, 2015 [online]. Available at: http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html

[8] English text: "Vision and Actions… Op. cit.

[9] European External Action Service. *ASEM Senior Officials' Meeting and ASEM Pathfinder Group on Connectivity*, *Brussels, 21-23 June 2017* [online]. Available at: https://eeas.europa.

Cooperation seems to be enabling this particular format as it calls to "reinforce cooperation in all relevant trans-regional and regional fora, in particular ASEM and the ARF […]"[10] However, some of EU's message characteristics present within the EU-China Summit statements, e.g. the value message, the human rights issue, level playing field requirements are largely absent from ASEM documents. The European Council makes its position known indirectly, such as by endorsing the EU's strategy for connecting Europe and Asia, which only speaks of China as one of, but not the only partner in Asia and strongly emphasizes values and respect for individual rights, three days before the 2018 ASEM summit in Brussels and including this information in the connectivity section of the ASEM outcome information on the European Council webpage.[11] It has to be kept in mind that even though the EU is involved as a regional organization and the European Commission is represented at the Summits, ASEM is primarily a platform of individual countries and any coordination that takes place between the EU countries on the sidelines of the meetings is voluntary and not official. Therefore, some divergences from the EU-China Strategic Partnership may transpire.

China's Belt and Road Initiative is much more controversial and perceived frequently in a contradictory manner among European stakeholders. It is a formidable initiative that transforms perceptual maps and policy agendas.[12] For many, BRI is instrumental in further providing opportunities for and facilitating cooperation in wider Eurasian area, including between the EU and China. The BRI has been perceived as a win-win vision and mutual open door outwards looking approach that has also brought closer China and Europe in an increasingly globalized world. The goal of BRI of building China-sponsored interconnected infrastructure around the world has been followed rapidly by a series of China-led infrastructure projects in Europe aiming at improving connectivity, investments and international trade. Along the BRI connectivity ideas, the EU-China "Connectivity Platform", which endeavours to promote cooperation in hard and soft kinds of connectivity through interoperable maritime, land and air transport, energy and digital networks, contributes to intensification of relationship and potential investment increase.

However, concerns and perceived risks are omnipresent. Initially, Belt and Road in Europe had been largely viewed as overlapping with China-CEE

eu/diplomatic-network/asia-europe-meeting-asem/28975/asem-senior-officials-meeting-and-asem-pathfinder-group-connectivity-brussels-21-23-june-2017_en

[10] European External Action Service. *EU-China 2020 Strategic Agenda for Cooperation* [online]. Available at: https://eeas.europa.eu/sites/eeas/files/20131123.pdf

[11] European Council. *Asia-Europe Meeting (ASEM), 18-19/10/2018, Main Results* [online]. Available at: https://www.consilium.europa.eu/en/meetings/international-summit/2018/10/18-19/

[12] MACAES, B. *Belt and Road: Chinese World Order*. London: Hurst and Company, 2018.

cooperation platform. Indeed, the members of the platform, including the Baltic States, were among the first ones in Europe to sign BRI memoranda in 2016, and "16+1" was positioned by China as a leg of the BRI. Austria's letter of intent on BRI in 2018 and Italy's signing of the BRI MoU in 2019 demonstrated that there is more to the BRI involvement in the EU than a line on the map of Europe coinciding with the historical iron curtain divide. The EU as such does not appear in top BRI documents, demonstrating a divergence between the two. Similarly to the 2015 "Vision And Actions On Jointly Building Silk Road Economic Belt And 21st-Century Maritime Silk Road" already mentioned in the context of ASEM, the 2018 "Action Plan on Belt and Road Standard Connectivity" does not mention the EU at all, whereas Central and East Europe is specifically underscored, stating the goal to "expand and extend the regional standardization cooperation channels with Central and Eastern Europe, Central Asia, West Asia and Arab countries, and basically achieve full construction and Standardized cooperation mechanism for smooth flow of key countries along the "Belt and Road".[13] This goes to show that even though the Belt and Road Initiative in Europe largely coincides with the countries involved in the "17+1" cooperation and the "17+1" is consistently being mentioned by Chinese leaders as a promoter of BRI cooperation, China positions "17+1" as a mechanism for China-EU cooperation, but leaves the topic of the EU out of the Belt and Road Initiative. This trend is worrisome from the perspective of finding common ground between the Belt and Road Initiative and the EU-China Strategic Partnership. The European Commission has underlined that BRI needs to be an open, transparent and all-inclusive initiative, which adheres to international and multilateral market rules, requirements and standards[14]. The results are apparently mixed.

The EU has taken some initiative to shape transcontinental connectivity rules. The Europe-Asia Connectivity Strategy revealed in December 2018 is a good step in that direction. However, the disbalance in financing between China-fuelled BRI budget and EU-proposed Strategy is named to be one of the major shortcomings of the "European answer" to BRI. Even though the future of BRI is not entirely clear, as the China's government might plateau or decrease its contributions in the face of domestic criticisms, still, a search of matching sustainable financing models on the EU side is crucial for EU-led connectivity initiatives.[15]

[13] Belt and Road Portal. 标准联通共建 "一带一路" 行动计划（2018–2020年）. January 11, 2018 [online]. Available at: https://www.yidaiyilu.gov.cn/zchj/qwfb/43480.htm

[14] European Commission. *Roadmap for EU China S&T cooperation.* October 2018 [online]. Retrieved at: https://ec.europa.eu/research/iscp/pdf/policy/cn_roadmap_2018.pdf

[15] See, e.g. HOLZNER, M. *One Trillion Euros for a European Silk Road*. The Vienna Institute for International Economic Studies, November 20, 2019 [online]. Available at: https://www.ac.at/one-trillion-euros-for-a-european-silk-road-n-406.html

Moreover, Transatlantic dimension adds to the cautiousness and necessity of response-seeking on European side about China's "going global". The United States are taking a conspicuously tougher stance on China. For some, US-China relations are entering some resemblance of the cold war.[16] The EU member states, including the Baltics, agree with many US complaints about China, but they disagree with the confrontational strategy adopted by Washington, as it contributing to a "muscle-led" international order.[17] Therefore, the Baltic States are trying to shape national positions on the premise that the US is the primary and indispensable ally, but China should not be dismissed as an economic partner – if the relations are properly managed, they can provide profitable economic engagement. The controversy surrounding 5G apparently is just the beginning of this difficult balancing act. The EU is in favour of a tighter investment screening approach. Although the EU is not shying away from naming China a "systemic rival" anymore, the export-oriented countries are interested to cooperate with China. Hence, it will be a very difficult task on the EU side to find a consensus and manoeuvre between the US and China.[18]

4. Regionalization: "17+1" and beyond

Of all the formats of the Sino-European engagement, the "17+1" [19] is arguably the most controversial one and carries the highest level of potential political risks from the EU perspective. During the early days of the platform, starting from 2011/2012, China was channelling the message of Central and Eastern Europe as being "different" from the rest of Europe. The "traditional friendship" between China and some of the 16 countries during their socialist period was given as a reason to be invited into this particular format.[20] As PRC's then-Premier Wen Jiabao put it during the first China–Central and Eastern European

[16] WESTAD, O. A. The Sources of Chinese Conduct: Are Washington and Beijing Fighting a New Cold War? Foreign Affairs Journal, September/October 2019, 86–87.

[17] OTERO-IGLESIAS, M., ESTABAN, M. Introduction: Europe in the Face of US-China Rivalry, *A Report by the European Think-tank Network on China*, (eds.). Mario Esteban, Miguel Otero-Iglesias, Una Aleksandra Bērziņa-Čerenkova, Alice Ekman, et. al. January 2020, p. 31.

[18] BARKIN, N. Hard Choices on China. Berlin Policy Journal, November/December 2019.

[19] Commonly referred to "16+1" prior to the accession of Greece in 2019.

[20] For more on China's narrative adaptation, see TURCSANYI, R., QIAOAN, R. *Friends or foes? How diverging views of communist past undermine the China-CEE '16+1 platform'.* Asia Europe Journal, May 27, 2019 [online]. Available at: https://link.springer.com/epdf/10.1007/s10308-019-00550-6?author_access_token=OYMOmvWCncuJbhjhcen0Afe4RwlQNchNByi7wbcMAY5YGpCBDKQoEr8zVHjIUXf-RA3k9dRyAGTX2SQJF_jnvZsxP8o-OgnPdS4836VGy0rrlrfNHoI0y5Dk3Ep1Tz-9FVLcCLFSnwjyL-Bu46bRfA%3D%3D

Countries Economic and Trade Forum in Budapest, "After the founding of New China, most Central and Eastern European countries established diplomatic relations with China for the first time, opening a new chapter in friendly exchanges between the two sides."[21] Although the role of the EU was also mentioned, still, the latter perceived China's activities as a way of bypassing EU's rules and regulations.

Later on, however, especially after the Summits in 2018–2019, this China's narrative subsided – not least due to persistent EU criticism of what was called China's attempts at dividing the EU – and a new narrative grew in force. First of all, China's leadership emphasized that "17+1" cooperation is just one of the platforms for China-EU exchanges. Prime Minister Li Keqiang indicated that China-CEE cooperation "follows international rules and EU laws and regulations, and respects the responsibilities and obligations of EU member states among the 16 countries."[22] Secondly, as the Dubrovnik Summit of 2019 brought Greece's accession, the format is no longer tied to the "socialist past" and the EU "newcomer"/candidate status associated with the original 16 members, as Greece has been an EU member state since 1981. These developments are designed at minimising the controversy and reassuring the EU by bringing the "17+1" closer to the spirit of the EU-China Comprehensive Strategic Partnership.

Throughout the course of China-CEE cooperation, the Baltic States have been consistent in emphasizing the role of the platform as being complementary to China-EU cooperation and upholding the Brussels position[23]. However, as the platform is comprised of several diverse regions, other partners have occasionally antagonized Brussels. From the Baltic perspective, there are no major divergences between EU-China cooperation and the "17+1" in this particular region, but there have been occasions when other players, e.g. Hungary, have not supported the common EU position.[24] Therefore, it can be concluded that the level of convergence between the EU-China Comprehensive Strategic Partnership and the "17+1" varies from country to country.

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[21] The Central People's Government of the People's Republic of China. 温家宝在中国–中东欧国家经贸论坛上致辞(全文). June 26, 2011 [online]. Available at: http://www.gov.cn/ldhd/2011-06/26/content_1892867.htm

[22] Xinhua News. 李克强出席第八次中国 - 中东欧国家领导人会晤. April 13, 2019 [online]. Available at: http://www.xinhuanet.com/world/2019-04/13/c_1124360993.htm

[23] ŠTEINBUKA, I., MURAVSKA, T., KUŽNIEKS, A. EU-China: New Impetus for Global Partnership. European studies. The Review of European Law, Economics and Politics. Czech Association for European Studies, Vol. 4, 2017, pp.121–139. ISSN-1805-8809 (print), eISSN 2464-6695 (online), ISBN 978-80-7598-032-8 (Print). Indexed ERIHplus.

[24] HEIDE, D., HOPPE, T., SCHEUER, S. and STRATMANN, K. EU ambassadors band together against Silk Road. *Handelsblatt*, April 17, 2018 [online]. Available at: https://www.handelsblatt.com/today/politics/china-first-eu-ambassadors-band-together-against-silk-road/23581860.html

In the opinion of some political and economic analysts, the danger for the Baltic States is that Chinese initiatives like the "17+1" and the Silk Road Economic Belt project become mechanisms to leverage greater space for Chinese economic penetration into the European markets. If "Germany has become aware that the growing number of economic ties with China may bring in tandem with the many benefits also certain threats"[25], then the situation for much smaller and weaker Baltic economies presents even more risks. On one hand, "Chinese enterprises can leverage their full-fledged experiences and technologies in infrastructure building to help the CEE countries where demands of the kind are increasingly rising"[26]. On the other hand, it is not clear what sort of leverage this will give. It is true that the Baltic countries as "17+1" framework members, look to China for opportunities to boost their transport and logistics sector and to attract investment. However, Chinese investment in the Baltic States would be a mixed blessing[27]. Chinese financing may build up a disadvantageous "debt model"[28] for the small Baltic countries, given disadvantageous rates that are further tied into using Chinese companies and Chinese workforce to deliver.

This raises the question of reciprocity. While Chinese companies find an open-door environment in Europe, it is quite difficult, if not impossible, for a European company to succeed in winning a contract to build an infrastructure project in mainland China[29],[30]. This lack of "reciprocity" is an issue for the Baltic States as such projects leave the region at "risk". Local industry can be undercut by greater volumes of cheaper Chinese imports the transport costs of which would have been reduced through these infrastructure projects.

The analysis shows that China is strengthening bilateral relations with only some of the 17 and paying more attention to them than to others. China seeks "leverage" in which Beijing is ready to advance its own agenda in the region. A related challenge for the Baltic countries is to preserve EU solidarity within the "17+1" framework, which in general is not serving the solidarity purpose in trade negotiations with

[25] POPLAWSKI, K., 2017. Capital Does Have Nationality: Germany's Fears of Chinese Investments. *OSW Commentary*, Centre for Eastern Studies, No. 230, p. 1.

[26] ZHANG, Y., 2017. China's Economic Diplomacy Entered the New Era. *Foreign Affairs Journal*, April [online]. Retrieved at: http://www.chinesemission-vienna.at/eng/zgbd/t1455480.htm [Accessed 14 Feb. 2018].

[27] SCOTT. D., 2018. China and the Baltic States: strategic challenges and security dilemmas for Lithuania, Latvia and Estonia, *Journal of Baltic Security* 4(1), De Gruyter Open, p. 25–37.

[28] JAKOBOWSKI, J., KACZMARSKI, M., 2017. Beijing's Mistaken Offer: the '16+1' and China's Policy Towards the European Union, *OSW Commentary*, Centre for Eastern Studies, No. 250, p. 3.

[29] CASARINI, N., 2015. Is Europe to Benefit from China's Belt and Road Initiative? *IAI (Insituto di Affari Internazionali) Working Papers 15*, No. 40, p. 1–11.

[30] LE CHORRE, P., SEPULCHRE, A., 2016. China's Offensive in Europe. Washington: The Brookings Institution Press.

China. Chinese officials make reassurance on this issue. At the Riga Summit in November 2016, China's Prime Minister Li Keqiang argued that "we have all along stressed that the '16+1' cooperation is a part of and useful complement to China-EU cooperation […] and has injected new vigour into the China-EU comprehensive strategic partnership"[31],[32]; but actually in the world of 'power politics' the "17+1" format enables China potentially to exert increased leverage on the small Baltic countries, and to also weaken the bloc advantages for the EU in its wider negotiations with China, however this risk so far remains rather theoretical.

Economic security is an issue as there is an ongoing large trade imbalance, in which Chinese exports to the Baltic States increasingly outweigh Baltic exports to China[33]. Furthermore, Baltic exports to China are strongly in the food area (particularly dairy produce); while Chinese exports to the three Baltic States are strong in finished industrial products (machinery, technology). Terms of trade give China's exports increasing price rises, while Baltic raw resources' price rise less quickly. Consequently, a gap in value increasingly opens up in China's favour and against the Baltic States. The pattern of China-Baltic trade also threatens to establish a neo-colonial pattern between primary resources and finished industrial products[34]. Such structural imbalances are compounded by imbalances in relative importance: the economic links with China are of rising significance for the three Baltic countries, but the economic links with the Baltic countries are of much less significance for China[35]. This also gives China greater power in negotiations with the Baltic States, who operate in structural terms from a position of relative weakness.

From the Baltic perspective, other regional formats also play into EU-China relationship. The Nordic-Baltic Eight (NB8) is the current name of the cooperation

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[31] LI, K., 2016. Forging a Reliable Partnership for Win-win Cooperation, November [online]. Retrieved at: http://english.mofcom.gov.cn/article/newsrelease/counselorsoffice/bilateralexchanges/201612/20161202274017.shtml [Accessed 14 Feb. 2018].

[32] LIU, Z., 2014. The Role of Central and Eastern Europe in the Building of Silk Road Economic Belt, China Institute of International Studies, September [online]. Retrieved at: http://www.ciis.org.cn/english/2014-09/18/content_7243192.htm [Accessed 14 Feb. 2018].

[33] KALENDIENE, J., DAPKUS, M. et al., 2017. Nordic-Baltic Countries and China: Trends in Trade and Investment: A Business Perspective, *The New Silk Road: China Meets Europe in the Baltic Sea Region*, July [online]. Retrieved at: https://www.researchgate.net/profile/Jone_Kalendiene/publication/317156119_Nordic-Baltic_Countries_and_China_Trends_in_Trade_and_Investment_A_Business_Perspective/links/59fcc8abaca272347a22a61f/Nordic-Baltic-Countries-and-China-Trends-in-Trade-and-Investment-A-Business-Perspective.pdf?origin=publication_detail

[34] SCOTT, D., 2018. China and the Baltic States: strategic challenges and security dilemmas for Lithuania, Latvia and Estonia, *Journal of Baltic Security* 4(1), De Gruyter Open, p. 25–37.

[35] MARTYN-HEMPHILL, R., MORISSEAU, E., 2015. Small Step for China – Giant Leap for the Baltics? *Baltic Times*, February [online]. Retrieved at: https://www.baltictimes.com/small_step_for_china_-_giant_leap_for_the_baltics_/ [Accessed 14 Feb. 2018].

framework comprised of five Nordic nations, namely, Denmark, Iceland, Norway, Finland, Sweden, and three Baltic states–Latvia, Lithuania and Estonia, established in 1992. Although the day-to-day cooperation vectors are mostly regional, such as security, resilience, energy, EU Eastern Partnership, the framework also strives to include wider strategic issues in the agenda by covering also transatlantic, broader EU and UN contexts.[36] Even though East Asia and China, in particular, has not been in the focus of NB8 cooperation, still, in January, 2018, the speakers of parliaments of the respective countries, except for Denmark, paid a joint official visit to Beijing, discussed cooperation between their parliaments and the Chinese National People's Congress, and met with China's President Xi Jinping, who in turn assessed NB8-China cooperation as being "conducive to pushing forward the development of the comprehensive strategic partnership between China and the EU".[37] The perception of NB-China cooperation as a smaller-scale representation of EU-China exchanges is shared by both sides. Even though two of the NB8 nations – Norway and Iceland – are not member states of the EU, there are no differences between the standpoint of NB8 and EU's agenda within the EU-China Comprehensive Strategic Partnership. In addition, the NB8 framework has had regular work meetings with the Visegrad countries as of 2013 referred to in a rather equation-like way as NB8+V4, and China has strongly appeared on the agenda of this format in 2019.[38] However, it is still too early to tell whether there will be exchanges between NB8+V4 and China. Such exchanges would prove more challenging than the NB8 for the European side and may even carry political risks, as with the inclusion of Czech, Hungarian, Polish and Slovak positions, a wider spectrum of opinions on EU-China engagement will have to be negotiated.

5. Conclusions: managing divergence and diversity

The European Union and China enter an increasingly intensive and dynamic relationship. This has been facilitated by both China and EU "going global'" in their economic, trade and investment outlook and endeavours. China's Belt and Road initiative has become one of the important pieces of the relationship and

[36] Ministry of Foreign Affairs of the Republic of Latvia. *Co-operation among the Baltic and Nordic countries*. April 19, 2017 [online]. Available at: https://www.mfa.gov.lv/en/policy/baltic-sea-region/co-operation-among-the-baltic-and-nordic-countries

[37] Xinhua News. China hopes for more exchanges with Nordic, Baltic countries. January 10, 2018 [online]. Available at: http://www.xinhuanet.com/english/2018-01/10/c_136885940.htm

[38] lsm.lv. Latvian Foreign Minister warns of "black and white perspective" on China. 2 April 2019 [online]. Available at: https://eng.lsm.lv/article/politics/diplomacy/latvian-foreign-minister-warns-of-black-and-white-perspective-on-china.a314671/

political agenda. In addition, a mutual "going global" has served as a catalyst for regionalization and concrete connectivity opportunities. The regionalization of this interaction, such as "17+1", has provided particularly countries and societies in the Central and East European region with opportunities to develop a different perspective, and essentially "become global". Hence, although dilemmas of choices and challenges exist, an engagement with China and its initiatives is now firmly placed on a mainstream agenda in the Baltic countries.

Challenges, however, are significant and can not be ignored. Divergence of values and asymmetries of interests exist. China in its own eyes is replacing the EU as a global normative superpower and role model for development. Diverging models and strategies of economic and political development complicate the relationship. China has been described as "systemic rival promoting alternative models of governance".[39] The perceived lack of reciprocity, limited market and investment access in China and assertive business expansion in Europe are only a few but important concerns among the EU decision-makers. As EU is starting gradually push back, Europe's economic and technological sovereignty is increasingly invoked. This has been further facilitated by the importance of Transatlantic link in a phase of the US-China tensions.

Moreover, diversity exists among the EU members states and it influences EU position on "going global" with China. Countries vary in terms of size and capacity, perceptions and interests, relations and affiliations. Various stakeholders such as governments, businesses, non-governmental institutions occasionally may compete among themselves for access, attention and resources. Management of diversity becomes both a manifestation and challenge of ever-growing web of various connectivity. Some countries, such as Greece, Italy, Portugal and Hungary, see benefits of closer engagement. Other countries, such as France, Scandinavian countries, Spain, Poland, Chechia, are becoming increasingly critical of the "European naivete" on China. German leadership's ambivalence and gradual shift from "comprehensive strategic partnership" to notion of "systemic competitor" is indicative of perceived coexistence of opportunities and risks within the EU. The Baltic States see opportunities of the EU-China cooperation and particular advantage of their geographic position at the crossroad between major axes of communication. At the same time, importance of rules-based order, aspiration for a common EU position and ensuring Transatlantic solidarity have become the cornerstones of the Baltic perspective on international partnerships, including with regard to the EU-China relationship.

[39] European Commission and HR/VP, *EU-China-A strategic outlook, Joint Communication*, 12 March 2019 [online]. Available at: https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf

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Establishment and Provision of Services of Third Country Nationals in the EU

Michal Petr*

Summary: Even though the discussion on migration has in the last years been overshadowed by its illegal form and concentrated in particular on potential tools to mitigate it, legal migration rightfully remains a crucial consideration for a comprehensive migration policy. Given the significance of services in today's economy, it might be surprising that the focus has been on migration of workers, rather than self-employed persons. In this article, we shall review the current legislation on this matter and explore its potential further developments.

Key words: free movement of people – legal migration – self-employed – third country nationals

1. Introduction

It is clear from the European Agenda on Migration of 2015[1] that *"migration will increasingly be an important way to […] ensure sustainable growth of the EU economy*" and thus, "*it is important to have in place a clear and rigorous common system, which reflects the EU interest, including by maintaining Europe as an attractive destination for migrants"*.[2] Third-country nationals (hereinafter referred to as "TCNs") are thus important for the overall sustainability of EU economy.

To this end, the set of legal migration directives has been extended or modified over the past five years, while some of them are still under review (see below). As a result, the legal migration system, broadly speaking, aims at promoting legal immigration of high-skilled workers, researchers and students. Conversely, the position of self-employed persons and entrepreneurs is covered only marginally.

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

2 Ibidem, p. 14.

This is striking, given the importance of services to modern economy. Indeed, approximately three quarters of the EU's GDP is created within the services sector[3] and the workers constitute only a minority of TCNs legally residing in the EU.[4] In some Member States, the TCNs constitute a significant proportion of their self-employed, approximately 20 % in the United Kingdom or on Cyprus.[5] Still, the EU rules on TCN entrepreneurs cover only rudimentarily their free movement within the EU and in particular their possibilities to enter the EU and thus the Internal Market. As the Commission puts it, even though the category of self-employed was to be covered by the legal migration directives in parallel to workers, this approach was abandoned and currently, *"[n]o harmonisation rules at EU level […] exist regarding this category and rules on the issue are national"*.[6] As a result, the Commission's survey revealed that only 36 % of TCN respondents found the EU attractive to start a business, compared to 70 % attractiveness for students and researchers.[7]

This article will proceed as follows. First, we will analyse the current primary and secondary legislation concerning self-employed TCNs, including its amendments under discussion, in two distinct fields: the right to stay within the EU and the right to move freely within the EU (Chapter 2). On the basis of this, we will then discuss the possible ways in which the legislation in both these fields might evolve (Chapters 3 and 4) in order to make the EU more attractive for the highly-qualified self-employed TCNs.

2. The EU Legislation

Legislation concerning the legal status of self-employed TCNs in the EU is surprisingly limited, as will be described below. The primary law in essence only contains a legal basis for the adoption of secondary legislation; the self-employed TCNs are nonetheless hardly ever mentioned by the secondary legislation.

[3] EUROSTAT. *National accounts and GDP* [online]. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/National_accounts_and_GDP#Gross_value_added_in_the_EU_by_economic_activity (accessed 2. 1. 2020).

[4] There were 18,7 million holders of valid residence permits in the EU at the end of 2017; only 2.9 million of them were labour migrants. Commission Staff Working Document *Fitness Check on EU Legislation on Legal Migration.* SWD(2019) 1055 final. Part 1/2 (hereinafter referred to as "Fitness Check, Part 1"), p. 16.

[5] Commission Staff Working Document *Fitness Check on EU Legislation on Legal Migration.* SWD(2019) 1055 final. Part 2/2 (hereinafter referred to as "Fitness Check, Part 2"), p. 169.

[6] Ibidem, p. 170.

[7] Fitness Check, Part 1, p. 33.

2.1. Primary Law

According to the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU"), the EU shall develop a common immigration policy aimed at ensuring the efficient management of migration flows and fair treatment of third-country nationals residing legally in Member States [Article 79 (1) TFEU]; to that end, it may adopt measures on the conditions of entry and residence of TCNs [Article 79 (2) (a) TFEU] and on their rights in a Member State of their residence, including the conditions governing freedom of movement and of residence in other Member States [Article 79 (2) (b) TFEU].

This constitutes a significant development from the previous Treaty on the Economic Community (hereinafter referred to as "TEC"), which only allowed the adoption of measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States [Article 63 (4) TEC]. Even though this development was welcomed by most scholars,[8] the situation of self-employed TCNs has not much evolved.

It is also important to note that the Member States retain the right to determine the volumes of admission for economic migration, which can therefore not be fixed or influenced by EU legislation [Article 79 (5) TFEU].

2.2. Secondary Law

To start with, it needs to be observed that the Commission used to have more ambitious plans concerning the legal status of self-employed TCNs. Already under the Amsterdam Treaty, a framework directive on economic migration, covering both employed and self-employed activities,[9] was proposed, it however failed to attract the then-required unanimous agreement in the Council and was eventually withdrawn in 2005.[10] In 2010, the Commission attempted to consolidate the legal migration legislation again, this time in an 'immigration code', in order to *"maximise the positive effects of legal immigration for the benefit of all stakeholders and […] strengthen the Union's competitiveness"*;[11] however, neither this proposal was adopted.

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[8] See eg. IGLESIAS SANCHEZ, S. Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of new Mobility Rights in the Area of Freedom, Security and Justice. *European Law Journal*, 2009, vol. 15, no. 6, p. 797.

[9] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities. COM(2001) 386 final.

[10] Communication from the Commission to the Council and the European Parliament. *Outcome of the screening of legislative proposals pending before the Legislator*. COM(2005) 462 final.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Delivering an area of*

The current EU legal migration framework is thus laid down in several "sectoral" directives, covering different categories of TCNs and regulating different stages of the migration process. As a consequence, these directives are limited in terms of their personal scope and the degree of harmonisation that they ensure. In essence, the directives cover the entry and residence conditions and the rights in different phases of the migration process (material scope) of some categories of TCNs (personal scope). This has led to complex interaction between EU rules, on the one hand, and national rules that cover the remaining categories of TCNs or aspects not harmonised under EU law, on the other.[12]

The objectives of the EU legal migration *acquis* – or rather their importance in the overall narrative on migration – have evolved over the years. While the earlier directives focused on ensuring the integration of TCNs, giving them rights as close as possible to those of EU citizens and enhancing their intra-EU mobility, the focus has gradually shifted towards ensuring efficient management of the flows of migrants that the EU economy "needs". Specifically, the focus of the most recent directives has mainly been on attracting and retaining certain TCNs (particularly the highly skilled, including students and researchers), in order to enhance the EU's economic competitiveness and growth.[13]

The legal migration directives currently cover: (i) sectoral directives on highly qualified workers (the Blue Card Directive, hereinafter referred to as "BCD"),[14] intra corporate transferees (hereinafter referred to as "ICTD"),[15] students and researchers (hereinafter referred to as "S&RD")[16] and seasonal workers (hereinafter referred to a "SWD"),[17] accompanied by (ii) transversal directives (i.e. not aiming at regulating the entry and residence conditions of a particular socio-professional group) on single permit for entry (hereinafter referred to as

freedom, security and justice for Europe's citizens – Action plan implementing the Stockholm programme. COM(2010) 0171 final.

12 Fitness Check, Part 1, p. 11.

13 Ibidem, p. 27.

14 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

15 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.

16 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

17 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

"SPD"),[18] family reunification (hereinafter referred to as "FRD")[19] and the status of long-term residents (hereinafter referred to as "LRD").[20]

None of the legal migration directives grants the self-employed admission to the EU in their own right. The LTRD and FRD as well as the BCD, if amended, grant the holders of the relevant permits the right to work in self-employed activities and the S&RD includes this as an option for Member States as regards students; the ICTD and SPD explicitly exclude self-employed workers from their scope.

The relevant provisions concerning self-employed TCNs will be briefly discussed below.

2.2.1. Long-Term Residence Directive

The LTRD applies also to self-employed TCNs, as it confers rights on all the TCNs legally residing within the EU.[21] Generally speaking, the Member States shall grant long-term residency status to TCNs who have resided legally and continuously within its territory for at least five years[22] and who have stable and regular resources which are sufficient to maintain themselves and the members of their family, without recourse to the social assistance system of the Member State concerned;[23] such resources may clearly come from self-employed activities.

The long-term residency status guarantees, among others, access to employment and self-employed activities[24] and free access to the entire territory of the Member State concerned.[25] Conversely, the directive does not regulate the entry into the EU, nor does it grant a right to intra-EU free movement. The latter may be considered especially intriguing, given the fact that the directive claims that the TCNs with long-term residency status shall be granted a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.[26]

Admittedly, the LTRD does provide for a limited possibility for TCNs to be economically active in other Member States. TCNs who have already obtained the long-term residency status in a Member State are entitled to reside in another

[18] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

[19] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[20] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[21] Art. 3 (1) of the LTRD.

[22] Art. 4 (1) of the LTRD.

[23] Art. 5 (1) (a) of the LTRD.

[24] Art. 11 (1) (a) of the LTRD.

[25] Art. 11 (1) (h) of the LTRD.

[26] Recital 2 of the LTRD.

Member State for a period longer than three months if they intend to exercise in there an economic activity in a self-employed capacity.[27] In order for the residency to be granted in another Member State, such state may ask the TCN to demonstrate sufficient resources;[28] all Member States have chosen to request it.[29] Thus, it is in practice feasible for the TCNs to move into another country only in order to expand their enterprise, not to start a new one.

In any case, the statistics show that this right is hardly ever exercised in practice,[30] which in effect excludes the possibility of intra-EU mobility for self-employed TCNs on the basis of the LTRD.

This conclusion is also supported by the fact that the LTRD itself is not much employed in practice; for reasons beyond investigation in this article, it is interesting that the vast majority (73 %) of all the cases in which TCNs take recourse to the LTRD take place in Italy, and practically all of them (more than 90 %) in just four Member States: Austria, Czech Republic, Estonia and Italy.[31] The Commission has summarised three main reasons why the LTRD is practically unused for the purposes of intra-EU mobility: (i) in some cases, the exercise of that right is subject to as many conditions as a new application for a residence permit; (ii) the competent national administrations are not sufficiently familiar with the procedures; (iii) or they find it difficult to cooperate with their counterparts in other Member States.[32] No concrete measures to overcome these hurdles have been proposed.

2.2.2. Family Reunification Directive

Similarly to the LTRD, also the FRD applies to all the TCNs legally residing in a Member State,[33] and thus also to self-employed. Apart from providing for the conditions of entry of the family members of TCNs already legally residing within the EU, it also guarantees these family members a right to access to

[27] Art. 14 (1) and (2) (a) LTRD.

[28] Art. 15 (2) of the LTRD. It is noteworthy that while the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States only requires *"sufficient resources not to become a burden on the social assistance system"* in Article 7 (1) (b), the LTRD requires *"resources which are sufficient to maintain themselves and the members of their families, without recourse to the social assistance of the Member State concerned"*.

[29] Report from the Commission to the European Parliament and the Council *on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long term residents*. COM(2019) 161 final, p. 8.

[30] Ibidem, p. 7.

[31] Ibidem, p. 1.

[32] Fitness Check, Part1, p. 19.

[33] Art. 3 (1) of the FRD.

self-employed activities.[34] This can however hardly be viewed as a route for TCNs to legally enter the EU in order to establish an enterprise. As far as intra-EU mobility is concerned, it is not covered at all by the FRD.

2.2.3. Single Permit Directive

As far as the SPD is concerned, it applies only to workers and expressly excludes self-employed from its scope.[35]

2.2.4. Sectoral Directives

The S&RD allows students to exercise self-employed economic activity outside their study time and subject to national rules.[36] In addition to that, after completion of research or studies, these TCNs are allowed to stay on the territory of the Member State for a period of at least nine months in order to set up a business.[37]

Similarly, according to a proposed amendment of the BCD,[38] the Blue Card holders should be allowed to start a business on the side of their employed activity;[39] the same should apply to their family members.[40] Interestingly, the impact assessment included in the proposal contained a possibility to *"extend the scope of the EU Blue Card from highly skilled employed workers to innovative entrepreneurs"*,[41] this was however not adopted.

The ICTID expressly excludes the self-employed from its scope,[42] while the SWD does not mention the self-employed at all.

2.3. Partial Conclusions

None of the legal migration directives grants the self-employed TCNs a possibility to enter the EU in their own right; only to some of them, already legally residing within the EU, they guarantee access to self-employed activities. The self-employed TCNs thus have to rely on national permits to enter the EU. Admittedly, some Member States have recently focused on attracting highly skilled

[34] Art. 14 (1) (b) of the FRD.
[35] Art. 3 (2) (k) of the FRD.
[36] Art. 24 (1) of the S&RD.
[37] Art. 25 (1) of the S&RD.
[38] Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment. COM(2016) 378 final (hereinafter referred to as "BCD Amendment").
[39] Art 13 (2) of the BCD, as amended.
[40] Art. 16 (6) of the BCD, as amended.
[41] BCD Amendment, p. 9.
[42] Art. 2 (2) (d) of the ICTD.

entrepreneurs seeking to set up innovative businesses and start-ups;[43] indeed, twelve Member States have specific programmes in place to attract and facilitate the admission of immigrant business owners.[44]

As far as the intra-EU mobility is concerned, the possibility to pursue business activities in other Member States is not covered by the legal migration directives at all, with the burdensome exception of possible request for permit under the LTRD, which is hardly ever used in practice. This means that self-employed TCNs are not allowed to reside outside the Member State that issued their residence permit and that the short-term travel possibilities are limited to up to 90 days in any 180-day period in other Schengen States.[45] To put it simply, *"the participation of TCNs legally residing in the Member States in the internal market is limited to the side of demand"*,[46] as their rights are in principal limited to short-time travel, purchase of goods and reception of services.[47]

A specific issue in this area is that self-employed TCNs who are legally residing in a Member State are currently not allowed to provide cross-border services, since no such EU rules have been adopted under Article 56 (2) TFEU, which provides for such a possibility.[48] Self-employed TCNs are therefore debarred from cross-border activities throughout the internal market.[49]

3. Possible Improvements Concerning Entry of Self-Employed TCNs

It might be argued that the fact that the EU law does not provide any rules concerning the entry of self-employed TCNs may have a negative impact on the EU economy. Indeed, as the Commission observed:

"The absence of regulation of admission and residence conditions at EU level may well have an impact on the EU's ability to attract and retain (highly skilled) third-country nationals willing to create a business. This appears particularly true when considering business opportunities linked with the new economy in view of the network effects it relies on, impacting also the objective of enhancing

[43] Fitness Check, Part 1, p. 33.

[44] In more detail, see Fitness Check, Part 2, p. 172.

[45] In detail, see Fitness Check, Part 2, s. 171

[46] HEDEMANN-ROBINSON, M. Third-Country Nationals, European Union Citizenship and Free Movement of Persons: a Time for Bridges rather than Divisions*. Yearbook of European Law*, 1996, vol. 16, no. 1, p. 321.

[47] In detail, see IGLESIAS SANCHEZ, S. *(op. cit. sub* 8*)*, p. 793.

[48] Fitness Check, Part 1, p. 34. Such a proposal was – unsuccessfully – put forward in 1999.

[49] They may however partly benefit from this freedom by setting up an EU company within the meaning of Article 54 TFEU.

the knowledge economy, and more broadly that of mitigating the consequences of demographic ageing."[50]

If the EU was able to agree on common rules concerning the entry of (at least certain categories of) workers, might it possibly do the same with respect to self-employed? Such calls have indeed been made, in particular from business, fearing that the absence of an EU-wide scheme to attract TCN entrepreneurs (in particular in innovative sectors) might prevent the EU from being seen as a front-runner in the global race to attract talent and new companies.[51]

Conversely, other business representatives considered that a range of competing national models is a welcome "incubator" for testing different creative solutions in this fast-evolving field.[52] Given the fact that the majority of Member States do not support an EU-level initiative for this category of TCNs,[53] it is highly unlikely that any relevant legislation would be adopted any time soon.

In our opinion, this approach might be mistaken. If the EU sees itself fit to adopt regulation aimed at attracting certain crucial categories of workers, we can see no compelling reason why the same should not be done with regard to self-employed.

In conclusion, we advocate for a comprehensive inclusion of self-employed TCNs into the legal migration regulation, in a way similar to the workers.

4. Possible Improvements Concerning Intra-EU Movement of Self-Employed TCNs

We have already observed that the intra-EU mobility is quiet limited for self-employed TCNs legally residing in a single Member State. From an economic point of view, it is universally agreed that such limitations create inefficiencies.[54] This topic has so far been addressed mostly from the perspective of TCN workers, not self-employed, but some scholars have already advocated for a general rule allowing for intra-EU mobility of TCNs legally residing in a Member State for some time.[55]

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[50] Fitness Check, Part 2, s. 171.

[51] In detail, see Fitness Check, Part 1, p. 33.

[52] Ibidem, p. 34.

[53] Ibidem.

[54] See e.g. BOHNING, W. R., WERQUIN, J. *Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market.* International Law Organisation, World Employment Programme Research Working Paper MIG WP 46 E, 1990, p. 9: *"statutorily imposed restrictions on economically active persons introduce rigidities and inefficiencies".*

[55] See e.g. PASCOUAU, Y. *Intra-EU Mobility of Third-Country Nationals. State of Play and Prospects.* European Policy Centre Discussion Paper, 2013 [online]. Available at: http://www.

There are two rationales underlying the broadening of intra-EU mobility rights of self-employed TCNs. The first is the one of principle. As we have observed, the primary law guarantees *fair treatment* to TCNs legally residing in Member States [Article 79 (1) TFEU]; as the exclusion of TCNs from the possibility to freely circulate in the internal market might have a negative impact in their integration into society of "their" Member State,[56] it might be argued that also TCNs are entitled to free movement within the EU; indeed, some scholars have already argued in favour of such a right.[57]

The second, more pragmatic rationale is connected with EU's ambition to attract the most qualified people to its markets; in this regard, *"mobility rights are regarded as a "pull" factor, inasmuch as they are considered an asset, which can make the EU more attractive a destination"*.[58]

Even the Commission found out that according to a number of stakeholders, the intra-EU mobility seems to be generally overlooked by national authorities, which instead often require full application procedures.[59]

No legislative action on this topic is however envisaged in the near future. The only (and quiet modest) modification is an improvement in the position of highly qualified workers, who might be able to gain the long-term residency status sooner if the amendment of the BCD is adopted.[60]

5. Conclusions

We have observed that the self-employed TCNs are to a large extend overlooked by the EU legal migration legislation; it does not discuss their rights of entry into the EU and it gives them only a very limited possibility of intra-EU mobility. The former may be contrasted with the position of TCN workers, where the EU

europeanmigrationlaw.eu/documents/Intra-eu_mobility_of_third-country_nationals.pdf (accessed 2. 1. 2020); DELLA TORRE, L., DE LANGE, T. The "importance of staying put": third country national's limited intra-EU mobility rights. *Journal of Ethnic and Migration Studies*, 2018, vol. 44, no. 9, p. 1409.

[56] In that regard, see eg. IGLESIAS-SANCHEZ, S. Free Movement as a Precondition for Integration of Third Country Nationals in the European Union. In: GUILD, E., GROENENDIJK, K., CARRERA, S. (eds.). *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*. Abingdon: Routledge, 2009.

[57] IGLESIAS-SANCHEZ, S. (*op. cit. sub* 8), p. 796: "*The level of mobility within the internal borders must reflect the level of harmonisation achieved in the fields of justice and interior … The deepening in the integration process has to be accompanied by a deepening in the enjoyment of rights and freedoms for all the individuals living under the jurisdiction of a public authority*".

[58] Ibidem, p. 799.

[59] Fitness Check, Part 1, p. 42.

[60] In more detail, see DELLA TORRE, L., DE LANGE, T. *(op. cit. sub* 55*)*.

has facilitated entry for certain categories of them, while the latter is omitted in case of workers as well.

We believe that the self-employed TCNs deserve more attention. In our opinion, the EU should identify those of them relevant for its economy and create common rules for their entry into its markets, similarly as it has done for highly qualified workers in the BCD.

Concerning the intra-EU mobility rights, we believe that not only the legally residing self-employed as well as workers, but also the EU itself would benefit from rules which would enable them to pursue economic activities in other Member States.

These proposals will probably not be realised in the near future due to political considerations. From an economic point of view, it is however difficult to argue against them.

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The Implementation of the Aarhus Convention's Third Pillar in the European Union – a Rocky Road Towards Compliance

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Summary: This article provides a detailed analysis of the European Union's road towards compliance with the third pillar of the Aarhus Convention and the current developments in this regard. The European Union's Notice on Access to Justice in Environmental Matters that was accepted in 2017 is also evaluated. No doubt, that environmental concerns became extremely important in the 21st Century, in front of the judicial bodies as well. It is interesting to see how the EU has been struggling to reach compliance with the right to access environmental justice, causing not just heated conversation between the greening NGO sphere and the EU, but also raising significant concerns regarding the effectiveness of the decision-making system.

Keywords: access to justice in environmental matters – Aarhus Convention – Court of Justice of the European Union – NGO – implementation – third pillar

1. Introduction

In the long line of environmentally related international treaties, the Aarhus Convention[1] has a special place. Not just because it has a unique divided structure, providing three correlated, but different rights, but also because the European Union is party to the treaty. The European Union signed the Aarhus Convention in 1998, and after the ratification procedure, the decision on the conclusion of the Aarhus Convention was adopted in 2005. The Convention itself was signed in 1998 and entered into force in 2001.[2] It was accepted by the aim to *"to con-*

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1 The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Hereinafter: Aarhus Convention, Convention.

2 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters Aarhus, 1998 (2001) UNTS Vol. 2161, p. 447.

tribute 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."[3] The original structure of the treaty is built on free main pillars: firstly, the right to access environmental information, secondly, the public participation in environmental decision-making and last but not least, the access to justice in environmental matters. The issue can be raised whether the Aarhus Convention is an instrument of environmental law or can be labelled as a human rights convention? The international treaty was accepted within the frame of the United Nations Economic Commission for Europe (UNECE) and one of the two legally binding tools[4] that put Principle 10 of the Rio Declaration on Environment and Development in practice.[5] The UNECE communication declares the Aarhus Convention is a *"new kind of environmental agreement"* that *"links environmental rights and human rights"* concerning the rights of future generations and sustainable development.[6] Because the aim of the Convention is not the direct protection of the environment, it cannot be considered a simple multilateral environmental treaty. It is more about the ecocentric approach as part of environmental ethics, where human rights gain a new dimension, and the treaty provisions encourage the governments and other actors to accept new legislation and to provide real public access to decision making in environmental matters. There is a strong correlation between human rights and the environment; the international legal order of environmental law is contributing to human rights protection as well.[7]

The European Union is a party to the Convention since 2005 and through a set of Directives and other instruments had successfully implemented the first[8]

[3] Aarhus Convention Art.1. Objective.

[4] The other tool is the Protocol on Pollutant Release and Transfer Registers (2009).

[5] Principle 10 of the Rio Declaration: *"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."*

[6] Available at: https://www.unece.org/env/pp/introduction.html (04 February 2020).

[7] *See* Jankuv, J. Protection of Right to Environment in International Public Law. *ICLR*, 2019, vol. 19, no. 1, pp. 146–171.

[8] Especially via the 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 L 41. 2003. 2. 14., p. 26–32. CELEX 32003L0004.

and second pillars[9] of the Aarhus Convention. The EU joined the international treaty *"as an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UN/ECE region, in accordance with the principle of sustainable development"*.[10] The accepted legislation had modified the EU law in several aspects to comply with the rules of the Aarhus Convention.[11]

Furthermore, a new regulation is also in force detailing how the Community bodies and institutions shall applicate the provisions of the Convention.[12] The Regulation clarifies the Aarhus Convention's terms, such as defines *"environmental information"* and *"plans and programmes relating to the environment"*.

On the other hand, the right to access environmental justice has proven as a significant challenge for the European Union to comply with. There is no need to explain how vital access to justice is for individuals and organisations to challenge environmental decisions in front of judicial bodies. Compliance with the third pillar of the Aarhus Convention has appeared as a *black hole* in the legislation of the European Union. Every version of the alleged new law was cancelled in the beginning. Finally, in 2017, the Aarhus Convention Compliance Committee[13] found the EU in violation of the Aarhus Convention for strictly limiting to challenge the EU institutions' decisions before the Court of Justice of the European Union.

2. Access to environmental justice

In general, access to justice means that every citizen has the right to seek legal protection and sufficient remedy in front of judicial bodies. As Theodore Roosevelt

[9] In order to implement the second pillar, the Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 was accepted, 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., 2003. 6. 25., p. 17–25. CELEX 32003L0035.

[10] UNTC Aarhus Convention, Declarations and Reservations. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27#EndDec (05 February 2020)

[11] For example, the Directive concerning environmental assessment (Directive 2001/42/EC) and the Water Framework Directive (Directive 2000/60/EC) and also extended the scope of the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents to all Community institutions and bodies.

[12] 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., 2006. 9. 25., p. 13–19. CELEX 32006R1367.

[13] Hereinafter: ACCC.

said: *"Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it wherever found, against the wrong."* Access to justice, in general, is one of the core values of the European Union, that also appears in the Charter of Fundamental Rights as well.[14] *"Access to justice provides a means to environmental laws, correct erroneous administrative acts, decisions and omissions and to push competent authorities to do their job."*[15] Access to justice has two main components: firstly, right to a fair trial and secondly, right to an effective remedy.[16] The primary source of law is the Treaty on Functioning of the European Union stating that: *"The Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."*[17] The Charter of Fundamental Rights provides a full Chapter sentenced to *"justice"*. Article 47 provides the right to a fair trial and effective remedy.[18]

The implementation of access to justice in environmental matters is the most difficult to put into practice, out of the Aarhus Convention's pillars.[19] Access to justice is a core value in modern democracies, and every legal system has a set of rules to provide the citizens' fundamental right. It is also a crucial part of public international law, especially human rights conventions.[20]

Access to justice in environmental matters is a specific form of the right in question and proved to be a significant burden for the EU and the member states

[14] Charter of Fundamental Rights of the European Union. OJ C 326, 26. 10. 2012, pp. 391–407. CELEX 12012P/TXT.

[15] EBESSON, J. Access to Justice at the National Level. *Aarhus Convention at Ten*, *Interactions and Tensions between Conventional International Law and EU Environmental Law*, 2011, p. 247.

[16] Handbook on European law relating to access to justice. European Union Agency for Fundamental Rights and Council of Europe, 2016, pp. 20–21.

[17] Treaty on Functioning of the European Union. OJ C 326, 26. 10. 2012, pp. 13–390. CELEX12012M/TXT. Art. 19. (1).

[18] Art. 47. Charter of Fundamental Rights: *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

[19] DROSS, M. Access to Justice in Environmental Matters. *Tilburg Foreign Law Review*, 2004. volt. 11, no. 4, pp. 721.

[20] *See* Art 8 Universal Declaration of Human Rights (1948) *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."* Art. 6 (1) European Convention on Human Rights *"… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…."* Art 25 American Convention on Human Rights *"Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts…"*.

as well. Access to justice in environmental matters is regulated in Article 9 of the Aarhus Convention. Under the rules of the Convention, access to justice has to be ensured in an impartial, fair procedure if the member of the public can prove *sufficient interest* or *impairment of a right*.[21] Also, the procedure must be equitable, timely and not overly expensive.[22] The member of the public shall *"have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission."*[23]

In the case of access to justice in environmental matters, the European Union relies on the national judicial systems. As it will appear, the EU was not able to adopt any specific legislation sentenced to the matter, so the burden on the member states' courts is even more pressuring. In many cases, the EU law relies on the national court to oversee the correct application and enforcement of community measures. However, the unique legislation does *"not fit comfortably"* to the national legal or judicial system, causing less adequate application.[24] It is proved, that the member states' current legislation on access to justice in environmental matters differs considerably and there is a lack of harmonisation. Minimum standards exist in only those member states' which successfully harmonised by secondary law, for example as a result of the Environmental Impact Assessment Directive. In the communication of the European Union, the national courts should focus on the relevant decisions of the CJEU[25] and follow up on the latest recommendations. The EU law has been modified in some aspect to comply with the third pillar – for example, in the case of the Habitat Directive – but the lack of specific legislation challenged the national courts so far.[26]

3. The European Union's steps towards compliance

The European Union's legislative procedure concerning access to environmental justice has a long and unfortunate history. Officially, the EU joined the Aarhus Convention in 2005, but the *"Aarhus-inspired"* legislation had already started in 2003. In 2006 the EU adopted the Aarhus Regulation on the application of

[21] Aarhus Convention, Art. 9. 2. a) and b).
[22] Aarhus Convention, Art. 9. 1–5.
[23] Aarhus Convention, Art. 9. 1. b).
[24] Ryall, Á. *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland*. Hart Publishing, 2009, p. 257.
[25] Court of Justice of the European Union (CJEU).
[26] Communication on access to justice at national level related to measures implementing EU environmental law. 21/07/2016, pp. 1–5.

the provisions of the Aarhus Convention, that is still in force.[27] The Commission adopted a proposal to contribute to the implementation of the Aarhus Convention and to eliminate several shortcomings in the EU's environmental law. The main aim off the proposal was to justify the legislative procedure at the EU level and the legal basis of the future directive.[28] In 2004 the European Parliament[29] and the European Economic and Social Committee[30] issued very detailed opinions on the Proposal, suggesting several modifications for to Committee to consider. The Commission had its last meeting about the *Access to Justice Directive Proposal* in 2005. For a six-year term between 2006 and 2012, no official steps had been made concerning the Proposal in question. So, the first attempt to accept a legal instrument about environmental justice failed. In 2012 the Commission adopted a communication with the specific aim to improve access to justice.[31] As the Communication stated, several provisions in environmental law restricted to ensure *"reasonable access to justice"*. The Communication also mentioned the previous proposal: *"a 2003 Commission proposal aimed at facilitating wider access has not progressed but the wider context has changed, in particular, the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge."* In 2012 the Parliament Resolution's on the Review of the 6th Environment Action Plan also mentioned the obligation of full compliance with the Aarhus Convention as the following: *"underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses, in this connection, the urgent*

[27] 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., 2006. 9. 25., pp. 13–19. CELEX 32006R1367.

[28] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters. COM/2003/0624 final – COD 2003/0246 CELEX 52003PC0624.

[29] European Parliament legislative resolution on the proposal for a European Parliament and Council regulation 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 EC institutions and bodies (COM(2003) 622-C5-0505/2003 – 2003/0242(COD).

[30] Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation 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 EC institutions and bodies'. 2004/C 117/13.

[31] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness COM/2012/095 final CELEX 52012DC0095.

need to adopt the directive on access to justice; calls on the Council to respect its obligations resulting from the Arhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012."[32]

The second phase of implementation attempts started in 2012 and ended in 2014 when the Proposal was officially withdrawn. Meanwhile, comparative studies had been delivered about justice in environmental matters, and also further communications were accepted to hasten the adoption of the new legislation; unfortunately, all attempts failed.

A new decade has started since the last legislative proposal, and the EU is still *"continue to explore ways and means"* to successfully comply with the third pillar of the Aarhus Convention – as is clearly stated in the Commission's Roadmap.[33] The Aarhus Convention Compliance Committee was informed about the failure of the European Union at the matter of environmental justice and provided detailed recommendations and findings since 2008. In 2017 the Committee recommended that the CJEU modifies its case-law or that the Union amends the Aarhus Regulation or adopts new legislation.[34] The meeting of the Parties in 2017 could not agree in the case of the European Union and postponed the consideration to the next session in 2021. In 2018 the Commission published a roadmap and started a public consultation on the topic of access to justice in environmental matters.[35] As part of the same path, the Council adopted a decision requesting a study on the Union's findings and possible outcomes.[36] In September 2019 the EU published a more than three hundred page long study on the implementation of the Aarhus Convention in the area of access to justice in environmental matters, usually referred to as the Milieu Report.[37] In between, in April 2017 the

[32] European Parliament resolution of 20 April 2012 on the review of the 6th Environment Action Programme and the setting of priorities for the 7th Environment Action Programme – A better environment for a better life (2011/2194(INI)) Paragraph 68.

[33] EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. DG ENV.E4 – Compliance and Better Regulation Unit. Q2 2019.

[34] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union1 Adopted by the Compliance Committee on 17 March 2017.

[35] EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/Ares-2018-2432060 (05 February 2020).

[36] Council Decision (EU) 2018/881 of 18 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006. OJ L 155, 19. 6. 2018, pp. 6–7. CELEX 32018D0881.

[37] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters Final report September 2019, 07.0203/2018/786407/SER/ENV.E.4.

European Commission adopted a *Notice on Access to Justice in Environmental Matters* serving as a guidance document that clarifies how individuals and their associations can challenge decisions, acts and omissions by public authorities related to EU environmental law before national courts.[38] To sum up, in the last more than fifteen years, the European Union has not accepted any legally binding instrument to implement the third pillar of the Aarhus Convention. Besides, the EU objected to the investigation of the ACCC and subjected itself a series of negative comments from the NGO sphere and the member states.

4. Main problems leading non-compliance with the third pillar

In the latest communication of the European Commission, a detailed summary can be found in which the ACCC's critics are compared with the comments of the European Union.[39]

The first round of critics is about the administrative review mechanism that should be opened beyond NGOs to other members of the public. As the EU replied, the parties, who can seek administrative and judicial review represents the issue of *"who"* would start the procedures.[40]

The question of eligible applicants – especially in acts for annulment – proved to be a considerable burden for the Court of Justice of the European Union. Since the middle of the '90s, the CJEU denied access to justice in environmental matters for NGOs and failed to provide a detailed explanation of how these organisations can meet with the requirements as applicants.

In the *Slovak Brown Bear Case,*[41] the CJEU ruled that Article 9(3) of the Aarhus Convention cannot be considered as a *self-executing* norm in the member states legal order. The Decision occurred in a preliminary ruling from the Supreme Court of the Slovak Republic. The applicant was a Slovak non-governmental organisation, "VLK ('LZ')" which wanted to participate in an administrative procedure regarding derogations concerning protected species – more

[38] Notices from European Union Institutions, bodies, offices and agencies. Commission Notice on access to justice in environmental matters. Official Journal of the European Union, C 275, 18 August 2017. CELEX C:2017:275:TOC.

[39] Commission, Report on European Union implementation of the Aarhus Convention in the area of access to justice in environment matters. Brussels, 10. 10. 2019. SWD (2019) 378 final. (Hereinafter: Commissions Communication, 2019.)

[40] Commission's Communication, 2019, p. 24.

[41] Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.Case C-240/09. ECLI:EU:C:2011:125.

specifically the brown bears – and areas which are protected by the Habitat Directive. The Court decided that Article 9(3) of the Convention does not have direct effect in European Union law. On the other hand, it is crucial to interpret the relevant rules to the fullest extent possible, to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law. In 2011 the case raised significant issues regarding to mixed agreements because member states are responsible for the performance of the obligations according to Article 9(3) and will remain so unless and until the Community adopts provisions of Community law covering the implementation of those obligations – as it was clearly defined when the EU became party to the Convention. Mixed agreements are agreements including shared competences or concurrent competences or member states' competences.[42] The member states remain responsible until the EU exercise its power under the EC Treaty and adopts proper provisions in the matter.[43]

The legal standing of the NGOs and the required Plaumann-test as a measurement in front of the CJEU, causing a heated discussion between the EU and the civil sphere for a long time. The first round was the infamous Greenpeace ruling of the CJEU in 1998 in which the well-known organisation wanted to challenge the Commission's decision taken between 1991 and 1993 to disburse to the Kingdom of Spain financial assistance provided by the European Regional Development Fund for the construction of two power stations in the Canary Islands.[44] The Court decided, environmental NGOs must fulfil the criterion of the Plaumann-test: *"Persons other than the addressees may claim that a decision is of individual concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed."*[45] The international organisation was not able to meet with the measurements of "*individual concern*". In the view of environmental NGOs, the CJEU is strictly limiting access

[42] *See* Leal-Arcas, R. The European Community and Mixed Agreements*. European Foreign Affairs Review*, vol. 6 no. 4, 2004, pp. 2004, pp. 483–513.

[43] 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. Declaration by the European Community in accordance with Article 19 of Convention on access to information, public participation in decision-making and access to justice in environmental matters. 2005/370/EC.

[44] Judgment of the Court of 2 April 1998. Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities. Case C-321/95 P. ECLI:EU:C:1998:153.

[45] Judgment of the Court of 15 July 1963. Plaumann & Co. v Commission of the European Economic Community. Case 25–62. ECLI:EU:C:1963:17.

to justice in the European Union since none of the relevant organisations could meet the requirements and they are practically forbidden from challenging environmentally related decisions. The scope of the Plaumann-test is quite restricted because it is only applied in actions for annulment if the applicant is considered as non-privileged.[46] In 2017 the CJEU delivered another decision concerning Greenpeace, the application for annulment of the Commission's decision approving State aid for the nuclear power plant, Hinkley Point C. The Court ruled that the applicant failed to meet with the criteria of *"individual concern"* denying access to justice – again.[47] In the *Janecek* case from 2008, the Court also had to deal with the term of *"directly concerned"* and ruled: *"persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution."*[48]

NGOs are incredibly crucial at the field of environmental policy, serving the *watchdogs' function* and should have the power to challenge and dispute environmentally related decisions. The role of non-governmental organisations is generally frowned in the European Union, for example, because of the lack of formalised involvement in decision-making procedures.[49] The problems arising from the lack of proper implementation of the Aarhus Convention is just another added issue.

Secondly, the ACCC found that review should encompass not just acts of individual scope but general acts to. In this regard, the European Union emphasised, the EU has a unique catalogue of legal sources and institutions; other bodies can adopt many different types of acts with various legal effect. Moreover, the scope of review is also a problem, because in the opinion of the ACCC, every administrative act that is merely environmentally-related should be challengeable, not only acts that are accepted as part of environmental law. For the European Union, *"what"* can be challenged is limited to and only act under environmental law.[50] About the ACCC findings, not just legally binding and external, but other acts should also be open to review. Meanwhile, the European Union justifies the scope

[46] Gombos, K. *European law – the legal order of the European Union*. Budapest: Wolters Kluwer Publishing. 2019, pp. 91–95.

[47] Order of the Court (Eighth Chamber) of 10 October 2017. Greenpeace Energy eG v European Commission. Case C-640/16 P. ECLI:EU:C:2017:752.

[48] Judgment of the Court (Second Chamber) of 25 July 2008. Dieter Janecek v Freistaat Bayern. Case C-237/07. ECLI:EU:C:2008:447.

[49] ELIANTONIO, M. The role of NGOs in environmental implementation conflicts: 'stuck in the middle' between infringement proceedings and preliminary rulings? *Journal of European Integration*, vol. 40 no.6, 2018, pp. 753–767.

[50] Commission's Communication, 2019, pp. 22–23.

of the procedure to acts having an external legal effect. The explanation is in the separation of powers, as one fundamental principle of the European Union. [51]

5. Closing remarks: compliance versus the semblance of compliance?

"Justice is open to all – like the Ritz Hotel."[52] The quotation is usually used to emphasize how expensive litigation could be, excluding those from the judicial system, who are directly affected by governmental and administrative decisions. In the European Union, the Aarhus Convention's third pillar had not brought the desired effect and in the interpretation of the NGO sphere, they are still practically excluded to challenge decisions and acts for annulment in front of the CJEU. It was emphasised, the scope of Plaumann-test is limited as described earlier, but the CJEU is slightly failed to provide a detailed explanation of how the organisations could meet with the requirements. In the last two decades, the European Union tried to reach compliance with the Aarhus Convention by modifying the relevant legislation and accepting the proper legislation. On the other hand, one of the shortcomings of the environmental policy is the lack of specific implementation of the third pillar. With regard to that, the main problems can be divided into the following segments. Firstly, the lack of specific binding legislation concerning access to justice in environmental matters and the failed Proposal. Moreover, the lack of proper legislation put too much burden on national courts in the member states.

The *locus standi* or legal standing generally means the right or ability to bring legal action to a court of law or to appear in a court. The legal standing of NGOs as part of the access to justice in environmental matters is a reason for complaint. The Commission's Notice issued in 2017 is the latest attempt to shed light in this regard. The Notice clarifies that *"in the absence of express legislative provisions, the requirements concerning legal standing have to be interpreted in the light of the principles established in the case-law of the CJEU"*.[53] Although some of the environmental directives specify the provisions of legal standing, access to justice is absent in most secondary legislation.[54] The aim of the European Union

[51] Commission's Communication, 2019, p. 24.
[52] SALMON, P. Access to Environmental Justice. *New Zealand Journal of Environmental Law*, 1998. Vol. 2, p. 11.
[53] Commission Notice on access to justice in environmental matters. C/2017/2616. 18 August 2017, p. 59.
[54] Ibidem.

is *"better results through better application"*[55] leaving the core decisions to the member states' administrative and judicial bodies. The main question is whether the new notice can help in better implementation, or the EU should finally adopt specific legislation at the matter of access to environmental justice. In two decades, the EU institutions were not able to agree on a particular law and the access to environmental justice is a still existing black hole in the European Union's legislation. Seemingly, the EU reached compliance with the Aarhus Convention, but because of the third pillar, the two opposing parties – NGOs v member states and EU – has very different opinions on the real possibilities. The EU's strict tenacity to the practice of the CJEU is understandable, but a more clarified approach would be appreciated from the NGO sphere. The failure of the EU is quite surprising, because it had been involved to the full discussion before the acceptance of the Aarhus Convention.

Article 9 is interpreted and applied differently in the member states. That is the reason why the NGO sphere is trying to pressure the EU institutions the adopt a new directive: *"Directive on Access to Justice in Environmental Matters, specifying minimum common rules for transposition of these provisions by member states, should be adopted."*[56] The will is understandable, but it is hardly imaginable that after twenty years of struggle, the EU will be able to reach common grounds and adopt the alleged legislation. In the foreseeable future, the European Union does not plan to adopt such a new directive. As a result, the EU stays in the state of the semblance of compliance. But as the well-known quote says: *"Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has."*[57]

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[55] Communication from the Commission. EU Law: Better Results through Better Application. Brussels, 21. 12. 2016.

[56] Report on Access to Justice in Environmental Matters. Justice and Environment, p. 21. Avaiable at: http://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf (07 February 2020).

[57] MEAD, M. In: KEYS, D. *Earth at Omega: Passage to Planetization*, 1982.

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EU Human Rights Approach in Climate Change and Energy Transition – Call for Sustainable Development?

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Summary: European Union is considered as valuable actor in international surrounding. The principle of human rights as set in article 2 TEU is observed in its legislation and policies. The current development in area of sustainable development goals is also generating new challenges especially in relation to climate change. The EU as the signatory country of Paris agreement and observer to UN followed its obligations, and in contributing to climate change actions, focused its policy also to energy transition. The development in EU differ to universal development, due different political, legal and regional aspects. How the EU implement its obligation in sustainable development, climate change and energy transition with its human rights protection principle? The paper is focused on analysis, how the EU acts in concrete policy actions and whether there exists human rights and development nexus.

Keywords: human rights – human security – sustainable development – EU external action – EU energy policy – energy transition

1. Introduction

Human rights comprise a part of the globalized world as well as technologies, innovations and new security challenges including the climate change. The human rights protection and its implementation is embedded in different structures of international society.

In 2000 the UN had presented on the Millennium Summit a vision of the future and the areas that should be in the focus of the international community such as combating poverty, education in developed and developing countries, gender equality, effective development aid and, naturally, the pursuit of peace

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and security in the world based on the principle of human security. This program is known as the Millennium Development Goals and they were expected to be fulfilled by 2015. Instead of the objectives themselves, the initial concerns about their non-feasibility came true.

The path to the future sustainability of the next generations is seen in the later Sustainable Development Goals, focused on the universality of human rights and sustainable development. Within creation of global goals, the focus was also on natural challenges such as climate changes and non-renewable sources of energy, on economic growth and innovations, responsible production and consumerism, and last but not least on sustainable cities and communities. These Sustainable Development Goals has been set to meets its objectives till the 2030. They represent changed in development policy and change in international development regime.

One of the biggest challenges of the SDGs is in fact implementation at national level. In this regard, however, member states are not the only actors who are involved in the process of implementation of the SDGs which include – in addition to civil society, multinational corporations, but most of all also regional organization, in particular the European Union. The EU since the ratification of Lisbon Treaty has acquired legal personality, has strengthened its position in the economic market, and has also outlined plans for sustainable development, including fight against climate change and connected energy transition.

The sustainable development goals formed new development regime, which comprises of norms and principles common to other regimes as well (climate or human rights regime). SDGs regime is based foremost on the idea of human security and thus is up to certain level covered by the current EU activities. However, the coordination mechanism is missing that would secure the complex administration of these goals in the EU policies. The uniqueness of the EU functioning, its organizational structure, strong economic position worldwide and already existed basis of the SDG regime force the EU to pursue its own vision of the development regime rather that to accept the standard set by the UN.

The paper is focused on the SDG implementation in the EU policies, within the framework of human rights as one of the fundamental principles of the EU. We consider that the concrete EU policies should be interconnected mainly through the human rights principles and EU interests. The EU by joining the SDG should observe fulfilment of set goals in all its internal and external policies. According to the principle of human rights set in article 2 TEU is precondition of internal policies and as set in article 21 TEU in external policies, we focus on analysis how concretely the principle of human rights in connection

with development is observed and implemented in climate policy and energy transition. These two policies have both internal and external dimension and are directly connected with EU contribution to SDG. Selection of these two policies was also limited by the fact, that in comparison to others, these are initially of economic character and by its analysis we may evaluate shift or development of EU actions conform to SDG and human rights approach. The research question is: How is the human rights approach observed in climate change and energy transition policy of the European Union, as contribution to sustainable development?

2. EU external relations in the context of human rights and sustainable development

2.1. Human rights, human security and sustainable development

During its development it has created an idea of a European identity based on civil power (Duchene[1], Smith[2]), normative power (Manners[3],), or superpower (McCormick[4]). However, the ontological debate on defining the EU can keep forever, so the researchers also took deontological position and looked rather what the EU does in order to allow a comparison of statements and actions – words and deeds (Bindi[5]). In this respect, therefore, it is important to understand what are the main principles of the EU and how these are fulfilled by the EU not only in its internal policies but also in its external relations. On the basis of Art. 2 TEU, the EU is committed to the values of human dignity, freedom, democracy, the rule of law and respect for human rights, including minority rights. The Union has thus gradually established its role in of the international scenario[6]

[1] DUCHÊNE, F. The European Community and the Uncertainties of Interdependence. In: KOHNSTAMM, M, HAGER, W. *A Nation Writ Large? Foreign-Policy Problems before the European Community.* London: Macmillan, 1973, pp. 19–20.

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and present itself as the international actor in several areas, including human rights protection.[7]

The EU as an actor in international relations[8] has observation status at the United Nations and all EU Member States are UN members. According to this, the EU use to coordinate its external policies in communicating UN topics and obligations towards UN treaties, however it is often criticized for a lack of coherence and consistency in this field. EU external action includes a number of specific policies (e.g. international trade, development and humanitarian aid, security and defense policy, energy policy, diplomacy, migration, enlargement, neighbourhood, etc.) with different level of success or recognised international actor position.[9] The EU in its external relations rely not only on the decision of its Member States, but also general principles. Unlike the internal EU policies, where the Charter of Fundamental Rights (Art. 6 TEU), guarantees respect for human rights within the Union in external relations, there is no enforcement of these rights other than the above-mentioned Article. 2 TEU. The main tools within the EU scope are clauses on human rights, which are part of the political conditionality in international treaties. And although (inter)national interest and promotion of human rights are the dominant principle of international agreements and international regimes there exists between them and untouched area calling for a thorough analysis.

The broader human rights approach to achieve EU goals as set in treaties are relying on the human security approach, which defines the connection between concrete policies and the secure and sustainable environment. So-called security-development network (security – development nexus) is aware of the relationship between development and security. In this manner it is clear, that EU act accordingly to the universally set development agenda within the UN, however considering the security environment of the European region.

AGGESTAM, L. *A European Foreign Policy? Role Conceptions and the Politics of Identity in Britain, France and Germany.* Doctoral dissertation. Stockholm: University of Stockholm, 2004 [online] Available at: https://researchportal.bath.ac.uk/en/publications/a-european-foreign-policy-role-conceptions-and-the-politics-of-id

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[7] See more: MOKRÁ, L., JANKOVÁ, K. EU as a human rights actor? *Bratislava law review*, 2018, vol. 2, no. 2, pp. 91–105.

[8] See also: BRETHERTON, CH., VOGLER, J. *The European Union as a Global Actor*. London: Routledge, 1999.

GINSBERG, R., H. *The European Union in International Politics*. *Baptism by Fire*. Boston, Rowman & Littlefield Publishers, 2001.

[9] See also MOKRÁ, L., JANKOVÁ, K. Humanitarian aid and crisis management: new EU challenges in relation to Doha summit. In: MODRZEJEWSKI, A. (ed.). *Challenges of today: Politics and Society*. Gdańsk: Research Institute for European Policy and Authors, 2015, pp. 196–215.

The EU use to refer in its declaration and policies to make a positive and constructive contribution to the development of the 2030 Agenda for Sustainable Development. The basis for further analysis on the actions of the EU in development regime will be the model of the EU behaviour in human rights regime. Despite the fact that the human rights regime can be defined as relatively powerful regime, the EU in this case has not downloaded the regime as such but created its own through Art. 2 TEU and Art. 6 TEU. Here opens the space for our research that examines how the EU approaches the development regime. How does the EU contribute to the creation and implementation the Sustainable Development Goals? Is the sustainable development regime (SDGs) implemented according to the structures and rules of the UN or the EU again issued its own way and its own rules and procedures similarly as in the case of human rights regime, and how it is conditioned?

2.2. Climate change as threat to human security(?)

"Climate change is a reality and can seriously harm the future development of our economies, societies and eco-systems worldwide", according to the 2007's scientific report from the UN's Intergovernmental Panel on Climate Change (IPCC)[10]. The human impact of climate change may be understand also in connection to universally recognized fundamental rights, mainly to the right to life, adequate housing, health, and water, however all these rights connections are not explicitly stated in universal documents and there are still several states not guaranteeing all of them (n.b. only 155 states recognised right healthy environment as fundamental right[11]).

Although the climate change affects the protection of human rights as recognised by the Universal Declaration of Human Rights and different regional treaties, there are still some regions and countries, where the human rights cannot be exercised properly due non-implementation and inefficiency. Sustainable development goals have been adopted as agenda, which should frame the world's community intention to prevent violation of human rights due instable environment, influenced by ongoing climate changes and connected with negative effects on environment and human beings.

The UN as the main leader in adoption climate change's agenda, constantly emerged about the situation in environment and non-sustainability of human

[10] OHCHR. *Climate change and human rights* [online]. Available at: https://www.ohchr.org/EN/NewsEvents/Pages/Climate.aspx

[11] UN. *Human rights are at threat from climate change, but can also provide solutions* [online]. Available at: https://www.unenvironment.org/news-and-stories/story/human-rights-are-threat-climate-change-can-also-provide-solutions

beings' actions. In its 5th Assessment Report, the Intergovernmental Panel on Climate Change (IPCC) "unequivocally confirmed that climate change is real and that human-made greenhouse gas emissions are its primary cause. The report identified the increasing frequency of extreme weather events and natural disasters, rising sea-levels, floods, heat waves, droughts, desertification, water shortages, and the spread of tropical and vector-borne diseases as some of the adverse impacts of climate change. These phenomena directly and indirectly threaten the full and effective enjoyment of a range of human rights by people throughout the world, including the rights to life, water and sanitation, food, health, housing, self-determination, culture and development."[12]

The UN and IPCC work was supported also by the Office of High Commissioner for Human Rights, once he publicly declared, that "Climate change therefore should be addressed in a way that is fair and just, cognizant of the needs in the community or region and adherent to the principles of non-discrimination and equality. Any sustainable solution to climate change must take into account its human impact and the needs of all communities in all countries in a holistic manner."[13] The UN through this common attitude ask states and international organisations to effective contribution in fighting climate change, as it has uncountable impact to people and influence the level of human rights protection.

As to the latest, in the Climate Change and Human Rights report the UN had "set of specific recommendations related to protecting human rights from climate change impacts and responses, including:

- the inclusion in the Paris agreement of a schedule for assessing and revisiting country commitments with the aim of increasing, over time, the ambition of the climate targets set by countries,
- a reference in the Paris Agreement to the effects of climate change on the exercise of human rights and the need to respect, protect, promote and fulfil human rights in all climate-related activities,
- ensuring implementation of social safeguards in various climate funds to take into account human rights considerations." [14]

As mentioned, one way how to contribute to sustainable environment and eliminate climate change as possible, is to focus on more just, equitable society

[12] PAUCHARI, R., K., MEYER, L. (ed.). *UN IPCC 5th Assessment Report* [online]. Available at: https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf

[13] OHCHR. *Climate change and human rights* [online]. Available at: https://www.ohchr.org/EN/NewsEvents/Pages/Climate.aspx

[14] BURGER, M. (ed.). *Climate Change and Human Rights* [online]. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf?sequence=2&amp%3BisAllowed=

and urge countries to meet their commitments under the Paris Agreement. This universal treaty was signed on 2016 by 175 contracting parties (174 states and the European Union) on the first date when it was open for signature. The Agreement entered into effect as of 4 November 2016. The European Union as the regional type of international organisation by its signature of Paris Agreement had double underlined the intention to be active actor in area of climate change and sustainable development connected to fulfilment of agreement objectives.

3. EU action in climate change and energy transition

In the previous section, we have established indisputable link between the human security and the climate change that poses a profound threat to (not only) humans. As formulated by the Working Group II of the Intergovernmental Panel on Climate Change (IPCC), the implications of the climate change on the human (in) security include 1) undermining the livelihood and human capital; 2) comprising the culture and identity; 3) increasing the involuntary migration; or 4) inability of states to provide conditions fostering the human security[15]. The European Union has been founded on the values and principles of peace, security, (but in the context of this article most importantly) sustainable development and human rights[16]. Moreover, these principles (should) guide also the EU external actions[17] and thus constitute the normative framework for the EU actorness[18]. Hence, the EU is accustomed to mainstreaming its principles and values into various policy areas (for example incorporation of human rights and gender into security and defence policy[19]). On that account and in the context of the climate change, in this part, we deliberate on the activities of the European Union on the nexus between the human security and energy policy.

[15] INTERGOVENRNMENTAL PANEL ON CLIMATE CHANGE. *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects.* Cambridge: Cambridge University Press, 2014, pp. 755–791.

[16] EU. *Treaty on European Union*. *Article 2.* OJ C 326, 26. 10. 2012, pp. 13–390.

[17] EU. *Treaty on European Union*. *Article 21.* OJ C 326, 26. 10. 2012, pp. 13–390.

[18] For more about the EU as normative power see MANNERS, Ian. Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies,* 2002, vol. 40, no. 2, pp. 235–258.

[19] GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN UNION. *Mainstreaming human rights and gender into European security and defence policy* [online]. Available at: https://op.europa.eu/en/publication-detail/-/publication/34de8812-1331-400b-bf78-c886aef81654/language-en

3.1. EU approach to combat climate change

The European Union has embraced its role as the leader in the fight against the climate change[20] as a reaction on the degradation of the climate situation (and subsequent implications) and to commit itself to the international obligations in this matter. In line with the United Nations' Sustainable Development Goals (SDGs) – primarily Goal 7 (Affordable and Clean Energy) and Goal 13 (Climate Action)[21] – and the commitment to the Paris Agreement[22], the lynchpin of the EU approach to (combat) the climate change is a low-emission economy transition with a view of climate neutrality by 2050. As the Paris Agreement emphasises, the reduction of the greenhouse gas (GHG) emissions is pivotal in attempts to mitigate the climate change impacts[23]. Whereas, the "energy-related emissions account[ed] for almost 80% of the EU's total greenhouse gas emissions,"[24] the EU has commenced ambitious and large-scale energy transition that triggers major changes for the EU energy policy and the very structure of the energy system. Within the European context, the energy policy has been approached primarily through the prism of state-centrism, assuming that the (member) states are the most important actors pursuing their energy policy goals on the basis of national interests (for example energy security)[25]. However, since the adoption of the Lisbon Treaty, the energy policy has become a shared competence between the EU and the member states[26], which enhanced the role of the EU in the energy policy framework and provided platform for more comprehensive action, specifically decarbonisation of the energy system. As Solorio pointed

[20] EUROPEAN COMMISSION. *The European Union continues to lead the global fight against climate change* [online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5534

[21] UNITED NATIONS. *Transforming our world: the 2030 Agenda for Sustainable Development* [online]. Available at: https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf

[22] UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE. *The Paris Agreement* [online]. Available at: http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

[23] UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE. *The Paris Agreement* [online]. Available at: http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

[24] DIRECTORATE-GENERAL FOR ENERGY. *Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy*. Luxembourg, Publications Office of the European Union, 2011.

[25] CHERP, A., VINICHENKO, V., JEWEL, J., BRUTSCHIN, E., SOVACOOL, B. Integrating techno-economic, socio-technical and political perspectives on national energy transitions: A meta-theoretical framework. *Energy Research & Social Science*, 2018, vol. 37, pp. 175–190.

[26] TEWS, K. Europeanization of Energy and Climate Policy: The Struggle Between Competing Ideas of Coordinating Energy Transitions. *The Journal of Environment & Development*, 2015, vol. 24, no. 3, pp. 267–291.

out, the post-Lisbon setting encouraged the "Europeanisation of energy policy governance" by incorporation of the environment/climate variable into energy policy framework[27]. Coupling the energy with the climate has created a truly 'European' energy policy paradigm, guiding the energy transition, by shifting the primary focus of the action from states to the people and sustainability of their environment. The anthropocentric perspective on the energy policy and energy transition underlines the consideration of the human security and penetration of EU values and principles into the policy areas not usually common for people-oriented action. Moreover, the adjustments of the EU energy policy and re-structuralisation of the energy system in order to combat the 'threat multiplier' to the human security (as climate change is referred to) uncovers the political motive of the EU behind the energy transition. Hence, we presume that the policies are the drivers of the energy transition in the EU rather than technological innovations or economic development/cost competitiveness[28]. In the following section, we examine the presence of the concept of anthropocentrism (primarily through human security) in the EU energy agenda that is overlapping in both domestic and external dimension of the EU action.

3.1.1. Domestic dimension

For a long time, the European Union has been side-lined from drastically influencing member states' energy policy as the member states opposed the idea of EU-wide energy policy due to the fact that they each have their own unique position regarding the (energy) resources, import-export or consumption patterns[29]. Thus, the EU has focused mainly on the business/economic aspect of the energy policy by building the common energy market. Adapting to the reality, the EU has pursued the liberalisation of the gas and electricity markets and setting the regulatory framework in three series of legislative packages (in time span 1996–2009) in order to ensure functioning market with fair competition and customers' protection. As mentioned earlier, the ratification of the Lisbon Treaty provided a legal basis for the energy policy being shared competence between the European Union and the member states. Arguably, it created a momentum for more assertive stance of EU in shaping the energy policy, which manifested in two ways.

[27] SOLORIO, I. Bridging the Gap between Environmental Policy Integration and the EU's Energy Policy: Mapping out the 'Green Europeanisation' of Energy Governance. *Journal of Contemporary European Research*, 2011, vol. 7, no. 3, pp. 396–415.

[28] BLAZQUEZ, J., FUENTES-BRACAMONTES, R., MANZANO, B. *A road map to navigate the energy transition*. Oxford: Oxford Institute for Energy Studies, 2019, pp. 1–18.

[29] HAALAND MATLÁRY, J. *Energy Policy in the European Union*. New York: St. Martin's Press, 1997.

Firstly, the European Union shifted its primary orientation from the economic to more anthropocentric by undergoing low-carbon energy transition to address the issue of the climate change and sustainability of the environment. Despite the fact that under the Article 194 of the Treaty on the Functioning of the European Union, member states have 'sovereignty' in exploiting its energy resource and choosing its energy mix (which may contradict the energy transition objectives); the EU has been able to impose obligations on the member states to comply with the new EU energy policy paradigm. In 2010, the European Commission communicated its ambition for EU to reduce its greenhouse gas emissions by 20 %, increase the share of renewable energy sources to 20 % (of consumption) and achieve 20 % improvement in energy efficiency[30]. Moreover, it was accompanied by the corresponding legislation, notably, the 'Renewable Energy Directive' that sets binding national targets for increasing the share of renewables in the energy consumption of the member states by 2020[31] or the 'Energy Efficiency Directive' under which the member states are required to set indicative national energy efficiency targets, as well as publish 3-year national energy efficiency action plans and subsequent annual progress reports[32]. Similarly, the EU has set the targets to deliver by 2030 – 40 % reduction of greenhouse gas emissions, 32.5 % of renewable energy sources in final consumption and 32.5% energy efficiency[33]. Nevertheless, the renewable energy and the energy efficiency have become paramount elements of the energy transition and achieving climate neutrality (net-zero greenhouse gas emissions) by 2050. Furthermore, the new (von der Leyen) Commission follow the path of the Juncker's Commission by the proposal of a European Green Deal, building on the transition as the (energy) policy paradigm.

Secondly, in line with the energy transition efforts, the EU managed to launch a platform to institutionalise the energy policy and its governance. In 2015, the European Commission introduced the Energy Union encompassing "five mutually-reinforcing and closely interrelated dimensions designed to bring greater energy security, sustainability and competitiveness," which are 1) energy

[30] EUROPEAN COMMISSION. *Energy 2020: A strategy for competitive, sustainable and secure energy (COM(2010) 639 final)* [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0639&from=EN

[31] EU. *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC*

[32] EU. *Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC*

[33] EUROPEAN COMMISSION. *Clean energy for all Europeans*. Luxembourg: Publications Office of the European Union, 2019.

security and solidarity; 2) fully integrated energy market; 3) energy efficiency; 4) decarbonisation of economy; and 5) research and innovation[34]. Such a holistic approach to the energy policy that the Energy Union represents aims to provide a framework for coherent EU energy policy with concrete results (safe, sustainable and affordable energy) and for EU to establish a synergy between the energy policy and its principles (in this case human security). Furthermore, the EU has set up a control and 'enforcement' mechanism on the compliance of the member states with the new energy policy paradigms in form of the 'Regulation on the Governance of the Energy Union'[35]. Under the regulation, the member states are obliged to draft national energy and climate plans (NECPs) for the period 2021 to 2030 and then every 10 years for the following 10-year periods, elaborating on the how the member states intent to deliver the 2030 energy and climate targets, and on the compliance with the commitment to the Paris Agreement and the GHG emissions reduction. Moreover, the regulation also contains a provision that establishes a consultation process between the European Commission and member states, and authorise the Commission to monitor and assess the progress of the member states towards the achievements and contributions to the Energy Union. This mechanism implies power relation between the Commission and the member states in the context of the energy transition.

Furthermore, the question of energy security has been also addressed by the liberalisation of the internal energy market and integration of the energy system[36], thus economy-oriented approach. Besides, reflecting on the geopolitical situation in energy area (high energy import dependence of the EU primarily on Russia and the Russian gas disruptions in 2006 or 2009), the Energy Union emphasises diversification of the energy supplies (sources, suppliers and routes)[37]. However,

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[34] EUROPEAN COMMISSION. *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy* (COM(2015) 80 final) [online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF

[35] EU. *Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council*

[36] LABELLE, M. C. Regulating for Consumers? The Agency for Cooperation of Energy Regulators. In: ANDERSEN, S. S., GOLDTHAU, A., SITTER, N. (eds.). *Energy Union: Europe's New Liberal Mercantilism?* London: Palgrave Macmillan, 2017, pp. 147–165.

[37] EUROPEAN COMMISSION. *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy* (COM(2015) 80 final). [online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF

the incorporation of the human (in)security concept into the energy policy via climate variable resulted in the rethinking of the EU perception of energy security. In the framework of the energy transition, the domestic renewable energy sources and energy efficiency has become a new benchmark for energy security[38]. Given the EU's approximate 55 % energy import dependency (in 2017)[39], the domestically produced renewable energy decreases the dependency on the external supplies/suppliers (and potential political pressure or price shocks) and the improvements in energy efficiency (and moderation of the demand) decrease the energy consumption. Thus, the shift away from the climate-harmful fossil fuels brings also pragmatic implications for the EU energy security and resilience of the energy system.

Although the access to energy is not explicitly enshrined in the human rights doctrine, the "interrelationship between energy and other socioeconomic rights of fundamental importance is evident"[40], as the energy (access) is often pre-requisite to other socio-economical processes. Another manifestation of the EU's actions to cultivate the human security in context of the energy transition and climate concerns is the latent (human) rights-based approach to address the energy poverty. Energy poverty denotes the inability of individuals or households to "adequately heat or provide other required energy services in their homes at affordable cost" and in EU almost 50 million people has encountered it[41]. In order to protect and empower (especially) vulnerable households, the key transition aspects (as we outlined previously) renewables and energy efficiency should help to address the structural causes of the energy poverty. As the empirical study suggests, the energy efficiency improvements contribute to reduction of household energy consumption (decrease in energy spending) and simultaneously decrease the energy poverty rates, thus, "showing the direct effect of energy efficiency in helping reduce energy-related economic vulnerability"[42]. Moreover, in attempts to alleviate the energy poverty, the renewables play a complementary role. The EU is encouraging decentralisation of the energy system by removing barriers

[38] EUROPEAN COMMISSION. *Clean energy for all Europeans*. Luxembourg: Publications Office of the European Union, 2019.

[39] EUROPEAN COMMISSION. *EU Energy in Figures: Statistical Pocketbook 2019*. Luxembourg: Publications Office of the European Union, 2019.

[40] BRADBROOK, A. J., GARDAM, J. G. Placing Access to Energy Services within a Human Rights Framework. *Human Rights Quarterly*, 2006, vol. 28, no. 2, pp. 389–415.

[41] THOMSON, H., BOUZAROVSKI, S. *Addressing Energy Poverty in the European Union: State of Play and Action* [online]. Available at: https://www.energypoverty.eu/sites/default/files/downloads/publications/18-08/paneureport2018_final_v3.pdf

[42] COUNCIL OF THE EUROPEAN DEVELOPMENT BANK. *Energy Poverty in Europe: How Energy Efficiency and Renewables Can Help* [online]. Available at: https://coebank.org/media/documents/CEB_Study_Energy_Poverty_in_Europe.pdf

(socio-technical, administrative, legislative) of self-production of the renewable energy that should empower the energy poor households. Additionally, the increased use of renewable energy should in long-term decrease the renewable energy prices[43] and combined with the improvement in the energy efficiency significantly contribute to combating the energy poverty in EU. Furthermore, supplemented by the EU legislation, the member states have to prioritize households in social housing and vulnerable households, monitor energy poverty and include the objectives on energy poverty in NECPs, and incorporate energy poverty in long-term renovation strategies – all with the assistance of the Energy Poverty Observatory initiative platform[44].

3.1.2. External dimension

Whereas the climate change is a global and trans-boundary issue the domestic action (in form of the energy transition), undertaken by the European Union, could be considered to have an external dimension as well. However, the EU 28 member states (including Great Britain) accounts only for approximately 10% of the global fossil CO_2 emissions[45]. Hence, in order to safeguard its principles and values (in this context human security and sustainable development), the EU must choose international approach and multilateral cooperation to address the climate change. It means that the EU has to incorporate the climate variable into its external actions and thus, according to the logic of intertwining climate with energy, the penetration of the energy agenda into the EU external action.

Traditionally, the EU external energy policy has been centred on the internal market and the regulatory power. Regarding the EU energy dependency on external suppliers and geopolitical dynamics, the regulatory power of the EU backed by the attractive (single) energy market has been used to achieve foreign policy objectives, mainly in the scope of energy security[46]. Especially in the case of state-owned enterprises (such as Gazprom) the regulatory power more or less disabled the 'divide and rule' politics based on the bilateral deals between the

[43] THOMSON, H., BOUZAROVSKI, S. *Addressing Energy Poverty in the European Union: State of Play and Action* [online]. Available at: https://www.energypoverty.eu/sites/default/files/downloads/publications/18-08/paneureport2018_final_v3.pdf

[44] EUROPEAN COMMISSION. *Clean energy for all Europeans*. Luxembourg: Publications Office of the European Union, 2019.

[45] MUNTEAN, M., GUIZZARDI, D., SCHAAF, E., CRIPPA, M., SOLAZZO, E., OLIVIER, J., VIGNATI, E. *Fossil CO2 emissions of all world countries: 2018 Report*. Luxembourg: Publications Office of the European Union, 2018.

[46] ANDERSEN, S. S., GOLDTHAU, A., SITTER, N. Introduction: Perspectives, Aims and Contributions. In: ANDERSEN, S. S., GOLDTHAU, A., SITTER, N. (eds.). *Energy Union: Europe's New Liberal Mercantilism?* London: Palgrave Macmillan, 2017, pp. 1–11.

member states and Russia. All in all, the external dimension of the energy policy has been focused on achieving internal energy-related objectives (primarily security). However, with the energy transition based on (as previously identified) human security principle, the EU external energy (and climate) agenda has arguably shifted from regulatory to normative. Consequently, the discursive practice of the EU (predominantly through European Commission) adjusted accordingly. The European Union has positioned itself in the roles of 'energy and climate action leader', 'promoter of clean energy', or 'leader in fight against the climate change' – all in the framework of global sustainable development and human security. Moreover, as European Commission asserted, "[EU] is committed to systematically including energy efficiency and renewable energy as a priority in all existing geopolitical, diplomatic and financial initiatives"[47]. Hence, unlike the regulatory approach to external dimension of the energy politics (where energy-related policies shall generate internal energy-related results), the normative approach to external (coupled) energy and climate policy aim to produce external energy-related outcomes, which are however prerequisite and subordinated to the (ultimate) human security agenda.

Committed to the normative agenda, in order to mainstream the climate sustainability and clean energy into national structures of the third countries (while implementing the Paris Agreement objective), EU contributes significant financial resources, especially to developing countries. European Union is not only the biggest donor of official development aid but also the biggest provider of public climate finance (giving more than 20 billion euro in 2018 alone)[48]. Dedicated to the global energy transition and eradication of the energy poverty, the EU activities the bolster the role of energy efficiency and renewables are notable mainly in Africa. The EU cooperation with the African Union is facilitated under the framework of Africa-EU Energy Partnership (AEEP) and launched numerous initiatives. For example, the Renewable Energy Cooperation Programme (RECP) or the EU-Africa High Level Platform on Sustainable Energy Investments (SEI Platform) seek to improve the access to energy, energy security and attract sustainable investments – all in the context of sustainable development, inclusive growth and energy transition in Africa. Therefore, true to the human security paradigm, the energy and climate has gained a prominent role in the area of international development and cooperation.

Furthermore, the European Union is in all aspects of the external actions committed to the principle of multilateralism. The climate change creates challenges

[47] EUROPEAN COMMISSION. *Clean energy for all Europeans*. Luxembourg: Publications Office of the European Union, 2019.

[48] EUROPEAN COMMISSION. *International climate finance* [online]. Available at: https://ec.europa.eu/clima/policies/international/finance_en

that EU cannot overcome alone but can promote a global multilateral coordination of actions. Thus, the EU engages in the 'energy/climate diplomacy'. Firstly, the effectiveness of the EU climate diplomacy is dependent on the credibility of the domestic action (on which we elaborated in the previous section) as the EU is dedicated to 'lead by example' in this area. Secondly, the EU builds on the robust diplomatic network, leadership in providing development aid and sizeable economy/trade opportunities in to order to (successfully) incorporate the energy and climate provision into the multilateral or bilateral (not only investment) agreements, particularly on the G20 forum (having global share of roughly 80% of GHG emissions). The responsibility of the EU to manage a multilateral response to climate change is substantially larger, since the United States under the President Trump abandoned the Paris Agreement.

4. Conclusion

The European Union within the implementation of the sustainable development agenda had modified the universal regime created within the UN, by reviewed its policies on human rights approach. This is reflecting the internal EU obligation to observe human rights principle as set in article 2 TEU.

In evaluation of the concrete types of action in relation to sustainable development – climate change and energy transition, we may see shift in how the EU act – in adopting legislation and implementing policies. The Union since adoption of Paris agreement has constantly developing its policies conform the principle of human rights, but also applies human rights approach.

The combination of human rights and sustainable development universal obligation led EU to implement human rights approach fully into its internal and external policies. A human rights approach is a "conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress."[49] As such, the human rights approach provides EU even normative framework for the anthropocentric attitude, when the human rights interest prevails economic orientation of the EU.

In this sense we may conclude, that EU use to elaborate not only its own development regime, but also human rights and development nexus. The contribution

[49] UNICEF. *Human Rights Based Approach* [online]. Available at: https://www.unicef.org/policy-analysis/rights/index_62012.html

of EU to sustainable development agenda in area of climate change is observing human rights principle, both in internal and external dimension.

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The Constitutional Obligation of the State to Protect the Weaker Party in a Horizontal Relationship*

Monika Florczak-Wątor**

Summary: The aim of this paper is to present how the State's obligation to protect the weaker party in a horizontal relationship can be reconstructed from the provisions of the constitution. The paper outlines the concept of the protective obligations of the State as well as the peculiarities of the horizontal relationships. It deals with normative grounds for the general obligation to protect an individual by the State and for the specific protective obligations with respect to particular rights and freedoms. The analysis is primarily based on the constitutional provisions of Visegrad Group countries and includes the provisions of the European Convention on Human Rights. The paper concludes that conflicts of the State's protective obligations resulting from conflicts of the rights and freedoms of individuals should be resolved in the same way in which the theory of law recommends resolving conflicts of constitutional principles.

Keywords: protective obligations – horizontal relationships – constitution – weaker party – conflict of State's obligation – protection of individuals – rights and freedoms

1. Introduction

Protecting the rights and freedoms of an individual is a fundamental obligation of any State. Discharging the obligation by the State authorities is an argument justifying the State's existence and actions. The monopoly of State power and the individual's duty to obey – combined with the prohibition of any form of self-help that involves the use of force – means that the State is the sole guarantor of all the rights and freedoms vested in an individual. The obligation to protect is also inherent in these rights and freedoms. For an individual, the rights and

* This paper is a part of the research project 'Positive obligations of the State in the Horizontal Relations' funded by the Polish National Science Centre (DEC-2013/11/B/HS5/03711).

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freedoms mark the boundaries of a sphere that is free from interference and whose protectithe State guarantees. Any holder of these rights and freedoms can demand that the State provides such protection, while the State has an obligation to treat all its citizens equally. Yet in horizontal relationships, the individual's rights and freedoms are often in conflict, and so are the State's protective obligations. The State in obligated by the constitution to ensure the protection of the weaker party in a horizontal relation from the actions of the stronger party. This is precisely the topic covered herein.

2. Horizontal relationships and their particularities

Let us start by explaining the particular nature of a horizontal relationship, because understanding this term is pivotal for our further consideration. A horizontal relationship is a relationship between two private entities that are on an equal footing. It can arise as a result of entry into an agreement (for instance, between the tenant and the landlord), the expression of consent to enter into a specific relationship with another person (such as the relationship between spouses), or it can result from the regulations concerning the legal position of certain persons (for example, parents and children). Its opposite is a vertical relationship between the State and an individual, where the individual is subordinate to the State.[1]

The basic principles underpinning a horizontal relationship are those of the autonomy of the parties' will and their equal standing.[2] The first of these principles means that parties in a horizontal relationship are free to define the relationships between them, which they achieve through a variety of legal transactions: unilateral, bilateral, or multilateral ones.[3] The consequence of the autonomy of will is the freedom of contract, meaning the freedom to decide whether or not to conclude a contract, the freedom to define the substance of a contractual relationship, the freedom to choose the counterparty and the freedom to terminate

[1] On the difference between horizontal and vertical positive obligations see LAVRYSEN, L. *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*. Cambridge, Antwerp, Portland: Intersentia, 2016, pp. 78–82.

[2] See FLORCZAK-WĄTOR. M. *Obowiązki ochronne państwa w świetle Konstytucji RP i Europejskiej Konwencji Praw Człowieka*. Kraków: Wydawnictwo Księgarnia Akademicka, 2018, pp. 23–26.

[3] On the autonomy of will from the philosophical perspective see: DWORKIN, G. *The Theory and Practice of Autonomy*. Cambridge: Cambridge University Press, 1988; DARWALL, S. The Value of Autonomy and Autonomy of the Will. *Ethics*, 2006, vol. 116, no. 2, pp. 263–284; YOUNG, R. The Value of Autonomy. *The Philosophical Quarterly*, 1982, vol. 32, no. 126, pp. 35–44.

the agreement.[4] The second principle that applies in horizontal relationships is the equality of the parties. Both parties have corresponding rights and obligations and hold an equal influence on the formation of their horizontal relationship. Naturally, in practice, there can be actual inequalities between the parties, which may put the parties on an unequal footing. In employment relations, the employer will always be the stronger party compared to the employee, just as in economic relationships where the entrepreneur will always have the advantage over the consumer. However, where the parties' equal footing is not distorted to an extent preventing either party from influencing the substance of the legal relationship between them, we can still refer to it as a horizontal relationship. But where the parties are clearly not on an equal footing or where there is a high risk that this will be the case, then the State's corrective intervention may be necessary to protect the weaker party from the actions of the stronger one.[5] Such an intervention aims to restore the balance between the parties involved in a horizontal relation. It needs to be stressed that the principle of the equal footing of the parties to such a relation is closely linked with the principle of autonomy of will, because the latter can be implemented only if neither party has an advantage over the other to the extent that would enable the former to subordinate the latter.

3. Source of protective obligations

The State's protective obligations are expressed in different ways in constitutions and international agreements. My further reflections are primarily based on the analysis of the constitutions of four Visegrad Group States[6] and the European Convention on Human Rights as a part of their constitutional orders.[7] Case-law and legal literature have seen attempts at inferring from these legal acts both

[4] RADWAŃSKI, Z. *Teoria umów*. Warszawa: Państwowe Wydawnictwo Naukowe, 1977, p. 99.

[5] The Bundesverfassungsgericht held in the *Bürgschaftsverträge* case of 19 October 1993 (1 BvR 567/89, 1 BvR 1044/98) that when a 'structural inequality' of the bargaining positions of the contracting parties has resulted in a contract that is exceptionally onerous on the weaker party, the courts are obliged to intervene. See also NOLAN, D., ROBERTSON, A. (eds.). *Rights and private law*. Oxford: Hart Publishing, 2012, p. 104; SMITS, Jan. *The making of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*. Antwerp-Oxford-New York: Intersentia, 2002, p. 27.

[6] See the Constitution of the Slovak Republic of 1 September 1992; the Constitution of the Republic of Poland of 4 April 1997; the Fundamental Law of Hungary of 25 April 2011 and the Constitution of the Czech Republic of 16 December 1992 together with the Charter of Fundamental Rights and Freedoms.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms open for signature in Rome on 4 November 1950 and came into force in 1953. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

a general obligation to protect an individual by the State and some more specific obligations with respect to the protection of particular rights and freedoms. Of the latter obligations, we will be looking especially at those connected with protecting the weaker party in a horizontal relationship from the stronger party's actions. We are going to treat them as the aforementioned instrument of State interference aimed at restoring the balance between the parties of such relations.

Before embarking on an analysis of the normative basis for the general and specific protective obligations, we should explain that when such protective obligations are enshrined in a legal act such as a constitution or convention, this has the nature of a guarantee for the individual, because it is one of the ways in which a State binds itself to these obligations. Yet there can be doubts regarding whether a provision that enshrines the State's protective obligations is actually the source of these obligations. As mentioned earlier, protecting the individual is the basic function of the State, or the reason why it exists, while the State's protective obligations are inherent in the rights and freedoms of an individual. Thus, the individual can demand the protection of his/her rights and freedoms from the State even when the laws do not expressly provide for the State's obligation to grant such protection. This leads to the conclusion that the legal regulation of the State's protective obligations is declarative rather than constitutive in character. In other words, this regulation does not establish these obligations, but confirms their existence, although we also need to stress that it clarifies the substance of these obligations. However, for an individual, the legal regulation of the State's protective obligations predominantly has the function of a guarantee. It allows for a more precise definition of the claims for the protection of rights and freedoms that an individual can address to public authorities. Knowing what the State is obliged to do, the individual can more effectively enforce the protection of his/her rights and freedoms.

4. Normative grounds for the general obligation to protect

The general obligation to protect the rights of the individual by the State can be derived in case of all Visegrad Group countries mainly from the constitutional provisions that require the State to protect the dignity of the individual.[8] It is generally accepted that the rights and freedoms of the individual stem from the

[8] MAHLMANN, M. Human Dignity and Autonomy in Modern Constitutional Orders, in ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press 2012, p. 385.

individual's dignity; hence, the obligation to protect such rights and freedoms also stems from the obligation to protect the individual's dignity. Apart from guaranteeing the inviolability of human dignity, the contemporary constitutions expressly require public authorities to respect and protect that dignity.[9] The obligation to respect human dignity is mainly a negative one: it prohibits violating this dignity. However, the obligation to protect human dignity also belongs to the category of positive obligations, because activity and commitment are part of the essence of protective measures. Another difference between the obligation to protect human dignity and the obligation to respect it is the source of the threat.[10] Whereas the obligation to respect human dignity refers to public authorities' own actions, whereby they should not violate human dignity when exercising their powers, the obligation to protect it concerns measures taken by public authorities in response to threats or violations of human dignity coming from private entities. Therefore, we reach the conclusion that not only are public authorities required to refrain from measures that violate human dignity, but they are also obligated to protect human dignity against the actions of third parties.

Human dignity is not a value mentioned expressly in the European Convention on Human Rights.[11] It is inferred from the essence of the Convention[12] and from Art. 3 thereof; it provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[13] Although from this provision, the European Court of Human Rights (ECtHR) does infer, in its case-law, certain positive obligations of State Members of the Convention, it is not treated as a source of the general protective obligation. Such an obligation is, however, inferred from Art. 1 of the Convention, which requires every State Member of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The literature stresses that this provision is

[9] See Art. 30 of the Polish Constitution, Art. 12 of the Slovak Constitution, Art. II of the Hungarian Constitution, and the Preamble to the Czech Constitution.

[10] See SONIEWICKA, M., HOLOCHER, J. Human Dignity in Poland, in. BECCHI, P., MATHIAS, K. (eds.). *Handbook of Human Dignity in Europe*, Cham: Springer International Publishing, 2017, pp. 708–713.

[11] See COSTA, J. P. Human dignity in the jurisprudence of the European court of human rights. In: MCCRUDDEN, Ch. (ed.). *Understanding human dignity*. Oxford: Oxford University Press, 2013, pp 393–402; HESELHAUS, S., HEMSLEY, R. Human Dignity and the European Convention on Human Rights. In: BECCHI P., MATHIAS K. (eds.). *Handbook of Human Dignity in Europe*, Cham: Springer International Publishing, 2017, pp. 970–971.

[12] See judgments of the ECHR: *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002; of *Van Kück v. Germany*, no. 35968/97, 12 June 2003.

[13] Judgments of the ECHR: *Bouyid v. Belgium*, no. 23380/09, 28 September 2015; *Svinarenko and Slyadnev v. Russia*, no. 32541/08 and 43441/08, 17 July 2014; *M. S. S. v. Belgium and Greece*, no. 30696/09, 21 January 2011.

'the foundation of the doctrine of "positive obligations"'[14] and that it underpins the obligation to protect the rights and freedoms of the individual against any threats, regardless of whether they result from the actions of the State or from a private entity.[15] State Members of the Convention are obligated not only to respect the rights and freedoms it enshrines, but also to secure their enjoyment by all beneficiaries, hence to prevent violations or counteract the effects of violations once they occur. Following this train of thought, we reach the conclusion that the obligation, provided for in Art. 1 of the Convention, to 'secure' the rights and freedoms defined in the Convention means more than 'not disturbing' or 'not interfering,' but also comprises of the obligation to take measures to guarantee that these rights and freedoms are protected.

In the contemporary constitutions such a general obligation of the State to secure its citizens' rights and freedoms is rarely *expressis verbis* formulated, precisely because it results, by and large, from the aforementioned obligation to respect and protect human dignity. It is, however, worthwhile observing that sometimes the obligation is expressed in the provisions that define the State's tasks.[16] Protecting the rights and freedoms of the individual is, after all, a basic task of the State. And the State's tasks generate obligations whose discharge serves to fulfil these tasks. Hence, we can consider that the State's task, defined as securing the rights and freedoms of its citizens, also comprises of a general obligation to protect those rights and freedoms.

The general obligation of the State to protect the rights of the individual also stems from the provisions specifying when the constitutional rights and freedoms of the individual can be limited. In the Polish Constitution, such a general limitation clause is contained in Art. 31(3), which reads: 'Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.'[17] It should be added that some provisions of the Polish Constitution that enshrine a given right or freedom also contain the

[14] SPIELMANN, D. The European Convention on Human Rights. The European Court of Human Rights. In: OLIVER, D., FEDTKE, J. (eds.). *Human rights and the private sphere. A comparative study*, New York: Routledge-Cavendish 2007, p. 432.

[15] GARLICKI, L. Relations between private actors and the European Convention on Human Rights. In: SAJO, A., UITZ, R. (eds.). *The Constitution in private relations. Expanding constitutionalism*, Utrecht: Eleven International Publishing 2005, p. 130.

[16] See Art. 5 of the Polish Constitution and Art. I sec. 1 of the Hungarian Fundamental Law.

[17] See also the limitation clauses in: Art. I sec. 3 of the Hungarian Fundamental Law, Art. 13 of the Slovak Constitution, Art. 5 of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

so-called specific limitation clauses, which modify the conditions of limiting the constitutional rights or freedoms specified in Art. 31(3) or introduce additional conditions. A good example is Art. 22 of the Polish Constitution, stating that '[l]imitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.' Unlike the Polish Constitution, the European Convention on Human Rights does not have a general limitation clause and the conditions for limiting the rights that it regulates are specified in the provisions concerning those rights. As an example, we can quote Art. 8(2) of the Convention, according to which no interference by a public authority with the exercise of the right to respect for private and family life is permitted 'except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

An analysis of the contents of the above limitation clauses warrants the conclusion that the conditions for limiting the rights of an individual guaranteed by the constitutions and the European Convention on Human Rights are similar, but, more importantly for our further reflections, both kinds of limitation clauses allow the State to limit the rights and freedoms of one person in order to protect the rights and freedoms of another. Moreover, State interference is permitted as an exception to the rule prohibiting such interference. This exception can be described as necessary. It is worth stressing that rights and freedoms are not absolute and their enjoyment without any limitations by some individuals would prevent other individuals from enjoying them. Therefore, it is the State's obligation to set the limits of enjoyment of all individuals in terms of their rights and freedoms. This leads to the conclusion that provisions introducing limitations upon the enjoyment of rights and freedoms by one person may serve to protect the rights and freedoms of another person. Provisions of this kind do not permit the State to interfere too much in the first person's rights and freedoms, as they require these provisions to interfere when this is necessary to protect the rights and freedoms of other persons. This necessity requirement means that State interference is indispensable, unless, of course, it is excessive, as it is useful to provide protection, and at the same time, it takes into account the need to balance the values underlying the rights and freedoms of both persons. These three elements form the so-called principle of proportionality[18], to which I shall return to later in this paper. Any provision that protects one right while limiting another

[18] See SCHLINK, B. Proportionality & BARAK, A. Proportionality, both in ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press 2012, pp. 718–737, 738–755; BARAK, A. *Proportionality. Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012.

must meet the conditions specified in the limitation clauses quoted above. Thus, these clauses have the function of guarantees, but they also serve to prevent, in statutory law, any abuses of the possibility of limiting the rights and freedoms of some individuals justified by the alleged need to protect the rights and freedoms of other individuals.

The existence of a general and universal protective obligation on the part of public authorities may also be inferred from the provisions on whose basis individuals can claim protection of their violated rights and freedoms. Contemporary States (among them also Visegrad Group States) introduce such provisions that establish different means for the protection of rights and freedoms as a form of their commitment to react when the individual claims that such protection is needed.[19] The basic constitutional means of protection of the rights and freedoms of the individual include the right to fair trial and the right to claim damages. However, the constitutions of particular States can grant the individual also other means of protection such as the right to submit a constitutional complaint, the right to file an application with the Ombudsman, the right to submit a petition to the State authorities, or the right to appeal against decisions issued by first-instance courts or bodies of public administration.

Similarly, the European Convention on Human Rights provides for different means of protecting the rights and freedoms of the individual. It established a collective enforcement mechanism of the fundamental freedoms[20] that are the foundation of justice and peace across the globe.[21] The State Parties to the Convention maintain this mechanism based on, as stated in the Preamble, the 'common understanding and observance of the Human Rights upon which they depend.' As can be seen, human rights are not only guaranteed by individual States in their territories, but also collectively by all State Parties to the Convention in the whole territory where the Convention applies. Thus, each of the State

[19] See the subchapter on 'Means for the protection of freedoms and rights' (Art. 77–Art. 81) of the Polish Constitution and the chapter on 'The right to judicial and other legal protection' (Art. 46–Art. 50) of the Slovak Constitution.

[20] See SCHABAS, W. *The European Convention on Human Rights. A Commentary*. Oxford: Oxford University Press, 2017, p. 73–74.

[21] As the ECHR states in the judgment on *Ireland v. the UK*, no. 5310/71, 18 January 1978: 'the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'. By virtue of Article 24 (art. 24), the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals. By substituting the words "shall secure" for the words "undertake to secure" in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States.'

Parties can refer another State Party to the ECtHR for a violation of the rights enshrined in the Convention (Art. 33), regardless of the fact that an individual application can be made by the victim of such a violation (Art. 34). The fact that even the title of the Convention stresses its basic aim of protecting human rights and fundamental freedoms and that its provisions establish the aforementioned mechanism of collectively guaranteeing the rights enshrined in the Convention leads to the conclusion that the basic obligation of the State Parties is precisely to protect these rights.[22]

5. Normative grounds for specific protective obligations

Apart from the general protective obligation, the constitutions of four Visegrad Group States also provide for protective obligations of a more specific nature with respect to particular rights and freedoms. As an element of the normative structure of these rights and freedoms, the obligations can be expressed in different ways in the aforementioned provisions.[23]

The first method involves identifying the protected goods, thus precisely defining the object of protection. In such cases, the constitution usually provides that the State protects, or agrees to provide protection to, a specific good. Such a good that the State declares to protect can be marriage, family, motherhood, parenthood, employment, property, or the environment.[24] A more in-depth analysis of the contents of these provisions leads to the conclusion that the intention was to provide protection not so much to particular goods that the constitution-maker considered as valuable but to the holders of these goods, meaning, respectively, spouses, parents, children, employees, owners, and persons using the environment.

The second way in which protective obligations can be expressed in the normative structure of rights or freedoms is by indicating that a given person

[22] On the theory of positive obligations of the States see also: MOWBRAY, A. R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, Portland, Oregon: Hart Publishing, 2004; XENOS, D. *The Positive Obligations of the State under the European Convention of Human Rights*, New York: Routledge, 2012.

[23] See also FLORCZAK-WĄTOR, M. *Obowiązki ochronne państwa w świetle Konstytucji RP I Europejskiej Konwencji Praw Człowieka.* Kraków: Wydawnictwo Księgarnia Akademicka, 2018, pp. 72–79.

[24] See e.g. Art. 18 of the Polish Constitution: '(…) the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland' or Art. 41(1) of the Slovak Constitution: 'Matrimony, parenthood, and family shall be protected by the law. Special protection of children and minors shall be guaranteed'.

has the right to protection of a given good or value. Obviously, this also means that the State provides protection for the good or value in question, but in this case, the constitution-maker focuses directly on the right to which protection is accorded and defines this right as a classical public right. Examples of protective obligations expressed in such a way include constitutional provisions granting everyone the right to protection of their privacy, the right to the protection of their health, the right to the legal protection of life, or the right to protection of their dignity. Any right to protection generates, on the part the State, an obligation to protect.

And finally, the third way in which protective obligations are formulated in the normative structure of the particular rights or freedoms is by indicating the categories of persons to whom special protection is accorded, because the constitution-maker believes that these persons are a weaker social group and require such protection. This way of expressing the protective obligations can be found in the provisions stating that the State provides protection of the rights of a child, the protection of tenants' rights, and the protection of the rights of consumers, customers, hirers, or lessees.[25] They provide for an obligation to protect all the rights of the persons they name, and this is precisely what sets them apart from the second category of provisions that concern the protection of specific kinds of rights, regardless of the persons who enjoy them.

6. Protection of the weaker party in a horizontal relation

A special kind of protective obligation of the State comprises of those concerned with the weaker party in a horizontal relation.[26] This involves a legal relation where either the balance between parties has been upset or, due to the actual advantage of one party to the horizontal relation over the other, the balance between them is highly likely to be upset. As mentioned earlier, corrective State interference is required in this case. Its aim should be to restore or maintain the balance between the parties, because it is a condition for the autonomy of will and the freedom of the contract, both of which define the essence of horizontal relations. Attention should be drawn to three categories of this kind of horizontal

[25] See e.g. Art. 76 of the Polish Constitution: 'Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices.' or Art. XV sec. 5 of the Hungarian Constitution: 'Hungary shall adopt special measures to protect children, women, the elderly and persons living with disabilities.'.

[26] FLORCZAK-WĄTOR, M. *Horyzontalny wymiar praw konstytucyjnych*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014, pp. 399–403.

relation that are constitutionalized in all Visegrad Group States to accord protection to the weaker parties of such relations.

The first category includes employer–employee relations, whereby the employee is subordinate to the employer by agreeing to perform work according to the employer's instructions, in a place and at the hours set by the employer, while the employer agrees to employ the employee and pay him a salary for his work. Therefore, one could say that by definition, the unequal statuses of the parties of an employment relation and the element of subordination inherent in this relation make the employee the weaker party. If employment is a constitutionally-regulated relation, then this regulation is predominantly protective in nature. Consequently, employees can have guarantees provided by the constitution for freedom of association in trade unions, the right to days off, the right to healthy and safe working conditions, or the right to organize workers' strikes or other forms of protest.[27] Contemporary constitutions often also apply the principle of equal treatment to employment relationships by prohibiting discrimination in the workplace or guaranteeing employees equal rights to employment, promotion, and the same pay for work of equal value. In the Polish Constitution, this protective character is visible in the provision that prohibits permanent employment of children of up to 16 years of age, which is a direct interference of the State in the freedom to define the employment relationship, including the employer's freedom to choose the employee.[28]

The second kind of horizontal relation that often gets constitutionalized to accord protection to the weaker party is the relation between businesses and consumers. It is common knowledge that the consumer is the weaker market participant, with limited knowledge or information compared to the professional partner (vendor, service provider).[29] The State's consumer-protection measures, aimed at strengthening the consumer's position vis-à-vis the professional partner, serve to level the playing field and give the consumer the freedom to choose and to make a decision without external influence. In the Polish Constitution, protective obligations in the sphere of consumer transactions are defined in Art.

[27] See e.g. Art. 59 of the Polish Constitution, Art. 36 of the Slovak Constitution, Art. XVII of the Hungarian Constitution, Art. 28 of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

[28] See Art. 65 (1) of the Polish Constitution. Special protection of minors in employment relations are also guaranteed by Art. 38 (2) of the Slovak Constitution are Art. XVIII of the Hungarian Constitution

[29] See e.g. DEVENNEY, J., KENNY, M. (eds.). *European Consumer Protection: Theory and Practice.* Cambridge: Cambridge University Press, 2012; CHEREDNYCHENKO, O. O. *Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions,* Utrecht: Sellier. European Law Publishers, 2007.

76, which requires public authorities to 'protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices.' The scope of the above protection is specified by statute.[30]

The third kind of relation that is worth mentioning in this context is parent–child relations. They belong to the sphere of private life and are protected as part of the protection of the right to privacy. Nevertheless, granting parents parental authority over children, thus legally subordinating children to their parents, obligates the State to supervise how this authority is exercised and to intervene when it is abused. How children are brought up by their parents is also an element of civic education, which additionally justifies the State's interest in this kind of horizontal relation. Some constitutions expressly grant parents the right to bring their children up – also including their moral and religious upbringing – in accordance with their beliefs.[31] They also give children the right to have their parents consider their degree of maturity and their rights and freedoms in the process of their upbringing.[32] The constitutional regulation almost invariably deals with the issues of children's education. Constitution can obligate parents to provide their children with education, while leaving the choice of school to the parents' discretion.[33] Moreover, constitutions often define the boundaries of State interference in the relation between parents and children.[34] Such interference should be justified by the need to protect the child's interests. It is important that the State protects the parents in bringing their children up rather than substituting for them, let alone relieving them of the task. Thus, the State can only take over the care of the child when the parents are unable to exercise their parental authority, or when it is in the child's interest that they stop doing so.

7. Conflict of the State's protective obligations

It is inherent in the essence of horizontal relationships that the parties' rights and freedoms conflict because they usually have conflicting interests, giving

[30] See also Art. M of the Hungarian Constitution: 'Hungary shall ensure the conditions for fair economic competition, act against any abuse of a dominant position, and shall defend the rights of consumers'.

[31] See e.g. Art. 48 of the Polish Constitution, Art. 41 (4) of the Slovak Constitution, Art. XVI (2) of the Hungarian Constitution, Art. 32 (4) of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

[32] See Art. 48 (1) of the Polish Constitution.

[33] See Art. 70 (3) of the Polish Constitution.

[34] See Art. 48 (2) of the Polish Constitution; Art. 41 (4) of the Slovak Constitution; Art. 32 (4) of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

rise to different expectations about what the State should do. A typical example is the tenancy relation, which the parties establish recognizing that it furthers their interests and which they terminate when it is no longer advantageous for them to remain in it for various reasons. However, whereas establishing a tenancy relation requires the mutual consent of both parties, it is often terminated without the consent of one of the parties. Then the landlord can demand that the tenant move out, while the tenant can demand that the landlord ensures his/her quiet enjoyment of the premises. Both parties to this relation, as beneficiaries of rights and freedoms, can also expect protection from the State, and their demands made on the State will be mutually excluded. The landlord will require the State to help to evict the tenant, while the tenant will expect help in ensuring the quiet possession of the premises he/she has rented. And here it turns out that the consequence of a conflict of rights and freedoms of individuals is a conflict of the State's protective obligations, as the State is unable to fully satisfy both parties' demands for protection.

Conflicts of the State's protective obligations resulting from conflicts of the rights and freedoms of individuals should be resolved in the same way in which the theory of law recommends resolving conflicts of principles.[35] The norms that provide for the State's protective obligations belong to the category of norms-principles rather than of norms-rules.[36] Protection in a certain state which may be ensured to a greater or smaller degree, though there is naturally a minimum degree of protection below which we can conclude that no protection is guaranteed at all. Since the norms that provide for protective obligations are included in the category of principles, we should say that if there is a conflict, the State cannot limit itself to selecting one obligation that it will discharge, giving up the discharge of other obligations that are in conflict with the former one. The State is obligated to discharge all its obligations to the greatest extent possible in the given situation and in accordance with the existing laws. Thus, protection must be guaranteed to all beneficiaries of rights and freedoms, although the scope of such protection and the degree of its intensity may vary depending on the facts and the legal status of each beneficiary. This justifies granting stronger protection to the weaker party in a horizontal relation, but also requires that the

[35] FLORCZAK-WĄTOR, M. *Obowiązki ochronne państwa w świetle Konstytucji RP i Europejskiej Konwencji Praw Człowieka*, Kraków: Wydawnictwo Księgarnia Akademicka, 2018, p. 112 ff.

[36] I follow the meaning of rules and principles adopted by Robert Alexy and other scholars referring to his concept. See: ALEXY, R. *Theorie der Grundrechte*, Baden-Baden: Nomos-Verlagsgesellschaft, 1985, p. 71 ff; ALEXY, R. Rights and liberties as concepts, in ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, pp. 291–297; GIZBERT-STUDNICKI, T. Zasady i reguły prawne, *Państwo i Prawo,* 1988, no. 3, pp. 16–26; NOVAK, M. Three models of balancing (in Constitutional Review), *Ratio Juris*, 2010, no. 1, pp. 101–112.

other party of this relation–the stronger one in the given context–be provided with sufficient protection.

If a conflict of the State's protective obligations is resolved in the same way as a conflict of principles, we should also bear in mind that resolving conflicts of principles requires determining the conditional order of precedence and implementing both principles to the extent determined by the order of their precedence. The principle that is given precedence limits the ability to implement the competing principle. Resolving a conflict of principles that takes the form of the protective obligations of the State also requires reference to the principle of proportionality.[37] This principle comprises of three sub-principles. The first one is the principle of suitability, which requires the State, while limiting the rights of an individual in order to achieve certain objectives, to select such means that will enable successful attainment of these objectives. The next one, the principle of necessity, requires the State to select such means of attainment of the intended objectives that will be the least onerous for the individual. And finally, the principle of proportionality in the strict sense, the third sub-principle, makes it necessary to maintain an adequate balance between the means selected and the objectives set. It requires applying the mechanism of weighing the conflicting interests, i.e. the interest violated by the means undertaken and the interest protected by means of the State's interference. The weighing process defined in this way, according to Robert Alexy, is a special form of applying the principles understood as optimization requirements.[38] The sub-principles of suitability and necessity make it possible to determine the required scope of implementation of protective obligations in a certain factual situation, while the sub-principle of proportionality in the strict sense and the objective which justifies the interference determine the scope of implementation of the principle of proportionality in the broad sense under particular normative conditions. The aim of the interference and the means to attain it are defined by statute, thus it is the legislator who is the direct addressee of the sub-principles of suitability and necessity. At the same time, the legislator is obligated to determine the conditional order of precedence, which was mentioned earlier, doing so on the basis of the sub-principle of proportionality in the strict sense, that is, by decoding the constitutional preferences of the values underpinning the particular rights and freedoms and weighing them

[37] LAVRYSEN, L. *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights,* Cambridge, Antwerp, Portland: Intersentia, 2016, pp. 171 ff.

[38] ALEXY, R. Rights and liberties as concepts. In: ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, p. 291; ALEXY, R. Discourse theory and fundamental rights. In: MENENDEZ, A., ERIKSEN, E. (eds.). *Arguing fundamental rights*, Dordrecht: Springer Netherlands, 2006, p. 23.

up. This serves as the basis for determining the conditional order of preference of conflicting obligations of the State that are aimed at protecting the particular rights and freedoms. Finally, a conflict of constitutional rights, and consequently also a conflict of State obligations, is resolved by a court on a case-by-case basis. The court's task is to apply the sub-principle of proportionality in the strict sense to specific facts. It means that the court weighs up the values, taking into account the facts of the case at hand, and being, in this regard, bound by the conditional order of precedence determined by the statute.

8. Conclusions

Summing up the above considerations, it should be stated that the State's protective obligations are an important element of regulations contained in the contemporary constitutions, including the constitutions of all Visegrad Group countries, namely the Republic of Poland, Czech Republic, Slovak Republic and Hungary. These obligations are expressed in various ways and justify State interference in a horizontal relationship in order to protect one of the parties, more precisely, the one considered as weaker. A conflict of the rights and freedoms of different individuals who are parties to horizontal relationships can potentially result in a conflict of the State's protective obligations. This conflict needs to be resolved in the same way as a conflict of principles understood as optimization requirements, because the constitutional norms that provide for protective obligations of the State can be included in the category of constitutional principles.

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Independence of the Office for Public Procurement*

Mária T. Patakyová**

Summary: The regulation of public procurement fulfils an essential task for the proper functioning of states. Public procurement directly influences the efficient public spending within a state. No doubt that the process shall be supervised by an independent and qualified institution. However, is this the case? In order to answer the question, the article chooses the jurisdiction of the Slovak Republic and it explores whether the supervisory body, the Office for Public Procurement, is to be seen as independent. Due to the fact that the notion of independence is unclear, the article presents the understanding of this notion and the criteria encrypted therein, following which the notion is applied to the Office for Public Procurement and to its leadership in particular. Since it is established that there is room for improvement regarding independence of this institution, the article presents concrete proposals for improvement of independence of the Office for Public Procurement.

Keywords: Public procurement – Office for Public Procurement – De iure independence – De facto independence – Functional Independence – Political Independence

1. Introduction

The increasing mistrust of citizens towards their states is detectable all around the world. This problem is undoubtedly connected with the operating of states, i.e. with experience of citizens with state apparatus. It may be generalised that the

* This article was supported by a Grant project of "Agentúra na podporu výskumu a vývoja v rámci projektu č. APVV-17-0641: Zefektívnenie právnej úpravy verejného obstarávania a jej aplikácie v kontexte práva Európskej únie." The early version of this article was presented on the conference 3rd International Scientific Conference on Economics and Management – EMAN 2019, Ljubljana, Slovenia, Hotel M, March 28, 2019; and published within the conference proceedings. PATAKYOVÁ, M. T. Independence of Public Procurement Authority. In: BEVANDA, V. (ed.) *EMAN 2019: Economics and Management: How to Cope with Disrupted Times*. Beograd: Association of Economists and Managers of the Balkans, 2019, pp. 211–215.

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functioning is not ideal, since the news are full of corruption scandals, non-transparent procedures, misconduct of state authorities etc. Significant affairs have been related to public spending.

Efficient public spending should be guaranteed by public procurement.[1] This highly complex set of rules prescribes the way how, at least in theory, to find the best offer for a particular project, either in terms of money or in terms of other relevant values, e.g. environmental protection, sustainable growth and so on.[2]

However, written rules tend to be ignored if there is no sanction for their infringement. This is the reason why the supervision is so crucial. Infringement of public procurement rules can be sanctioned within various fields of law, such as administrative sanctions within public procurement law[3], competition law[4], criminal law[5], or even commercial law.[6] In each case, the person/institution imposing the sanction is different. This article will focus on a public procurement authority. Public procurement authorities play vital role in procurement procedures. Their decisions are able to change the outcomes of public procurements.[7]

Since the notion of independence is not uniformly understood, the article will briefly present various concepts of independence and various factors which shall be fulfilled in order for an institution to be independent. As there are too many sources for this task, the article choses, predominantly, the sources related to independence of regulators as presented by scholars and governmental and non-governmental organisations. Hence, other sources related to judicial independence, or independence as defined by judgements of European or national courts are deliberately omitted to great extent. This is justified by the fact that the definition of independence is not in the centre of interest for this article.

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1 Moreover, within the EU, it is important from internal market perspective. JEŽOVÁ, D. Public procurement in the view of the Court of Justice of the European Union decisions. *Ad Alta*, 2019, Vol. 9, No. 2, pp. 97–100.

2 KOVÁČIKOVÁ, H. Uncompetitive practices in public procurement in EU/Slovak context. *European studies : the review of European law, economics and politics*, 2018, Vol. 5, pp. 283–294. KOVÁČIKOVÁ, H., BLAŽO, O. Rule of law assessment – case study of public procurement. *European Journal of Transformation Studies*. 2019, Vol. 7, No. 2, pp. 221–236.

3 See Act No. 343/2015 Coll. on Public Procurement, as amended *("Public Procurement Act")*, Section 182.

4 See Act No. 136/2001 Coll. on Protection of Competition, as amended *("Competition Act")*, Sections 38 et seq.

5 See, for instance, Section 266 of Act No. 300/2005 Criminal Code, as amended *("Criminal Code")*.

6 One can imagine a contractual penalty to be imposed, or court proceedings based on action for damages to be started. See Act No. 513/1991 Coll. Commercial Code, as amended *("Commercial Code")*, Sections 300–302, et Sections 373 et seq.

7 This flows from PATAKYOVÁ, M. T. Independence of Public Procurement Authority. In: BEVANDA, V. *EMAN 2019: Economics and Management: How to Cope with Disrupted Times*. Beograd: Association of Economists and Managers of the Balkans, 2019, p. 211–215.

Once the elements of independence are identified, they are applied to a chosen public procurement authority, the Office for Public Procurement which operates in the Slovak Republic *("**Office**")*. Taking into account the various scandals which took place in the field of public procurement in Slovakia, one cannot deny the importance of such analysis.

Thus, the article asks which are the basic elements of independence of regulatory bodies, whether these are met by the Office and what might be done in order to improve the situation, focusing in particular on the leading persons within the Office. In order to deal with these issues, the article is organised as follows. First, the notion of independence and its elements are briefly presented. Second, the Office is described from the legal perspective and, when appropriate, from the perspective of its real functioning. Third, insufficiencies of the Office are identified, followed by proposals *de lege ferenda*. The main findings are summed up in the conclusion.

2. Independence and its Elements

There are different perspectives for the assessment of independence. First, we can distinguish between political independence and functional independence.[8] The former refers to independence from politicians, e.g. from the government. The latter refers to independence from business. Companies and firms usually stands in the position of regulated subjects. The idea behind this aspect is that the business should not influence its own regulators.

Second, one may distinguish between *de iure* and *de facto* independence. The former looks into the set of legal rules, hence, it assesses the legislative framework based on which the institution operates. On the other hand, the latter focuses on functioning of the institution in practice. It may happen that *de iure* independence seems to be on a sufficient level, however, the real functioning of the institution is under influence of, for instance, the government.[9]

As a starting point it should be highlighted that independence does not mean a total separation between an institution on the one hand and other bodies and policies on the other. Independence can be understood as a possibility of the

[8] ZEMANOVIČOVÁ, D. Protimonopolný úrad. In: PATAKYOVÁ, M. T. (ed.). *Efektívnosť právnej úpravy ochrany hospodárskej súťaže – Návrhy de lege ferenda. Zborník konferencie* (pp. 48–54). Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2017, pp. 48–54.

[9] To this end, see HAYO, B., VOIGT, S. Explaining de facto judicial independence [online]. Available at: https://www.uni-kassel.de/fb07/fileadmin/datas/fb07/5-Institute/IVWL/Forschungskolloquium/diskussionen/papier4603.pdf

respective institution to collect the necessary information, to act when there is a need to act and in a manner that is appropriate.[10]

2.1. Independence in the View of OECD

In 2017, OECD issued a document dedicated to independence of regulators.[11] It presents 5 areas by which independence should be safeguarded, namely clarity and responsibility, transparency and accountability, financial independence, independence of leadership, and staff behaviour.

First, the document emphasises the role clarity and responsibility. Under this point, the institution should have clearly described objectives. Interactions with other government actors should be established as well.

Second, transparency and accountability should be safeguarded. The functioning of the institution should be understandable and the institution itself should present the necessary information. Timely and relevant information on the institution's performance is to be available.

Third, it is important to provide the institution with sufficient financial resources, in order to safeguard its proper functioning. We may talk about financial independence in this sense.

Fourth, the leadership of the institution cannot be overlooked. The importance of a good manager at the top of an entity does not have to be justified in great detail, since it is natural that a leader is entitled to shape the functioning of an entity to a great extent. The procedure of nomination, appointment and dismissal of the institution's leader is significantly important. Conflict of interests with both politicians and business sphere should be precluded.[12]

Last but not least, staff behaviour, as another aspect of an institution's independence, cannot be underestimated. It shall not be omitted that, at the end of the day, the performance of an entity depends on the people who form it. Therefore, the recruitment procedure for an institution's staff should be considered when an assessment of the institution's independence is at stake. Apart from the recruitment itself, ethical codes may also help to make the institution more independent.

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[10] ALVES, S., CAPIAU, J., SINCLAIR, A., 2015, Principles for the Independence of Competition Authorities. *Competition Law International,* 2015, Vol. 11, No. 1, pp. 13–27, p. 15.
WINTER, H. Regulatory Enforcement in the Netherlands: Struggling with Independence. In: COMTOIS, S., DE GRAAF, K. (eds.). *On judicial and quasi-judicial Independence*. The Hague: Eleven International Publishing. 2013, pp. 157–166, p. 160.

[11] OECD: Creating a Culture of Independence: Practical Guidance against Undue Influence. Paris: OECD Publishing, 2017.

[12] OECD: Creating a Culture of Independence: Practical Guidance against Undue Influence. Paris: OECD Publishing, 2017.

2.2. Independence in the View of an NGO

One of the well-established NGO within the Slovak Republic, INEKO Institute for Economic and Social Reforms, has recently published an analysis of independence and expertise of public institutions.[13] The evaluating criteria were organised into four groups: creation of an institution's management and its position; removal of an institution's chief or members of management; sovereignty; co-decision making process, control and administrative procedure. Each group comprises of several elements which were indexed.[14] The analysis has shown that the most independent institution is the Committee for Budgetary Responsibility which is even more independent than the Constitutional Court of the Slovak Republic. Interestingly, the least independent institution is the Financial Directorate.[15]

The main recommendations of INEKO consisted in evaluation of institutions' performance; open selection procedure; requirement for qualified majority voting in the parliament for the election of institutions' chiefs, or, alternatively, if simple majority is sufficient, then the President of the Slovak Republic should be materially involved, i.e. she should have right to decline the elected nominee on reasonable grounds; six-years term of the office for institutions' chiefs; partial replacement of members of collective bodies within institutions; separation of function of the chief of an institution and the appeal body's member of that institution; linking salary of key persons within institutions with the average month salary of an employee in the economy of the Slovak Republic.[16]

2.3. Independence in the view of scholars

Many scholars have conducted deep analysis of institutions selected by them, whereas they have paid attention to what may be a positive and what a negative

[13] KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii

[14] KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii, p. 13–16.

[15] KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii, p. 6–18.

[16] KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii, p. 17–18.

element of their independence. Due to limited scope of this article, we will focus on work of few particular academics.[17]

Zemanovičová assessed the independence of Antimonopoly Office of the Slovak Republic, which is the national competition authority in Slovakia. She focused on several aspects, such as: position of the institution; position, election and removal of the leading persons; decision-making process; appeal body; judicial review; financing. She was not satisfied with lack of requirements for a transparent selection procedure for the leader of the institution or members of the appeal body of the institution. She also pointed out the possible risks connected to the re-election for the position and monocratic decision making on the first instance of the institution. It was also proposed by her that an announcement mechanism for meeting with persons from political or business environment should be introduced.

Authors Alves, Capiau, Sinclair[18] conducted a comparison of various institutions. They concentrated on regulators in the field of telecommunication, energy, railway and competition law. They observed it is important to discuss both the functional and the political independence. As to the concept of independence, they basically concluded that it means that the institution at stake acted (only) when it was necessary and by a proper remedy. The analysis of independence was related to appointment procedure for leaders of the institutions as well as rules on conflict of interests.[19] Accountability and transparency of the procedures conducted by the institutions was supposed to be safeguarded for instance by reports issued by the institution and discussed in the parliament. Hearings by the parliament may be supportive as well.

Ottow[20] discussed the issue of independence too. She recognised that there is a tension between policy considerations, which may be legitimately set by legislator, on the one hand, and need for sufficient discretion for the institution on the other. Different criteria might be imposed for the ordinary employees and for the politico-administrative leadership of the institution. In relation to the

[17] Naturally, there are many other works available, such as: VAN DE GRONDEN, J. W., DE VRIES, S. A. Independent competition authorities in the EU. *Utrecht Law Review,* 2006, Vol. 2, No. 1, pp. 32–66; LAVRIJSSEN, S., OTTOW, A. Independent Supervisory Authorities: A Fragile Concept*. Legal Issues of Economic Integration*, 2012, Vol. 39, No. 4, pp. 419–445.

[18] ALVES, S., CAPIAU, J., SINCLAIR, A., 2015, Principles for the Independence of Competition Authorities. *Competition Law International,* 2015, Vol. 11, No. 1, pp. 13–27.

[19] For conflict of interest, see KOVÁČIKOVÁ, H. Directive (EU) 2019/1 as Another Brick into Empowerment of Slovak Market Regulator*. YEARBOOK of ANTITRUST and REGULATORY STUDIES*, 2019, Vol. 12, No. 20, pp. 149–171, p. 161 et seq.; KOVÁČIKOVÁ, H. CONFLICTS OF INTEREST – CASE OF THE PUBLIC PROCUREMENT. *Journal Strani pravni život (Foreign Legal Life)*, in publishing.

[20] OTTOW, A. The different levels of protection of national supervisors' independence in the European landscape. In: COMTOIS, S., DE GRAAF, K. (eds.). On judicial and quasi-judicial Independence. The Hague: Eleven International Publishing, 2013, pp. 139–155.

functional independence, an attention should be paid also in relation to the job rotation between institution and business, since the former shall control the latter. Independence regarding gathering and analysing of information and adopting of appropriate measures should be secured.

3. The Office of Today

Although the elements which are necessary for an independent institution vary from one source to another, the main points remain the same. Institutions should have an independent leadership, elected in a transparent procedure. They should be accountable to a democratic assembly, yet separated from government. Their decision making procedure should be collective and institutions should have enough staff and financial resources for proper functioning. The conflict of interest should be prevented.[21] These elements will be applied to the Office below, paying particular attention to the leadership of the Office.

3.1. The Office as an Important Institution

Before jumping into details regarding independence of the Office, let us contemplate on the powers of the Office. The powers suggest the significant influence which this institution may have on the proper functioning of public spending. It should be highlighted that the Office does not provide all public procurement procedures in Slovakia. As a rule, public procurement shall be done by an institution (contracting authority) which is in need for goods or services. It usually needs the goods or services for conducting its public tasks. However, the Office is an important supervisory authority, i.e. it observes the fulfilment of public procurement rules. In relation to the over-limit contracts, it conducts *ex ante* assessment.[22] In other words, the Office controls the fulfilment of the rules even before the public procurement procedure per se starts. Apart from this special type of procurement, the Office is entitled to conduct *ex post* assessment, i.e. after a public procurement procedure takes place. It is worth mentioning that such control may be initiated not only based on a complaint of e.g. unsuccessful tendered, but also from the Office's own initiative.[23] Apart from being a "watchdog",

[21] In relation to application of this criteria to Antimonopoly Office of the Slovak Republic, see PATAKYOVÁ, M. T. Independence of National Competition Authorities – Problem Solved by Directive 2019/1? Example of the Antimonopoly Office of the Slovak Republic. *YEARBOOK of ANTITRUST and REGULATORY STUDIES*, 2019, Vol. 12, No. 20, pp. 127–148, p. 132–134.

[22] Section 168 of the Public Procurement Act.

[23] Sections 163 et seq. of the Public Procurement Act.

the Office is also responsible for issuing guidelines, methods and even certain regulatory acts.[24] All in all, it may be concluded that the Office plays vital role in the public procurement field in Slovakia.

3.2. The Office and its Legislative Framework under Scrutiny

Although the significance of this public procurement authority is not open to any questions, it is interesting to note that there is no explicit legal provision which would designate the Office as an independent body. This is so in relation to the Public Procurement Act as well as Directive on public procurement[25], Directive on the award of concession contracts[26], Directive on procurement by entities operating in the water, energy, transport and postal services sectors[27].

As indicated above, we will mainly focus on the leadership aspect of independence provided in Sections 140–146 of the Public Procurement Act. The head of the Office is the President of the Office, which is nominated by the government, however, he or she is elected by the National Council of the Slovak Republic, i.e. the Slovak parliament. It is undoubted that the appointment by the parliament is to be seen as a positive factor, especially due to the fact that it is a collective body. However, it cannot be omitted that the Slovak Republic is a parliamentary democracy, hence, as a rule, the government has the support of the majority of the parliament. Therefore, if the government is in stable coalition of parties (or if one party has the majority in the National Council all by itself), it can basically push its favourable candidate through. The leading position of the government is supported by the fact that the government adopts a regulation based on which the details of the election procedure are established.

None the less, independence of the President of the Office is supported by the fact that the publicity of the call for "registration" of the candidates for the function is provided in law. This means that at least 90 days before the end of the term of the President in office, the government announces the call for registrations. This announcement is made public on the website of the governmental office and at least in one state-wide daily news.

The independence is also put on a higher level due to the public hearing of candidates for the office. This means that the government can be controlled

[24] Section 147 of the Public Procurement Act.

[25] 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.

[26] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

[27] 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.

by civil society in the process of picking the candidate. However, all the other particularities are to be set in a governmental regulation. The provision of the Section 143 para 1 of the Act on Public Procurement, which is related to the Members of the Council of the Office, is referred to. Pursuant to this provision, the regulation of the government shall establish publication of CVs' of candidates with designation of place where they were exercising their professional practice in the field of public procurement and what entity proposed the candidate. The governmental regulation shall also establish the manner in which the reasons why a particular candidate was chosen are announced.

The term of the presidency of the Office is set to five years. As the election to the National Council (therefore arguably the change of government) occurs at least every four years, it may be assumed that the position of the President and his political independence is strengthened, since his or her term in the office is longer than the term of those who nominated and appointed him.[28] On the other hand, independence of the President is undercut by the fact that he may be re-elected for the function.[29] It may be assumed that, if the same person wants to be re-elected, he or she may act in line with the interests of people who elects them, i.e. the government and the parliament. This might be particularly true once his or her first term reaches its end.[30]

The independence is supported by the fact that there are clearly stated reasons for the dismissal of the President. Basically, these reasons are related to committing of intentional crime, losing of legal capacity, non-performing of the function for more than 6 consequent months, or beginning of performing of an activity which is incompatible with the function of the President. As these reasons are clearly stated, the political independence of the President of the Office is strengthened, since he or she cannot be removed from the Office anytime he or she acts contrary to political interests.

As far as the requirements for the person of the President of the Office are concerned, one has to admit that these requirements are fairly brief. The legislation prescribes his or her separation from the political parties. None the less, there are no explicit requirements for work experience or formation of candidates for the position of President of the Office, apart from the requirements for the

[28] ZEMANOVIČOVÁ, D. Protimonopolný úrad. In: PATAKYOVÁ, M. T. (ed.). *Efektívnosť právnej úpravy ochrany hospodárskej súťaže – Návrhy de lege ferenda. Zborník konferencie* (pp. 48–54). Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2017, pp. 48–54.

[29] Ibidem, pp. 48–54.

[30] For the sake of completeness, it shall be noted that this observation is true not only for the re-election. Therefore, if a person whose term is reaching the end is promised another position in another institution, he may act in favour of the government or anyone capable to install him or her to a new function.

members of the Council, i.e. five years of experience with public procurement and accomplished university education of second degree.[31] Moreover, the functional independence is not secured, because there are no limits on previous links of the President with the business sphere. Nowadays, the current President of the Office was active as an attorney also in the field of public procurement. Hence, it may be assumed that he may still be under influence of the business, at least indirectly. On the other hand, it is difficult to imagine that there could be a person who would be completely independent from the political sphere as well as business sphere. Such person might be a pure academic, however, in that case it might be argued that he or she lacks practical experience with the field for being its chief. To find an ideal candidate is a utopia. Yet, it may be argued that virtually no legal criterion in sense may be seen as insufficient.

In relation to the two Vice-Presidents of the Office, similar provisions take places. The major difference is in proposing and appointing of them. As oppose to the President of the Office, the proposal from candidates comes from the President of the Office and the Vice-Presidents are appointed by the government instead of the parliament. The President of the Office also determines the issues which each of the Vice-Presidents shall be responsible for, as well as the order in which they substitute him.

Regarding Vice-Presidents, it is important to note that currently the only Vice-President, Juraj Bugala, is being called to resign by the President of the Office. The reason for his unfitness in the eyes of the President of the Office is the fact that, before he took his position within the Office, he had allegedly breached law in his attorney's practice. The first-instance court decisions were issued and fines were imposed on the law office.[32] However, since the government is the body entitled to remove a Vice-President from his position, the decision of the government needs to be taken. The government hesitates with the removal, since the Vice-President is one of the members of the Council of the Office and, the Prime-Minister claims that he does not want to make the Council of the Office dysfunctional.[33] The Prime-Minister wants to wait till the vacant position in the Council of the Office are filled in.[34]

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[31] Section 144 para. 1 of the Public Procurement Act.

[32] TASR: Podpredseda Úradu pre verejné obstarávanie: Nie sú dôvody na moje odvolanie [online]. Available at: https://spravy.pravda.sk/domace/clanok/538891-podpredseda-uradu-pre-verejne-obstaravanie-nie-su-dovody-na-moje-odvolanie/

[33] Currently, the Council of the Office misses two regular members and one Vice-President, i.e. it has 6 out of 9 members. See: ÚVO: Členovia rady úradu [online]. Available at: https://www.uvo.gov.sk/o-urade/rada-uradu/clenovia-rady-uradu-373.html; and ÚVO: *Vedenie úradu* [online]. Available at: https://www.uvo.gov.sk/o-urade/vedenie-uradu-36a.html

[34] TURČEK, M., BARIAK ml., L. *Pellegrini:* Čoskoro odvoláme podpredsedu ÚVO Bugalu [online]. Available at: https://www.aktuality.sk/clanok/757756/pellegrini-coskoro-odvolame-podpredsedu-uvo-bugalu/

Apart from the leadership of the Office itself, there is also another body which plays a vital role in the functioning of the Office. The Council of the Office is the appeal body against first-instance decisions of the Office. It consists of the President, the Vice-Presidents and six other members. The President is also the president of the Council, and the same applies to the Council's vice-presidents. Let us now zoom in on the appointment procedure of these other members.

The procedure is to great extent similar to the appointment of the President or the Vice-Presidents. The other members are appointed by the government. The manner of selection of them is specified in the regulation of the government pursuant to Section 143 para 1 of the Act on Public Procurement mentioned above. It should be taken positively that the other members cannot be employees of the Office. This means that two-thirds of the Council are occupied by persons outside of the Office. The term of the other members is for five years.

As to the personal requirements, the other members shall be citizens of the Slovak Republic, have full legal capacity and, in general, no crime record. Moreover, they shall have a university master degree and at least five years of practice in the public procurement sector.

4. The Office of Tomorrow

After analysing the current position of the Office in light of the elements of independence, we may now look into what can be improved from *de iure* perspective. We will follow the insufficiencies suggested in the previous part and we will suggest various proposals *de lege ferenda*. As this article is devoted to independence with a special attention given to the leading persons of the Office, we will divide our proposals to four groups: independence in general; position of the President and Vice-Presidents of the Office; position of the Council; and appointment process.

First and foremost, there is a lack of explicit legal provision which would describe the Office as an independent institution. It is true that a mere proclamation in the Public Procurement Act may not have a direct impact, however, we believe that such important institutions as public procurement authorities, which have public spending supervision in their agenda, should be described as independent authorities.

Second, it is appalling that the criteria which should be met by the future chief of the Office are so brief. In fact, we may imply that there are only two professional requirements – to have a professional experience in the field of public procurement for at least five years, and to have a Master or Engineer degree.[35]

[35] These requirements flow from Section 144 para. 1 of the Public Procurement Act, i.e. they are related to members of the Council. Since the President is also a member of the Council, it is

We propose that these criteria should be more elaborated. It is true that the Slovak Republic, having only few millions of citizens, cannot set the threshold in such way that virtually two persons will them. However, it is doubtful that more precise requirements cannot be implemented. For instance, the professional experience with public procurement might be elaborated on. Practical as well as academic experience should be accepted. Moreover, other capabilities and skills should be required, such as managerial skills, language skills, personal integrity and so on.

Drifting away from professional criteria, the Public Procurement Act requires that the President and the Vice-Presidents of the Office are neither members of political parties nor act in their name or in their benefit.[36] It is advisable to insert a "vacant" period, during which a candidate should not be member of a political party. This would prevent last-minute resignations from political parties. What is even more urgent is to safeguard functional independence of the chiefs of the Office. For instance, the current Vice-President was claimed to have strong connections with influential entrepreneurs.[37]

Regarding the possibility of re-election, it is advisable to change the current possibility to hold two consecutive five year terms to one longer term of, for instance, seven years. In such way, political independence of the President and the Vice-Presidents will be increased.

Third, in relation to the Members of the Council, apart from the President and the Vice-President, four out of six members currently hold the position. It is interesting to point out that each member has been employed in a public body such as a Ministry. One of them is even now the head of the department for public procurement on the Ministry of Education.[38]

There are several propositions which should be considered. Firstly, the interconnection between the Council and the leadership of the Office bears several disadvantages.[39] It is proposed to have maximum of one person of the leadership

possible to interpret the provision in such way that the President of the Office himself or herself should meet the criteria too.

[36] Section 141 para. 3 of the Public Procurement Act.

[37] TREND.SK: ÚVO má nového kontroverzného podpredsedu, Juraj Bugala robil s Kmotríkom [online]. Available at: https://www.etrend.sk/ekonomika/uvo-ma-noveho-kontroverzneho-podpredsedu-juraj-bugala-robil-s-kmotrikom.html

[38] ÚVO: Členovia rady úradu [online]. Available at: https://www.uvo.gov.sk/o-urade/rada-uradu/clenovia-rady-uradu-373.html

[39] The negative consequences of this constellation are seen nowadays, when one of the Vice-Presidents should be removed from his office, however, only six out of nine members of the Council will be present after his removal. Therefore, as mentioned above, the Prime-Minister proposed to first elected the remaining members of the Council and only subsequently removed the Vice-President from his position.

of the Office involved also in the Council. Secondly, the separation of the Office as the supervisory body from the contracting authorities which it is supposed to supervise is blurred. This should be changed and a balance between representation of people from private sector and public sector should be observed, Thirdly, more requirements for the field of specialisation of the Members of the Council should be presented. For instance, pursuant to Competition Act, the Council of the Antimonopoly Office shall consist of at least two persons with legal education and at least two persons with economic education.[40] Even this may be considered as insufficient.[41] Fourthly, it is open to consideration to change the possibility to serve for two consequential terms of five years to only one term of, for instance, seven years. Fifthly, partial change of the members should be established, in order to make the practice of the Council more consistent.[42]

Fourth, the involvement of the parliament in the nomination process of the President of the Office is undoubtedly appropriate. However, a simple majority may not be sufficient to safeguard a separation of the nominee from the government, hence, political independence may not be completely safeguarded. It is interested to point out the propositions presented by INEKO. Pursuant to them, members of parliament will choose from all the candidates which fulfil the criteria. The election is done in two rounds[43], whereas if no candidate is chosen in the first round[44], the two candidates with the highest number of votes will continue to the second round. If the candidate is chosen by a simple majority, the President will be entitled to refuse the appointment of the candidate based on significant reasons.[45] However, if the candidate receives more than qualified majority of all members of parliament, the President will have no option but to appoint the nominee.[46]

This is undoubtedly an interesting proposition. It is questionable whether the procedure should be so complex. It might be sufficient if a qualified majority for

[40] Section 19 para 3 of the Competition Act.

[41] PATAKYOVÁ, M. T. Inštitúcie vystupujúce v prípadoch týkajúcich sa súťažného práva a ich nezávislosť. *ACTA FACULTATIS IURIDICAE UNIVERSITATIS COMENIANAE*, 2019, Vol. 38, No. 2, pp. 256–269.

[42] Similar partial change is well-established in relation to, for instance, judges in the Court of Justice of the EU.

[43] This proposition took inspiration from Act No. 532/2010 on Radio and Television of Slovakia, as amended.

[44] It means that no candidate receives simple majority of votes from the presented members of parliament.

[45] Nowadays, it is not clear how much discretion the President has in her decision not to appoint a candidate. See, for instance, PATAKYOVÁ, M., PATAKYOVÁ, M. T. New challenges to democracy: Slovakia. *European review of public law*, 2015, Vol. 27, No. 1, pp. 483–496.

[46] KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii, pp. 28, 29.

the election is required, provided that high level of transparency is guaranteed in the selection of the candidate. In this regard, taking inspiration from nomination of candidates for constitutional judges, candidates for the position of the President of the Office could come not only from the government[47], but also from other subjects, such as individual members of parliament; the President of the Constitutional Court of the Slovak Republic; the President of, or five members of, the Judicial Council of the Slovak Republic; the President of the Supreme Court of the Slovak Republic; the Public Defender of Rights, i.e. the Slovak ombudsperson; bar associations and scientific institutions active in the field of law.[48] If so many persons are entitle to propose candidates, there is a higher chance that candidates will be outside of political sphere.

Plus, not only the election of the President of the Office, but also the election of the Vice-Presidents should be improved. Currently, the candidates come from the President of the Office and they are appointed by the government. It is advisable to extend the number of subjects which may propose candidates. Public hearing should also be held.

In relation to the members of the Council, the involvement of the parliament should be considered, as the Council is a crucial body which serves as appeal body. Although the process should be relatively transparent, it is still fully up to the government who will or will not be a member of the Council. Bearing in mind that the Council is the appeal body of the Office and that the Office controls public spending, this constellation might be seen as insufficient. The public hearing should be held and this requirement should be explicitly stated in the Public Procurement Act.

5. Conclusion

This article dealt with several questions. Firstly, it asked what are the basic elements of independence of regulatory bodies. It was established that, although independence may comprise various elements, the main elements are: independence of leadership, financial independence, independence from politicians/government, independence from regulated subjects, accountability of the institution. Secondly, focusing on the first mentioned element, we analysed whether leadership of the Office is sufficiently independent. We spotted several insufficiencies. To sum them up, the statutory requirements are brief. The *de iure* independence

[47] The government is currently the only subject entitled to make the proposition. See Section 141 para 1 of the Public Procurement Act.

[48] Section 15 of the Act No. 314/2018 Coll. on Constitutional Court of the Slovak Republic, as amended.

would be supported by more precise educational and professional requirements for the President and Vice-Presidents of the Office, as well as requirements towards functional independence. The latter may be secured e.g. by making relationships of the leaders of the Office with the business sphere more transparent. This leads us to, thirdly, proposals *de lege ferenda*. These may be divided into four groups: proposals regarding independence in general; proposals regarding position of the President and Vice-Presidents of the Office; proposals regarding position of the Council; and proposals regarding appointment process.

The Office is of crucial importance for proper functioning of the Slovak Republic as a democratic state governed by rule of law. Bearing in mind the extensive amount of scandals related to public procurements, the legislator should do as much as possible to improve *de iure* independence of the Office. This would undoubtedly help the Office to be seen as an objective supervisor over complex procedures of public procurements. It remains to be seen what the future brings in this regard.

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Illiberal democracy in action: Polish kind of symbolic legislation*

Agnieszka Bień-Kacała**

Summary: The author explores symbolic legislation in Poland. Three instances of such legislation enacted since the 2015 general election are analysed in this essay. The author recognizes symbolic legislation of the negative type and provides specific features. She asks about the causes for such activity of the Parliament. The author has outlined the conclusion, that possible reasons may be: a deficient process of the transition to democracy, and past negative time perspective. Both reasons disturb the sustainable development of Polish society. As a possible solution, the author considers a properly functioning education system. However, this would be regulated by an act of Parliament that may be entirely symbolic as well.

Keyword: act of parliament – symbolism – symbolic legislation

1. Introduction

One of the fundamental requirements of the rule of law is that legal provisions should refer to the future and not to past situations. The aim of the law-making is to shape the legal sphere through the representatives of all members of the state community. This way, the legislator solves (consensus) or ends (closes disagreement) conflicts that appear in the social space. The basic form of action should be here, a statute adopted by deputies in an open and transparent legislative process. Nevertheless, since the 2015 election, we can notice the specific activity of the Polish legislator, which is not focused on the regulation of future behaviour. The purpose of such legislation is to provide a certain symbolic value, to emphasise its importance for the majority in the Parliament. The symbolism comes to the fore in

* The paper is supported by the National Science Centre, Poland, *Illiberal constitutionalism in Poland and Hungary*, UMO-2018/29/B/HS5/00232. The paper is translated and updated version of the forthcoming text: Funkcja symboliczna ustawy (Symbolic function of a statute). In: Konstytucjonalizm polski (Polish constitutionalism), A. GAJDA, K. GRAJEWSKI, A. RYTEL-WARZOCHA, P., UZIĘBŁO, M. M. WISZOWATY (eds.). Gdańsk: 2020.

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this legislation, as if at the expense of the other functions of the act. The form of the statute has been chosen because of its importance within the system of sources of law and its feature of regulating the behaviour of individuals. Nevertheless, the statute's normativity is not taken into consideration, and it is even neglected. We can sometimes notice a magical effect attributed to a statute. Adoption of a piece of legislation is treated as tantamount to the implementation of the symbolism associated with it, i.e. confirmation of a specific value or sense expressed by a statute. This means that the legislator is not interested in generating effects in the legal sphere. What's more, by emphasizing the symbolism, the Parliament has weakened the basic aim of law-making that is relied upon in solving social conflict. By invoking symbolism, the legislator admits the uniformity of its understanding and acceptance in the human community, but disregards that such a community is not homogeneous[1]. As a consequence, the Parliament has generated a social conflict, which seemed to be unexpected for the current majority in power. In this context, the question remains open as to why the parliamentary majority in Poland chooses a statute to emphasise symbolism, having at their disposal a whole range of means of expressing values associated with symbolism (e.g. appeal, resolution, declaration). The answer touches not only on the features of statutes as a source of law, but also on the motivations of the parliamentary majority.

The paper is structured as follows: firstly, the problem of symbolic function of a statute is discussed (2.), then examples of such a symbolic legislation are analysed (3.) and finally the possible reasons of such a systemic practice are provided (4.).

2. The symbolic function of a statute

The rudimentary function of the law is undoubtedly the regulation of social relations. In this manner, the legislator sets out the rules of behaviour in a specific social area. The regulatory function influences human actions by establishing specific patterns of behaviour and their legal effects. If this area is covered by constitutional regulation, the legislator has the task of implementing the standards outlined in the constitution. In this respect, every statute should implement and develop constitutional provisions. Obviously, statutory norms ought to refer to reality.

Sometimes, however, the legislator goes beyond purely regulatory and normative functions. The effect in the legal sphere is not the primary but secondary objective of the law. The expression of a specific value, meaning, belief or

[1] WŁOCH, W. *Demokracja zaczarowana* (Enchanted democracy) [online]. Available at: https://www.gazetaprawna.pl/artykuly/988374,wloch-demokracja-zaczarowana.html [23. 1. 2020].

attitude becomes a priority. Moreover, they are symbolically linked to an act, which therefore becomes a visible sign of something invisible (the symbolic legislation).

The phenomenon of symbolic legislation is known within the realms of legal sociology and has already been scholarly described[2]. The two concepts of symbolic legislation which were highlighted: are both negative and positive. The first is when the stated purpose of the law does not coincide with a political objective that has not been publicly disclosed. The origin of this function is found in the Norwegian Law on Housemaids (1948). This regulation served only to create an illusion of social reforms, because of the lack of an adequate legal means to ensure effectiveness[3]. In theory, symbolic legislation is linked to the non-effective legislation[4]. Indeed, the legislator seeks to maintain *the status quo* by introducing ineffective legal measures.

Symbolic laws are not intended to implement legal norms, especially through sanctions (direct effect of the law). Nor are intended to achieve more fundamental objectives or values (indirect effects of the law)[5]. The legislator seeks to: (1) confirm a system of values of a particular social group, (2) demonstrate its power, or (3) resolve a conflict between two or more social groups or political parties. Important to note is that the symbolic function is rarely pure. It is combined with other functions (mainly regulatory or normative). It may also be combined with the instrumental use of law to achieve *ad hoc* political objectives. However, the instrumentalization of law differs from the symbolic legislation. For example, the Act of 28 December 2018 concerning excise duty could be seen as an instance of instrumentalization[6]. The statute has been used as an instrument to stabilize electricity prices despite the economic need for an increase. The purpose of the act is clear and oriented toward creating effects in the legal sphere that are in line with the political agenda of the parliamentary majority. The effectiveness and efficiency of the power exercised by the current majority and the fulfilment of electoral promises serves as the symbolic ground of instrumentalization.

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2 KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing Switzerland, 2016, pp. 1–2.

3 AUBERT, V. *Some Social Functions of Legislation*, Acta Sociologica 1967, vol. 10, issue 1–2, pp. 97–120.

4 LEMBCKE, O. Symbolic Legislation and Authority. In: KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing Switzerland, 2016, pp. 87.

5 KLINK van, B. Symbolic Legislation: An Essentially Political Concept. In: KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing, Switzerland: 2016, pp. 22–23.

6 Dz. U. z 2018 poz. 2538. Hasty legislative process. [online]. Available at: http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=965859E2E30B5FACC125836A005EB34C

The symbolic concept in the positive sense can be identified when the legislator clearly indicates the purpose of the act and refers to values or attitudes in order to create legal effects, by using non-legal methods of communication and social interaction. The legislator identifies the preferred values of the society and introduces mechanisms for their implementation. Moreover, it seeks to shape specific attitudes and approaches of the individual. The symbolic legislation in the positive sense is widely used in biomedical law[7]. However, it can be found also in regulation of other societal spheres especially when the legislator formulates a preamble[8]. In a sense, the constitutional accountability could be considered an example of symbolic legislation in the positive sense. According to the Polish Constitution and the statute of the Tribunal of State[9] the preferred situation is to prevent breaching of the law by state officials. Obviously, sanctions are also provided[10]. However, following the logic of the preventive effect, we trust that the sanction itself will affect the attitude of state officials so that they will not breach the law. The preference is thus revealed for a positive image of the officials as honest and trustworthy people. Unfortunately, this positive symbol of fair and law-abiding officials is undermined by some politicians disregarding constitutional accountability and procedures against them[11]. Such a disregard may, in some sense, indicate the failure of symbolic function in the positive sense[12].

In the post-2015 election legislative practice in Poland, at least a few laws can be identified, whose intention is not an effect in the legal sphere, but to highlight certain values, attitudes or symbolic meaning. These statutes refer to certain values and those values are symbolically linked to the immanent characteristic of the law, which is effectiveness. As a consequence, the statute has been attached to a value in such a way that the value has been embodied[13]. The

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7 KLINK van, B. Op.cit., pp. 19–20.

8 For example, the Act on Family Planning, Human Fetus Protection and pregnancy termination conditions of 7 January 1993 (Dz.U. Nr 17, poz. 78 ze zm.) or the Act on Disclosure of documents of the Security Service of 1944–1990, and the contents of these documents of 18 October 2006 (Dz. U. Nr 218, poz. 1592).

9 The Act of Tribunal of State of 26 March 1982 (Dz. U. 1982 r. Nr 11, poz. 84 ze zm.).

10 More on constitutional accountability BIEŃ-KACAŁA, A. Trybunał Stanu (The Tribunal of State). In: WITKOWSKI, Z., BIEŃ-KACAŁA, A. (eds.). *Prawo konstytucyjne* (Constitutional Law). Toruń: TNOIK 2015.

11 [online]. Available at: https://www.gazetaprawna.pl/artykuly/663974,ziobro-o-wniosku-o-postawienie-go-przed-ts-premier-i-po-sie-osmieszaja.html [3. 1. 2020].

12 PŘIBÁŇ, J. On Legal Symbolism in Symbolic Legislation: A Systems Theoretical Perspective. In: KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing Switzerland, 2016, pp. 105–119.

13 PŘIBÁŇ, J. Op.cit., pp. 108–109 and more RICOEUR, P. Egzystencja i hermeneutyka. Rozprawy o metodzie (Existence and hermeneutics. Essays on method). Warszawa: Pax, 1985, pp. 58–146.

normative function of the law was used for this purpose. Thus, the symbol is perceived as realized – "the word became flesh" in a sense. In such a situation, the legal effects of the legislation are irrelevant, as the law becomes the primary means of expressing a particular view of the world.

This phenomenon can be identified in the case of: the demotion Act[14] and the amendments to the Institute of National Remembrance Act[15] and the Supreme Court Act[16]. In the first two examples, the values represented were clearly indicated and separated from the legal effects of the Acts[17]. The values addressed were a settlement with the past and the protection of the image of a homogeneous Polish Nation were obvious. In the case of the amendment to the Supreme Court Act, the sovereignty of the Republic of Poland as a symbol was associated to the Act. The cases study will confirm the observations.

3. Examples of such a symbolic legislation

The subject matter literature identifies criteria that are helpful in identification of symbolic legislation. They concern the textual qualities of the law at hand (semantic criteria) and the context of the adoption of the law (pragmatic criteria)[18].

The semantic criteria are as follows: "the substantive provisions are not backed up with provisions to enforce them and this discrepancy cannot be justified on rational grounds *(criterion of discrepancy);* the text of the law is incomprehensible for the citizens who have to comply with it as well as for the legal and political actors who have to apply it *(criterion of obscurity);* and the rules of which the law consist can be interpreted in various ways *(criterion of vagueness)*. Pragmatic criteria are: in the legislative process two or more groups with conflicting or incompatible interests are fighting each other *(criterion of*

[14] The Act of 6 March 2018 on the deprivation of the military rank of persons and soldiers in the reserve, who, in the years 1943–1990, had betrayed the Polish reason of state [online]. Available at: http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=2319 [3. 1. 2020]. The Act was vetoed by the President of Poland on 30 March 2018.

[15] The Act of 26 January 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. 2018 poz. 369). The repeal of the controversial provision occurred by the Act on 27 June 2018 (Dz. U. 2018 poz. 1277).

[16] The Act of 21 November 2018 amending the Act of Supreme Court (Dz. U. 2018 poz. 2507).

[17] [online]. Available at: https://dzieje.pl/aktualnosci/z-romaszewska-ustawa-degradacyjna-jest-w-ogole-niepotrzebna [3.01.2020]. Ustawa o IPN nie będzie działać [online]. Available at: https://www.tvn24.pl/wiadomosci-z-kraju,3/instytut-pamieci-narodowej-o-stosowaniu-znowelizowanej-ustawy-o-ipn,817494.html [3. 1. 2020].

[18] KLINK van, B. Op.cit., pp. 22.

conflict of interest); one of the groups involved considers the enactment of the law as a moral victory over the other group (or groups) and a confirmation of its values *(criterion of politisation)*; and society is in a state of emergency that calls for immediate governmental action *(crisis criterion)*[19]".

According to the literature, the symbolic legislation can be identified if at least two of the criteria are met. In this respect, examples of the Acts pre-classified as symbolic legislation will be evaluated.

The symbolic function is the most obvious as far as the so-called Demotion Act is concerned. In the preamble of the Law of 6 March 2018 on the deprivation of the military rank of persons and soldiers in the reserve, who, in the years 1943–1990, had betrayed the Polish reason of state, we can find a simple reference to the symbolism[20]. Among the semantic criteria, the criterion of discrepancy was directly identified. The President of the Republic of Poland pointed to it as a motive for vetoing of the Act[21]. The main issue was the lack of legal remedies against the effects of the implementation of the legislation in question. Still, it seems that the text of the Act is sufficiently understandable and clear to the addressees of the standards of conduct contained therein. The legal effects have been clearly defined and are virtually automatic in relation to a predefined group of people (especially the members of WRON[22]). More importantly, deceased people are affected. The explanatory memorandum directly indicated the name of Gen. W. Jaruzelski[23]. However, this end seems to be difficult to complete in a logical sense. In the context of pragmatic criteria, it should be noted that the conflict of interest has been logged by the President as existing in the social area. Moreover, the veto procedure revealed a conflict within the governing party. The President acted against "his" majority that passed the Act. The politicisation criterion was in principle included in the explanatory memorandum and was revealed in the discussions that took place at the time the law was adopted. The Act was undoubtedly aimed at confirming certain moral values. While the situation did not require immediate action, the ruling majority passed the Act promptly.

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[19] KLINK van, B. Op.cit., pp. 22.

[20] „… it is necessary to introduce a legal solution which will serve to clean up the Armed Forces of the Republic of Poland in the symbolic sphere", translation by author.

[21] [online]. Available at: http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art,396,wystapienie-prezydenta-dotyczace-weta-do-tzw-ustawy-degradacyjnej.html [3. 1. 2020].

[22] The Military Council of National Salvation – a body responsible for state administration during martial law of 1981.

[23] "The bill will allow the Polish society to be compensated and will constitute a symbolic settlement of the epoch of the People's Republic of Poland, in which the symptomatic was a career of Wojciech Jaruzelski, a collaborator of the Military Information Service during the Stalinist period", translation by author.

In the context of the amendment to the Law on the Institute of National Remembrance[24], it should be stressed that the controversy was mainly raised at a level of international relations and concerned two issues. The first, covered by the original draft law, concerned the crimes of Ukrainian nationalists and Ukrainian formations collaborating with the Third Reich. The second, introduced in the draft law during the Sejm's hearings, concerned the crime of 'defamation of the Polish Nation'. Both provisions caused massive reactions from both Ukraine and Israel respectively, as well as in wider public discourse. It should be stressed that the symbolism was not disclosed in the explanatory memorandum to the amendment but can be identified on the basis of the circumstances surrounding the adoption and implementation of the Act. As a result, with regard to the semantic criteria of legislation, the first criterion of discrepancy was revealed by issues relating to the prosecution of foreign nationals abroad by Polish authorities. In addition, following a motion on constitutional review[25], the Marshal of the Sejm has explicitly stated that he does not imagine that the Act would be applicable until the Tribunal had dealt with the case[26]. Thus, despite some implementation mechanisms, there was no political will to implement the Act. However, the provisions of the Act seem to be understandable to the addressees, although some vagueness has been highlighted in relation to the potential prosecution of researchers dealing with crimes committed during the occupation of Poland by the Third Reich. The lack of clarity of the regulations was alleged by the President in his motion to the Constitutional Tribunal. Pragmatic criteria focus not so much on conflict as on two differing visions of the Polish Nation. The first one assumes the existence of a homogeneous community which acts morally only, while the second vision assumes the heterogeneity of the Nation and the individualization of moral attitudes. These visions are based on a psychological mechanism to deal with the assessment of the ingroup[27]. The conflict is permanent and has already been highlighted in the past. For some time, it has been obvious that the moral values are confirmed by the ruling majority in the legislative practice. Therefore, there is no need for a state of emergency. In a sense, however, we can find a need

[24] The Act of 26 January 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. 2018 poz. 369).

[25] Motion of 14 February 2018 (K 1/18). Mirosław Wyrzykowski presented his constitutional arguments in this regard in the paper: WYRZYKOWSKI, M. Law on The Institute of National Remembrance before The Constitutional Court. *Gdańskie Studia Prawnicze*, 2018, vol. XL, pp. 355–369.

[26] [online]. Available at: https://www.tvn24.pl/wiadomosci-z-kraju,3/karczewski-w-jeden-na-jeden-ustawa-o-ipn-nie-bedzie-dzialac,816548.html [3. 1. 2019].

[27] BILEWICZ, M. *Między idealizacją a hiperkrytycyzmem. Polska niepamięć historyczna i jej źródła* [Between idealization and hypercritical. Poland's historical oblivion and its sources], Instytut Studiów Zaawansowanych, Warszawa, Seria ANALIZY, Wrzesień 2018, pp. 1–8.

for immediate action in the following amendment to the Act which repealed the crime of defamation of the Polish Nation[28]. The instant legislative repeal was driven by a severe political reaction from Israel and the USA. This immediate legislative change highlighted the moral base of the need to criminalize a specific assessment of the behaviour of Poles during the Second World War.

The third example of symbolic legislation is the Act of the Supreme Court which was amended in a hasty legislative procedure on 21 November 2018[29]. In particular, the Act fulfils the criterion of discrepancy. Semantically, it provides clear and understandable legal provisions and mechanisms for their implementation. However, the Act itself is not able to raise legal effects, as the effects have already come into force based on the decision of the TSEU (especially interim measures)[30]. What we can clearly see here is the pretence of law-making. The reasons are not clear, however. The explanatory memorandum of the Act states that the implementation of the interim measures of the Vice-President of the Court of Justice of the European Union (CJEU) requires the Member State's legislative procedure. The relationship between the EU legal system and the Polish legal system was therefore symbolically highlighted, giving supremacy to the Polish legal system. In a sense, there can be identified a conflict of interest between Poland and the European Union, where the value of the sovereignty of Poland has been emphasized in the expanse of the common European values. The crisis and the need for immediate legislative reaction was expressed in the explanatory memorandum of the Act. In the opinion of the ruling majority, passing the Act within three and a half hours and the failure to provide ample *vacato legis,* was justified thus.

The analysis shows that the symbolic legislation is connected to the protection and implementation of certain values that are important for the ruling majority (settlement with the past, the homogeneity of the Nation, the sovereignty of the Republic of Poland). These values are implemented in expanse of values so far recognized as important (right to defence, freedom of research, primacy of the EU law). The aim of the Acts is often clearly expressed in the explanatory memorandums, or is easily identified in the political declarations uttered in the context of the legislative process. This can be seen as a specific characteristic of Polish symbolic legislation. Obviously, such a legislation allows the political objectives of the ruling majority to be achieved[31]. The symbolic values are equated with the political aims. The law-making power thus confirms a certain view of the world

[28] The Act of 27 June 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. 2018 poz. 1277).

[29] Dz. U. 2018 poz. 2507.

[30] Case C-619/18 Commission v Poland, ECLI:EU:C:2018:852.

[31] KLINK van, B. Op.cit., pp. 19.

while demonstrating its power in a hasty legislative process. Consequently, the hyperextension of the symbolic function can be noted. The main objective of the law-making seems to be the achievement of partisan goals rather than legal goals. The lack of the intent of regulating the legal sphere is shifting the law into a mystical phenomenon. The law becomes an instrument for the magical transformation of reality. It makes it possible to demote posthumously, recognize the homogeneity of the Polish Nation, or acknowledge supremacy of the Polish legal system over the EU law. The adoption of a symbolic statute does not, however, alter the fact that the actions of majority in power remain mainly on the level of "moral victory". Thus, the Parliament does not solve or end the conflict, but rather generates it by the attempt to impose the specific world's view on the whole society.

4. Conclusions

In conclusion, the Polish Parliament passes symbolic legislation to achieve political goals. Since the 2015 election, the ruling majority has promoted certain attitudes and emphasised certain symbolic values. The situation extrapolated on the new term of office that started after the 2019 election. The first and most spectacular example of symbolic legislation is the amendment to Acts of ordinary courts and of the Supreme Court[32]. The symbolic aim of the amendment is respect for independence of courts and the impartiality of judges explicitly shown in the preamble, while the political goal seems to be "cleansing of the judiciary" as was explicitly expressed by the Polish President[33]. Obviously, there is no need for an immediate reaction to achieve this political goal but the will to impose certain values is primary among ruling politicians. Such a situation does not create a favourable milieu for sustainable development of civil society that respect pluralism and equality. the causes of the increase of symbolic legislation requires to be identified to resolve the situation. However, this is not an easy mission, as there might be many reasons rooted in historical development of the Polish society[34]. Possible origin could be the loss of sovereignty as a result of the Partitions, the Second World War and the Soviet domination. Additionally, it seems that the Polish society has not settled with the past as there was not

[32] The ongoing legislative process [online]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/proces.xsp

[33] [online]. Available at: https://oko.press/duda-o-sedziach-oczyscic-do-konca-nasz-polski-dom-iustitia-to-mowa-nienawisci/ [20. 1. 2020].

[34] DRINÓCZI, T., BIEŃ-KACAŁA, A. Extra-legal particularities and illiberal constitutionalism: the case of Hungary and Poland. *Hungarian Journal of Legal Studies,* 2018, vol. 59, no. 4, pp. 338–354.

a proper "transition ritual" that could bring a kind of relief[35]. Thus, even after 30 years since the transformation to democracy, calls for such a settlement are still alive (eg the Demotion Act). The frustration increases in a sense, as the time perspective of Poles could be associated with past negative attitudes (eg protection of the positive image of the Polish Nation in the context of the Second World War)[36]. The time negative past perspective makes it difficult to aim in the future and develop in a way that is free from the burden of loss of sovereignty (eg in relations with the European Union). In this context, it is somehow obvious that a symbolic legislation ceases to be a source of law. It has become a political and moral manifestation rather than a conflict solution. As a kind of truism could be perceived a postulate of appropriate education aiming at shaping a free, independent, aware society and responsible individuals. However, the education system remains in the hands of the ruling majority and the Parliament. Consequently, the demand for proper education can only be of symbolic importance.

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Compatibility of Terminology of Competition Law and Electronic Communications Law

Eva Zorková*

Summary: Due to rapid technological developments, the sector of electronic communications law is very specific. In many aspects, electronic communications law is strongly linked to the application of competition law rules. The aim of this paper is to evaluate the terminology used in the Czech Act on Electronic Communications and its compliance with the terminology used in the Czech Act on the Protection of Competition, as well as its compliance with the EU terminology. Problems may be caused by inconsistencies in the terminology used, for example when defining the relevant market and subsequently identifying a competitor/an undertaking with a significant market power.

Keywords: Electronic communications law – competition law – competitor – undertaking – legal terminology – the Office for the Protection of Competition – the Telecommunication Office – European Commission

1. Introduction

Due to rapid technological developments, the dynamically developing electronic communications sector is very specific, for example in terms of its nature and sectoral regulation of public law. Electronic communications law is strongly interrelated in the application of competition law rules as well. The aim of this paper is to evaluate the use of the term *"competitor"* on a wider range of sectors than "just" the competition law. The first question is whether the terminology used in the Czech Electronic Communications Act is consistent with the terminology used in the Czech Competition Act. While the second question is whether the terminology used in the Czech Electronic Communications Act is consistent with the EU terminology.

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** This article was drafted with the support of the grant project of the Czech Science Foundation *"Koncept soutěžitele v českém a unijním právu"* [*Concept of Undertakings in Czech and EU Law*], grant no. GA18-21829S.

Indeed, inconsistency in legal terminology that is used could cause practical problems, for example in defining the relevant market and subsequently identifying a competitor or an undertaking with a significant market power. Defining the relevant market may, in factm be different from the perspective of the Czech Telecommunication Office, as well as from the perspective of the Czech Office for the Protection of Competition, and ultimately from the perspective of the European Commission.

In order to answer the above questions, we will briefly mention the definitions relevant to the addressees of competition law, including the terminology used by EU and Czech competition laws (section 2). Subsequently, we will characterize the area of electronic communications law, including its interconnection with competition law (section 3). In the fourth chapter, we will focus on the EU regulatory framework for the electronic communications market and its terminology (section 4). We will also evaluate the terminology used in Czech law and the Electronic Communications Act (section 5) We will try to find out whether the inconsistently used terminology have any (negative) impact on practices, such as differentiating between the relevant market and the undertaking with significant market power, as it occurred in the Czech Republic within the division of companies O2 and CETIN in 2015 (section 6).

2. A competitor in EU and Czech legislation – definition and terminology used

While EU law refers to *"an undertaking"* or *"an association of undertakings"* as the addressees of competition law, the terminology of Czech competition law uses the term *"competitor"* in the same meaning. However, the term *"competitor"* is used in EU law in a slightly different meaning. Inaccurate translation often leads to illogical formulations, for example in official Czech translations of EU law.[1] It is therefore clear that the terminology of Czech legislation at the first glance differs from EU law, although it can be inferred from application practice and academic publications[2] that the Czech definition of a competitor is compatible with the EU definition. The mutual compatibility of two terminologically different concepts at the level of Czech and EU law has been discussed many times

[1] For comparison see the official Czech translation of Commission Regulation (EU) No 330/2010 of 20.4.2010 on the application of Article 101 (3) TFEU to categories of vertical agreements and concerned practices, Article 1 paragraph 1, letter (a) or (c).

[2] KINDL, J., MUNKOVÁ, J. *The Act on Protection of Competition. Commentary 3rd Edition*. C. H. Beck, 2016, p. 51, and also the judgment of the Czech Supreme Administrative Court of 29 October 2017, case 5 As 61/2005 (called ČESKÁ RAFINÉRSKÁ).

within variou publications,[3] as was the use of the Czech term *"competitor"* (in Czech *"soutěžitel"*) for the term *"undertaking"* (in Czech *"podnik"*) in the EU.[4]

For readers of this article, it is surely not important to discuss in detail the definition of a competitor within competition law, but for the sake of clarity, we would like to make a very brief excursion as an introduction. An undertaking is the addressee of the competition law rules defined by EU case-law as *"an entity engaged in an economic activity, regardless of its legal form or method of financing"*.[5] The Court of Justice of the European Union has repeated this definition in other judgments as well. The first conceptual feature of the term *"competitor"* is *"a unit"* or *"an entity"*, which means an economic entity, not a legal entity, i.e. a unit comprising of several separate legal entities, which implies that a unit may be composed of several persons, either natural or legal[6]. Moreover, according to EU case law, even if these units act as single economic units on the relevant market (for example a parent company and its subsidiaries), they shall be considered as one economic unit on the relevant market.[7]

Czech law does not use the term *"unit"* but speaks rather of natural and legal persons and various forms of association which are not legal persons themselves.[8] In some Czech judgments, the term *"entity"* is used instead of the term *"unit"*, which might be confusing for its readers.

The second conceptual feature of the term *"competitor"* is (according to the EU case law definition) the *"economic activitym"*, i.e. offering goods or services on the relevant market.[9] Gaining any profit is not a prerequisite for an economic activity,[10] which means that a competitor might not be necessarily an undertaking. Compared to the Czech term *"entrepreneurship"*, which by definition is an activity pursued for the purpose of making a profit, the pursuit of an *"economic activity"* is defined more broadly. Thus, the Czech competition law does not use the term *"economic activity"*. According to the Czech competition legislation, it is essential for a competitor to *"participate in the competition"* or to be *"able to influence the competition by competitor's activities"*. And so, any participation

3 PETR, M. Definition of a Competitor for the Purposes of Competition Law and Unfair Competition. *Antitrust. Review of Competition Law*, 2019, no. 2, pp. 44–51.

4 MUNKOVÁ, J. An Undertaking as an Addressee of the Law within Competition Law. *Právní rozhledy*, 2004, no 17, pp. 625. and also PELIKÁNOVÁ, I. A Competitor and an Undertaking in the Czech law. *Antitrust. Review of Competition Law,* 2016, no. 1, p. 7.

5 Case CJEU, C-41/19 Höfner, Article 21.

6 Case CJEU, 170/83 Hydrotherm, Article 11.

7 Case CJEU T-11/89 Shell, Article 312.

8 Article 2, paragraph 1 ofAct No. 143/2001 Coll., of 4 April 2001, Act on the Protection of Competition.

9 Case CJEU 118/85, Commission v Italy, Article 7.

10 Case CJEU C-67/96 Albaešny, Article 85.

in a competition means not only an *"entrepreneurship"*[11] which, by its definition is a run for profit, but also any other activity capable of affecting the relevant market (whether it is a profit-oriented activity or not).

3. Electronic communications law and its relation to competition law

The term *"electronic communications"* similarly to the term *"competitor"* or the term *"undertaking"* is not directly defined in EU law. Its definition is based on the definition of the term *"electronic communications networks"*. It is interesting that even the European Commission itself is not strictly consistent in the use of terminology and in its official publications sometimes uses outdated terminology or incorrect and confusing terminology.[12] As far as the definition necessary for understanding the issue is concerned, the term *"electronic communications networks"* means transmission systems as well as switching or routing equipment and other means which enable transmission of a signal over a line (s) by radio, optical or other electromagnetic means, including satellite networks, fixed, circuit-switched or packet-switched networks, including the Internet, mobile terrestrial networks, power distribution networks in the signal transmission range, radio and television networks and cable television networks, regardless of the type of information transmitted.[13]

For the purposes of this article, it is essential to note that only communication networks and services of a public nature are subject to regulation and protection, namely those networks and services that are publicly available and so capable of affecting the proper functioning of effective competition in the relevant electronic communications market. By their nature, telecommunications have always represented the strategic interest of states due to the need for protection of public security, public orders and the security interests of states in general. The specificity of the electronic communications sector also lies in the fact that, for objective reasons of a technical nature, agreements between undertakings may be required, for example, to ensure the interconnection of networks and services. That is why, in the area of electronic communications general competition rules

[11] The definition of an entrepreneur is based on Act No. 89/2012 Coll., The Czech Civil Code, Article 420.

[12] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of competition law*, 2010, no. 3, p. 2.

[13] For comparison see Article 2 (a) 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.

can only be applied but the objective specificities of the relevant markets, their complexity and their dynamic nature have to be taken into account.[14]

Unlike other regulated areas, in the case of electronic communications, it is not possible to rely solely on general competition regulation (ex post regulation). The current Czech Electronic Communications Act, unlike its predecessor, abandons ex ante regulation and aims to protect competition in the electronic communications sector ex post, all in order to ensure the development of a competitive market. The interconnection of competition law with the law of electronic communications can be seen for example in conducting the analysis of the relevant markets (in defining the relevant markets) for electronic communications. In the case of the Czech Republic, analyses of relevant markets are carried out by the Czech Telecommunication Office and are based on the transposed legislation.[15]

The Czech Telecommunication Office (hereinafter referred to as "CTU") analyses the markets in order to determine whether these markets are effectively competitive. Market analysis are issued in the form of general scope measures, while ex ante regulation is to be performed principally on the basis of market's results analyses carried out by the CTU at regular intervals.[16] The analysis is carried out within a period of 1 to 3 years but may also be carried out as required by the market situation. Market analyses provide basic substantive, as well as argumentative support for regulation, as it is essential that ex ante regulatory obligations are imposed only in the absence of effective competition.[17] If the market in the area of electronic communications is not effectively competitive, then the CTU may determine (for undertakings with significant market power operating in inefficient markets), a proposal for measures that are exhaustively laid down by law.[18] There is a rule that in the context of the analysis of relevant markets, the CTU consults its findings with the Office for the Protection of Competition (hereinafter referred to as the "UOHS"), incorporates its comments and finally requests its final opinion.[19] The UOHS opinion is also required by law when

[14] Explanatory Memorandum to Articles 51, 52 and 53 of Act No. 127/2005 Coll., On Electronic Communications (herein after the "Electronic Communications Act").

[15] Specifically Articles 51, 52 and 53 of the Electronic Communications Act.

[16] Up to now, the CTU has conducted in total 4 analyses of relevant markets. Relevant markets were defined as follows: (1) wholesale fixed call termination services in public telephone network; (2) voice wholesale termination services on mobile network; (3a) fixed location wholesale access services; (3b) wholesale services, and (4) wholesale services with high quality access provided at a fixed location.

[17] The procedure for analyzing the relevant markets is defined in Article 16 of the "Framework Directive". The procedure for defining the relevant markets is defined in Article 15 of the "Framework Directive".

[18] Commentary on Article 51 of the Electronic Communications Act.

[19] Specifically according to Article 52 of the Act on Electronic Communications.

defining relevant markets in the area of electronic communications and evaluating significant market power. The UOHS therefore, plays an important role in commenting and consulting. It can be said that the regulatory activities of both the CTU and the UOHS are very influenced and it has always been very important to define the correct division of tasks and find an effective way of communication between the CTU (as a regulator) and the UOHS (as a competition authority). In practice, it may be problematic that the CTU's legal evaluation is completely (or in partly) different from the legal evaluation of the UOHS.[20]

The European Commission also plays an important role in the analysis of relevant markets for electronic communications. The EU regulation of relevant market analyses can be found in the Framework Directive. After the onsultation, the European Commission is empowered to issue recommendations on relevant product and service markets and to define product and service markets within the electronic communications sector. The European Commission shall define all relevant markets in accordance with the principles of competition rules. Subsequently, within the meaning of the Framework Directive, national regulatory authorities carry out regular analyses of the relevant markets defined, taking into account, to the maximum possible extent[21] the European Commission's guidelines while carrying out the analysis in cooperation with the national competition authorities. If the relevant market is not effectively competitive, the national regulatory authority will designate the undertaking (or undertakings) with significant market power and will impose specific regulatory obligations or maintain or amend existing regulatory obligations.[22]

4. The EU regulatory framework for the electronic communications market and its terminology

The area of electronic communications is regulated by several directives of the European Parliament and the Council of 2002.[23] This so-called regulatory framework for electronic communications was further revised in 2009.[24] The regulatory

[20] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of Competition Law*, 2010, no. 3, p. 9.

[21] In accordance with Article 7, paragraph 7 of the Framework Directive.

[22] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of Competition Law*, 2010, no. 3, p. 8.

[23] Explanatory Memorandum to the Government Bill, Parliamentary Press 768/0, Chamber of Deputies, www.psp.cz.

[24] The revision of the regulatory framework took place with the adoption of two revising Directives, namely Directive 2009/136/EC of the European Parliament and of the Council of 25 November

framework for electronic communications also forms the basis of legislation in all EU Member States. The most important role plays the Framework Directive,[25] another important directive in terms of the competition is the Competition Directive.[26] The Framework Directive is followed by four other Directives, that is the Authorization Directive, the Access Directive, the Universal Service Directive and the ePrivacy Directive.[27]

For the purposes of this article, we have focused on the terminology used in all Directives mentioned above. In the English language versions of all Directive is used almost exclusively the term *"undertaking",* which is the Czech language version is translated flawlessly as "*an undertaking*". The term *"competitor"* appears sporadically in the text of all English language versions and is always translated correctly as *"a competitor"* (in Czech *"soutěžitel"*).

5. The addressee of law in the Czech Electronic Communications Act

The relevant provisions of the Electronic Communications Act[28] define an undertaking with significant market power as *"a natural or legal person who, alone or in conjunction with other entities, has a position in the relevant market or closely related market that allows to behave largely independently on other competitors, end-users and consumers"*. If the position mentioned above has one *"person"*, then it is an undertaking with independent significant market power. As it is clear the terminology of the Czech Electronic Communications Act differs from terminology of the Czech Competition Act, which uses the term "*competitor*". Thus, although the areas of electronic communications and

2009 and Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009. Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) also forms the framework for electronic communications.

[25] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a commonregulatory framework for electronic communications networks and services.

[26] Directive 2202/77/EC of the European Parliament and of the Council of 16 September 2002 on competition in the markets for electronic networks and services.

[27] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to networks Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and user rights relating to electronic communications networks and services and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communication ssector.

[28] Articles 51, 52 and 53 oftheElectronic Communications Act.

competition are clearly linked, the inconsistency in the used terminology could cause practical problems, for example in defining the relevant market and subsequently in defining a competitor/ an undertaking or a person with significant market power.

In the following chapter, we will try to explain how such a definition may differ from the position of the CTU, from the position of the UOHS and from the position of the European Commission.

6. The Czech case law – division of companies O_2 and CETIN

As mentioned above, the area of electronic communication networks is a specific area in which it is necessary to distinguish between the infrastructure, ie "*networks*", and "*services*", which are mediated through the infrastructure. Although it is usually difficult to create any additional competitive infrastructure, mainly due to financial or technical impossibility, it is still desirable to create healthy competitive conditions in the market of provision of services. That is why the concept of separating infrastructure (ie the concept of separating networks) from business activities (ie from the provision of services) has been gradually developed within the EU.[29]

In the Czech Republic, a voluntary division of companies CETIN and O^2 has occurred. In April 2015 O^2 's shareholders voluntarily agreed to split the formerly vertically integrated operator with significant market power into two separate companies. The separation requested the transfer of O^2 's physical telecommunications network and previous wholesale offers to a new wholesale entity, CETIN. The split entered into force on 1st of June 2015. The CTU's opinion on the division of companies was that both companies, although majority-owned by the same investment fund (called PPF group[30]), are considered as two legally and economically separate companies (entities) with separate management and supervisory structures, separate headquarters, staff, systems IT and accounting records. CTU perceived the division of companies as a measure to support competition, since CETIN did not grant O^2 any preferential treatment and O^2, therefore, had to compete equally with other retail operators using CETIN's wholesale inputs. Therefore, according to CTU, the removal of vertical links between O^2

[29] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of Competition Law*, 2010, no. 3, p. 3.

[30] PPF Group acquired by O2 in January 2014. PPF is a Czech investment group operating in various sectors in Europe, Asia and the USA.

and CETIN had led to the situation in which imposing of certain remedial measures was not appropriate.

The CTU defined two relevant product markets as follows: 1) relevant product market for wholesale services with local access at a fixed location, [31] and 2) relevant product market for wholesale central access provided at a fixed location for widespread consumption products.[32] The geographical relevant market was defined for both relevant product markets mentioned above as a national market that covers the whole territory of the Czech Republic.

6.1. A brief reflection on the comments of the European Commission and the UOHS opinion

The European Commission, as well as the UOHS, have expressed several reservations within their comments and opinion, for the purposes of this article we will focus on three main areas:

1. The European Commission explicitly proposed to include an alternative platform to the definition of wholesale product market and if CTU will not include solutions based on CATV and Wi-Fi in the relevant market, the European Commission required to justify such a decision properly.[33] Such an assessment also corresponds to the opinion of the UOHS which states that the interchangeability of WiFi and CATV technology with xDSL/FTTx at the retail level and their indirect influence at the wholesale level was not sufficiently demonstrated.[34] In view of the future competitive development of alternative platforms at the retail level, the European Commission recommended assessing the ability of these platforms to exert sufficiently strong indirect pressure at the retail level and highlighted CETIN's ability to act independently of its competitors at the wholesale level. This should have led CTU to eventually include these platforms in the relevant wholesale market.[35]
2. The European Commission also commented on the definition of the geographic relevant market. In the light of the future infrastructure (including

[31] Also referred to as "market number 3a".

[32] Also referred to as "market number 3b".

[33] Comments from the European Commission pursuant to Article 7 paragraph 3 of Directive 2002/21/EC of 26. 6. 2017 on Commission Decisions in Cases CZ/2017/1985 and CZ/2017/1986: wholesale local access provided at a fixed location and wholesale central access provided in a fixed location for products for wide consumption in the Czech Republic, pp. 11–14.

[34] UOHS Opinion No: ÚOHS-D0036/2017 OS-/TU-05499/2017/830/JVj of 13. 2. 2017.

[35] Comments from the European Commission pursuant to Article 7 paragraph 3 of Directive 2002/21/EC of 26. 6. 2017 on Commission Decisions in Cases CZ/2017/1985 and CZ/2017/1986: wholesale local access provided at a fixed location and wholesale central access provided in a fixed location for products for wide consumption in the Czech Republic, pp. 11–14.

various alternative technologies) the relevant markets seem to be developing more dynamically in some geographical areas of the Czech Republic than in others. The European Commission suggested collecting data at a more detailed level in favour of defining sub-geographic markets of wholesale services. The UOHS stated that CETIN, as an undertaking with a significant market power, has sufficient freedom to set the price of the wholesale offer, since there is no WiFi or CATV wholesale offer (nor is it expected to be submitted within the relevant market). The provision of services on these technologies is therefore only of a local nature and the size of the networks providers does not reach the size of CETIN network.

3. Concerning the assessment of the application of excessive prices, the European Commission pointed out using the economic replicability test as a minimum protection against the risk of excessive prices.[36] This procedure was again in line with the UOHS opinion, which also recommended to execute the economic replicability test soon.

7. Conclusion

As it is clear from the previous chapter, in the case of division of companies CETIN and O^2, the CTU defined the relevant markets differently from the requirements set out in the UOHS opinion and the European Commission comments. In general, the UOHS opinion corresponded to the Commission's comments. The CTU was criticized for failing to carry out a sufficiently detailed analysis, for insufficient justification of taken (or not taken) measures, or for an inappropriate way in which the consumer survey was carried out. For sure it is clear necessary to cooperate and coordinate all procedures, mainly in a situation in which the regulatory activities of the CTU and the UOHS overlap and influence each other. In some ways, it may be problematic to define the division of tasks of both authorities. An effective communication between these two regulators can be a difficult task as well, but it is crucial to prevent hidden competence disputes. In our opinion, the different definitions can be attributed to the communication problems between these two regulators rather than the different terminology used within legal regulations. Whatever the reason for the different approaches is, it can certainly be agreed on the fact that such a situation is not beneficial for the relevant market itself, regardless

[36] Comments from the European Commission pursuant to Article 7 paragraph 3 of Directive 2002/21/EC of 26. 6. 2017 on Commission Decisions in Cases CZ/2017/1985 and CZ/2017/1986: wholesale local access provided at a fixed location and wholesale central access provided in a fixed location for products for wide consumption in the Czech Republic, pp. 11–14.

of the companies concerned. Last but not the least, such a situation is not beneficial for consumers and social welfare.

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YOUNG RESEARCHERS PAPERS

The Respect of the International Environmental Law in the Field of the Northern Dimension: Good Practices and Virtuous Examples in the European Region

Francesco Gaudiosi*

Abstract: The following work aims at analyzing the theme of regional environmental cooperation within the Northern Dimension, a joint policy created by the European Union together with Norway, Iceland and the Russian Federation which sees the Northern Dimension Environmental Partnership as a collaborative dimension between governments, private companies, public stakeholders and local communities in the implementation of projects aimed at environmental protection. In the logic of international law, the dynamics of the NDEP are particularly interesting to study as representing a model of virtuous cooperation in the environmental protection field and in the prevention of international disputes related to cross-border pollution in the Nordic region. The precautionary approach that is actively enforced through the implementation of the of international environmental law obligations, makes the Northern Dimension Environmental Partnership considered a unique example of its kind, thanks to its ability in contributing to sustainable development in the region.

Key-words: International Environmental Law – Northern Dimension – Common Foreign and Security Policy – International and European Cooperation – Northern Europe – Sustainable Development Goals

1. Introduction of the Northern Dimension: the international cooperation in the high north

The Northern Dimension represents a particularly interesting area of international cooperation to analyze in the international perspective. It is the result of

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a joint policy which brings together the European Union, Russian Federation, Iceland and Norway. From a legal point of view, the EU launched the Northern Dimension in December 1997, with the European Council adopting the Finnish proposal to create a "Nordic dimension" of cooperation with other non-EU States within the framework of the northern borders of the Union.[1]

The Northern Dimension was born from the need to create an area of cooperation between State actors and an International Organization, in this case the EU, in order to intensify relations between the European Union and Russia *prima facie*, and between the EU and two states of the European Economic Area and European Free Trade Association (EFTA), Iceland and Norway. The peculiarity of the Northern Dimension, in its nature of a sub-regional joint policy, is that it provides a multi-level cooperation framework that concerns areas of collaboration different from the agreements between the EU and Russia, namely which are the Partnership already existing and Cooperation Act (PCA) of 1994 and the Common Strategy of the European Union on Russia (first adopted in 1995 and revised at the Cologne summit in the summer of 1999) and also different from the Free Trade Agreement that the EU has with Norway and Iceland.[2]

The Northern Dimension wants to deepen cooperation in areas substantially different from those listed above, as it intends to promote security and stability in the region, as well as helping to build a safe, clean, and accessible environment for all people in the northern European scenario. These include cold climatic conditions, health and social disparities in standards of living, environmental challenges including problems with nuclear waste and wastewater management, insufficient transport and border crossing facilities. As part of these objectives, it also has the great possibility to be able to take advantage of the potential in terms of natural resources and the unique ecological heritage that the Northern European area and the sub-Arctic polar spaces possess.[3]

The 2004 enlargement of the Union with the inclusion of Estonia, Latvia, Lithuania, and Poland, has determined a renewed centrality of the Northern Dimension: eight EU Member States (Denmark, Germany, Poland, Lithuania, Latvia, Estonia, Finland, and Sweden) surround the Baltic Sea, and the EU's shared

[1] See point 68 on Regional cooperation in Europe in the Conclusions of the Presidency of the Council; Available at: https://www.europarl.europa.eu/summits/lux1_en.htm

[2] An interesting historical reconstruction of the path of the ND is offered by MAZUR-BARANSKA, A. "The Northern Dimension of the EU". 9 Pol. Q. Int'l Aff. 31, 2000.

[3] On this issue, AALTO, P., TYNKKYNEN, N. "The Nordic Countries: Engaging Russia, Trading in Energy or Taming Environmental Threats?". In: AALTO, P. (ed.). *The EU–Russia Energy Dialogue: Europe's Future Energy Security?* Aldershot: Ashgate, 2007, pp. 119–129; LYNE, R. "Blueprint for a New Relationship with Russia". *Europe's World*, No. 9, 2008, pp. 52–58 and Artic Monitoring and Assessment Programme (AMAP), *AMAP Assessment Report: Arctic Pollution Issues*, Arctic Council, Oslo, 1998.

border with Russia has lengthened.[4] This led the ND, following its launch in 1999 to a need for renewal in 2006 – thanks to the Northern Dimension ministerial meeting held in Brussels which approved by unanimity "The Guidelines for the Development of a Political Declaration" and "Policy Framework Document for Northern Dimension Policy"[5] aimed at defining four areas of cooperation, which are implemented through *ad hoc* partnerships in the following subjects: environment, public health and social well-being, transport and logistics, culture.

The most innovative element of this form of cooperation seems to lie in what could be called a *"multilevel approach"*[6] In this case, the ND provides for coordination and cooperation at different levels. The European Union, the countries taking part to the Joint Policies, and the public and private actors placed in the area. The *ratio* is linked to the fact that there are other existing field of cooperation that take advantage of a well-established multilevel approach in the northern European area,[7] even if the Northern Dimension undoubtedly represents the most advanced area of cooperation between state and non-state actors at the regional level as well as representing a field of coordination with the greater commitment of the European Union on the territory, with the propulsive role of the European External Action Service[8] of the European Union (EEAS) in increasing dialogue and stability in the area.

If viewed from this perspective, the ND is considered to be the element of cooperation that most of all guarantees a fair and sustainable partnership between the Russian Federation and the European Union. This include the exercise of shared competences between the EU and the Member States includes in the

[4] Many authors have discussed the leading role of the Finnish Government for incrementing the ND in the European context: see the contribution of WICHTER, J., WILSKA, J. "Northern Dimension in Europe – Esko Aho". *Brown Journal of World Affairs*, 7(2), [v]-2, 2000. See also on this topic ARTER, R. "Small State Influence Within the EU: The Case of Finland's Northern Dimension Initiative". 38 J. Common Mkt. Stud. 677, 2000 and OJANEN, H. "EU and Its Northern Dimension: An Actor in Search of a Policy, or a Policy in Search of an Actor". *European Foreign Affairs Review*, Vol. 5, Issue 3, 2000, pp. 359–376.

[5] See the two documents at http://www.eeas.europa.eu/archives/docs/north_dim/docs/nd_political_declaration_2006_en.pdf and https://eeas.europa.eu/sites/eeas/files/northern_dimension_policy_framework_document_updated_28_05_2015.pdf

[6] CATELLANI, N. "Outlining the Northern Dimension: toward regional cooperation in Northern Europe". *The European Union's Northern Dimension*, Rome, Laboratorio CeSPI, 2000, p. 17.

[7] The main other areas of regional cooperation in the region are the following ones: The Council of Baltic Sea States, The Barents Euro-Arctic Council, the Nordic Council and the Arctic Council. The element that clearly differentiates these cooperation forums from that examined in this work is the presence and the incisive role that the European Union possesses within the Northern Dimension, with the exercise of skills and an area of cooperation that, only in the case of the ND, does it appear clearly in the Common Foreign and Security Policy of the EU.

[8] See the EEAS action in the Northern Dimension at: https://eeas.europa.eu/diplomatic-network/northern-dimension/347/northern-dimension_en

realization of projects that involve investments and capitals of many stakeholders of the region in order to foster the economic development and the well-being of the local communities in the area.

In terms of EU Law, the competence of the Union falls within the Common Foreign and Security Policy[9] of the European Union, since it is a joint policy which involves the external relations of the European Union but which has nevertheless not seen the conclusion of an international treaty between the EU and third States. For what concerns the juridical nature of the ND, the EU does not exercise exclusive competence in drafting international agreements, as it has been observed, although it does exercise many shared competences (in this case social policies, environment and energy, based on art.4 TFEU) and supporting competences (such as the protection of human health and culture, as mentioned in art.6 of the same Treaty).

The ND activity is carried out through Ministerial Meetings;[10] Meetings of Senior Officials and a Steering Group (composed of representatives of the European Union, Iceland, Norway and the Russian Federation, set up at an expert level). The Northern Dimension Institute, the Northern Dimension Business Council and the Northern Dimension Parliamentary Forum[11] represent further field of this cooperation and enhance public participation in the ND. This contributes to create a project-based cooperation which gives an agile structure to this regional dimension, possibly open to the participation of other States too.

This explains and confirms what has been previously said about the multilevel approach of which the Northern Dimension's actions and cooperation areas are made up. In its nature as a *sui generis* international organization, the European Union establishes and develops a Northern Dimension joint policy in areas of shared interest with the other parties, while then delegating to the States the execution and launch of specific *ad hoc* projects in the matters of interest of the subject involved. It will therefore be the state concerned, or the private actor representing economic interests, to put this form of cooperation into practice in an economic partnership already started by the EU. The outcomes on which the ND operates are mainly attributable to three points: firstly, the single partnerships

[9] The CFSP is defined and implemented only by the European Council and the Council, and represented by the President of the European Council and by the High Representative of the Common Foreign and Security Policy together with the leading role of coordination of the EEAS in these matters.

[10] See the Joint Statement of The Third Ministerial Meeting of the Renewed Northern Dimension, Brussels, 18 February 2013, https://ec.europa.eu/commission/presscorner/detail/en/PRES_13_63

[11] The Sixth Northern Dimension Parliamentary Forum was held in in Bodø, on 19–20 November 2019. The Conference Statement is readable at https://www.stortinget.no/contentassets/54e5750d20674a978dd60789eef15633/conference-statement-sixth-northern-dimension-parliamentary-forum.pdf

aim to favor agreements in specific matters of cooperation in the long-term run, increasing confidence-building between public and private subjects involved in the area. As a second element, the ND can be an interesting model for building other regional experiences of similar composition and effectiveness, useful for regional groupings of States interested in establishing forms of agile partnerships as in this case. Finally, it is possible to affirm that this kind of cooperation can prove itself useful in the formation of legally binding behaviors between States which could lead to local customs: a very useful tool in international law to interpret agreements between present States in the region.

This work intends to focus precisely on those areas of cooperation concerning the protection of the environment, the wastewater treatment and the correct use of nuclear wastes coming from nuclear power plants of the region.

2. The Northern Dimension Environmental Partnership

The Northern Dimension countries share a geographical datum: in fact, they are all coastal states overlooking the Barents and the Baltic Sea.[12] The "pathological" element shared by Norway, Russia, Iceland and Finland is linked to the problem of pollution caused by poor wastewater treatment, insufficient energy efficiency measures and inadequate management of urban, agricultural and nuclear waste.[13] In this case, several rural and less developed local areas of the territory do not have the necessary resources to deal with these environmental problems. An example is the north-western area of the Russian Federation which needs a strategic partnership, also with European actors and with third states, to define new environmental projects in the area.[14]

The case of Northern Dimension Environmental Partnership (NDEP) precisely fits this topic, an environmental cooperation[15] inserted in the wake of the Northern Dimension that intends to promote international cooperation between governments, the European Union, private investors and European financial

[12] LANE, J. "In search of balance: Russia and the EU in the North". *Polar Geography* 34(3): 163–192, 2011, DOI: 10.1080/1088937X.2011.597886, p. 120.

[13] VÄYRYNEN, A. "The renewed Northern Dimension – Experiences and Expectations". *Seminar on the Renewed Northern Dimension and the Next Steps, Lappeenranta*, 2007, p. 3.

[14] CATELLANI, N., op. cit., p. 10.

[15] It is interesting to note that the cooperation on environmental matters has also been extended to Belarus, which belongs to the area of the Baltic Sea, although not being officially part of the Northern Dimension joint policy. In the area of nuclear safety, projects focus on the treatment of radioactive waste and the safe storage of spent nuclear fuel.

institutions in order to stimulate investments and create new economic opportunities for environmental projects. This logic of cooperation therefore intends to encourage the development of the territory thanks to a multi-level partnership that stimulates green investments, thus going to have positive externalities on environmental protection too.

Another characteristic of the territorial dimension on which the ND extends, is connected to the risk of nuclear wastes related to the use of Russian nuclear energy in the north-western area.[16] To this end, the NDEP promotes nuclear safety projects in close collaboration with the Russian authorities and international experts, with grants from the NDEP[17] which fully cover the investment funds.[18]

The projects relating to the NDEP are therefore linked to two main sections: on the one hand, the protection of the environment meant as the conservation of the marine ecosystem and natural resources in the area between the Baltic Sea and the Barents Sea, and another preventive approach linked to the use of nuclear energy in the area – especially on the Russian territory – aimed at preventing any kind of cross-border damage to neighboring states.

From an environmental and marine point of view it is worth underlining the richness of natural resources and marine biodiversity[19] both in rivers and seas of the territory and in forests that cover a large portion of the geography of the area. The recent phenomena of environmental degradation, mainly linked to climate change which shows its most evident effects especially in the Arctic area, raise numerous environmental problems in the Nordic region. The data linked to the increase of temperatures of the Baltic and the Barents Sea explain that these two

[16] GODZIMIRSKI, J. *"*Russia's energy strategy and prospects for a Northern Dimension energy partnership". In: AALTO, P., BLAKKISRUD, B., SMITH, H. (ed.). T*he new northern dimension of the European neighborhood*, Centre for European Policy Studies, Brussels, 2008, pp. 145–163.

[17] "*The fund serves the Northern Dimension Area, covering north-west Europe from the Arctic and Sub-Arctic areas, including the Barents and White Seas, to the southern shores of the Baltic Sea. It includes all countries in this vicinity from north-west Russia in the east to Iceland in the west"*, from NCD Partnership website at http://ndcpartnership.org/funding-and-initiatives-navigator/northern-dimension-environmental-partnership-fund-ndep

[18] The NDEP, following its establishment in 2001, aims to coordinate funding for priority cross-border environmental projects in the ND area. This is in fact equipped with an NDEP support fund, launched by the initiative of international financial institutions, receiving contributions from the European Union, Belarus, Belgium, Canada, Denmark, Finland, France, Germany, the Netherlands, Norway, Russia, Sweden and UK. By 2016, a total of 348 million of euros had been allocated to the NDEP Support Fund, with 182 million earmarked for environmental projects and EUR 166 million for nuclear safety projects.

[19] *The Northern Dimension of Canada's Foreign Policy, Communications Bureau Department of Foreign Affairs and International Trad*e, Canada [online]. Available at: http://www.international.gc.ca and *Nuclear Wastes in the Arctic: An Analysis of Arctic and Other Regional Impacts from Soviet Nuclear Contamination*, Washington, DC: U.S. Government Printing Office, 1995, p. 115.

marine areas are particularly sensitive to environmental degradation and this is further aggravated by the low salinity and the shallow waters of the Baltic Sea, the latter being also threatened by eutrophication, which reduces oxygen in the water and damages the health of indigenous people of the territory, as well as the life biodiversity of fish, plants and animals.[20] Phosphorus and nitrogen from poorly treated wastewater and agricultural waste have led to excessive algae growth in seawater which deprives other living organisms of oxygen when it decomposes and produces marine dead zones. The Baltic Sea has changed over the years from a marine environment with clear waters to a sea with a growth of harmful algae[21] in large part. The narrow body of water in the Gulf of Finland – shared by Finland, Estonia and Russia – has been particularly affected. In the context of the NDEP plan of action, improving wastewater treatment is the central point of the environmental program. Project selection is based on the environmental effects of sources, if it has direct cross-border impacts and on local and regional priorities.[22]

The second line of action is instead linked to the treatment of nuclear waste. Spent nuclear fuel and radioactive waste in northwestern Russia present

[20] ANADÓN, R., DANOVARO, R., DIPPNER, J. W., DRINKWATER, K. F., HAWKINS, S. J., O'SULLIVAN, G., OGUZ, T., REID, P. C. Impacts of Climate Change on the European Marine and Coastal Environment. *Marine Board, Position Paper 9, European Space Foundation,* 2007, pp. 24–39; HOLT, J., SCHRUM, C., CANNABY, H., DAEWEL, U., ALLEN, I, ARTIOLI, Y., BOPP, L., BUTENSCHON, M., FACH, B. A., HARLE, J., PUSHPADAS, D., SALIHOGLU, B., WAK*, S.* Potential impacts of climate change on the primary productionof regional seas: A comparative analysis of five European seas. *Progress in Oceanography*, Volume 140, 2016, pp. 93 and 106; PUSHPADAS, D., UTE, D., SCHRUM, C. "Projected climate change impacts on North Sea and Baltic Sea: CMIP3 and CMIP5 model-based scenarios". *Biogeosciences Discussions.* 12(15), DOI: 10.5194/bgd-12-12229-2015, 2015.

[21] "The long-term effects of pulp mill chlorate on different algal species of the Baltic Sea were studied in land-based model ecosystems simulating the littoral zone. Brown algae (Phaeophyta) exhibited an extraordinarily high sensitivity to chlorate and pulp mill effluents containing chlorate. All brown algal species ceased growth or showed major signs of toxicity at all concentrations tested, down to microgram per litre levels". ROSEMARIN, A., LEHTINEN, L., NOTINI, M., MATTSON, J. Effects of pulp mill chlorate on baltic sea algae. *Environmental Pollution*, Volume 85, Issue 1, 1994, pp. 3–13.

[22] An example of cooperation in this field is the mining industry of Nickel Pechenga. The Nordic countries have been active in an attempt to reduce mining pollution in the Murmanskregion through inter-state cooperation in the region. The renovation project of Pechenganikel, a Norilsk Nikel branch that manages Cupron. Relaunched in 2005, the project is finally making progress in its environmental profile, which is likely to improve the state of the environment in the entire Murmansk region. See the contribution of SALMI, O., TYNKKYNEN, N. Environmental Governance in Russia: Changing Conditions for International Environmental Cooperation in the Case of the Murmansk Region Mining Industry and the St. Petersburg Water Sector. Submitted draft article, 2008 and SALMI, O. Eco-Efficiency and Industrial Symbiosis – A Counterfactual Analysis of a Mining Community. *Journal of Cleaner Production*, Vol. 15, No. 17, 2007, pp. 1696–05.

numerous environmental risks on an international scale. The Barents Sea area is the largest nuclear waste repository in the world,[23] with existing nuclear waste management facilities that appear completely used, determining consistent losses of radioactive material in the environment. The currentuly supported structures cannot cope with the huge task of dismantling the aging of the Soviet nuclear fleet and therefore efforts must be directed to radically improve the way in which accumulated waste is managed, as well as to facilitate the present and future decommissioning and the dismantling of nuclear-powered ships. As for nuclear non-proliferation of armaments, the size of the nuclear fleet has been reduced with 140 submarine support vessels and other equipment that have been withdrawn from service in the northwestern region of Russia.[24] The result is significant quantities of spent nuclear fuel and accumulation of radioactive waste in poor storage conditions in the region.

The nuclear partnership therefore aims to provide all the necessary tools to eliminate any risks – or damage – associated with cross-border pollution in the European scenario. This has become an important multilateral initiative for the management of nuclear waste in northwestern Russia. It focuses on the regions of the Kola Peninsula, Archangelsk and Murmansk,[25] which make up the largest nuclear waste repository in the world. NDEP's work also aims to provide expertise and cooperation with the International Atomic Energy Agency (IAEA).[26]

[23] AMAP Assessment 2009, *Radioactivity in the Arctic*, p. 16; NYMAN, J. The Dirtiness of the Cold War: Russia's Nuclear Waste in the Arctic. 32 Envtl. Pol'y & L. 47, 2002, pp. 50–51; KIRCHNER, A. The Dumping of Radioactive Waste in the Arctic. *European Environmental Law Review*, Issue 2, 2000, p. 48; YABLOKOV, A. et al. Facts and Problems Related to the Dumping of Radioactive Waste in the Seas Surrounding the Territory of the Russian Federation. Commissioned by the President of the Russian Federation, 1992, Decree no. 613 (Greenpeace Russia trans., 1993); MELLOR, J. Radioactive Waste and Russia's Northern Fleet: Sinking the Principles of International Environmental Law. *Denver Journal of International Law and Policy*, n. 28, 1999, p. 59.

[24] MOLTZ, J. C. Russian Nuclear Submarine Dismantlement and the Naval Fuel Cycle, *The Non-proliferation Review*, n. 7, 2000; HANDLER, J. The lasting legacy: nuclear submarine disposal. In: *Jane's Navy International*, 1998, pp. 16–18.

[25] GODZIMIRSKI, J. op. cit., p. 156.

[26] There are several financial institutions operating in this environmental partnership, among which the most significant are represented by the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), the Nordic Investment Bank (NIB) and the Nordic Environment Finance Corporation (NEFCO). The Northern Dimension Environmental Partnership concept was approved at the EU summit in Gothenburg in 2001 with the establishment of a Steering Group. The Steering Group addresses the preparation of projects as many times as necessary, once or twice a year, in preparation of the Assembly of Contributors. The NDEP Assembly of Contributors is the governing body that chairs the NDEP Support Fund responsible for the general policy of the Fund and for the decision on the awarding of grants. The participants in the Fund constitute the members of the Assembly and the international financial

In this context, the European Bank for Reconstruction and Development, with the Bodø Declaration of March 1999, launched a process to create a multilateral legal framework that would set the conditions under which all the countries concerned could aid the Russian Federation on nuclear-related activities. The Multilateral Nuclear Environmental Program in the Russian Federation (MNEPR) was signed on May 21, 2003 by western donors and the Russian Federation and created an official framework to address the most important legal issues associated with western assistance in the Russian Federation, in particular the access to sites, tax exemption and liability. The completion of the MNEPR agreement was a precondition for the conclusion of NDEP grant agreements for nuclear waste projects under the Northern Dimension environmental partnership.[27]

NDEP's work saw a renewal of skills and strengthening of its projects when the European Union, Russia, Iceland and Norway adopted the new political framework and the political declaration for the Northern Dimension[28] for a permanent dimension of joint cooperation in the European high-north in 2006. In fact, the documents note the work of the NDEP, together with the EBRD mandate, as virtuous mechanisms and correct example of environmental protection, as well as an effective cooperation model to attract investments in the green and blue economy in the region.

3. The NDEP contribution to prevent international litigation on environmental issues

So far, the role of the economic partnership within the Northern Dimension has been seen as an instrument which, although not having legally binding obligations

institutions participate in the meetings of the Assembly as observers. The EBRD is responsible for the administration of the fund. This establishes a set of principles and a program of potential nuclear projects, building on the extensive experience of the International Atomic Energy Agency (IAEA) contact expert group in collaboration with Russian authorities, including the Federal Atomic Energy Agency (Rosatom).

[27] Cooperation on nuclear waste is significantly more complex due to numerous factors: uncertainty about the future ownership of the structure, changes in the composition of the project participants, a multitude of donors, Russian suspicion of the chemical-biological treatment process designed by European partners, the lack of common understanding and an insufficient cost estimate. An example is the project concerning the hazardous waste facility Krasnyi Bor. See TYNKKYNEN, N. Experiences of environmental cooperation between the nordic countries and Russia: lessons learned and the way forward. In: AALTO, P., BLAKKISRUD, B., SMITH, H. (ed.). *The new northern dimension of the European neighborhood*. Centre for European Policy Studies, Brussels, 2008, pp. 71–91.

[28] See note n. 5 above.

well defined by the States, enhance international cooperation in environmental matters. This occurs in a particularly interesting way, as it provides not only an involvement of local communities in order to strenghten environmental development projects in the region, but also thanks to the cooperation between governments and private financiers who develop economic policies with positive externalities in the area.

Among the best practices of the ND, it is worth mentioning the preventive approach, which intends to enhance that set of internationally binding actions or behaviors aimed at preventing certain activities deemed dangerous or likely to cause an environmental damage.

In this case, the example of cooperation within the NDEP for nuclear waste appears to be of fundamental importance from an international perspective. Indeed, the Russian Federation is not part of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and the 1963 Protocol and is has only signed the Vienna Convention on Civil Liability for Environmental Damage of 1963 without never ratifying it. The role of the International Atomic Energy Agency (IAEA) becomes fundamental, which, in the context of the 1994 Convention on Nuclear Safety, acts as a monitoring agent for Nuclear safety. The role of the NDEP is aimed at strengthening the mandate of the IAEA,[29] thanks to partnership and investment policies which, through the creation of soft-instruments, aim to encourage Russian waste control and monitoring activities and to cooperate with States in order to prevent any cross-border prejudice that could give rise to international disputes with the Russian Federation.[30] The role of the NDEP therefore goes alongside the legally binding instruments that already exist on the international level: in fact, it promotes multilevel policies that manage to be more incisive thanks to a local application – in full compliance with a subsidiary principle – of the binding rules of environmental protection in the field of international law.

Having reviewed the legal framework governing the work of the NDEP in its global projection, it is now necessary to dwell on the analysis of the partnership in the sphere of environmental protection and its legal bases in international law. Most of the projects currently implemented thanks to NDEP concern wastewater treatment and actions aimed at avoiding cross-border damage through the marine space that the Northern Dimension States share. In fact, it has been seen that the NDEP applies in the geographical area that includes the Baltic Sea and the Barents Sea, together with the sub-arctic areas of the territory.

[29] JANKOWITSCH, O., TONHAUSER, W. "Convention on Nuclear Safety". *Austrian Review of International and European Law*, Vol. 2, Issue 3 (1997), pp. 319–340.

[30] CARROLL, S. "Transboundary Impacts of Nuclear Accidents: Are the Interests of Non-Nuclear States Adequately Addressed by International Nuclear Safety Instruments". 5 Rev. Eur. Comp. & Int'l Envtl. L. 205, 1996, pp. 205–206.

Firstly, it is appropriate to mention the international rule that establishes the obligation to preserve the marine environment and to take all the necessary measures to prevent, reduce and control pollution of the marine environment.[31] In this case the *lex generalis* is to be found in the United Nations Convention on International Law of the Sea (UNCLOS) which, in art.192 of Part XII establishes the obligation to preserve the marine environment and in art.194 the need to adopt all measures to control the pollution of the marine environment, deriving from any source. Last but not least, UNCLOS in art. 197 also establishes the obligation of cooperation through international organizations of a regional nature with the aim of developing *ad hoc* rules for the protection of the marine environment.[32]

In order to incardinate the work of the NDEP in the logic of international environmental law, there are three key-conventions that govern and set the rules for environmental cooperation in the sector of the treatment of marine spaces and wastewater: the Convention on the Protection and Use of Transboundary Watercourses and International Lakes adopted in 1992 in Helsinki (hereinafter the Water Convention); the Convention on the Law of the Non-navigational Uses of International Watercourses of 1997 and, to a complementary extent, the Convention on Environmental Impact Assessment in a Transboundary Context of 1991.

The Water Convention is undoubtedly the legal element in which the need for international cooperation is declared in order to prevent a transboundary impact of any environmental damage. Article 3, para 1(g) states that *"appropriate measures and best environmental practices are developed and implemented*

[31] With regard to the methods of protecting the marine environment, it is interesting to note that that the agreements concluded after the 1972 Stockholm Conference are characterized by no longer considering the marine environment and its pollution as the subject of synallagmatic relations between States, that is, as an object of strictly reciprocal individual rights and obligations, but there is a general interest of the international community in the protection of the marine environment as such. These agreements therefore define the role of agent *uti universus* towards any other State that has polluted the marine environment. Conversely, it follows the erga omnes obligation to protect the marine environment for all States in the international community. In these terms, see LEANZA, U., CARACCIOLO, I. "Il diritto Internazionale: Diritto per gli Stati e Diritto per gli Individui – Parti Speciali". Turin, Giappichelli Editore, 2010, pp. 377–380.

[32] In this regard, the Convention invites the parties to create agreements and texts of a conventional nature that have a clear regional vocation in the protection of the marine environment, precisely in order to better outline the characteristics of the marine ecosystem that is intended to be protected. In the case of the Northern European area, the conventional text is represented by the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area of 1992.The aim of the States-Parties to the Convention is to prevent and eliminate pollution of the marine environment of the Baltic Sea Area caused by harmful, toxic and dangerous substances from land-based sources; from ships; from incineration and dumping; from exploration and exploitation on the seabed.

for the reduction of inputs of nutrients and hazardous substances from diffuse sources, […] (guidelines for developing best environmental practices are given in annex II to this Convention)".[33] Best environmental practices are appropriate combinations of measures that lead to the minimization or elimination of the main sources of pollution in marine spaces. The concept implies the combinations of measures that will reduce harmful emissions as well as the introduction of dangerous substances in the most cost-efficient way,[34] and considering the influence of the time scale in the assessment of ecological effects. These practices are therefore conditioned by a deepening of international scientific cooperation in order to develop projects and partnerships aimed at reducing the impact of human activities on the environment. The application of best environmental practices should logically not result in any increase in pollution in other parts of the environment which do not concern the marine space, nor an increase in the risk to human health or biological resources of cross-border countries.

Article 9(2), takes up the theme of cooperation insisting in a logic of Joint Bodies in order, *inter alia*, to develop concerted action programs for the reduction of pollution loads from both point sources (municipal and industrial sources) and diffuse sources (particularly from agriculture). The same article lists the tasks that must be performed by a joint body. Through this provision, the Convention aims to promote substantial compatibility between the different institutional cooperation mechanisms within its legal framework. However, it is logical that the Riparian States can freely decide, on the basis of their priority and needs, which forms of cooperation or joint bodies to establish and which competences to confer with the body. It implies the possibility of modifying the functions and powers of a common body over time or of assigning further tasks, exactly as in the case of the Northern Dimension Environmental Partnership, that is a continuously expansive joint policy, especially when it comes to considering the environmental projects that have been approved in the recent years. [35]

The Convention on the Law of the Non-navigational Uses of International Watercourses enforces what has been said by the Water Convention, while referring in art. 21(2)-(3) to a cooperation that provides for a harmonization of scientific knowledge and the development of policies aimed at reducing

[33] Convention on the Protection and Use of Transboundary Watercourses and International Lakes as amended, along with decision VI/3 clarifying the accession procedure, adopted 1992 and entered into force in 1996.

[34] *Guide to Implementing the Water Convention*, United nations economic commission for Europe-Convention on the Protection and Use of Transboundary Watercourses and International Lakes, ECE/MP.WAT/39, 2013, pp. 50–55.

[35] The on-going projects and the joint bodies who manage the environmental cooperation in the field of the NDEP can be seen at https://ndep.org/projects/#environmental

and controlling the pollution of watercourses.[36] The article takes up the ban on cross-border pollution, a customary environmental rule[37] that defines that the State, although having full sovereignty over its territory, and the right to freely dispose of the natural resources present therein, must not compromise the possibilities of other states to exercise the same rights.

In connection with the ban on cross-border pollution, it is important to take into account in the Convention also the reference to the concept of *due diligence*, relevant principle of international environmental law. Its legal basis in the Convention can be found in letter (*b*) and (*c*) of art. 21(3), the obligation to *"establish techniques and practices to address pollution from point and non-point sources; and to define lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored".* These positive actions constitute the basic nucleus on which the *due diligence* obligation in international law is based,[38] and therefore in the attitude of diligence adopted by the State in preventing the risk of ecological damage, through measures that tend to eliminate or mitigate any harmful action. In this case, the attitude put in place by the Northern Dimension Environmental Partnership intends to offer the member States of the joint policy the execution of positive obligations, aimed at affirming diligent behavior implemented by each State in the region. The particularity in the execution of this obligation, within the framework of the NDEP, is given by a cooperation that starting from the economic and investment sector has environmental consequences in the environmental field, by providing tools of knowledge and information exchange that directly answer to the due diligence approach established by environmental law.

Finally, the Convention on Environmental Impact Assessment in a Transboundary Context helps to analyze NDEP as a particularly interesting form of cooperation in the framework of international environmental law and the application of its principles in the European scenario. In fact, the agreement[39] refers to

[36] Convention on the Law of the Non-navigational Uses of International Watercourses Adopted by the General Assembly of the United Nations on 21 May 1997.

[37] The ban on cross-border pollution finds its first application in the sentence of 11 march 1941 by an Arbitral Tribunal instituted to resolve a dispute between the United States and Canada regarding *Trail smelter case*, see *Reports of International Arbitral Awards, Trail smelter case (*United States, Canada), 16 april 1938 and 11 march 1941. Regarding the principle of cross-border pollution, see also a sentence of the ICJ, Corfù channel (United Kingdom of Great Britain and Northern Ireland v. Albania) of 1949, and the Advisory Opinion of 1996 about *Legality of the threat or use of nuclear weapons*.

[38] On this principle in the field of international environmental law, see YOTOVA, R. "The principles of due diligence and prevention in international environmental law". *Cambridge Law Journal*, 75(3), 2016, 445–448.

[39] Convention on Environmental Impact Assessment in a Transboundary Context, approved in February 1991, entered into force in September 1997.

the Environmental Impact Assessment as a concrete indication of the diligence used by the State, through an administrative procedure mechanism capable of identifying any negative repercussions that could result to the environment from the execution of a given activity. The Convention is particularly interesting to analyze in the light of the NDEP, because despite having the Environmental Impact Assessment (EIA) as its central element – which is part of a logic of internal law with a clear administrative component – it translates the national obligation on an international scale, considering the connection between the EIA and the cross-border context. The Convention in art. 2(6) establishes the obligation on States to *"provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and […] ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin"*.

In this case, the environmental impact assessment is the result not only of an endogenous process of the national system, but is an administrative procedure that develops and improves over time thanks to a constant and gradual cooperation between the State entity and third parties, through a transfer of knowledge and expertise of other private and public entities that contribute to providing a multi-level partnership policy in the execution of the EIA.

4. Conclusions

The article wanted to focus on the Northern Dimension Environmental Partnership as a structure which, in the context of the joint policy headed by the Northern Dimension, constitutes a rare example for structure and composition in the international system and represents a virtuous example in the environmental cooperation. Its hybrid structure, free from legally established agreements or obligations, albeit institutionalized through the role of joint bodies that coordinate the activities and projects of the NDEP, places it as a case which favors the development of a cooperation capable of involving both public and private actors in the northern region, establishing an effective instrument of environmental cooperation between the Member States of the European Union and the neighboring ones such as Russia, Iceland and Norway. The international regulatory framework therefore contributes to fill a single apparent gap of the Northern Dimension, namely the absence of an established regional organization, by making use of the development of multi-level cooperation instruments that in the European framework also strengthen and stimulate the exchange of good practices and the green economy in the area. It follows that, if an environmental

partnership is implemented within the Northern Dimension, the ability of states to act in full compliance with the international environmental rules becomes an opportunity to deepen many partnerships in areas that constitute a very particular case in the existing environmental cooperation framework.

This cooperation encourages both negative obligations, as in the case of the ban on cross-border pollution, and positive conducts that the State must put in place, as seen through the due diligence and the environmental impact assessment that primarily concern a preventive approach in avoiding to cause an environmental damage to another State. The EIA was considered as a process which, although linked to an internal evaluation mechanism capable of identifying the possible negative effects that a human activity could have on the environment, follows an international path too, thanks to capacity of sharing best practices that validate and give meaning to a *sui generis* cooperation such as that of the NDEP. To conclude, it is precisely this structure of multi-level cooperation and the creation of regional development mechanism that responds effectively to new environmental challenges, possible ecological risks and their repercussions on international scale. The new challenges of international law relate precisely to the ability to understand how the concept of cooperation between States is evolving over time, providing also for the inclusion of new subjects in the context of sustainable development policies. In fact, even though considering the role of primary subjects of the international communities (namely the States) as crucial, this does not exhaust them in achieving results with the necessary inclusion of new actors and subjects for the realization of these objectives. The Sustainable Development Goals launched by the United Nations in 2015 precisely aim, in the 17 points listed, to understand how the complex problems of the current world can find their resolution only through regional systems, thanks to a local development that must include the involvement of cooperation mechanisms, such as joint policies, which are measured according to the circumstances and needs of the territory considered. The fragility and uniqueness of the Northern European ecosystem has in fact led States, together with the European Union, to develop several specific projects that start from this new perspective of sustainable development. The Northern Dimension Environmental Partnership has *in nuce* possibilities with specific characteristics able to enforce concretely the cooperation, even not limited to the environmental field, in the Northern European scenario.

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Potential Double Impacts of Brexit "With And Without A Deal" For EU and UK – In Particular "Internal Market" Issue

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Summary: Article 50 of the TEU acknowledges the right of the member states to withdraw from the EU. The provision entitles to a unilateral, unconditional, but not immediate withdrawal from the European Union, which renders relatively easy in procedural terms to trigger the process. As landmark need should also be noted, Article 50 of the TEU releases from the strictures of public international law, and in case its absence of an explicit withdrawal, so the applicable law will be the Vienna Convention on the Law of the Treaties. Short and long-term impacts could result from the negotiation process between the UK and the EU and "Hard" or "Soft" Brexit. In particular, how the "internal market" will be regulated, will it remain as a complete package or some part will be transformed depending on the future relations between the UK and the EU, the article will focus on the possible forms of relations such as Free Trade Agreement (FTA), European Economic Area (EEA), Custom Union Agreement (CUA), and Bilateral Agreement (BA).

Keywords: Brexit – Art. 50 of TEU – deal and no-deal Brexit – internal market – withdrawal agreement

1. Introduction

On 23 June 2016, British electorate voted to withdraw from the European Union (EU) in the referendum, which turnout was very high at 72 %, with more than 30 million people voting – 17.4 million people (52 %)[1] in favour of leaving opting, and in a consequence after one year (29 March 2017) government of United Kingdom (UK) informed the European Council about intention to withdraw from the European Union and the Euratom ("Brexit" is the UK's withdrawal from EU).

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[1] London, September 2016. [Online] Available at: https://www.electoralcommission.org.uk/sites/default/files/pdf_file/2016-EU-referendum-report.pdf. Accessed: 17. 11. 2019.

The UK-EU relationship has built up over 40 years of membership and affects many aspects of the UK Government, the internal market of the EU[2] and in terms of exit would have to cover the full extent of that relationship. Lisbon Treaty regulates the legal provision for the exit as the main a legal act, but in the absence of this Treaty, the issue of withdrawal would be regulated by international public law, since as subjects such as state (UK) and international organizations (EU) have a legal capacity of an international character. Withdrawal from the EU affects primarily the European Union law and national laws of the member states and secondarily international law[3].

In case withdrawing according to Article 50(3)of the TEU, the Treaties are to cease to apply to the withdrawing state from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period[4]. Thus, according to this Article European Council and EU 27 states for UK's request granted an extension of the withdrawal period envisaged until 31 January 2020. One of the important point to emphasize is that the UK can ratify the withdrawal agreement at any stage before 31 January 2020 and on 17 October 2019 agreement reached the level of negotiators[5] and European Council, in an EU 27 format, endorsed the revised withdrawal agreement and approved the revised political declaration that was agreed on 17 October 2019 at the level of the EU and the UK negotiators[6]. As follows from the agreed document, Britain still pays the EU about 33 billion pounds "compensation" for the "divorce" and guarantees the rights of

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2 Treaty on the Functioning of the European Union, internal market in Article 26(2), European Union, 2007. Online available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF. Accessed: 17. 11. 2019.

3 KISS, L. N. "Withdrawal from the EU and the Constitutional Law issues in the United Kingdom", In: Keresztes, Gábor (szerk.) Tavaszi Szél = Spring Wind 2017, [tanulmánykötet] 1. Budapest, Magyarország Doktoranduszok Országos Szövetsége, Budapest, 2017, pp. 220–226.

4 Treaty of the European Union, European Union, 1992. [Online] Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf. Accessed:17. 11. 2019.

5 Council Decision (EU) 2019/1750 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, European Union, 21 October 2019. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D1750&from=EN. Accessed: 17. 11. 2019.

6 Council Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, European Union, 11 January 2019. Online available at:https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0274&from=EN. Accessed: 17. 11. 2019.

3.5 million EU citizens living on its territory. Until the two parties can come to a single agreement, the legal force of the TEU remains in force, so the the UK still as a member state of the EU and has all related rights and obligations until the date of its official withdrawal.

Catalog of main events for the last three years (2017-2019)	
31 January 2020	Expected withdrawal date of the UK from the EU.
21 October 2019	EU Council takes the first formal step towards the conclusion of the withdrawal agreement
September 2019	UK Parliament passed a special law banning Prime Minister of UK, Boris Johnson plane on leaving the EU without an agreement. Moreover, if the agreement is not yet reached, the bill on withdrawal from the EU will be extended for three months (until January 31, 2020).
Until October 31, 2019	The current Prime Minister of UK, Boris Johnson, has a very simple program such as the UK leaves the EU with «Deal or no deal» until October 31, 2019. He refused to pay $ 50 billion to the EU in compensation for breaking agreements. Nevertheless, it was postponed to January 2020.
11 April 2019	European Council (Article 50 TEU), decided in agreement with the UK, to extend further the two years provided for by Article 50 TEU until 31 October 2019.
23 March 2018	Withdrawal agreement reached on parts of the legal text and called for intensified efforts to make progress on the remaining withdrawal issues. The European Council (Art. 50) further stated that nothing was agreed until everything is agreed upon.
29 March 2017	UK notified the European Council of its intention to leave the EU.

In the guidelines, the European Council states that the EU (27 states) will keep unity and during negotiations act as one with one vision: the UK as a close partner; any future deal based on the balance of rights and obligations. State that a non-member cannot enjoy the same rights and benefits as a member, and the single market must be preserved, which means *four freedoms of the movement* are indivisible and excludes *any cherry-picking*[7] since the EU law of the internal market is to ensure free movements of goods, services, capital, and persons

[7] Guidelines, Special meeting of the European Council (Art. 50), General Secretariat of the Council, European Council, Brussels, April 2017.

around a commitment to nondiscrimination on the grounds of member state nationality. It is important to note that negotiations under Article 50 of the TEU should be conducted as a *single package,* which means that nothing is agreed until everything is agreed, and individual items cannot be settled separately.

For conceptualization and restoration full picture of the Brexit, it is proposed to go through the main terms that gave rise to some legal facts, circumstances from 2017:

It is essential to point out the white and policy papers[8] review of the EU and UK covers quite different options for a possible policy that gives its advantages and disadvantages of trading relationship with internal inclusion market between the UK and the EU, and the main ones are as follows:

1. *Deal-Brexit (Soft Brexit)* is the withdrawal of the UK from the EU with the withdrawal agreement (November 2018). In this case, the UK joins the European Economic Area (EEA) the UK would have access to a single market, but not to agriculture or fisheries. Until the end of the transition period, UK will remain part of the EU in all respects (as a member state of EU), except one: will no longer have representatives and voting rights in the institutions of the European Union. In view of the unique circumstances on the island of Ireland, the European Council stressed the need to support the Good Friday Agreement and the peace process in Northern Ireland.
2. *Semi-hard Brexit,* where both contracting parties would have unrestricted access to trade and the movement of people. (The UK enters a free trade agreement (EFTA) with EU). (EFTA model).
3. *No-deal Brexit (Hard Brexit)* in which the UK trades with the EU under the terms of the World Trade Organization (WTO). In case if the EU and UK do not enter into a trade agreement, the trade relations between them will be governed by rules of the WTO.

In this regard, the decision to exit now this very complex and all 27 member states could be argued, but Brexit started to produce its consequences in nowadays. Both parties, the EU and the UK, should be ready for all scenarios and impacts of the Brexit with possible outcomes with and without a deal. The

[8] White paper, The United Kingdom's exit from, and new partnership with, the European Union, UK Government, February 2017. [Online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf. Accessed: 17. 11. 2019 and Policy Paper, Future Relationship between the United Kingdom and the European Union, UK Government, July 2018. Online available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf. Accessed: 17. 11. 2019.

formalization of the will of the parties to settle the dispute, past and present and the relationships to become would certainly make it less burdensome for both parties the separation insight. Otherwise, assumed the level of integration in every area of society between the European Union and the Member States, the absence of a definition of the remaining pending issues (economic, political, juridical) would inevitably subtract the relations between the withdrawing State and the EU from the law and the instrument of negotiation to deliver it to that of mere relations of force, true 'Achilles Heel' of customary and particularly international law[9].

In this article, the author hypothesizes that *deal-Brexit (Soft) with particular European Economic Area model is the best profitable and friendly pathway of the UK-EU future relationship* based on the author's opinion and critical analysis of potential double impacts of Brexit "with and without a deal" for the EU and the UK, particularly "internal market".

2. The outcome of a deal Brexit

On 11 April 2019, European Council extends further the two years provided for by Article 50 of the TEU until 30 October 2019 and then extended till 31 January 2020. The UK can ratify the withdrawal agreement at any stage before 31 January 2020, which means withdrawal will take place on the first day of the month of ratification procedures.

Long before Brexit, there was Groxit 35 years ago, on 23 February 1982. As a part of the Danish Kingdom, Greenland had joined the Community in 1973 even though its citizens had voted against membership.[10] Six years later, Denmark granted home rule to the island, and a referendum was held, resulting in 52 percent of Greenlanders voting in favour of leaving the European Communities, the same number as the UK vote. Compared to the on-going Brexit-ordeal, the post-referendum exit-negotiations only took three years, but it iteratively tested the patience of the diplomats and politicians of the leaving polity. Since Groxit, the economic funding from the EU has continued via the Fisheries Agreements and later the Partnership Agreement, but the perhaps more

[9] CIRCOLO, A., HAMUĽÁK, O. Euratom and Brexit: Could the United Kingdom maintain one foot in the European Union? Current scenarios and future prospects of British withdrawal from the EAEC, ICLR, 2018, Vol. 18, No. 2. Online available at: file:///C:/Users/TechLine/Downloads/Euratom_and_Brexit_could_the_United_King%20(3).pdf. Accessed: 17. 11. 2019.

[10] KISS, L. N. Exiting the EU: Pre- and Post-Lisbon, Curentul Juridic Year XXI, No. 3 (74): 3, 2018, pp. 13–26. [Online]. Available at: http://revcurentjur.ro/old/arhiva/attachments_201803/recjurid183_1F.pdf. Accessed: 17.11.2019.

interesting development is the diplomatic relations that continue to evolve[11]. 25 years before the Lisbon Treaty of 2007 introduced formal procedures for exiting the EU, these core beliefs made for much lengthier and more frustrating negotiations.

In Brexit's case it should have argued for the application of customary international law *"clausula rebus sic stantibus"*, also established in Article 54, 65, 67, 68 of the Vienna Convention on the Law of the Treaties[12] *(see annex # 1)* providing for the unilateral withdrawal from international treaties within the EU framework. Article 54 is basically what happened in the case of Greenland, but states nothing about unilateral withdrawal from a Treaty. Article 56 of the VCLT states that if a treaty has no provision regarding termination or withdrawal, an implicit right to withdraw can be derived if it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right of denunciation or withdrawal may be implied by the nature of the treaty[13]. This will be underpinned by the creation of international law obligations that will flow from agreements with the EU. However, *the* Court of Justice, obtainable indirectly from some historical judgments (above all, Case C 6/64, Costa v. ENEL 23)[14] a clearly restrictive view on the possibility to withdraw from the Community which it recalls the sovereignty freely chosen by the member states with their accession to the treaties, establishing the basis of *"an ever closer union among the European peoples"* (Preamble of the EC Treaty – art. 1 of the TEU). In this historic decision, the European judges had to say that "the transfer, by the States in favour of the Community, of the rights and the obligations corresponding to the provisions of the Treaty, implies a definitive limitation of their sovereign rights." Besides, the Court of the Justice in C-621/18 *Wightman* – case[15], declares that there is no doubt as to the relevance of the question referred to since it concerns the interpretation of a provision of the EU law and this approach is more sensitive to the autonomy of the EU law, and an interpretation of Article 50 of the TEU as an explicit clause within a constitutional charter, rather than taking the international law perspective whereby the withdrawal clause functions merely as *"lex specialis"* and Article 50 of the Lisbon Treaty (TEU) provides[16].

[11] RASMUS, L. N. 35 years after the 'Groxit'-referendum: Why the EU still plays an important role for Greenlandic diplomacy, Oslo, Norway, September, 2017. [Online]. Available at: https://ecpr.eu/Filestore/PaperProposal/fc7f9236-e302-420f-9ae0-dddd0337bdfc.pdf Accessed: 17. 11. 2019.

[12] Vienna Convention on the Law of Treaties, United Nations, 23 May 1969.

[13] Vienna Convention on the Law of Treaties, Article 54, United Nations, 23 May 1969.

[14] Court of Justice, Case 6–64, Judgment of the Court, *Flaminio Costa v E.N.E.L.*, Reference for a preliminary ruling: Giudice conciliatore di Milano, Italy, July 1964.

[15] Court of the Justice, Case C-621/18, Wightman and Others, October 2018.

[16] Lisbon Treaty (TEU) of the EU, European Union, 1992.

"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and agree with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or decisions concerning it.
A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

Article 50 of the TEU names three possible explanations for the lack of a provision for withdrawal in the Treaties before the Treaty of Lisbon. The first one is the *mere negligence of the drafters* of the Treaties. A second explanation could be that the *lack of a withdrawal provision might reflect the intention of the drafters to preclude a right to withdraw*. The third explanation mentioned is the one she considers most probable, namely that the *lack of a provision on withdrawal in the Treaties was to discourage the member states from withdrawal rather than deny* the existence of the possibility of withdrawal[17]. Moreover, Article 50 of the TEU does not specify how much the withdrawal agreement itself should say about the future relationship between the EU and the UK. Any detailed relationship would have to be put in a separate agreement that would have to be negotiated alongside the withdrawal agreement using detailed processes set out in the EU Treaties[18].

[17] BLANKE, H-J., MANGIAMELLI, S. (ed.). book, *The Treaty on the European Union (TEU): a commentary,* Wyrozumska A., article, Voluntary withdrawal from the Union, Berlin & Heidelberg: Springer-Verlag, 2013. pp.1384–1418.

[18] White Paper, The process for withdrawing from the European Union, UK Government, 2016. [Online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf. Accessed: 17. 11. 2019.

Having this regard, the author focuses on the basic requirements of the two parties (the EU and the UK).

European Union's position:	**UK's Position:**
The obvious fact is that the EU is not profitable to abandon its basic freedoms of movement of people, capital, goods, and services, which is why the EU insists that deal should contain a "backstop" clause, according to which the UK will remain in a single market with the EU until no decision is found on how to avoid establishing a border between Ireland and Northern Ireland.	Among the terms of Brexit agreement, the most unpopular is the backstop provision, which envisages maintaining an open border between the draft withdrawal agreement the British region of Northern Ireland and the state of Ireland and establishing customs control on the administrative border with other parts of the UK after it leaves the EU.

In addition, it is necessary to take into account some assumptions made about the impact of Brexit on trade barriers, migration, and investment. In particular, productivity can have large effects on the estimates of the economic consequences of leaving the EU[19].

In terms of the law, jurisdiction treaty (s) on the future relationship between the EU and the UK can only be concluded after the UK becomes a third country. For example, the EU and the UK will be able to agree on future trade relations only after date of its official withdrawal which means no parallel negotiations. On 17 October 2019 the UK and the EU agreed a draft agreement on the withdrawal of the UK from the EU. The UK needs a bill to implement the *withdrawal agreement*, and on 22 October 2019 *the withdrawal bill* passed its first stage in the UK Parliament in a major boost to the prime Minister's plan (Boris Johnson) to take the UK out of the European Union. The main two reasons for the bill:

1. To meet our international obligations. When the the UK becomes a party to an international treaty, the treaty does not automatically take effect in UK law. Instead, Parliament must legislate to give effect to the treaty.
2. A full Act of Parliament is required by prior legislation. Under the EU (Withe drawal) Act, Parliament must pass a further Act before the UK is allowed to ratify the treaty.

[19] TETLOW, G., STOJANOVIC, A. Understanding the economic impact of Brexit, Institute for Government, London, November 2018. [Online]. Available at: https://www.instituteforgovernθment.org.uk/sites/default/files/Economic%20impact%20of%20Brexit%20summary.pdf Actcessed: 17. 11. 2019.

Europe's demands	England's proposals and terms
The actual bill would now be about £33bn. During the transitional period, the UK will remain a member of the EEA, the single market, and custom Union, the EU laws will continue to apply to the UK, and the UK will continue to pay into the EU budget. The UK will not be represented in the decision-making bodies of the EU. If the transition period is extended then extra payments may need to be maybe and would be decided by a join the UK-EU committee. Businesses will have time to adjust to the new situation and time for the British and the EU governments to negotiate a new trade deal and relations between the EU and the UK.	According to the latest proposals of the Prime Minister of England Johnson, after Brexit and the transition period, Northern Ireland will only leave the customs union, but will remain in the internal market, unlike the rest of Britain until 2025.
The main conclusions are as follows: ▪ Unresolved external border issues in Northern Ireland are not satisfied EU, Britain does not agree to the transparent border since it runs for 499 km (310 mi) from and 270 public roads that cross the border ▪ If, during the transition time the UK and the EU do not conclude a trade deal that allows keeping open borders, customs checks and duties will return to the island. Both on the border in Ireland and at sea between Northern Ireland and the UK. Even if England is sure to bring a new agreement from Brussels without a "backstop," the Prime Minister of the UK still needs to get approval in Parliament UK.	

While studying the draft of withdrawal agreement can be summarized, that it covers key strategic issues such as citizens' rights, border arrangements (particularly Republic of Ireland), and financial issues, such as customs, and division of assets, liabilities, payment, and mechanisms for resolving disputes between the UK citizens in the EU. It should be noted that from jurisprudence point, there are enough legal collisions and economic conditions that are losing one for the UK. This article reflects a brief key summary of analysis on a draft of withdrawal agreement, for example:

- The draft of the withdrawal agreement provides transitional period from 31 January 2020 to 31 December 2020, and during this period, the UK will continue to be a subject for the EU law, customs union, single market, EU trade policy, and apply the EU customs tariffs. However, there will be limitations, certain exceptions such for example, the UK will no longer

take part in the EU decision-making process and not be able to vote to the European Parliament[20].

- Article 174 of the withdrawal agreement proposes that any legal dispute and relationship between the UK and the EU be managed by joint committees (five-member arbitration panel), and the same time any issues relating to the EU law will still be referred to the European Court of Justice. The decisions of the two of them will be binding. Uniquely, dual jurisdiction of two different bodies or quasi-judicial bodies can complicate and hinder resolution legal disputes in practice, and lawsuits can last several years, which will complicate especially trade, financial relationship that requires a quick response. But the origin of their practice of the existence of two judges in the European space can be seen from the case Opinion 2/13 it briefly addresses the impact of Opinion 2/13 of CJEU[21] on the EU's accession to the Convention before exploring, judicial dialogue between the CJEU and the ECtHR has taken over the years and discussing the influence of the jurisprudence of one over the other. A final part relies on the notion of systemic integration to argue that the cooperation between both courts goes beyond mere (voluntary, optional) comity and amounts to a legal duty. The CJEU was concerned that the principle of mutual trust, highly relevant in the context of the EU's Area of Freedom, Security, and Justice (AFSJ), could be undermined. CJEU has used autonomy to define the EU's relationship with international law.
- Under the UK's constitutional arrangements,[22] the withdrawal agreements will not automatically become part of the UK's internal legal order since it needs to enact domestic legislation to give effect to them.
- The EU can (and does) agree to a wide range of approaches to dispute resolution under international agreements, including by political negotiation and binding third-party arbitration.

3. The Outcome Of A "No Deal" / "Hard Brexit"

In case of "No Deal Brexit", the UK will be a third country exactly on the day of the withdrawal and the EU law ceases to apply and the UK will be forced to start exchanging goods, capital instantly, and services with the EU on general terms of

[20] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, European Commission, 14 November 2018. [Online]. Available at: https://ec.europa.eu/commission/sites/betapolitical/files/draft_withdrawal_agreement_0.pdf. Accessed: 17. 11. 2019.

[21] Court of Justice, case 2/13 opinion of the full Court, 18 December 2014.

[22] Policy paper, Technical note on implementing the withdrawal agreement, UK Government 2017.

the World Trade Organization with duties, tariff, border and customs controls[23]. Furthermore, it would not provide specific arrangements for the EU and UK citizens. More accurately, the jurisdiction of the CJEU and the doctrine of direct effect will cease to apply in the UK, which means the UK-EU agreements will be addressed through the UK's domestic legal order since the UK has a dualist such legal system[24] such as, for example Ireland, Denmark, and Sweden rather than a monist one. "No Deal Brexit" was inevitable as the EU flatly refuses to renegotiate the terms of an orderly agreement, regardless of who is in power in the UK. It is insurance against the border between Northern Ireland (part of the UK) and Ireland (a separate EU member state), since of the UK Parliament, three times refused to ratify the deal agreed by Theresa May (Former Prime Minister of UK) with the EU.

With "No Deal Brexit", the UK will be regulated under the WTO rules and the UK as a member would be subject to Most Favoured Nation tariffs, which would potentially raise the cost of exporting to the EU and moreover, it would create some significant logistical and administrative challenges, for example, in the border issues the EU must apply its regulation and tariffs including checks and controls for customs, sanitary, phytosanitary standards and verification of the EU's compliance which could be cause dramatically delays in road transport, obstacles for trade.

Conflicts within the WTO are also not excluded from Brexit, while now in the WTO, all the EU member states are included as a single member. The total trade burden consists of all import tariffs levied by the UK, and from a traders' point of view, the value of all "export" costs on exports sent to other countries. There is a distinction here between tariffs as seen by the government and as seen by traders[25]. Over time, if there is a divergence between the UK and the EU standards, the UK businesses would need to produce two different product lines – one for the UK and one for the EU, which would increase costs and reduce competitiveness. The Centre for Economic Performance estimates that a "No Deal WTO rules only" scenario would reduce the UK's trade with the

[23] PAUN, A., SARGEANT, J., WILSON, J., OWEN J. No Deal Brexit and the Union, Institute for Government London, October 2018. [Online]. Available at: https://www.instituteforgovernment.org.uk/sites/default/files/publications/no-deal-brexit-and-the-union_0.pdf. Accessed: 17. 11. 2019.

[24] Policy Paper, Enforcement and dispute resolution: a future partnership paper, UK Government, 2017. [Online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf. Accessed: 17. 11. 2019.

[25] BLACK, A. Hard Brexit-International Trade and the WTO Scenario, Global Policy Institute, London, 2017. [Online]. Available at: https://fedtrust.co.uk/wp-content/uploads/2017/05/Hard_Brexit_Andrew_Black_May_2017.pdf. Accessed: 17. 11. 2019.

EU by 40 % over ten years. This reduced trade would mean a fall in income per head of 2.6 % per year (net of the savings from no membership fees). There would also be longer-term negative effects from lower investment and slower productivity growth, which are estimated to be another 3.5 % of GDP. Adopting a policy of unilateral free trade would mitigate part of these costs. However, the savings from unilateral tariff cuts are estimated to be just 0.35 % of GDP. The short-term disruption resulting from the sudden imposition of these the WTO rules could exacerbate these negative effects[26]. Moreover, distinctive remark also that the WTO-model will not cover matters relating to co-operation on policing, criminal justice, security, and foreign policy.[27] While paying attention to statistical data, UK economy will grow more slowly after Brexit than it would do as a member of the EU, with those predictions ranging from a negligible cost to an 18% reduction in output in 2030 compared to a world in which the UK remained a member of the EU and also the UK's GDP would be 3.5 % smaller by 2021 with no-deal Brexit[28].

Must admit that it is not conducive to optimism according to the publication data, Institute of Fiscal Studies (2019) in the UK, which indicates that the pre-situation of leaving the UK from the EU has led to declining investment, contraction of the UK economy, and turned a loss of 60 billion Euros. In the case of a "Hard Brexit," national debt will double and exceed a 50-year high[29].

The imposition of tariffs on trade with the EU would increase costs for both UK importers (and hence consumers) and exporters. The average EU tariff rate is low – around 1.5 %. However, at a sectoral level, the impacts would be much larger: for example, for cars and car parts the tariff rate is 10 %.[30]

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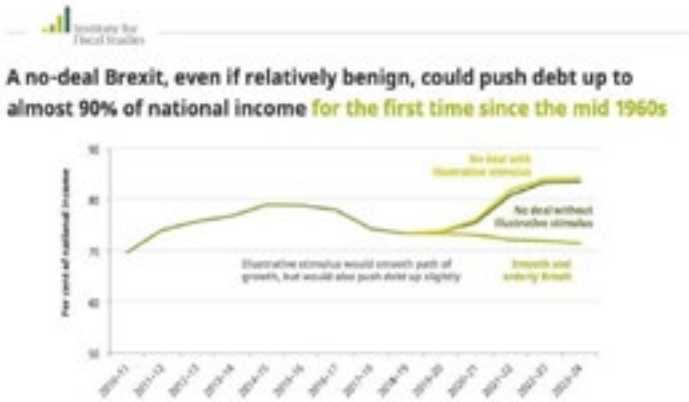
[26] SWATI, D. Brexit Factsheet, No Deal: The WTO Option, independent research UK in a Changing Europe, UK, 2017. [Online]. Available at: https://ukandeu.ac.uk/wp-content/uploads/2017/09/No-Deal-The-WTO-Option-Fact-sheet-1.pdf. Accessed: 17. 11. 2019.

[27] Policy Paper, Alternatives to membership: possible models for the United Kingdom outside the European Union, UK Government, 2016. [Online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504661/Alternatives_to_membership_possible_models_for_the_UK_outside_the_EU_Accessible.pdf. Accessed: 17. 11. 2019.

[28] Policy Paper, Leaving the EU Implication for the UK economy PWC, UK, 2016. [Online]. Available at: https://www.pwc.co.uk/economic-services/assets/leaving-the-eu-implications-for-the-uk-economy.pdf Accessed: 17. 11. 2019

[29] Data, Institute of Fiscal Studies, Britain's leading independent microeconomic research institute, London, 2019. [Online]. available at: https://www.ifs.org.uk/research/198. Accessed: 17. 11. 2019.

[30] SWATI, D. Brexit Factsheet, No Deal: The WTO Option, independent research UK in a Changing Europe, UK, 2017. [Online]. Available at: https://ukandeu.ac.uk/wp-content/uploads/2017/09/No-Deal-The-WTO-Option-Fact-sheet-1.pdf. Accessed: 17. 11. 2019.



Car manufacturing: the impact of withdrawal from the EU
These are 10 percent for cars and, on average, 4.5 percent for vehicle components. At present, consumers benefit from the fact that 95 percent of cars imported to the UK are not subject to a tariff. Industry representatives told us that the additional costs of any tariffs imposed on imported cars would be likely to be passed on to consumers[31].
Japanese concern "Nissan" refused to build a plant for the production of SUVs in the UK due to the fact that Brexit and it develops UK – Europe relationship. Brexit's case will be applying a 10 % tariff on exports, and this additional burden on the British division of "Nissan" will be 500 million pounds per year, which is not beneficial to "Nissan".[32]

Scottish fisheries rely on exports to the EU. In 2017, Scottish vessels accounted for almost 60 % of the UK's fishing catch by value, and 71 % of UK fish exports are sent to the EU[33]. These would be affected by high tariffs and significant additional paperwork and bureaucracy at the border – making the prospect of business with the continent unviable for some vessels, for a period at least.

[31] The impact of Brexit on the automotive sector, Fifth Report of Session 2017–19, House of Commons Business, Energy and Industrial Strategy Committee, 27 February 2018. [Online]. Available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/379/379.pdf Accessed: 17. 11. 2019.

[32] The impact of Brexit on the automotive sector, Fifth Report of Session 2017–19, House of Commons Business, Energy and Industrial Strategy Committee, 27 February 2018. [Online]. Available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/379/379.pdf Accessed: 17. 11. 2019.

[33] Report, Marine Scotland Seafood Trade Modelling Research Project – Assessing the Impact of Alternative Fish Trade Agreements Post EU-Exit, Marine Scotland, ABPmer, April 2018. [Online]. Available at: file:///C:/Users/TechLine/Downloads/00536121.pdf. Accessed: 17. 11. 2019.

Northern Ireland has an estimated fiscal deficit of approximately £9 billion a year, which is the largest per capita deficit of any of the 12 standard UK regions). If Northern Ireland were to reunite with Ireland, then this hole would need to be filled by the Irish Government via increased taxes or borrowing, or else there would need to be substantial public spending cuts in Northern Ireland[34].

The UK would restrict its access to the single market if broader free trade deals were not negotiated and reached with the EU outside the WTO framework, since individual the EU member states would be obliged to adhere to the terms of the EU's agreements with the UK, restricting bilateral agreements between the UK and the respective the EU member states.

4. Discussion, critical analysis, possible scenarios of the UK-EU relationship after Brexit

The Lisbon Treaty (TFEU), capable of claiming the title of a pan-European constitution, closely connected the EU countries with each other that no one can afford to leave Union so quickly and easily. The EU countries, by the membership to the EU, transferred a significant part of their sovereignty to the European Institutions. In addition, the fact that the Lisbon Treaties were concluded for an unlimited period was widely understood or interpreted to exclude the right of unilateral withdrawal, and the conclusion is that the EU is positioning itself as a permanent organization that will not break up. Unlimited duration of the commitment assumed leans in favour of the indissolubility of the bond contract by Member State: the absence of a specific procedure of withdrawal would, therefore, be the logical consequence of this choice, to be honest a little pragmatic and crystallized in legal abstraction (the question has always been shown to have a "material" side, difficult to contain by regulations)[35]

It is clear from the chronological events of the EU that there was no case law on withdrawing from the EU and has not yet been established, so Article 50 of TEU has never been tested. During the integration process that started with the foundation of the European Community no country has withdrawn from the

[34] PAUN, A., SARGEANT, J., WILSON, J., OWEN, J. No Deal Brexit and the Union, Institute for Government London, October 2018. [Online]. Available at: https://www.instituteforgovernment.org.uk/sites/default/files/publications/no-deal-brexit-and-the-union_0.pdf. Accessed: 17. 11. 2019.

[35] TROITIÑO, D. R., KERIKMÄE, T., CHOCHIA, A. Book *"Brexit History, Reasoning and Perspectives*", Switzerland, 2018, pp. 205–207.

community[36] since Greenland was no autonomous member state of the EU, it can also be argued that the Greenland action was a member state's reduction in size and therefore not a withdrawal of a member state according to the European Community Law. Respectively after that, withdrawal is a new instrument for the member states. In addition to the above, Article 50 of TEU does not set down any substantive conditions for a Member State to be able to exercise its right to withdraw rather it includes only procedural requirements. That means more space for negotiation of a withdrawal agreement if no agreement for two years there are options also with it extending this period[37]. Unconditionally means that the exercise of the right to withdrawal is not subjected to any preliminary verification of conditions nor is it even conditional on the conclusion of the agreement foreseen in the provision[38]. Article 50 of TEU does not even mention the generic circumstances in which this right may be activated, and the proposals aired during the Convention, such as the existence of 'extraordinary circumstances' such as revision of the Treaties or conditioned on obtaining unanimous assent of Member States which would be equivalent to requesting authorization were ruled out.

From the legal aspect, it should be noted, that no- inclusion ways of exit from EU on TEU was a smart solution which creates some possibility, legal space for political organization such as the EU and state as the UK for flexible interpretation and the establishment of the constitutional practice negotiations, and finding the optimal solution for both sides and defining, in particular, the latter's future relationship. But on the other hand, as a compulsory format and legal structure of the Treaty, it had to include mandatory main points, *"Termination of Treaty,"* which means leaving a member from the EU with ensuing rights and obligations in detail, which would easily facilitate situation around Brexit also. For example the most discussed and troublesome issue in Brexit is a border in Northern Ireland and Ireland since now there are no customs or border posts between them, they quietly move around the island and trade with each other in the daily basis,

[36] Referring to the withdrawal of Greenland from the EU, Berglund, 2006, pp. 157 shows in her essay that a withdrawal from the Union is in principle possible. Since Greenland was no autonomous member state of the EU, Zeh 2004, p.192, however argues that the Greenland action was a member state's reduction in size and therefore not a withdrawal of a member state according to the European Community Law.

[37] POPTCHEVA, E.-M. Briefing, Article 50 TEU: Withdrawal of a Member State from the EU, European Parliamentary Research Service, February 2016. [Online]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf. Accessed: 17. 11. 2019.

[38] CLOSA, C. Interpreting Article 50: exit and voice and… what about loyalty? Global Governance Programme, European University Institute, Robert Schuman Centre for Advanced Studies, 2016. [Online]. Available at: https://cadmus.eui.eu/bitstream/handle/1814/44487/RSCAS_2016_71.pdf?sequence=1&isAllowed=y. Accessed: 17. 11. 2019.

as both countries are members of the EU, within which there is a single market and customs union. If the UK and the EU fail to strike a trade deal during the transition period to keep the borders open, customs checks will return to the island both on the border with Ireland and at sea between Northern Ireland and the rest of the UK. Therefore, the withdrawal agreement states that if the parties do not find a mutually acceptable solution by the end of the transition period, Northern Ireland can remain part of the customs union of the EU. Nevertheless, this would be a partial economic rejection of an integral part of Britain, and this, to put it mildly, does not like either UK or Northern Ireland itself. It is assumed that Northern Ireland in any outcome of "Brexit" can remain in a customs union with the EU. In October 2019, UK Government in its report[39] stressed the latest country's position that UK will continue to uphold the Belfast (Good Friday) Agreement[40], continue to maintain existing Common Travel Area (CTA) arrangements and under no circumstances will it put in place infrastructure, checks, or controls at the border between Northern Ireland and Ireland.

As a result of the UK in such a situation has mainly three options: *"Hard or Soft" Brexit or rejection of Brexit.* Moreover, it should be noted that "Hard" Brexit was not implied during the referendum vote (2017). Even the majority of the same party members of Prime Minister of UK, Boris Johnson, did not approve the idea of leaving the EU without a deal. It is noteworthy and encouraging in such a deadlock situation, a clearer legal explanation was from the side of Court of Justice ruled in C-621/18 Wightman-case it confirms that Article 50 notification can be unilaterally revoked, so the UK has the right to unilaterally withdraw notification under Article 50, which means cancel "Brexit" and have a payment of Brexit ussies[41]. The Court proceeds to the argumentation from the context of Article 50. The CJEU draws upon the statements of the principle of ever closer union among the peoples of Europe, and the values of liberty and democracy. Besides, according to Article 50 of the TEU, the UK may cancel its withdrawal application at any time. Controversial with inaccurate view, approaches to solving Brexit inside the UK country and in these days according to the latest BBC news British opponents of leaving the UK from the EU are campaigning (People's Vote – "people's vote") for a second referendum on the

[39] Report, No-Deal Readiness, UK Government, October 2019. [Online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/837632/No_deal_readiness_paper.PDF. Accessed: 17. 11. 2019.

[40] Policy Paper, "The Belfast Agreement, also known as the Good Friday Agreement in multi-party negotiations", UK, 10 April 1998. [Online]. Available https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf. Accessed: 17. 11. 2019

[41] Court of the Justice of EU, Case C-621/18, Wightman and Others, 10 December 2018.

EU membership with beliefs that people will "change their minds" about leaving the EU and so-called "confirmatory" referendum with legally binding. By arguing that withdrawal is inevitable once notice has been given, proponents of Brest rally on Article 50 of the TEU to ensure that the referendum result cannot be overturned should the British public change its mind[42].

For most types of financial services, the EU law amounts to the substantial majority of the UK's legislative framework, whether directly applicable or the EU Directives transposed into UK law. The EU Directives and Regulations govern the regulation – both prudential and conduct of the business of all major sectors, including banking, insurance, wholesale and retail investments, provision of market infrastructure, payment, clearing and settlement systems, and a host of other activities[43]. One consideration for the UK Government would be how to avoid regulatory gaps in the UK's domestic legislative framework once the EU Treaties ceased to apply. This would involve questions over how existing the EU law could or should be adopted into domestic law. Cleary has been seen that the UK-EU internal market relations due to the double benefits for both parties and unknown framework of their regulation will be negotiated in the coming year – 2020. They are faced with different policy options to choose as it was noted above in this article such as possible the UK–EU trade relationship after Brexit[44]: 1) *Free Trade Agreement (FTA)* will include common standards and regulations for traded goods, and services but freedom of capital and persons will be limited. However, the UK and the UE will keep their controls over internal market regulation but with some limited cooperation on exporting goods and services. 2) *European Economic Area (EEA)* provides full access to the internal market the UK, but will keep contribution to the EU's budget and no control over migration, which means free movement of persons is compulsory to be applied. Under this arrangement, the UK would have access to the single market, but not to

[42] SARI, A. Reversing a Withdrawal Notification under Article 50 TEU: Can the Member States Change Their Mind? *Journal, European Law Review*, July 2017. [Online]. Available at: Ahttps://ore.exeter.ac.uk/repository/bitstream/handle/10871/27017/SARI_article50_20_no_tracks.pdf?sequene=1&isAllowed=yAccessed: 17.11.2019. KISS, L. N. The Brief Interpretation Of Article 50 TEU. In: Kékesi, T. (szerk.) Multiscience XXXII. MicroCAD International Multidisciplinary Scientific Conference, Miskolc-Egyetemváros, Magyarország: Miskolci Egyetem, (2018) pp. 1–8. Paper: E10. KISS, Lilla Nóra: Unilateral Withdrawal of a Member State? Some Thoughts on the Legal Dimensions of Brexit, *Pécs Journal Of International And European Law,* 2018, 1 pp. 36–46, 11 p.

[43] White Paper, The process for withdrawing from the European Union*,* UK Government, 2016. [Online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf. Accessed: 17. 11. 2019.

[44] Final report, Preparing for Brexit, Cambridge Econometrics, January 2018. [Online]. Available at: https://www.london.gov.uk/sites/default/files/preparing_for_brexit_final_report.pdf. Accessed: 17. 11. 2019.

agriculture or fisheries. However, agriculture is not comprehensively covered by these agreements, so some agricultural products remain subject to tariffs. (Nowadays EU has EEA with Iceland, Liechtenstein, and Norway). Important note that this model closest to EU stills the UK will have the internal market, which covers areas such as consumer protection, product standards, and competition policy the UK would not have any power to decide any legislation. Moreover, the UK will not belong to the EU Customs Union, which means the UK can set their external tariffs with the right for its trade negotiations with other countries. 3) *Customs Union Agreement (CUA)* which means no barriers for trade between the UK and the EU with common trade policy. The only difference between CUA and FTA will consist of the common tariff applied by third parties and traded exported goods and services. This model is similar to the conditions currently faced by Turkey, Canada. 4) *Bilateral Agreement (BA)* offer limited access to the single market, offering some combination of tariff-free trade, open access to the services market and guarantees that companies operating in these markets are treated in a fair and non-discriminatory way such as Switzerland has a complex set of bilateral agreements with the EU. For example, Switzerland has only partial access to the single market (goods and services (besides financial since there is no bilateral agreement with the EU on banking), but outside Customs Union and Switzerland can conclude its trade agreements with other parts of the world. The bilateral agreements include various provisions to reduce practical barriers to cross-border trade. The UK would have to make some difficult decisions about its priorities. Each possible approach would involve a balance between securing access to the EU's single market, accepting costs and obligations and maintaining the UK's influence.

5. Conclusion

The UK's leaving from the EU occurs some triggering of Article 50 of the TEU with political, economic, commercial, and legal uncertainties. The UK does not support compliance conditions with general rules of trade, social policy, and EU legislation on paying around 50 $ billion to the EU as a contribution during the transition period until the end of 2020. On the one hand, one country: the UK sits at the negotiating table Brexit and on the other the 27 member states (EU) with quite different interests, but showing unexpected unity on Brexit issues for the UK politicians. In the opinion of the author, no matter how bitterly it is necessary to recognize the fact that Brexit is a heavy blow for the EU in terms of the image and integration idea, but this crisis will not be fatal for the EU, even taking into account the serious costs of Brexit.

Brexit should be categorized as an instance of differentiated disintegration and defined differentiated disintegration as 'the selective reduction of a state's level and scope of integration. Disintegration can lead to internal differentiation if a member state remains in the EU but exits from specific policies, or external differentiation if it exits from the EU, but continues to participate in selected EU policies'. Accepting that European integration occurs in forms of differentiation *'per eo ipso,'* forms of 'complete disintegration' are implausible – unless disintegration occurs without any formal agreement on the type of association ('No-deal Brexit')[45]

Indeed, withdrawal epitomizes the democratic premise of membership, and in turn, triggers further reflection on alternative forms of participation in the European integration process[46]. Great Britain has never been a proponent of political integration in the EU. They became the EU member purely from a benefits perspective. The EU for Great Britain has nothing to do with ideology, and it is a project which should be beneficial to the UK's national interests. Great Britain should benefit from the EU membership, especially economically and in the area of security[47]. February of 2016, it was also said that Great Britain would not have to be a part of further political integration and 'the ever closer union.' However, people still voted that they wanted to leave the EU in the referendum in June. Other important push factors that came up in the run-up to the referendum were immigration, the EU budget and overall EU interference.

While the UK has committed to implementing the referendum outcome of 'leave' vote did not guide as to what form Brexit should take. Negotiating the terms of leaving the EU, UK is trying to continue his strategy 'cherry-picking,' seeking to maintain participation in the beneficial elements of its integration project. However, EU-27 member states are not inclined to indulge this intention. It is clear that Brexit issues depend on the quality of politicians to negotiate and generate high costs for both sides, so it should change for a positive impact due to its consequences. There is a great deal of uncertainty over what the UK's post-Brexit trading arrangements will be. Decisions over post-Brexit

[45] LERUTH, B., GÄNZLE, S., TRONDAL J. Exploring, Differentiated Disintegration in a Post-Brexit European Union Benjamin, *Journal of Common Market Studies*, 22 May 2019. [Online]. Available at: file:///C:/Users/TechLine/Downloads/JCMSExploringDifferentiatedDisintegration%20(2).pdf. Accessed: 17. 11. 2019.

[46] HILLION, C. Withdrawal under article 50 TEU: an integration-friendly process, Kluwer Law International, United Kingdom, Common Market Law Review 55: 29–56, 2018. Online available at: file:///C:/Users/TechLine/Downloads/BrexitIntegration.pdf. Accessed: 17. 11. 2019.

[47] OMENS, E. Research Paper, The process of withdrawal from the European Union Great Britain's path to European Union membership and the Brexit, University of Twente, 2017. [Online]. Available at: https://essay.utwente.nl/73741/1/Oomens_MA_BMS.pdf. Accessed: 17. 11. 2019.

membership of the single market and participate in the customs union will have profound effects on the price of goods in the UK. Furthermore, slowing economic dynamics and rising unemployment in the UK after Brexit will convince the population of other member states to stay in the EU and to improve integration.

It is also unclear whether sterling will depreciate further or appreciate as Brexit proceeds. These uncertainties over tariffs and the exchange rate mean that UK households are potentially going to be affected by considerable and unpredictable changes in food prices. After Brexit Northern Irish border will be the only land border between the EU and the UK with a lack of significant geographic barriers, which makes it difficult to control. The backstop issues would keep the UK in a trading relationship with the EU until a final deal to avoid a hard border could be agreed on, something that many politicians, scholar fear would never happen.

Important to note here is that the UK does not like the free movement of people part of the internal market, so they would want to get rid of that aspect. In addition to the free movement of people, the UK has historically had issues with both the Common Agricultural Policy as well as the Common Fisheries Policy, so they would want to get rid of those policies as well. From a legal perspective, an important issue will be the role of the Courts. The UK will want a relationship with the EU in which no EU Court would have any say in the UK. Besides, the status of EU citizens[48] in the UK and the UK citizens in the EU is important, as well as the status of British citizens working for the EU institutions. This is also apparent from the fact that this was one of the first and main points in the negotiations between the UK and the EU. Besides the status of citizens, the relationship with Ireland and Northern Ireland is an issue. As we have seen mechanisms were discussed already in the second round of negotiations to preserve the Common Travel Area and the rights that are associated with it[49].

Having regard to all the relevant circumstances, the EU and the UK should reach an agreement as long as they have this right instead of rules will according to international law and decide for a mutually beneficial effect of Brexit for the EU and the UK. Larger proportion of the UK-EU economy is dependent on each other's and considerably impact depends on dynamic of the negotiations. One of the most mentioned options is in this article for the UK –EU future relationship is EEA, and the UK becoming a part of this like Norway model which is

[48] KISS, L. N. The optician"s dilemma: Can all these lenses be polished into the same frame or do we need new frames, too? − BREXIT: Time to reform EU citizenship? Curentul Juridic Year XXII, No. 2 (77), 2019, pp. 21–37.

[49] OMENS, E. Research Paper, The process of withdrawal from the European Union Great Britain's path to European Union membership and the Brexit, University of Twente, 2017. [Online]. Available at: https://essay.utwente.nl/73741/1/Oomens_MA_BMS.pdf. Accessed: 17. 11. 2019.

most integrated with single market. The UK will pay EU budget, it would have to continue with the free movement of labor, and it would have to apply single market rules and regulations with some difference. The UK would also be subject to the EFTA Court instead of the European Court of Justice.

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Data, Institute of Fiscal Studies, Britain's leading independent microeconomic research institute, London, 2019. [Online]. Available at: https://www.ifs.org.uk/research/198. Accessed: 17. 11.2 019.

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Commission, 14 November 2018. Online available at: https://ec.europa.eu/commission/sites/betapolitical/files/draft_withdrawal_agreement_0.pdf. Accessed: 17. 11. 2019.

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Annex # 1

Article 54 *of the 1968 Vienna Convention on the Law of Treaties provides: "Termination of or withdrawal from a treaty under its provisions or by consent of the parties. The termination of a treaty or the withdrawal of a party may take place :(a) in conformity with the provisions of the treaty, or (b) at any time by consent of all the parties after consultation with the other contracting States."*

Article 65. *Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty "1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor. 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in Article 67 the measure which it has proposed. 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations."*

Article 67. *Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty "1. The notification provided for under Article 65, paragraph 1 must be made in writing. 2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty according to the provisions of the treaty or of paragraphs 2 or 3 of Article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers."*

Article 68. *"Revocation of notifications and instruments provided for in Articles 65 and 67. A notification or instrument provided for in Article 65 or 67 may be revoked at any time before it takes effect."*

OPINIONS, INFORMATION, COMMENTARIES AND NOTESS

Origin of Europe and its Changes

Pavel Hlavinka*

Summary: The studies aimed to figure out the basics parts of the mosaic which makes up the historical-spatial formation called Europe and, this way, partially answer the question of its identity. The central motive of the study winds around the determining spiritual line that accompanies the whole history of Europe. The question is whether in the future the European Union can lean on economism and its unified bureaucratic administration only, from which only the tradition of nationalistic Europe can profit.

Keywords: Ancient Egypt – Celts – Christianity in Ancient Rome – Christianity in the Middle Ages – Etrusks – Greek myths and philosophy – Judaism – Renaissance and Modern Times – Roots of Europa, Teutons

1. The myth and Greeks

Europa, the daughter of the Phoenician king Agenor and his wife Telephassa. She was kidnapped from the Phoenician coast (today's Lebanon) by a bull to Crete. In fact, the bull was a temporarily reincarnated Zeus, enchanted by her beauty. Ovidius in *Metamorphosis* noted her kidnapping as follows:

The royal maid,
unwitting what she did, at length sat down
upon the bull's broad back. Then by degrees
the god moved from the land and from the shore,
and placed his feet, that seemed but shining hoofs,
in shallow water by the sandy merge;
and not a moment resting bore her thence,
across the surface of the Middle Sea,
while she affrighted gazed upon the shore–
so fast receding. And she held his horn
with her right hand, and, steadied by the left,
held on his ample back–and in the breeze

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her waving garments fluttered as they went.[1]

Back in Crete he resumed his human appearance to conceive three sons with Europa, i.e. Minos, Rhadamantys and Sarpedon. He never married Europa and came back to his jealous wife, Hera. Europa married Asterion who looked after her three sons. Sarpedon returned to Asia, whereas Minos and his brother Rhadamantys chose to rule and fight for justice. Having left this world, they continued as judges of the dead in the underworld.

Meanwhile, in Phoenicia Agenor, Europa's father, sent all his sons, i.e. the kidnapped princess's brothers: Cilix, Phineas, Thasus, Phoenix and Cadmus, towards the setting sun. They were not allowed to come back home without their sister and their pilgrimage to the West most probably continued in the darkness of the underworld. After the martyrdom of an unsuccessful quest, only Cadmus goes for advice into the Oracle of Delphi, where he is recommended to stop his quest for his disappeared sister. Then, Cadmus beats a dragon and founds an independent city of Thebes.

Petr Placák in his text "Views of Europe" recalls yet another alternative interpretation of the incriminated kidnapping of the Phoenician Princess named Europa: *"However, the historian Herodotus of Halicarnas (484–420) describes the story of the kidnapping of Europe as a real historical event. According to him, it was a retaliation for the previous kidnapping of royal daughter Io of Arga Phoenicians. Only then did the Greeks go to Tire to kidnap Europe in Crete.*

Whatever the case, the myth of Europe's kidnapping gives a literary account of the origins of Western civilization from the culture of the Orient – a place where the cultural influences of ancient Egypt clashed with the cultures of Western Asia. The Crete of the Phoenician Princess Europa, which mediated these influences of the West, became the foundation of Greek culture and education."[2]

2. Europe as the Occident has its roots in the Orient

Europe as a continent can be interpreted etymologically: Hebrew *'ereb'* designates the west, Assyrian *'ereb shamshi'* and Aramean *'erab'* designate the sunset and the Greek *'erebos'* designates evening, darkness or the underworld and the empire of the dead. Therefore, Europe is the West.[3]

[1] OVIDIUS. *Metamorphoses*. Brookes More. Boston. Cornhill Publishing Co. 1922. Cited by http://data.perseus.org/citations/urn:cts:latinLit:phi0959.phi006.perseus-eng1:2.833/ Ov. Met. 2.833.

[2] PLACÁK, P. Views of Europe. In: www.Euroskop.cz

[3] See HORYNA, B. *Idea Evropy*. Praha: Argo, 2001, pp.14–15.

Europe did not get its name from Europeans themselves, but its origin is oriental. The Orient, i.e. Asia, is the home of this designation. Because Europe is defined as the West, it cannot be the centre, but only a periphery. From the geographical point of view, it is a peninsula belonging to Asia.

The identity based on non-Asian character was attributed to Greeks by the Persians. They saw Europe as a very attractive area for their military-political expansions.[4] For Persians, Greece was a part of Europe as a whole. We also read at Herodotus about King Xerxes, a Dareius's successor, says: *"Europe was an extremely beautiful land, one that bore all kinds of orchard trees, a land of highest excellence, worthy of no mortal master but the king."*[5]

King Xerxes adds to this: *It is my intent to bridge the Hellespont and lead my army through Europe to Hellas, so I may punish the Athenians for what they have done to the Persians and to my father. (...) For these reasons I am resolved to send an army against them; and I reckon that we will find the following benefits among them: if we subdue those men, and their neighbors who dwell in the land of Pelops the Phrygian, we will make the borders of Persian territory and of the firmament of heaven be the same. No land that the sun beholds will border ours, but I will make all into one country, when I have passed over the whole of Europe.* [6] However, Herodotus, who wrote about Greco-Persian wars, could not accept such an interpretation of the origin of Europe. In his presentation, the Greeks (Hellenikón) are the most original carriers of the European identity and, thus, of the history of Europe. For a long time, Greeks specified themselves based on their superiority: *We, cultural Hellenics, and other uncultured barbarians,* including other European nations.

3. Ancient Egypt and Judaism

The second significant cultural-historical line which follows the spiritual roots of Europe is the monotheistic, Egyptian-Jewish tradition. Worshipping a single God has its roots in the Egyptian Pharaoh of the New Empire (1552-1070 BC) Amenhotep IV. (1364-1347), who changes his name to Akhenaten (the Living Spirit of Aton) after his mystical experience in the Thebes palace in the sixth year of rule and founds his new royal seat called Akhetaton (today's Amarna).

Praying to one of the highest Egyptian gods, Amon-Ra, he repeated a mantra *khekau.* First, a red flame appeared on the right of the alter and then a purple

[4] See HORYNA, B. *Idea Evropy*. Praha: Argo, 2001, pp.16–19.

[5] HERODOTUS. *History*, with an English translation by A. D. Godley. Cambridge. Harvard University Press. 1920. Cited from: Hdt. 7.5.3 In: https://www.perseus.tufts.edu/hopper/.

[6] HERODOTUS. *History*. Cited from: Hdt. 7.8B.1. Hdt. 7.8C.1. Hdt. 7.8C.2.

flame appeared on the left. Later, an old priest explained the manifestation as he had also seen it. Apparently, they were materialized figures of archangels of Michael Order (Maha-Els) and Rafael Order (Ra-Pha- Els). The clerical aristocracy of Egypt then lost their jobs as Akhenaten cancelled the old gods. Let us now look at a short snippet of Akhenaten's Poem Of Praise To The Sun:

You arise beauteous in the horizon of the heavens.
Oh living Aten who creates life.
When you shine forth in the Eastern horizon you fill every land with your beauty.
You are so beautiful: you are great; gleaming and high over every land.
Your rays embrace the lands and all you have created;
You are Re and reach out to all your creations, and hold them for your beloved Son.
You are afar, but your rays touch the earth;
Men see you, but know not your ways.[7]

Akhenaten was allegedly poisoned, his capital destroyed and everything continued as before. However, some clerics did not forget monotheism. Neither did a floater and adopted Egyptian prince, later on, the high priest, Shakh kniu-Mu Moses, or the Old-Testament Moses.[8]

Moses changed Ankh (a key of life) into the Tree of Life (Etz Ha Chayim- described in kabbalah), where he substituted the names of old-Egyptian gods by Hebrew names. Thus, the Jewish Old Testament can be perceived as a part of the story, which had an important link onto the teaching of monotheistic pharaoh Akhenaten.

This begs following of this line in the New Testament and perceive Islam as one branch of this spiritual river. Judaism, Christianity and Islam are sister religions in this respect. Islam belongs in the family of monotheistic religions, which are related in their tradition to the name of old Jewish patriarch Abraham.

Abraham's eldest son Ishmael, whose mother was Hagar, a slave of Abraham's wife Sarah, was Isaac's brother. Today, Abraham is considered the father of Arabic nations. In the Koran, Muhammad, the founder of Islam in the 7th century, speaks highly of both Jesus and Moses. Not surprisingly, it was Archangel Gabriel who dictated the text. Apart others, he was the guardian angel of the Jews and the foreshadower of the birth of divine children to Virgin Marry, or to Zacharias, John the Baptist's mother's husband.

[7] Available at: http://www.palmyria.co.uk/superstition/akhenaten.htm

[8] Compare eg the egyptological study that tries to give a picture of Akhenaten without mysticizing characteristics: JACQ, Ch. *Néfertiti et Akhénaton. Le couple solaire. Paris:* Librairie Académique Perrin, 2005. Egyptologist Arthur Weigall in *The Life and the Times of Akhnaton*, *Pharaoh of Egypt.* (General Books LLC, 2010), however, is of the opinion more inclined to my idea.

4. Celts, Teutons and Etrusks

4.1. Celts

Between the 5th and 3rd centuries BC, Celtic settlements occupied a vast area, today referred to as the European continent. Let‘s imagine an area stretching from Scotland and Ireland, via France all the way to Spain and Portugal, and from the southern part of Germany via Switzerland, Austria, Bohemia, Moravia, Slovakia, Hungary, a part of Serbia, Romania and even Asia Manor Galicia.

Safe for exceptions, in this period Europe was clearly Celtic and at least till the 5th century AD the dominant part preserved their traditions and the citizens lived the traditions actively. Therefore, it is the case of a thousand-year-lasting influence of Celtic culture and religion, which is a period corresponding to the length of the influence of Christianity in certain parts of Europe.

The religious identity of Europe could thus also be constituted with the contribution of reconstructed Celtic spirituality. However, we only have a mediated information about it from records of Romans and Christian monks from the 6th to 11th centuries and from descendants of old Druid and Bard families who recorded the spiritual heritage of their ancestors. It is possible to deduce from the records that the old Europe was religiously heterogeneous, non-nationalistic and decentralized, polymytic and polytheistic in today‘s sense. The three most known Celtic gods are:

- Taranis (thunder god), symbolized by the sun circle with lightening and eagle. He was the god of war, the dead and rebirth. As we learn from the Romans, enemies were given to him as burning sacrifices in wicker baskets.
- Teutates, the god of the underworld (chthonic), portrayed as a snake with a ram’s head. He was associated with the protection of personal fate. Therefore, he was also called Adsmerius (supervising the direction of fate). Sacrifices were drowned in big vessels.
- The third god, most famous today, is Cernunnos *(Horned God)*, with stag’s horns and mistletoe. His influence is related to the harmonic circle of natural cycles and cycle of reincarnation. Cernunnos is usually associated with the Celtic Tree of Life. Sacrifices given to him were hung on trees.

Among female goddesses, the most important is Mother Goddess of Earth, Epona – horse goddess, and the goddess Brigid – Irish goddess of fire, poets and wisdom. However, frightening sacrificing rituals were not the only or major focus of the spiritual attention of Celtic nations. The most inspiring can be their natural connection of everyday life and astrological-natural cycles. This is documented by impressive celebrations of both solstices and the equinox.

Other important Celtic holidays were: Samhein (today's Halloween), Celtic New Year, 1 November – the beginning of winter. The pope Boniface IV. transformed it into the All Saints'Day. The night from 1 to 2 February was celebrated as Imbolc, (today's Candlemas) and the night from 30 April to 1 May called Beltine (the night of St Walburga). 1 August – Lughnasad, the celebration of harvest, sun and marriage, (today's harvest home).[9]

4.2. Teutons

Between the 3rd century BC and the 3rd century AD, the land of Teutons spread from Scandinavia, via central Europe to the Danube River and further to the Don River and the Black Sea.

In Germanic religion they typically refused to confine the divine, spiritual and omnipresent principle within the temple walls. The temple was the nature itself, forests, rivers, lakes, hills, whose natural vault was the sky. All gods together formed the family of gods, whose home was Asgard (Garden of Eden). Similarly to Celts, who worshipped a sacred oak, in Teutons the principal part of the image of the world is a still-green tree Yggdrasil, ash tree, as the axis of the world. In oriental religions of Hinduism and Buddhism, this axis is the mystical mountain Meru, materialized in the form of a mountain Kailash in western Tibet. The highest Germanic god was the one-eyed god, endowed by mystical sight and spiritual wisdom, called Wodan (Wuotan, Odin). One of his characteristics was tremendous warrior's rage. Another Germanic god was Thor (Donar), a strong giant with a red beard.

During Christianisation of the Saxons, the king Charlesmagne (772-804) wanted the christened people repeat the following text: *"Do you forsake the Devil? I do. I do forsake all diabolic works and words, Donar and Wotan and Saxnot and all those demons that are their companions."* [10]

Unfortunately not only the symbolism, such as the Celtic Cross of the neo-Nazis, but also the chosen Celtic or Germanic myths of the neo-Nazi political parties are highlighted, for example, in the text of František Štěch about Workers' Party (Dělnická strana) in the Czech republic as a pseudo-religious phenomenon[11]:

"A nationalist socialist with a hammer, whose spiritual model is the ancient Germanic god of thunder, a righteous warrior, and an evil protector – this should probably be an ideal member of the Workers' Party who proclaims

[9] See WEISSMANN, K. *Druiden, Goden, weise Frauen: Zurück zu Europas alten Göttern.* Herder Spektrum, Freiburg: 1991.

[10] BEMMANN, K. *Der Glaube der Ahnen. Die Religion der Deutschen bevor sie Christen wurden*. Published by Phaidon, Essen: (1990) p. 75.

[11] Cited by: *www.cdk.cz/ D*ělnická strana jako pseudonáboženský fenomén.

aboard a Viking warship. Such symbolism is not accidental, considering the emphasis the Workers' Party puts on the sharp polarity between good and evil. RI Page compares in his book on Nordic mythology Thor and Odin: Taking into account the treachery, the intricacy and complexity of Odin's character and the straightforwardness and simplicity of Thor's thinking, it means some relief. Thor is a warrior – the enemies of the gods are also his enemies: giants, monsters, and primordial powers. Spacilova and Wolf have similar characteristics:

"Tor is characterized by physical superiority, but not mental abilities, deceit and lie, hypocrisy and alien deceit." Thus, not a cunning god, but a simple god-strong man, a good worker, a supporter of good and an irreconcilable warrior against evil, is the model of the Workers' Party. Moreover, the party also presents itself as a "handful of the righteous" fighting tirelessly against all the "evils" in the world (communism, Americanism, pornography, alcohol and drugs). Other pictures of ancient warriors, heroes and knights also appear in the Anthem of the Workers' Party, usually in a situation of "victory over an opponent."[12]

4.3. Etrusks

Etrusks inhabited the Apennine Peninsula and the Corsica between the 8th century BC to the 1st century BC, when they were fully romanised. Due to the systematic decimation of their spiritual concept of the world by Christian apologists, we only have small fragments which, however, imply considerable knowledge of the fated interconnections of a man's individual life and predestined events of cosmic dimensions. This teaching made part of the Etruscan revealed religion.

A part of the teaching is a rule that each person and even each nation is set their length of life on Earth. This way, Etrusks, Proto-Europeans, were paradoxically reconciled with the end of their civilisation, which is rather oriental fatalism. Their timing was managed by the eternal and cyclic recurrence to the embryonic morning and further rebirth. Therefore, they were not aware of the historic time, which along with the spread of Christianity has become typical for Europe and its sense for the creation of history.

Thus, Etrusks did not direct their actions towards any shining target in the future. They focused on the power of the moment, which they understood through the mythically mediated law of the eternal recurrence, but not rational-philosophically recognized, as in the case of the Greek Anaximandre.

What is missing in the intuitively lived present is the principle of pragmatics, by which later historic, theological West sanctified various forms of religious

[12] SPÁČILOVÁ, L., WOLFOVÁ, M. *Germánská mytologie*. Votobia, Praha: 1996, s. 59–6.

and political oppression necessary for "better tomorrows". This is what is alien to the old Etruscan Europe as well as to Celts and Teutons.

It can be said that they were typically apolitical and a political abuse of an individual was completely foreign to them. On the other hand, a man as a free and responsible individual is a product of the western Modern Times.:

"The invoked element of the religious thought of this old Europe is its intrinsic and self-evident pluralism, polytheism and feminist view, an element of femininity in being portrayed not only by the female goddess as a fundamental aspect of life-giving and motherhood as the principle of life. An admired and often desired feature of old Europe is its apparent apoliticalism. In Europe, unlike all other Europe, politics is not a life coordinator worth mentioning."[13]

5. Christian Europe

5.1. Christianisation of Europe begins in the Ancient Rome

The dawn of Roman history is connected with the arrival of Italic-Celtic tribes (circa 1200 BC) and the cult of an amorphous, unimaginable and omnipresent divine principle called Numen. For many centuries, this tradition had been deeply tucked in Roman nation's subconscious due to the reception of Etruscan, Greek and oriental spirituality. According to certain authors (e.g. Pijoan – *History of Art I*.), this much later permitted the acceptance of a monotheistic religion.

There was the Crisis of the 3rd century AD in the Roman Empire, also called the Military Anarchy, when between 235 and 284 there were gradually 29 emperors on the throne. It was a period of immense social-economic pressures. This internal pressure tended to release through people's more intense interest in new and varied forms of spirituality. Popular became ancient Greek mysterious cults: Eleusin, Sabazius cult or the cult of the Goddess Kybele, whose temple in the Vatican was visited abundantly even in the next century. Mithra's cult, the god of the Sun, was also very widespread.

Next, there was the religion of Baal of Emesa which worshipped the Undefeated Sun (Sol Invictus) and popular was also originally Egyptian cult of Goddess Isis, or Apollo, the God of the Sun, Roman in origin. At that time (up to the 3rd century AD), Rome offered a picture of religious miscellany and eccentricity.

Christianity was one of numerous professed Asian mysterious cults, perceived as a new Jewish sect by many.

[13] HORYNA, B. *Idea Evropy*. Praha: Argo, 2001, p. 81.

The monumental turning point came with the conversion of Emperor Constantine. Since the 20s of the 4th century, Christianity begins to have a clear political primacy among the so far existing old cults. This is gradually used and, for sure, to monopolize Christianity and to systematically dispose of everything that was pagan.

St. Augustine Aurelius (354–430) was awarded the honorary title "Teacher of the West" at the end of this period of European development. His extensive work is an impressive twist of patristicism and thus creates one of the cornerstones of medieval Christian philosophy and theology. History, not just European ones, is a struggle for Augustine of light and darkness, good and evil, in the end, good and light prevail. In the file about *The City of God* gives the following breakdown of the history of the world.

In the paradise state of the creation of the world, man is part of the community of God as the perfect community of created beings with their creator. This is followed by the fall of man into sin, which gives rise to an earthly city (a state such as the Roman Empire). However, it is doomed for its imperfection, even corruption, to extinction (or, in any case, to transformation) and opens the space for the creation of the community of God. On Earth, this divine community (church) is also only an imperfect image of eternal communion with God's being, however, as Augustine says, it is the true communion of Christ and there is no salvation outside of it. And for more than a thousand years of further development in Europe, it has proved quite fatal in both the faithful man versus the Church and the secular state versus the Church.[14]

[14] *"This heavenly city, then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of pilgrims of all languages, not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognizing that, however various these are, they all tend to one and the same end of earthly peace. It therefore is so far from rescinding and abolishing these diversities, that it even preserves and adopts them, so long only as no hindrance to the worship of the one supreme and true God is thus introduced. Even the heavenly city, therefore, while in its state of pilgrimage, avails itself of the peace of earth, and, so far as it can without injuring faith and godliness, desires and maintains a common agreement among men regarding the acquisition of the necessaries of life, and makes this earthly peace bear upon the peace of heaven; for this alone can be truly called and esteemed the peace of the reasonable creatures, consisting as it does in the perfectly ordered and harmonious enjoyment of God and of one another in God. When we shall have reached that peace, this mortal life shall give place to one that is eternal, and our body shall be no more this animal body which by its corruption weighs down the soul, but a spiritual body feeling no want, and in all its members subjected to the will. In its pilgrim state the heavenly city possesses this peace by faith; and by this faith it lives righteously when it refers to the attainment of that peace every good action towards God and man; for the life of the city is a social life."* – AUGUSTINUS Aurelius. *De Civitate dei*, XIX, 17. English translation: The City of God (Book XIX) *Chapter 17. – What Produces Peace, and What Discord, Between the Heavenly and Earthly Cities.*

5.2. Christianisation of Europe continues in the Middle Ages

During the Middle Ages the whole Europe is being christianised. As for Christian Roman Catholicism, certain authors consider its original borders as such places in Eastern Europe, where it is possible to find traces of Roman architecture.For example, an abbatial church in a Hungarian village Jak near Szombhately (close to today's border with Austria), originally a monumental Roman Benedictine basilica sacred to St George, St Stephen's Basilica in Budapest and Church of St Andrew *(Kościół świętego Andrzeja)* in Polish Cracow.

The European history from the 4th/5th to the 16th/ 17th century became the history of salvation. Eschatologically, i.e. the end of the world, the passing of time creates the idea of Christian Universalism which is a promise of time passing to the end of all times.

The christianised medieval Europe has universal ambitions and, no doubt, is spiritised by the idea of *translatio imperii.*[15] This is supposed to be a translation of the Roman model of execution of power and control of space. Specifically, it was building on the tradition of Imperium Romanum by means of Otto's church politics of the 10th century and gradual constitution of the Holy Roman Empire.

However, the church had to provide content for their power, which could not be simply deduced from Paul's tradition: *"Greeks search for wisdom. But we preach Christ crucified."* (1.K 1,22-23) Thus, they found a solution in the translation of ancient knowledge and culture, which is called *translatio studiorum* in a book called *Time, Work, and Culture in the Middle Ages* by J. Le Goff. [16]

This programmed transfer of Greek-Roman knowledge into a rather undeveloped, early medieval Europe takes place from the 9th to 12th century. Their share on the transfer also had:

- The roots of programmed acceptation and translation of ancient culture can be traced back to educational programs of St. Augustine, Martianus Capella (5th c.) and Boethiah (6th c.).
- The climax of Carlovingian Renaissance is the year 778, when Charlemagne, "the first European" according to many, declares the famous *Capitulare* on organization of schools.
- The process of *translatio studiorum* started by the church takes an unexpected direction. Instead of mere content fulfillment of imperial administration of Christian Europe, whose catholically unified picture is presented by Dante

Translated by Marcus Dods. From Nicene and Post-Nicene Fathers, First Series, Vol. 2. Edited by Philip Schaff (Buffalo, NY: Christian Literature Publishing Co., 1887). Revised and edited for New Advent by Kevin Knight. Available at: http://www.newadvent.org/fathers/1201.htm

[15] HORYNA, B. *Idea Evropy*. Praha: Argo, 2001, p. 104–105.

[16] LE GOFF, J. *Kultura středověké Evropy*. Praha: Odeon, 1991, p. 179.

Alighieri and Thomas Aquinas in the 13th century, during the 14th and 15th centuries there is a real rebirth and renascence of Europe towards Renaissance.

- Islamic and Jewish scholars who, apart others, were responsible for the mediation of Plato and Aristotle‘s work, Arabic or Persian alchemy, medicine and natural sciences, mainly arithmetic, algebra, astronomy and biology.

Philosophy in the islamic cultural environment of the european continent dates back to the 9th century and its beginnings are directly linked to the translation of the writings of Greek philosophy into islamic scholars. But the attitude of Arab and Persian philosophers to Islam was much looser than the comparable relationship of Christian thinkers to the Christian religion. This was due, among other things, to the fact that Islam does not know dogmatic theology. Arab and Persian thinkers were mostly doctors or natural scientists. In contemporary Islam, the influence of the tradition of medieval arabic philosophy is virtually negligible. Arab and Persian scholars have all the more influenced and inspired medieval Christian thought. [17]

Medieval Jewish philosophical ethics finds its origins in Islamic philosophical-spiritual stream in the 10th century and flourishing in the 11th and 12th centuries in Andalusia, in Cordoba, Granada, Malaga or Sevilla, but also in other parts of the Iberian Peninsula. It may be inspiring for us, in contemporary Europe, that Christians, Muslims and Jews were able to live peacefully next to each other. In particular, Avicebron[18] (hebr. Shlomo ben Jehuda ibn Gvirol) and

[17] HLAVINKA, P. *Dějiny filosofie jasně a stručně.* Triton: Praha, 2008, p. 109.

[18] See HLAVINKA, P. *Dobro a ctnost pohledem etických a náboženských koncepcí*. Triton, Praha: 2014, pp. 107–108:

“Shlomo ben Yehuda ibn Gvirol (Avicebron) came from Andalusian Malaga, spent most of his short life in Zaragoza and stored his body in Valencia. Like Philon, in the Hellenistic era, he mediated the classical Greek philosophy, Avicebron showed medieval Oriental and European scholars again the pearls of Neo-Platonism. According to Avicebron, who presents his doctrine through conversation between the teacher and the disciple, God does not create the world by means of the logo, but by His Will. Everything created consists of a very fine spiritual substance and form.

The spiritual substance contains the germs of everything that can arise and therefore materialize to the coarser level. The basic idea of his main work, then, is the spiritual vision that the whole world is a manifestation of one single material called materia universalis, which is further away from its divine source, the source of life in its materialization, the less and less spiritual.

God did not create us according to Avicebron out of necessity, but by grace.

Even so, it was naturally incompatible with the act of creation, as understood by ordinary Judaism. There is not even a single mention of the Bible or rabbinic tradition in the whole book named Source of Life. Therefore, the doctrine of this Jewish philosopher, for eight centuries mistakenly considered a Christian or Muslim thinker, could easily have been spread among the tolerant scholars of these religions. Especially Johannes Duns Scotus and Giordano Bruno were enthusiastic about it.”

Maimonides, also known as Moshe ben Maimon, have also become respected authorities for Christian thinkers.

5.3. Europe in in ideological changes from the Middle Ages and Renaissance into modern times with constant attention to gnosis

New Renaissance Europe, which is the start of Modern Times, is the second attempt to overcome gnosis.[19].Gnosis is a philosophical-spiritual movement of an oriental origin which aimed for direct, mystic, i.e. institutionally unmediated knowledge of the divine.

However, such knowledge was undesirable as it did not require church authority and related control of the believers. The first attempt in the 2nd and 3rd century was not completely successful as the mystic tradition survived further in the medieval "underground" in various forms of heresy of a Manicheism type, e.g. the movement of Bogomils or Cathars.

We can read about Cathars for example in the book *Montaillou, Occitan village in the years 1294-1324* of the French historian Emmanuel Le Roy Ladurie. With extraordinary authenticity, attention to detail and sometimes funny by bringing closer the lives of the inhabitants of the high mountain village of Cathar of the French Pyrenees on the basis of the Inquisition Protocols of the investigator Bishop Jacque Fournier, later Pope Benedict of AvignonXII:

"Catharism in Mountaillou, this is also, and above all, a mythical interpretation past. In the evening village vigil, people tell her over and over all their variations. In the beginning there is a fall. The devil once managed to seduce part of the spirits that surrounded the good God in paradise.

They were therefore expected to fall from heaven. Their evil seducer imprisoned them on the earth in their bodies of earth or of meat modeled from the matter of oblivion. From one bodily death to death following these fallen souls have since run like runaway from one tunic to second. Such a soul can gradually incarnate in the body of animals and humans. […] Metempsychosis it is therefore the focal point of Cathar (in general) and of the Montreal myths (above all) and the equivalent of Catholic purgatory for the fallen and suffering souls for the whole their long stay on the ground." [20]

In my opinion, given the absence a unified theological system that can only be retrospectively and of course that rather artificially reconstructed is a quirky

[19] See BLUMENBERG, H. *Legitimacy of the Modern Age*. Frankfurt: 1966.

[20] LADURIE, E. Le R. *Montaillou, okcitánská vesnice v letech 1294–1324.* Argo, Praha: 2002, p. 510.

interpretation of Fournier's Inquisition Record this famous historian, one of the books he should take a pilgrim who discovers the magical atmosphere of Cathar castles in the Pyrenees. Then it will no longer be difficult to read along with Paul Coelho's novel Brida evoke at least an approximate idea of Cathar's ethical practice.

According to Brenon[21], however, there are also faithful descriptions of the Cathar liturgy written in Occitan, by the representatives of this "alternative" Christianity. They mention, for example, the typical baptismal baptism of hands under the name consolamentum or collective penance aparelhament. Unload namely the Cathar doctrine on the basis of diverse inventories of their heresies it is common among religionists and historians, but it is methodologically a last resort. Moreover, this creates a peculiar type of anti-heretic discourse, as David Zbíral[22] ingeniously points out The Latin text of the Fournier register on parchment is recorded as manuscript no Vatican Library.

I recall this despite the fact that I have resorted in part to this brief overview style. To my apology, my intention was not, of course from the antiquarian focus. Pursuit and systematic liquidation lived and sincere Christianity in the 12th to 13th centuries in Western Europe. On the contrary, it reminded me of the same persecution at that time still Christian religious sects among dozens of other sects by the state power of Rome in the 1st to 4th century 3rd century. After all, man's belonging to any Christian church, Catholic or "Cathar", has not yet guaranteed the true leadership of life in the footsteps Jesus' teachings. Its succession should have the most venerable form of the Cathari Perfect, as the most ascetic of them called themselves. Most others, with a few minor exceptions, she took a ride and was carried away by the predominant clergy or the intellectual currents of the time she happened to be,she was building her career and they found them somewhat unsuitable, even striking, that someone sees the same thing differently or that they even see something that a person does well embedded in the establishment can not see… How lucky in history, but of course there is an inner one for every human being a space of free spirit that is in principle beyond the reach of any ecclesiastical or political power.[23]

The second attempt to suppress the seeds of gnosis, according to Blumenberg and Horyna, comes with the development of Modern European Rationalism based on a mathematically almighty sovereign subject.

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[21] In the cited book, the author refers to p.41 for the collective edition of the following ceremonial texts: NELLI, R. *Ecritures cathares. L'ememble des toxtes cathares traditions et commentés.* Paris: 1959. Updated and extended edition of Le Rocher, 1995.

[22] ZBÍRAL, D. *Největši hereze*. Praha: 2007, pp. 72–77.

[23] See HLAVINKA, P. *Dobro a ctnost pohledem etických a náboženských koncepcí*. Triton, Praha: 2014, pp. 60–62.

"The overcoming of the gnosis in early times of the Church was carried by trying to prevent human curiosity and the desire for knowledge to interfere with doctrinally secure sentences. Interestingly it is not that it sounded empty, but rather why the modern age, which is generally regarded as an epoch of awakened individual consciousness, free thought, scientific curiosity, political and religious emancipation, modern human philosophy and philosophy of history, has the same characteristics: overcoming the gnosis again, we do not know how well. "[24]

In the 15th century classical documents on gnosis, Corpus Hermeticum, were found, supporting treatises for alternative Christianity, whose roots get all the way to the knowledge of Ancient Egypt, and which were faithful guides for Renaissance occultists, magicians and alchemists. These protagonists of gnosis were either interdicted by inquisition, e.g. Giordano Bruno, or swept away by the knowledge of scientists of Cartesian-Hume type.

Since then, of a value is what is institutionally approved, can be weighed, measured or calculated, and thus sold. The fresh spirit of Renaissance emphasizing the rebirth of an individual mind and unrestricted research gradually finishes the idea of Europe enclosed in a religiously doctrinal grip. However, at the same time, the Modern Times, emphasizing erudition, carry the seed of vague and manipulative learning. The Modern European erudition is based on the idea of proxy to lead the whole world towards progress. It is Faustian Europe which pleasantly succumbs to the Mephisto's temptation, Europe practically making use of the change of technical knowledge into the technological control of the rest of the world.[25]

The Modern Europe gradually runs into dreamy revolutionary illusionism and violent utopian visions that were supposed to replace the medieval respect of the forthcoming salvation and the end of the world. This devotional respect dictated by the church's power is replaced by the respect of exact science and uncontrollability of progress of enlightened intellect.

Even in the 20th century Europe again searches for its identity, e.g. asks the question what in reality the spiritual foundations of the European Union are. All this happens long after Europe had lost its power status in the New World

[24] HORYNA, B. *Idea Evropy*. Praha: Argo, 2001, p. 109.

[25] See HORYNA, B. *Idea Evropy*. Praha: Argo, 2001, p. 120–21*: "Overseas discoveries and a new image of the world brought a special effect. The European seafarer, who set out to the furthest corners of the Earth, quickly became convinced that he was sailing upstream and returning to the past. The people he met were living witnesses to him for the beginnings of human civilization, the most advanced stage of which he himself represented: they were witnesses of something long gone, past, backward, childish. (...) The idea of inferiority, which expresses the value of a person judged by his or her ethnic and racial belonging, has thus entered the overall picture of Europeanism destined to dominate others. The understanding of otherness as inferiority has grown into a modern form of the idea of the Empire, called imperialism."*

(the USA), as the direct product of Modern Age combination of the ideas of the Enlightenment and Protestant ethics.

And they have also lost control of the vast areas of the Orient, which are now the most progressive elements of the world economy in addition to the United States: the countries of Southeast Asia, China and Japan.

An the final question may be: what minimal contours would a new European ideology or a transformed religion have to have in order not to turn Europe into a provincial colony of these countries in the coming century?

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New Challenges to the EU Common Immigration Policy

Natalia Mushak*

Summary: The study investigates the current problems and new issues of EU common immigration policy. The article stipulates that the EU immigration policy is the object of common competence of the European Union and its Member States. The author defines the main directions of the European Union's common immigration policy: the promotion and economic development of legal immigration to EU Member States and the fight against the influx of illegal migrants from third countries. The study researches the effective means of combating illegal immigrants by means of the adoption of readmission agreements with third countries by both the EU and its Member States. The research states that readmission agreements facilitate the return of persons who do not have legal grounds to stay in the territory of the EU Member State to their country of origin or transit.

Keywords: Readmission Agreement – Legal Migration – Third Countries – Legal Instruments – Effective Means

1. Introduction

In recent years, issues related to the EU immigration policy have become key aspects for the European countries. Their proper solution depends largely on ensuring their economic, social and cultural development. Despite the fact that migrants have continued to make a significant contribution to the economic development of the European countries, all the tangible aspects related to immigration issues cause significant differences in the methods and means of their settlement. In this regard, S. Peers notes that disputes over the role of immigration processes are primarily related to the fears of certain European states regarding the threat of flows of illegal migrants to the national economy, social harmony and the established national values of each individual state[1].

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1 PEERS, S. *EU Justice and Home Affairs Law*. Oxford: Oxford University Press, 3rd edn, 2011, p. 165.

It should be emphasized that the EU takes the first place in the world by the number of immigrants (56 million people). And every year the tendency to cross the borders of the European continent as legal and illegal immigrants is increasing. For example, more than 500 thousand legal immigrants annually arrive on the territory of European countries. In regard of illegal immigrants, their total number is from 3 to 7 million. When the number of immigrants reaches a certain critical mass, the process of immigration creates real and potential threats to virtually any aspect of the security of the host party. It distorts the social, demographic, territorial structure, exacerbates competition in local labor and housing markets, creates entire sectors of employment that do not have legislative regulation, causes social tensions, increase xenophobia and extremism. Accordingly, these reasons have caused and made a huge impact on the changes in the formation of a common immigration policy of the EU Member States.

Nowadays, the issues related to the common immigration policy of the European Union are regulated by the TFEU (art. 77-80)[2]. In particular, the European Union is developing a common immigration policy aimed at ensuring of the efficient management of migration flows at all stages, fair treatment of third-country nationals legally residing in the EU Member States, and prevention of illegal immigration (art. 79 TFEU). To implement the common immigration policy of the EU Member States in accordance with Art. 79 TFEU the European Parliament and the Council of the EU, acting in accordance with the ordinary legislative procedure, take a number of measures in areas related to: (a) entry and residence conditions, as well as rules on the issuance by Member States of long-term visas and residence permits, including those that aimed at the reunification of families; b) definition of rights of third-country nationals who legally reside within the EU Member States, including the conditions that govern the freedom of movement and residence in other EU Member States; c) illegal immigration and residence, including the repatriation of persons of persons who reside illegally; d) combating with trafficking of persons, especially women and children[3].

In addition, the EU treaties also provide that the European Parliament and the Council of the EU may establish measures to encourage and support the activities of the Member States to facilitate the integration of third-country nationals legally residing within their territory (Art. 79, par. 4). The document states that any harmonization of laws and regulations of states is excluded. However, these provisions do not affect the right of European countries to impose quotas

[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. Available at: URL: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM: EN:HTML (date of access: 7. 7. 2019).

[3] MUSHAK, N. *Schengen Law.* In: MURAVIOV, V. (ed.). *European law: European Union law: textbook: in 3 volumes*. Kyiv: In Yure, 2015, p. 203–206.

in regard of entry of third-country nationals who arrive from such countries to their territory be employed or self-employed (Art. 79, par. 4).

Nowadays, the EU common immigration policy is based on the principles of solidarity and responsibility and is being in dynamic development. The common immigration policy is comprehensive. It means that the whole range of EU legislation in the field of immigration policy is aimed at simultaneously resolving of two main problems: promoting of legal immigration to the EU Member States and overcoming of the illegal immigration into the European Union in particular. As a rule, when we are talking about the issues related to immigration, it immediately appears to be false, third-country nationals who cross the external borders of the EU Member States. At the same time, problems related to the development of legal immigration and its significant impact on the economy of European states remains out of the question.

2. Main components of the EU's common immigration policy

First of all, it should be noted that for the European countries, the immigration problem does not mean only the problems with the illegal immigrants. Today, within the EU Member States, there is a need for legal migration, since the main importance of legal migration is to promote the economic development of European states. The inalienable components of the EU's common policy on legal immigration are: establishment of a unified approach to determining of the long-term stay status of third-country nationals in the EU; definition of measures for the reunification of families; the establishment of common conditions for the admission of third-country nationals for the purpose of studying, exchanging pupils, internship and voluntary service; definition of common approaches to labor immigration; introduction of measures to integrate immigrants into the European countries, etc. As the practice of the European Union shows, the procedure for legal access of third-country nationals to EU is limited by cases of granting work permits, training or family reunification.

In order to harmonize the national legislation and practice of the EU Member States in regard of the providing of residence status to third country nationals legally residing within the territory of one European country, Directive 2003/109/EC was adopted[4]. The document defines the conditions under which the third

[4] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. *Official Journal. L 016. 23/01/2004. P. 0044–0053.* Available at: URL: http://eur-lex.europa.eu/legal-content/en/ ALL/?uri=CELEX:32003L0109 (date of access: 16. 6. 2019).

country nationals who have been living within the territory of the EU for a long time may use the right to freedom of movement.

In particular, according to the provisions of the Directive in order to obtain a residence permit, a third-country national shall meet the following basic requirements: a) legally and for at least 5 years, reside within the territory of a particular EU Member State; b) receive a stable income and health insurance for themselves and their family members. In addition to the specified basic requirements, the optional requirements are also provided. They include: compliance with the integration requirements established by the national legislation of the relevant EU Member State (for example, language proficiency or knowledge of the host country's history) and documentary evidence of proper accomodation conditions.

Another category of immigrants who obtain residence permits within the EU are victims of trafficking who cooperate with the competent authorities. The procedure and conditions for issuance of a residence permit of the EU for these persons are established by the EU Directive 2004/81 of 29 April 2004[5]. The document specifies the conditions for granting of residence permits for third-country nationals who work with the relevant authorities in fighting against human trafficking or illegal immigration, even if these persons have illegally entered the territory of the EU Member State.

In issues related to legal migration, in addition to granting permits to citizens who have lived for a long time in the territory of one of the EU Member States, cases of family reunification are of key importance. These issues are regulated by the EU Council Directive 2003/86 that defines the conditions for family reunification rights and creates proper conditions for the transfer to the European Union of legal immigrants family members. The document also provides the opportunity for such persons to perform their labor or other social and economic activities within EU Member States.

The term "family reunification" means entry into the territory of EU Member State and residence within this territory of third-country nationals in order to preserve family unity, independently from the fact that these ties appear before or after the entry of this person (Art. 2).

It is necessary to draw attention to the fact that the provisions of Directive 2003/86 are often criticized for violation of such fundamental rights as the right to private life. On this basis, the EU Commission has appealed to the EU Court

[5] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. *Official Journal of the European Union*. L 261/19. Available at: URL: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX %3A32004L0081 (date of access: 16. 10. 2018).

to annul certain provisions of this Directive, in particular, in regard of stay of the applicant (on family reunification) on the territory of a third country before receiving of a permit for reunification with the sponsor, as well as establishing a two-year period for reunification (from the moment of filing of an application). At the same time, the EU Court did not support the position of the EU Commission, proclaiming that such requirements were caused by the necessity to ensure that there were favorable conditions for the family reunification, and the latter has strong ties[6].

However, this document, as a legal instrument for introducing of a common approach to the issue of family reunification, leaves many unresolved issues at the European Union level, that causes the necessity to apply to the national law of the EU Member States. Moreover, the aforementioned directive sets low standards in relation to the right to family reunification in comparison with international standards, but it does not restrict the possibility of application by EU Member States of higher standards in accordance with their international legal obligations in the field of human rights protection. Thus, Directive 2003/86 establishes minimum standards for family reunification. It means that EU Member States have the right to establish higher standards in family reunification in their national legislation. Furthermore, this Directive does not prohibit to conclude the agreements of EU (alone or with EU Member States) which provide a more favorable treatment for family members for third-country nationals.

In order to ensure a common policy in the field of legal immigration at the European Union level common conditions for the admission of third-country nationals with the purpose of education, pupil exchange, internship and voluntary service have been established. These issues are governed by Directive 2004/114 of 13 December 2004[7], that specifies the admission conditions for four categories of third-country nationals: students, pupils, trainees and volunteer workers.

The Directive defines the harmonized conditions for their entry and stay in the EU, including rules on the issuance and extension of residence. The document defines the general conditions for obtaining of a residence permit. The deadlines for residence permits for these categories of persons shall vary: for students – from one year, and for other categories of persons – no more than one year. For example, if the training covers a period of less than one year, then the residence

[6] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. *Official Journal of the European Union*. L 261/19. URL: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012: 0018:en:PDF (date of access: 16. 5. 2019).

[7] Council Directive 2004/114/EC of 13 december 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. *Official Journal of the European Union*. L 375/12. Available at: URL: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri =CELEX:32004L0114 (date of access: 16. 5. 2019).

permit for students is granted for the duration of this training. For students – no more than one year (with certain exceptions); volunteers – not more than one year (with a certain exception).

Directive 2004/114 provides the right of students to employ or conduct independent economic activity. Such persons can be hired as workers and engaged in independent economic activities in free time. However, the EU Member States are given the right to determine independently the time and conditions for such activities. The state may limit such right for the period of the first year of residence.

An important part of the common EU policy in the field of legal immigration is the development of common approaches to labor immigration.

Therefore, in order to introduce a joint accelerated procedure for admission of qualified workers the Directive 2009/50 on entry conditions was adopted[8]. It stipulates the following requirements for third country nationals: the ability of the labor contract or the invitation to work; relevant international instruments; the document that certifies the health insurance, etc. The competent authorities of the host EU Member State decide to grant the person "EU Blue Card". The period of validity of the latter is from one to four years with the possibility of renewal.

According to Directive 2009/50, the EU Blue Card holders are subject to the principle of "equal treatment" with nationals of the host EU Member State in regard of: working conditions; freedom of association; education, training and recognition of qualifications; social protection and pensions; access to goods and services, etc.

Also the issues related to legal immigration are regulated by key documents such as: Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on the procedure for applying of a single permit for third-country nationals to reside and work in the territory of EU Member State and a common set of rights of third-country nationals who legally reside within EU Member State[9]; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals in the territory of the EU for the purpose of employment of seasonal

[8] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. *Official Journal of the European Union*. L 155/17. Available at: URL: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0050 (date of access: 16. 5. 2019).

[9] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. *Official Journal of the European Union.* L 343/1. Available at: URL: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011: 343:0001:0009:EN:PDF (date of access: 16. 5. 2019).

workers (on a seasonal basis) and Directive 2014/66/EC of the European Parliament and of EU Council of 15 May 2014 on the conditions of entry and permanent residence of third-country nationals within the European Union within intra-corporate transfer[10].

In regards of Directive 2011/98/EC, the document establishes a single application procedure to allow third-country nationals to reside in the territory of the EU Member States with the purpose of work. In addition, the document simplifies the procedure for admission of third-country nationals to the European Union. In particular, an application for the grant, modification or extension of a single permit must be submitted through the application of a single application procedure. This procedure should not be contrary to the visa procedure, which may be a requirement for initial entry.

The particular attention is paid to the status and common set of rights for third-country workers who legally reside within the European Union in that Directive. For instance, third-country workers are entitled to equal treatment with the nationals of the EU Member State where they reside. Third-country nationals are equated with EU citizens' rights in: working conditions; freedom of association and membership in the organization; education and vocational training; recognition of diplomas, certificates and other professional qualifications in accordance with relevant national procedures; types of social security; tax benefits; access to goods and services at the disposal of the public, including procedures for obtaining housing; counseling services provided by employment offices, etc[11].

Concerning the Directive 2014/36/EC of 26 February 2014, the document defines the conditions of entry and stay of third-country nationals within the EU for the purpose of employment as seasonal workers, i.e. on a seasonal basis. In particular, the Directive sets out a number of criteria and requirements for obtaining of a residence permit for a period not exceeding 90 days. They include the submission of the following documents: (a) a valid employment contract or a binding offer from the employer to a seasonal worker in a particular EU Member State, specifying the place and type of work; duration of employment; remuneration for work; working hours during the week / month; other essential

[10] 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. Available at: URL: http://eur-lex.europa.eu/legalcontent/ (date of access: 16. 5. 2019).

[11] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. *Official Journal of the European Union.* L 343/1. Available at: URL: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:343: 0001:0009:EN:PDF (date of access: 16. 5. 2019).

working conditions; (if possible) the employee's starting date; (b) confirmation of the availability or application for sickness insurance covering all the possible risks normally covered by the insurance of Member States nationals; c) confirmation that the seasonal worker will have adequate accomodation or he will be provided with such accomodation. In doing so, the EU Member States should require seasonal workers to refrain from seeking social assistance. The EU Member State may also require the applicant to provide documentation confirming the qualifications of the third-country national and confirming his ability to perform the seasonal work specified in the contract (Art. 5)[12].

In addition to the essential requirements, seasonal workers must have a valid travel document, which must be valid for at least of the period of validity for which they are authorized to stay in the EU for seasonal employment. A residence permit in the territory of a Member State shall not be granted to a third-country national unless there is reason to believe that his or her stay constitutes a threat to public policy, national security and public health.

In accordance with Directive 2014/36/EC, the EU Member States have the right to determine the number of third-country nationals who may be authorized to enter and stay for seasonal employment. On this basis, any application for such a permit may be declared inadmissible or rejected on the basis of this provision (Art. 7).

For staying not exceeding 90 days, the EU Member States shall issue to third-country nationals: 1) a short-term visa stating that it has been issued for the purpose of seasonal employment; 2) a short-term visa and work permit stating that they have been issued for the purpose of seasonal employment; 3) a work permit stating that it has been issued for the purpose of seasonal employment (in case a third-country national does not require a visa).

For staying exceeding 90 days, the EU Member States shall issue to third-country nationals: 1) a long-term visa stating that it has been issued for the purpose of seasonal employment; 2) a permit for seasonal work; 3) a long-term visa and permission for seasonal work if a long-term visa is required by the EU Member State (Art. 13). The document also defines the duration of stay of seasonal workers in the territory of the EU Member State. In particular, Member States should, at their discretion, determine the maximum period of stay for seasonal workers, which, however, may not be less than 5 months and more than 9 months over a twelve-month period. After the expiry of that period, the third-country national must leave the EU territory unless the Member State has

[12] Directive 2014/36 / EC of the European Parliament and of the Council of of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. *Official Journal of the European Union*. L 343/1. Available at: URL: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32014 L0036 (date of access: 16. 5. 2019).

issued a residence permit to that person in accordance with national or EU law who has not the intention for seasonal work.

Art. 21 of the document stipulates the rights of seasonal workers. These rights include: entry and stay in the territory of an EU Member State which has issued a residence permit for the purpose of seasonal work; have free access to the whole territory of the issuing Member State in accordance with national law; the right to carry out the specific work specified in the permission. In its turn, seasonal workers should be treated in the same way (non-discriminatory) as nationals of the country of residence. The following rights must be guaranteed: (a) the right to equal work conditions; b) the right to strike; c) free access to goods and services; d) access to social security institutions; e) seasonal work advisory services provided by the employer; f) preparation and vocational training; g) recognition of diplomas, certificates and other documents in accordance with national procedures; h) tax benefits; e) the right to file complaints against employers.

Employees who have been granted an intra-corporate transfer permit have the right of entry and stay in the territory of the EU Member State, free access to their entire territory, and the ability to carry out the activities provided by the permission. Such workers are also allowed to work in another EU Member State for a short period (up to 90 days for six months) at an entity within the same structure.

In 2011, the European Immigration WEB Portal was created to disseminate information on legal migration and employment opportunities in the European Union.

In our view, legal migration is currently seen in the European Union as a response to the demographic and economic challenges facing Europe, as well as to migratory pressure on the borders of European countries. Most of the instruments adopted within the encourage the potential of immigration for the development of Europe, including the integration of third-country nationals who are within the territory of the European Union Member States and the attraction of new categories of foreign nationals. In other words, the European Union, by pursuing its policy on legal migration, encourages third-country nationals, as a rule, highly qualified workers, to their active integration into the European area. Thus, the European Union in the XXI century together with such countries as the USA and Canada, it plays one of the leading places in the legal immigration flows of third-country nationals, becoming a competitive world center.

Within the framework of the EU common immigration policy, there is a close relationship between legal and illegal immigration. For example, in July 2006, the EU Commission issued a Communication on policy priorities in the field of combating illegal immigration of third-country nationals.

3. Legal instruments of the EU common immigration policy on combatting illegal immigration

An important component of the common policy on combating illegal immigration is the fight against trafficking. In the European continent, this issue is relevant both within the Council of Europe's activities under Council of Europe Convention against Human Trafficking, 2005, and the European Union in particular. For example, there is the Expert group on combating human trafficking within the EU, whose function is to provide guidance on the harmonization of different practices. In addition, there is a program for the exchange of information between the EU Member States on human trafficking and sexual exploitation of children.

On 5 April 2011, Directive 2011/36 of the European Parliament and of the Council of the European Union on the prevention and fight against human trafficking and the protection of victims of human trafficking was adopted. The Directive establishes minimum standards for the definition of criminal offenses and sanctions in the area of combating human trafficking, and establishes preventive measures for this group of crimes, as well as measures for the protection of victims of human trafficking. In order to combat the illegal immigration, the European Union is pursuing the policy of returning of illegal immigrants. The EU law defines two categories of return for illegal residents: voluntary (by decision of the illegal resident itself) and forced (under the influence of coercion by the competent authorities of the EU Member State).

Among the main legal instruments for implementing of the external dimension of the EU's common immigration policy are readmission agreements concluded by the European Union with third countries, as a rule, countries of transit and the origin of illegal immigrants. In doing so, the European Union considers such agreements as an effective means of combating illegal immigration.

The doctrine and practice of international law considers the readmission as the mutual obligations of States enshrined in international agreements to take back their own nationals, as well as third-country nationals and stateless persons who have illegally arrived on the territory of one of the contracting parties or upon their arrival grounds for legal staying there[13]. Readmission agreements are concluded to facilitate the transfer of persons who no longer fulfill the conditions of entry, staying or residence in relevent country. Such definition is contained in the Green paper on Community policy on the return of illegal immigrants[14].

[13] SHENDEROVSKA, A. Characteristics of the Agreement readmission of persons between Ukraine and the EU and its implementation by Ukraine. *Journal of the Kyiv University of Law*, 2013, p. 379–383.

[14] Green paper on a community return policy on illegal residents COM/2002/0175 final. Available at: URL: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri= CELEX:52002DC0175 (date of access: 16. 5. 2019).

4. The mechanism of readmission agreements regulation

The mechanism of legal regulation of readmission issues is bilateral and multilateral agreements. In view of the conclusion of international readmission agreements, we consider it appropriate to determine the competence of the European Union and its Member States in this area. According to Art. 2 and Art. 79 TFEU the European Union has common competence with its Member States to conclude readmission agreements. In practice, it means that EU Member States have the right to conclude readmission agreements with third countries that have not concluded them with the European Union.

In the case of different interpretations or overlapping of legal provisions in both agreements, the readmission agreement with the European Union has pririty over the readmission agreement with the EU Member State. Once the EU has concluded a readmission agreement with a specific third country, the EU Member States are required to adopt the enforcement protocols with this country.

In other words, it means that EU Member States will not fullfill their readmission competence until the European Union negotiates or concludes a readmission agreement on behalf of the EU with the relevant third country. However, it does not mean that EU Member States do not have the capacity to exercise their readmission competence. In order to do it, the EU Member States should regularly inform the Commission, the Council and the European Parliament of their planned readmission agreements with third countries, as well as of their existing bilateral readmission agreements[15].

Taking into consideration the lack of definitions of bilateral and multilateral readmission agreements in national science, we consider it necessary to provide their own definition.

Bilateral readmission agreements are international agreements concluded by both parties on a bilateral basis in the area of combating illegal immigration. In our view, it is necessary to define the types of bilateral readmission agreements: bilateral agreements concluded between the EU and third countries, and bilateral agreements concluded between EU Member States and third countries.

A striking example of the latter is 13 readmission agreements concluded by Germany with third countries. In particular, dated 2018, there are agreements with such countries as: Albania (entry into force 1. 8. 2003), Algeria (entry into force 12. 5. 2006), Armenia (entry into force 20. 4. 2008), Bosnia and

[15] CASSARINO J.-P. Beyond symmetries: cooperation on readmission in the EU neighborhood. 2011. Available at: URL: http://www.euce.org/eusa/2011/papers/ 3b_cassarino.pdf (date of access: 16. 5. 2019).

Herzegovina (entry into force 14. 1. 1997), Georgia (entry into force 1. 1. 2008), Kazakhstan (the agreement has not yet entered into force), Kosovo (entry into force 1. 9. 2010), Morocco (entry into force 1. 6. 1998), Macedonia (entry into force 1. 5. 2004), Serbia (entry into force 1. 4. 2003), Southern Korea (entry into force 22. 3. 2005), Syria (entry into force 3. 1. 2009) and Vietnam (entry into force 21. 9. 1995).

Such examples also involve the readmission agreement between Spain and Romania, 1996 and the readmission agreement between Ukraine and Georgia 2003, etc.

Multilateral readmission agreements are international agreements concluded between the European Union, its Member States, on the one hand, and any third country, on the other, in the field of combating illegal immigration. If agreements require ratification by all EU Member States, these agreements should also be considered multilateral. An example of multilateral readmission agreements is the readmission agreement between Poland and Schengen States of 29 March 1991. Both types of international readmission agreements contribute to the effective fight against illegal immigration and are the necessary precondition for further visa facilitation.

Although readmission agreements are seen as effective tools for preventing and preventing illegal immigration, there are numerous difficulties in implementing such documents.

The problems are primarily in the lack of consular missions of some European countries abroad, that, in its turn, complicates the process of obtaining of citizenship, as well as the lack of well-established exchange of information and communication between countries, for example, between Armenia and Hungary, Slovakia, Liechtenstein. The practical way out of this situation is to create a network of immigration liaison officers or attaches to the foreign offices of European countries, as well as to use online tools for communication between EU Member States.

5. Conclusion

The common immigration policy is covered by the common competence of the European Union and its Member States, which, by adopting a number of legal acts and taking the appropriate measures, harmonize this field. The examples of harmonization are EU programs, action plans, declarations, communiqués, conclusions and other documents adopted by EU institutions, which are legal instruments for implementing of the common EU immigration policy and are the integral part of the EU acquis.

The main directions of the European Union's common immigration policy are the promotion and economic development of legal immigration to EU Member States and the fight against the influx of illegal migrants from third countries, which threaten national security, public policy and public order. Legal acts within the framework of legal immigration regulate issues related to the definition and granting of long-term residence status for third-country nationals within Europe; establishment of appropriate living conditions for such persons; setting measures and minimum standards for family reunification; adoption of uniform conditions for admission of third-country nationals to study, internships; introduction of an accelerated procedure for admission of skilled workers to the European labor market, etc. In other words, in pursuing its policy on legal immigration, the EU encourages third-country nationals to their active engagement and integration them into the European area.

Among the effective means of combating illegal immigrants are the adoption of readmission agreements with third countries by both the EU and its Member States. The main objective of readmission agreements is to facilitate the return of persons who do not have legal grounds to stay in the territory of the EU Member State to their country of origin or transit, as well as to resolve problems related to the return procedure, formalize an effective return process and prevent problems in this area.

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Corporate Policy of Compliance with Competition Law*

Ondřej Dostal**

Summary: This text deals with the notion and significance of preventive active adherence to law, i.e. compliance, in the area of protection of competition in the practice of corporate companies. Discussed are both advantages and possible issues of compliance programme application, desirable context thereof, conditions for its successful application including the position of competition authorities towards them.

Keywords: compliance – compliance programme – competition – protection of competition – competition law

1. Content of the notion of compliance

Policy of active preventive compliance[1] with legal rules regulating behaviour of undertakings in all or almost all business sectors, but also with legally non-regulated rules of ethics, is nowadays considered a common element of governance of undertakings also in the Czech Republic. It serves especially as means of prevention of severe sanctions from the part of regulatory authorities that may result from breaking the law in areas such as regulation of international trade, money laundering, protection of privacy and data, but also in the area of protection of competition. Another purpose of corporate compliance policy is increase in the

* This article was drafted with support of the grant project of the Palacky univeristy in Olomouc "Veřejné, soukromé a trestní prosazování soutěžního práva v České republice" [Public, Private and Criminal Enforcement of Competition Law in the Czech Republic], grant No. IGA_PF_2019_006.

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[1] Despite number of years application of corporate compliance policy in the Czech Republic, no stable Czech equivalent of the word "compliance" has yet come into use. This of course does not help intelligibility and appeal of the compliance policy for laymen. However, one may argue that especially in the corporate practice a number of various other notions such as "CEO, fee, closing" and "leniency" in the competition law field has already been adopted into Czech language.

value of the company as a sought-after business partner not representing a risk of breaking the law and its transmission to the co-operating parties – and on the other hand, providing means of monitoring and evaluation of the aforesaid risk on the part of business partners. Last, but not least, effective corporate compliance with e.g. labour law and rules of ethics aimed against discrimination, harassing or bossing contributes to the appeal of a company for employees thus motivated to increase their employer's performance. The notion of compliance may be thus divided into external compliance with legal rules binding the company and internal compliance with company's documents governing attainment of the former goal. Depending on the capabilities of the company to implement the compliance policy one may distinguish levels of compliance varying from "simple" adherence to the rules to their integration into internal and external position and behaviour of employees. Reaching the highest and after all any level of compliance depends especially on the ability of the company to present the rules to its employees regardless of their education and professional orientation, explain importance of the rules for the company and themselves, and of course the ability to apply the rules coherently in practice.

This and all the above-mentioned is especially true for complex topic of compliance with law on protection of competition. The following text deals with the importance of competition law compliance and conditions for achieving thereof.

2. Importance of compliance with competition law

Competition law is a highly specialised legal discipline with a significant overlap to economics and with universal applicability to actions of undertakings. Nowadays, virtually all developed and many developing countries apply some more or less advanced and at the same time globally unified[2] form of the competition law pillars, i.e. prohibition of agreements distorting competition and abuse of dominant position, control of mergers and acquisitions and in case of the EU countries also control of state aid. Any undertaking can thus be practically sure that its business will be subject to competition law in any jurisdiction where it decides to operate. In the European Union, which, together with the U.S., is one of the leading jurisdictions setting trends in protection of competition, the so-called Modernisation package of 2004 concerning application of Article 101 and 102 of the Treaty on Functioning of the EU explicitly transferred the responsibility for

[2] By means of numerous international organisations dealing with protection of competition law and standardizing its globally applied rules, e.g. especially OECD or ICN – the International Competition Network.

assessment of compliance with competition law to undertakings themselves[3]. The companies must thus, similarly to most competition jurisdictions, rely on their own knowledge of competition law or know-how of the consultant companies covering all the jurisdictions where they operate and their respective case law of competition authorities and courts, including the trend-setting EU institutions. Such absolute responsibility for compliance with competition law is intensified by the fact that there is a wide scale of regular operations of an undertaking on the market by which it is possible to unwillingly or even in "good faith" break the competition law. In line with individual areas regulated by competition law the typical risks are as follows:

- Prohibited agreements – both among competitors – such as agreements and joint projects with third parties, memoranda, associations, exchange of information or procuring thereof for other undertakings etc.; and in relations among suppliers and customers, typically in agreements on sale and purchase
- Abuse of dominant position on the market – all the actions by dominant undertakings that go beyond regular business practices and that cannot be replicated in acceptable time and at acceptable costs by (as efficient) competitors and causing damage to customers
- Mergers and acquisitions – identification of all the relevant jurisdictions, timely notification to the competition authority/authorities, execution of control over the acquired entity only after approval by the competition authority
- State aid – identification of accepted (or granted in case of publicly owned undertakings under specific circumstances) economic advantage as state aid, acceptance or giving out the funding only following verification of the compatibility of the aid with the internal EU market and/or following positive decision by the European Commission
- Unannounced inspections in business premises – preparedness of employees, dealing with sensitive documents and communication concerning competition topics

It is advisable to bear in mind that a company may easily face the afore-mentioned risks both in position of a wrongdoer, which is usually accentuated in the compliance context, but also in the position of a victim, when the abovementioned anticompetitive practices may be targeted at and cause damage to the company. At the same time, the bar for breaking the competition law is set quite low, as it is possible to commit a breach already by e.g. non-distancing from an anticompetitive

[3] In contrast with the previous regime allowing applications to the European Commission for assessment of undertakings' agreements compliance with competition law, or application for exemption from prohibition of anticompetitive agreements respectively.

proposal or by mediation thereof even in simultaneous non-participation in the illegal conduct, or as a result of possible responsibility for behaviour of contractual or even third independent parties. In every corporate company there is a high number of potential law-breakers – employees and business partners responsible for individual business transactions, whose behaviour is at the same time attributable to the given company. Despite this fact and related below described severe material and procedural fines and remedial measures, a rather low awareness of concrete notions, obligations and rights resulting from competition law is still typical for corporate companies' employees in the Czech Republic, perhaps with exception of the highest management[4]. In contrast, it is the group of high or middle managers responsible for individual business transactions that may face most frequently the situations prone to possible breach of competition law and that also may face most frequently the related sanctions including the criminal ones.

Given the afore-mentioned facts and existence of so-called object breaches of competition law resulting in *per se* punishability of least agreements on fixing prices or sharing the markets regardless of the market share of the tortfeasors or damages caused, it is possible to argue that certain level of competition law compliance seems to be advisable even in the smallest company. The need for competition law compliance grows with the size of the company and related number of activities subject to competition law, and so do the advantages of organising the internal rules into a competition law compliance programme.

3. Formal expression of competition law compliance – competition law compliance programmes

A formal expression of corporate company's emphasis on adherence to competition law is called for already by the above-illustrated fact that a question for virtually every business transaction is where and not whether there is an element in it relevant from the competition law perspective. Companies acquainted with importance of competition law[5] must be aware of the fact that their employees cannot follow rules they do not know; the companies cannot be sure whether

[4] In the author's opinion the reasons for this situation include generally relatively low frequency (typically units per year) of competition authorities' antitrust decisions resulting from the difficulty of proving a breach of competition law especially in the domain of cartels and abuse of dominant position and also subjective or objective difficulties of media explaining complex topic and importance of competition law in a way understandable to general public.

[5] Such knowledge is considered an obligation for large undertakings by the European Commission and competition authorities alike.

an employee, business representative or even an independent third party would not engage them in a breach of competition law; they also cannot be sure that the breaches of competition law would be worthwhile compared to the fruits of their own autonomous efforts for competition on the merits; and, among others, the companies must be aware that they would not be able to resolve their breach of competition law *ex post* without facing at least some of the consequences available in public or private law domain. All these facts provide incentives for a corporate company to introduce and/or confirm internal rules for compliance with competition law. Moreover, such a step is nowadays often no longer voluntary, as it is required as a precondition for a business transaction by business partners, especially the foreign ones.

As regards situation in the Czech Republic, the factors supporting introduction of competition law compliance include also coming into force of the Act on Criminal liability of legal persons[6] which under certain circumstances enables exculpation of those entities that prove having done their utmost for prevention of a crime. The criminal offences according to the Act do not include breaches of competition law[7], yet the possibility of exculpation incentivised broad introduction of corporate programmes of compliance with criminal law and other legal obligations including regularly and quite logically competition law compliance rules. Moreover, in the area of competition law compliance there is now an outlook to introduction of a general duty for companies to operate at least a basic system of internal reaction to breaches of competition law as a result of adoption of the EU Directive "on Protection of whistle-blowers"[8]. Still, for the time being, there is no legal obligation or incentive in the Czech Republic to introduce a competition law compliance programme and to take it into account in assessing and sanctioning anticompetitive behaviour; details are presented below. Regardless of that, and in any case, introduction of a competition law compliance programme brings following possible advantages and on the contrary non-introduction following possible disadvantages.

[6] Act No. 418/2011 Coll. on Criminal liability of legal persons and procedure against them.

[7] Certain analogy may be seen in meeting the conditions of active repentance in line with the Criminal Code No. 40/2009 Coll. by announcing existence of a cartel agreement in line with the conditions of Leniency programme pursuant to the Act No. 143/2001 Coll. on Protection of Competition.

[8] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of persons who report breaches of Union law.

3.1. Possible advantages of applying a competition law compliance programme

Universally valid contribution of creating and implementing corporate competition law compliance programme consists among others in: optimisation of preconditions for compliance with the law in force and reducing the risk of breaking the law and subsequent sanctions; increase in awareness of the risk and consequences of breaking the competition law among employees, suppliers, customers and competitors and thus reducing the likelihood of business specific breaches of law and related sanctions; timely detection of possible breaches of competition law by the undertaking/group or business partners and competitors; prevention of possible criminal liability of employees; elimination or reduction of costs related to causing damages, conducting legal disputes, fines, negative publicity; preserving and spreading good reputation of the company and higher appeal for consumers, suppliers and job applicants; qualified and effective negotiation with competition authorities including investigations of competition law breaches, better suitability for alternative solutions of competition law breaches (e.g. settlements and leniency); finally, depending on the jurisdiction (see examples below) more or less hypothetical possibility of consistent and seriously meant application of a competition law compliance programme being taken into account by competition authorities in setting the fines for anticompetitive behaviour.

3.2. Possible disadvantages of non-existence or non-application of a competition law compliance programme

Contrary to the above-mentioned, non-existence or non-application of a competition law compliance programme resulting in breach of competition law may in individual cases bring for example: non-validity of the faulty provision or an agreement as a whole from their very beginning and prohibition of performance thereof; imposition of a fine by competition authorities up to usually 10 % of annual turnover and possibly also penalties for breaking specific obligations; imposition of remedial measures in cases investigated by the European Commission consisting in modification of behaviour of a company or even dissolution thereof; enforcing damages caused by breaking competition law in civil proceeding; criminal penalty for persons involved in hard core cartels on price fixing or sharing markets; clawback of state aid including interests; labour law penalties, including notices, for persons responsible for anticompetitive behaviour; damage to reputation of a company/group and related loss in value of shares and profit due to aversion of potential business partners to trade with a company having

breached law; high costs of legal defence needed during the competition law cases lasting usually several years.

3.3. Corporate practice in the area of competition law compliance programmes in the Czech Republic

Competition law compliance programmes, or commitments to adhere to competition law, are nowadays publicly presented by big corporate companies across the economy. With respect to the proportion of small and medium enterprises (SMEs) to undertakings active in economy (9 of 10) [9] it seems appropriate that even smaller companies used sufficiently robust and tailor made version of competition law compliance programme, among others for the following reasons: SMEs may find themselves in a position of an offender but also a victim of breaking competition law; SMEs may easily succumb to illusion that they are "under the radar" of competition law and therefore fail to adhere to it; they may be an easy target of competition authorities as a result of "naive" or "good will" anticompetitive behaviour; SMEs may be more likely involved in competition issues due to non-recognizing anticompetitive actions of third parties e.g. business partners, associations or employees; SMEs have limited financial and personal capacities for monitoring the development of legislation, activities of regulators and taking into account the topic of compliance. Despite the afore-mentioned, but perhaps just exactly for the sake of it, small, medium and large companies alike should deal with the question of needful topics of their competition law compliance programme in the light of their business activities.

3.4. Criteria for selection of necessary topics of a corporate competition law compliance programme

A tailor-made competition law compliance programme should reflect the specifics of the daily business of a given company, so that it was possible to set detailed rules for situations following from the nature and regular operation of the business. Varying according to the size of the company and relevance for its activity the typical topics of the programme may include: prohibited agreements both among competitors (including exchange of strategic information and protection of competition in submitting bids to call for tenders) and suppliers and customers, especially as regards so called restrictions of competition by object, i.e. agreements of fixing prices, sharing markets and groups of customers and

[9] Source – Ministry of Industry and Trade https://www.mpo.cz/assets/cz/podnikani/male-a-stredni-podnikani/studie-a-strategicke-dokumenty/2018/10/Zprava_MSP_2017.pdf

also agreements on limitation of output; abuse of dominant position depending on the share of the company on the relevant market (even a small company may hold such a position on a niche or an emerging market); concentrations of undertakings (especially timely notification to competition authorities and awaiting their approval of the transaction); state aid; cooperation with competition authorities including especially preparedness for unannounced inspection in business premises; principles of communication on competition law topics; methodology of handling documents related to transactions material from the point of view of competition law.

At the same time, it is advisable to evaluate realistic capability of a company to deal with certain topics internally. For example carrying out economic analysis of an abuse of dominance demanding specialised know-how and time may be beyond possibilities of a small company in position of a victim of the abuse. Moreover, from the point of view of a regular employee the most practical topics may in fact be the rules for (non)exchanging strategic information and communication with competitors in general (e.g. in associations), rules for handling sensitive documents and preparedness for unannounced inspections. Every competition compliance programme should contain also at least basic procedures for monitoring of risks and related obligations to report and consult of them, including all planned material transactions, with company's competition law compliance expert or department where available.

3.5. Preconditions for efficiency of a competition law compliance programme

Standards of competition law compliance programmes are for the time being, with the below-mentioned exceptions, generally not prescribed by legislation and oscillate among the outlined pillars of competition law providing space for creativity of individual companies. The purpose of a competition law compliance programme should however always consist in prevention of breaking the law. Companies should therefore be always interested in truthful explanation of the competition law issues and strive for prevention of gold plating, i.e. introduction of imaginary duties or rights not resulting from the law in force. One may with certainty say that there is no ideal realistic scope of competition law compliance programme – as regards its specific topics, one may expect that in case of large companies it will cover the whole spectre of the abovementioned areas of protection of competition. A competition law compliance programme should provide transparent support of healthy effort of a company to achieve economic results on the basis of its own efficiency. The course of the effort to prevent breaches of competition law should be recorded in company's internal documents ideally

capable of explaining to competition authorities why a breach of competition law occurred despite the compliance endeavour.

Discussions on efficiency of competition law compliance programmes focus regularly on their ideal content, form, but not so much their optimum way of implementation. At the same time it is true that even competition law compliance programmes perfect as to their form and content do not have to be sufficient for ensuring competition law compliance. The utmost importance should be attributed to creation of internal trust of employees in the programme and their will to put it into practice in daily business of a company. Competition law compliance cannot be imposed unilaterally – acceptation and voluntary performance by its addressees, i.e. employees of the company, is of essence. Preconditions for success of competition law compliance include also introduction of the competition compliance programme to new employees during their admission training in a generally comprehensible way, followed by regular trainings focused on specific activity of groups of employees, and finally assistance of the experts responsible for competition law compliance in day to day transactions. Employees must be given enough internal information resources and choice of means for reporting compliance incidents including possibility of anonymous reporting.

3.6. Recommendations resulting from discussions of the Section of Competition Compliance of the Czech Compliance Association (CCA)[10]

CCA during its meetings deals with aspects of competition law compliance programmes in various areas and from various points of view of competition law application. It results from the hitherto discussions that competition law compliance programmes should be adopted ideally by all corporate companies in extent corresponding to their detected possible risks of breaking competition law and the jurisdiction where they operate, in a form exactly and comprehensibly communicating the competition rules and risks of anticompetitive behaviour in daily practice to the risk-specific groups of employees on all their levels. It is imperative to involve the management of the company into implementation of the competition law compliance programme, achieve identification of employees with the values of the programme and ensure effective system for monitoring, reporting and solution of detected competition compliance incidents. Detecting the risks of the incidents, improving the procedures for prevention thereof and corresponding trainings should take place regularly in sufficiently short

[10] See https://www.czech-ca.cz/ The below presented opinions reflect the discussion within the CCA Competition Compliance Section in presence of leading Czech experts on competition law.

periods respecting the nature of company's business. Competition compliance programmes should be focused on the company in question and its culture, identify the jurisdiction(s), field(s) of activity and structure of the market(s) relevant for the company. It should reflect results of possible previous investigation(s) of the company by competition authorities – in case of antitrust record, the management of the company may be more willing to support corporate compliance. The form and wording of competition law compliance programme must respect the nature of its addressees, nevertheless "popularisation" leading to distortion of the message needs to be avoided. Competition law compliance programme should be able to "entertain" and appeal the target employees to the topic and explain the types of cases in which they may deal with competition law. It is important to set procdedures for situations where likely breach of law has been detected and adequate rules for communicating these situations to competition authorities. Regular reporting to the management of the company is necessary with respect to their responsibility for conducting the business. Company's compliance experts must cooperate with the employees responsible for activities relevant from the perspective of competition law compliance programme. Identification and assessment of compliance risks should be carried out by respective managers of the afore-mentioned employees in consultation with the experts.

4. Approach of competition authorities towards corporate competition law compliance policy and competition law compliance programmes

With respect to the effort necessary for meeting all the above-mentioned requirements, corporate companies tend regularly to claim that one of the purposes, if not the most important one, of introducing and operating a competition law compliance programme is the possibility to apply for reduction of a fine imposed by a competition authority for a possible breach of competition law. The author of this article deals with the questions of justifiability of these claims in the end of the text, in any case he is convinced that the goal of seriously meant corporate competition law compliance should be that the company did not have to ever negotiate with with a competition authority about the influence of its competition law compliance programme on the amount of the fine for its anticompetitive behaviour. In other words, introduction of competition law compliance programme just for the purpose of achieving reduction in a possible fine in fact indicates, in the opinion of the author, an expectation of a fine coming up in the future and at least subliminally grants approval to an action in breach of competition law. At

the same time, the author of this Article is convinced that the effort and resources spent by corporate companies and their potential for active prevention of breaking competition law should be adequately used and stimulated by the public sector.

Competition authorities in general seem to acknowledge the potential of competition law compliance programmes for increasing awareness of companies' employees about the rules of protecting competition and for more effective prevention and solution of potential competition issues, however, at the same time they usually emphasize that a compliance programme does not serve as a means for exculpation or reduction of fines. Among supporters of this so far prevailing attitude we can find the European Commission[11], Czech Office for the Protection of Competition[12], or German Bundeskartellamt[13]. On the other hand, several other respected competition authorities have already commenced to incentivize operation of competition law compliance programmes by offering reduction of possible fines by 10–15 % or even more. For example, French Competition Council announced in 2012 that it may reduce fine by up to 10% in a settlement procedure in case of company's willingness to introduce or improve an existing compliance programme. UK's OFT in its Communication on calculation of fines of 2012 informed that evidence of clear and undisputed commitment to compliance and corresponding steps towards identification and mitigation of risks may lead to reduction of a fine up to 10 %[14]. Italian Competition Authority informed in its Communication on calculation of fines of 2014 that adoption and enforcing a specific and adequate competition law compliance programme may be taken into consideration in reducing a fine up to 15 %[15]. For further illustration examples of requests by Italian Competition Authority conditioning reduction in fine follow, largely overlapping with requests of the other two above-mentioned competition authorities: full involvement of the company's management; identification of employees responsible for operation of the programme; carrying out risk analysis taking into account the relevant business sector and operational context; adequate training programmes taking into account economic importance of the company; creating system of incentives for securing compliance with the programme and a system deterring from the non-compliance with the programme; implementation of monitoring and audit system.

[11] See https://publications.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en

[12] See https://www.uohs.cz/cs/informacni-centrum/informacni-listy.html

[13] See the relevant chapter in https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2011.06.20-Promoting_Compliance_Competition_Law.pdf?__blob=publicationFile&v=4

[14] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf

[15] See https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/ica-adopts-fining-guidelines

Perhaps the biggest responsiveness towards companies applying competition law compliance programme has been shown by the Hungarian competition authority, which according to its guidelines for imposition of fines is willing to reduce a fine by up to 20 % for anticompetitive behaviour internally discovered/ceased by the company itself as a result of its competition law compliance programme and reported to the Hungarian competition authority.

5. Conclusion – food for thought on eligibility of competition law compliance programmes for reward in form of reducing fines for breach of competition law

As suggested above, the companies applying competition law compliance programmes are usually of the opinion that, despite currently prevailing opinion of competition authorities, the programmes should be considered at least potentially eligible for reward in form of reducing fine for breaking competition law. On the contrary, the usual argument of competition authorities, including the European Commission, for refusing such reward for previous application of competition compliance programme in case of finding a breach of competition law, is a logical contradiction of the very idea of rewarding something that failed, or rewarding adherence to competition law which should be a matter of course or a legal obligation anyways.

In the following text the author will strive, for the sake of instigating discussion and while simultaneously preserving all his above-mentioned opinions as to the true purpose of compliance programmes, to elaborate at least some arguments for rewarding competition law compliance programmes in the context of the current system of reducing fines for breach of competition law in the EU.

One may begin with pointing out that the above-mentioned argumentation of competition authorities, however logical and easily comprehensible, does not sufficiently deal with the argument that rewards/reductions of fines for companies based on programmes of Leniency or Settlements are available exactly in cases of failure to adhere to competition law, or more precisely in cases of severe breaking thereof, while of course they are not awarded for the breaking of law, but for the possibility to prove previously unknown breach of competition law with assistance of the offender or save resources of competition authorities necessary for carrying out the whole administrative procedure. One can argue that contribution to society resulting from long term systematic and provable active adherence to competition law may, arguably under specific circumstances even

despite possible breach thereof, be comparable with contribution of admitting a breach or enabling establishing thereof by the offender. Whereas rewarding of provable competition law compliance from its certain quality level upwards could incentivize education of companies in competition law and its intensive application including spill-over effect to other companies, rewarding offenders willing to confess and/or blow the whistle, however hardly replaceable from the enforcer's point of view, is in fact at the same time a signal that breaking law may be under certain circumstance forgiven or just slightly punished. As regards the argument of natural duty to adhere to competition law, it can be suggested that the reward for competition law compliance was not conceived as a bonus for simple absence of breaking competition law for certain period of time allegedly as a result of operating competition law compliance programme, but as a bonus only for provable systematic and efficient ensuring of compliance of individual and all relevant transactions and actions of a company with competition law rules, disturbed by unique and the compliance system exceeding breach of law. A value for society eligible for a reward could be in such a case represented by ensuring certainty or high probability of compliance of a company with competition law for certain relevant period of time, in contrast to rewarding expression of rather inconsistent or even momentary will to adhere to competition law by applicant for leniency or a settlement. Such approach would at the same time set the intensity of required compliance with competition law to a seemingly very high or even impossible level – here again one may think of an analogy to differentiating the reward according to the quality of evidence on breaking competition law in the framework of leniency programmes. In the light of these considerations the highest obstacle to rewarding the competition law compliance programmes would seem to be the (estimate of and the ways to establish) needed volume and value of evidence on competition law compliance in sufficiently long period of time, which would allow for evidencing that the level of compliance with competition law desirable from the society's point of view had been achieved, which was disturbed only by an isolated action outside the reach of otherwise effective compliance programme. Although demands of establishing such certainty seem to be high, at the same time they do not seem to be impossible or absolutely unreal, which has been confirmed by the model compliance programmes of competition authorities in respected jurisdictions (FR, IT, HU, UK) and their conditions for reducing the amount of fine. It seems advisable to explore further in expert fora and in discussions with competition authorities the above-mentioned and all other arguments for rewarding or at the very least incentivising operation of efficient competition law compliance programmes, in order for the apparent will of corporate companies to apply them, or to actively adhere to competition law, not to be wasted.

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- Forthcoming volume | Volume 7 (2020):
- deadline for submissions of papers: 31st August 2020
- review procedure and editing processes: September/October 2020
- foreseen date of publication: November/December 2020