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

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ARTICLES

A Tale of Two Recipes: Well-being Policy Comes to the Western Capitalism Rescue in the (Post-) Trump and (Post-) COVID-19 Era

Tatjana Muravska*, Denis Dyomkin**

Summary: The neo-authoritarian "Trump Era"-induced political problems have been aggravated further by the coronavirus that triggered an economic slowdown. The new landscape put Western capitalism, international co-operation, and European integration at risk. This contribution shows similarities and differences in policies dealt with the recessions of 2008 and 2020 on both sides of the Atlantic, with a focus on the EU and Canada. It examines the rising popularity of the welfare state concept applied both to individuals and industries particularly in the EU, for which the protection of citizens' well-being and solidarity values are at the bloc integration's core. Ideologically opposing solutions for those crises reflect a fundamental shift in policymaking, reinforcing state interventions policies vs neoliberal approach to the extent of intensified discussions of a universal basic income notion as a response to the inequalities. The article highlights the need for multi – and cross-disciplinary approaches, benefiting policymaking.

Keywords: Covid-19; state intervention; neoliberalism; welfare; integration; media.

JEL Classification: O19, M38.

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1. Introduction

The "Trump Era," i.e. the tectonic shifts in the well-established liberal global economic order by the end of the 45th U.S. presidency, has suddenly been overlapped with a new era of the Covid-19.

That posed even, arguably, more daunting challenges for the world economy while worsening the problems created by nationalist economic policies pursued by China, India, and the United States under the presidency of Donald Trump. In the last decade, there has furthermore been a major eastward shift in the global economic power of an unprecedented nature. The exact composition of the newly emerging global economic powers (including China, Russia, India and Brazil) is not yet clear, but it is now fully acknowledged that the political and economic relevance of the West is being re-scaled. Moreover, global fragmentation and radical "deglobalisation" is a common consideration in international politics.

However, the ongoing crisis has provided an opportunity to assess the resilience of public policies in the European Union and its like-minded partners such as Canada. With doors and gates having slammed shut across the continent as the governments attempted to stop spreading the virus, the idea of borderless Europe is being questioned by critics, considering the pandemic as a serious blow to EU integration. The epidemic of biblical proportions has caught humanity by surprise. As governments and multilateral institutions around the world have not scanted on monetary incentives to support the economy and on urgent monetary policy and regulatory measures, the situation suggested an odd reminiscence of Eurosclerosis – a period in European integration history when protectionism tendencies dominated amidst high unemployment, over-regulation and generous spending on welfare policies resulted, particularly, in a slower pace of European integration. The present crisis has revealed that decades later the same measures supported the European integration: while acting with a great degree of autonomy to put extraordinary measures in place, the European Union (EU) Member States' governments, in actuality, have chosen almost identical policy options that constituted a leap forward on the way of European integration. What's more, a similar course of action has been adopted by Western nations across the Atlantic and elsewhere, thereby contesting the longevity of the idea of economic nationalism and isolationism having boosted populists across Western democracies in the Trump era.

This paper examines the policy responses, produced by governments to stop the spread of the novel coronavirus. That, in turn, has highlighted some fundamental problems while lending itself well to experimenting with workable solutions, cushioning the devastating impact on the global economy.

A few of the most notable and multifaceted policy developments deserve consideration as being directly influenced by the pandemic and embodying the essentials of the Western approach to tackling the overwhelming global challenge. The health crisis and the unprecedented economic collapse in the West, compared with the anti-pandemic responses in the East, have cast doubt on the ability of the neoliberal, austerity-driven political actors to perform the most basic functions of governance: to protect lives and secure livelihoods. The article is aimed to discuss Western democracies and in particular the EU, the Baltic States and Canada in a new environment, which faces multifaceted challenges of a unique global mixed and multidimensional crisis, some of which are putting the achievements of European integration and EU-Canada transatlantic partnership at risk. It is being said repeatedly: the COVID-19 pandemic is going to have major, long-term consequences.

This crisis is very different from previous economic downturns being multidimensional due to a combination of crises in health systems and, consequently, in the economic systems. Nations are dealing with simultaneous crises. The 2008–2013 recession and recovery recipes were based on neoliberal fundamentals, comprising a globalized market-based system, loosening regulatory controls, weakening social safety nets, reducing taxes. However, at times of crises, the neoliberal ideology, advocated by the Washington consensus institutions, supported the implementation of austerity measures (control of budget deficits and public spending) to overcome debt and fiscal problems, followed by neoliberal orthodoxy – market-oriented reform policies, lowering trade barriers and reducing state influence in the economy.

Indeed, Western policy responses, particularly those offered by the EU and Canada (circa 2008-2013) were guided by goals to stabilise, stimulate and recover the financial systems by promoting maximum employment and improving economic conditions.

Similarly, during the Covid-19 crisis, policymakers, backed by international institutions, have responded in delivering cash transfers to households and businesses as significant social protection measures. While many standard economic statistics have yet to catch up with the reality Western countries are experiencing, it is increasingly clear that the effects on Europe's socio-economic conditions as well as in North America are severe. However, this downturn could be to some extent contingent to policy actions taken at all levels of government in many countries to mitigate the socio-economic shock on households and businesses and to support recovery as the worst of the public health crisis is behind.

These measures of the previous 2008 crisis are not entirely useful and appreciated in 2020 due to different conditions that provoked by the Covid-19 crisis.

A move away from the neoliberal policies and neoliberal approach is unlikely to be the only methodology for overcoming this crisis. The actions taken by governments since the very beginning show that some lessons have been learned from the previous crisis and its management. As a result, an austerity policy is not applied to the public sector and is unlikely foreseen in one – or two years; the public sector and institutions consider themselves as the guarantors of their citizens' safety and security. Such a trend was bold at the first stage of the crisis, characterised by lockdown policies.[1]

The novel coronavirus has caused unprecedented government interventions in many countries in the world, including EU Member States (MS). The challenges are similar to a large extent in every MS as they all have to mobilise resources to provide post-disaster health and financial services to communities, businesses and individuals. Strategies developed for preventing, managing and mitigating the stress and anxiety for Europeans, even with some uncertainty, can lead to socio-economic recovery.

At the European level, the foundations of European integration are being questioned. The Single Market was built on the free movement of labour, capital and services, Competition Law, State aid and the Stability and Growth Pact. These pillars have been shaken by the pandemic and will certainly be at the centre of future debates.[2]

The question is whether the EU's essential values will push forward other policies as a result of the crisis? The authors believe that European fundamentals have a strong influence on the political responses not only by the EU institutions but also motivate governments to further harmonize rules and policies to overcome the crisis and its consequences for the sake of benefits, provided by the economic integration.

To maintain Europe's current living standards in a more restrictive global environment, reliance on each other and applying measures preventing barriers caused by the Covid-19, to sustain the welfare benefits of the Single Market, will be crucial. EU integration needs rethinking as it is now in a quandary between the national policies of the MS determined by the global pandemic, effectiveness of their health systems and an urgent need for cooperation by the member states to avoid European divisions and prevent economies and people from the severe economic downturn.

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[1] Organisation for Economic Co-operation and Development. COVID-19 and fiscal relations across levels of government. OECD. Published 2020. http://www.oecd.org/coronavirus/policy-responses/covid-19-and-fiscal-relations-across-levels-of-government-ab438b9f/

[2] ZULEEG, F. *The Economic Impact of Covid-19 on the EU: From the Frying Pan into the Fire.* European Policy Centre; 2020. https://wms.flexious.be/editor/plugins/imagemanager/content/2140/PDF/2020/Economic_impact_of_COVID19_on_EU.pdf

This contribution will pay attention to the process of the EU "Marshall Plan's" implementation considering new economic, social and political realities, including the competences of the European Commission (EC) in such policies as social, public health and health care.[3]

2. Socially Responsible Market Economies

Socially responsible welfare states so far are the model that not only impacts directly on citizens' wellbeing through the provision of personal services and family benefits but also more indirectly through improving the health, wealth and social wellbeing of a whole nation.

The social implications of the pandemic emerged rapidly, the coronavirus affected people indiscriminately across countries and interim quarantine measures have affected horizontally all workers, widening the social gap based on self-surveillance and surveillance of masses by governments' authorities. Covid-19 is not a crisis of neoliberalism or capitalism, according to some scholars.[4]

The uniqueness of the current crisis is that it highlights the contradictions that capitalism creates, which have not been solved by the Western welfare models and their social policies.

According to the International Labour Organisation (ILO), "the world of work is being profoundly affected by the global virus pandemic. In addition to the threat to public health, the economic and social disruption threatens the long-term livelihoods and wellbeing of millions."

Most countries in the Western world have spent resources on an unprecedented scale to boost the economy and employment through fiscal, monetary, social protection and other policies. An important reference for tackling these challenges is provided in the ILO Centenary Declaration for the Future of Work, which sets out a human-centred approach for increasing investment in people's capabilities, the institutions of work, and in the creation of decent and sustainable jobs for the future.[5]

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[3] LEYEN, U., von der. (2020). *Coronavirus: President von der Leyen outlines EU budget as Marshall Plan for Europe's recovery.* webgate.ec.europa.eu. https://ec.europa.eu/newsroom/ecfin/item-detail.cfm

[4] BONFERT, B. *Political Economy and Politics: – Covid-19, Critical Political Economy, and the End of Neoliberalism?* European Sociologist. 2020;1(45). https://www.europeansociologist.org/issue-45-pandemic-impossibilities-vol-1/political-economy-and-politics-–-covid-19-critical-political

SAAD-FILHO, A. *From COVID-19 to the End of Neoliberalism.* Critical Sociology. Published online May 29, 2020:089692052092996. doi:10.1177/0896920520929966

[5] International Labour Organization. COVID-19 and the world of work (COVID-19 and the world of work). www.ilo.org. Published 2020. https://www.ilo.org/global/topics/coronavirus/lang--en/index.htm

During the first wave of Covid-19, virtually all EU countries have been in lockdown, to 'flatten the curve' of new infections. That has enormous implications for society at large – for example, through the differential ability of a different social group to protect themselves; the existing social gap before the pandemic was increased.

Governments have intervened to subsidise depressed industries by subsidies to business (flat-rate loans, special reimbursements, tax reliefs) to compensate for forced interruptions. In addition, to sustain aggregate demand, the following measures to keep employment have been introduced in many EU countries: a) compensatory measures for workers whose activities have been suspended, aimed at reducing (even to zero) working hours by public support modelled on the German short-time scheme aimed at saving jobs (Kurzarbeit). As pointed out by the International Monetary Fund (IMF), interest in this model was grown in the pandemic, as Germany's short-time work programme is widely considered the gold standard of such programmes and b) cash compensation for the self-employed.[6]

Trade unions organisations in several OECD countries responded swiftly to the challenges raised by COVID-19.[7] According to the European Trade Union Confederation (ETUC), short-time work schemes with both employers and governments have been negotiated, so that workers continue to receive their wages or a percentage of their wages. Trade unions have concluded a number of agreements that achieve the triple objective of protecting business, maintaining employment and ensuring that when the EU economies come out of lockdown, they are in the best position to restart their activities. Constructive social dialogue (SD) and decisive response from all social partners are required to provide synergies between social and economic development, effective employment policy and a safety net for the future.[8]

Such initiatives illustrate that SD and collective bargaining can be mobilised to complement public action, identify flexible and balanced solutions for both

[6] International Monetary Fund. Kurzarbeit: Germany's Short-Time Work Benefit. IMF. Published 2020. https://www.imf.org/en/News/Articles/2020/06/11/na061120-kurzarbeit-germanys-short-time-work-benefit; SCHNETZER, M., TAMESBERGER, D., THEURL, S. *Austrian short-time work model: a labour-market policy for the many, not the few*. Social Europe. Published 2020. https://www.socialeurope.eu/austrian-short-time-work-model-a-labour-market-policy-for-the-many-not-the-few

[7] The Trade Union Advisory Committee. TUAC Assessment of the OECD Employment Outlook 2020. TUAC. Published 2020. https://tuac.org/news/tuac-assessment-of-the-oecd-employment-outlook-2020/

[8] European Trade Union Confederation. Covid-19 Watch: Short Time Work Measures Across Europe. 2020. https://www.etuc.org/sites/default/files/press-release/file/2020-03/Covid_19%20-%20Briefing%20Short%20Time%20Work%20Measures%20.pdf

companies and workers and strengthen labour market resilience.[9] Furthermore, many OECD countries extensively promoted teleworking or working from home. During the COVID-19 crisis, it was suddenly in both employers' and employees' direct interest to reduce the exposure to the virus and maintain operations. To promote a rapid move to telework for all operations that allow it, countries took a series of measures to simplify its use, including through financial and non-financial support to companies.[10]

The crisis demonstrates the urgency of a coherent, pan-European response to critical aspects of labour regulation and in-work poverty. Existing social safety nets cannot be relied upon to provide adequate protection.[11]

Whatever measures the EU and its MS implement, it is crucial to keep as many in employment as possible.[12] Employment and unemployment subsidies and the postponement of taxes are important steps that have already been introduced by many governments. But protecting employment and productive capacity at a time of dramatic income loss requires immediate liquidity support. This is essential for all businesses to cover their operating expenses during the crisis, be they large corporations or even more so small and medium-sized enterprises and self-employed entrepreneurs. According to the European Central Bank (ECB) "National governments have provided unheard-of fiscal support to firms that retain jobs, helping make the surge in bank loans and corporate debt serviceable ex-post. More than 25 million workers in the euro area – 15% of employment – have been enrolled in short-time work schemes during the second quarter. As a result, jobs and incomes have been protected and the connections between employers and employees have been preserved."[13] Some analysts and politicians depict the role of the state in social protection as a short-term and unsustainable or even counterproductive in the new global scenario. However, the risk of social exclusion and in-work poverty (IWP), which represents a substantial group among workers and their number

[9] OECD. OECD Employment Outlook 2019: The Future of Work. Oecd-ilibrary.org. Published 2019. https://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2019_9ee00155-en

[10] OECD. OECD Economic Outlook No 107 – Double-hit scenario – (Edition 2020/1). www.oecd-ilibrary.org. Published 2020. Accessed October 7, 2020. https://www.oecd-ilibrary.org/economics/data/oecd-economic-outlook-statistics-and-projections/oecd-economic-outlook-no-107-double-hit-scenario-edition-2020-1_82024563-en

[11] MARCHAL, S., MARX, I. *Europe's social safety nets were not ready for the corona shock.* Europe. Published 2020. https://www.socialeurope.eu/europes-social-safety-nets-were-not-ready-for-the-corona-shock

[12] DRAGHI, M. *We face a war against coronavirus and must mobilise accordingly*. www.ft.com. Published 2020. https://www.ft.com/content/c6d2de3a-6ec5-11ea-89df-41bea055720b

[13] LAGARDE, C. *Europe's response to the crisis*. www.ecb.europa.eu. Published 2020. https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200723~c06fafabb6.en.html

continues to grow in many EU countries started already before the current crisis began.[14] The European Pillar of Social Rights states that 'adequate minimum wages shall be ensured.'[15] As a response to the current crisis, the European Union is aimed to introduce a legal instrument on decent minimum wages in consultations with social partners in 2020. A European framework is foreseen to be designed and implemented. This initiative is another example of the interventionist approach in the EU social dimension in time of the crisis, which has, however, long-term ambition for a Social Europe and the EU efforts to reduce rising wage inequalities and in-work poverty and to provide vulnerable workers with a financial buffer in case of hard times; create greater incentives to work, thereby improving productivity, reduce wage inequalities in society, increase domestic demand, and the resilience of the economy, help close the gender pay gap. However, the legal instrument does not envisage harmonization of minimum wage setting systems depending on the minimum wage setting systems and traditions of the MS, in full respect of national competencies and social partners' contractual freedom.[16] (EC, 2020a.) It would be important to apply the issue of the adequate minimum wage as key elements of the European Semester and country-specific recommendations.[17]

Moreover, a new European Citizens Initiative (ECI) "Start Unconditional Basic Incomes (UBI) throughout the EU" (ECI 2020) registered at the beginning of the crisis on the 15 May 2020 with the collection dates from 25 September 2020 to 25 September 2021.[18] The aim is to establish the introduction of unconditional basic incomes throughout the EU, which ensures every person's material existence and opportunity to participate in society as part of its economic policy. This shall be reached while remaining within the competences conferred to the EU by the Treaties. The prime objective is to reduce regional disparities to strengthen the economic, social and territorial cohesion in the EU and to the joint statement by the European Council, the European Parliament and the European Commission, stated in 2017, in its response to the 2030 Agenda for

[14] PEÑA-CASAS, R., GHAILANI, D., SPASOVA, S., VANHERCKE, B. *Work Poverty in Europe.* A Study of National Policies. 2019, 78–86.

[15] European Council, European Parliament, European Commission. Our World, Our Dignity, Our Future.; 2017. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42017Y0630(01)&from=EN.

[16] European Council. Special meeting of the European Council (17, 18, 19, 20 and 21 July). www.consilium.europa.eu. Published 2020. https://www.consilium.europa.eu

[17] DHÉRET, C., PALIMARICIUC, M. *Minimum wage and the EU: Happily ever after*? The European Policy Centre. Published 2020. https://www.epc.eu/en/publications/Minimum-wage-and-the-EU-Happily-ever-after~33d394

[18] European Citizen Initiative. Start Unconditional Basic Incomes (UBI) throughout the EU. europa.eu. Published 2020. https://europa.eu/citizens-initiative/initiatives/details/2020/000003_en

Sustainable Development that "the EU and its MS will also support efficient, sustainable and equitable social protection systems to guarantee basic income" to combat inequality. The ECI is another tool that European citizens have to express their "demands" for an increased strengthening of the EU – the need to collect signatures in the majority of the EU MS for this initiative to be valid creates also the necessity for citizens to work across borders for the common goal which could be that of the EU where the voice of the people is heard and counts. The Article 11 (4) of the Lisbon Treaty states that "at least one million citizens of the nationality of EU MS may, on their initiative, invite the European Commission, in the exercise of its EU powers, to submit and make proposals for matters arising from the Treaty to citizens."[19] The ECI is seen as a new opportunity for citizens to participate directly in shaping the future of the EU. The issue has come to the fore under the influence of the free market and free movement of labour.

3. Borrowing from Socialists: Pandemic-Induced Welfare Policies

Indeed, the European Citizen Initiative reflects a revival of interest in the Universal Basic Income (UBI.) For the latter, the mass unemployment caused by the pandemic and consequent recession became an important test marking an abrupt transition from pilot experiments with the concept, long deemed to be a socialist idea challenging capitalism, now putting into practice by liberal democracies in Europe and North America, thereby representing a political consensus.[20] Spain, Italy and Portugal have urged to introduce a pan-EU minimum income system to protect the livelihood of citizenry affected by the pandemic recession, give people a sense of security, reduce social inequalities and regional disparities for the sake of strengthening of the economic, social and territorial cohesion in the European bloc. The idea of the UBI is back into the welfare debate, with a notion of a living wage or unconditional living allowance being discussed in France, Germany and elsewhere. Those advocating the adding of the UBI as an essential element of the policy packages argue that otherwise, the world will have to

[19] Official Journal of the European Union. EUR-Lex – C2012/326/01 – EN – EUR-Lex. eur-lex.europa.eu. Published 2012. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:C2012/326/01

[20] WRIGHT, E. O. (2006). *Basic Income as a Socialist Project. Basic Income Studies*. 1(1); YLIKÄNNÖ, M. *Could the COVID-19 crisis revive the idea of a Universal Basic Income?* Friends of Europe. Published 2020. Accessed October 7, 2020. https://www.friendsofeurope.org/insights/could-the-covid-19-crisis-revive-the-idea-of-a-universal-basic-income

deal with the widespread social discontent and violence, coupled with chaotic flows of migration fertilizing the soil for extremism and ultimately would cost governments even more.[21]

The same enthusiasm was abundantly evident in Canada, where the liberal government of Justin Trudeau has introduced The Canada Emergency Response Benefit (CERB) giving financial support to employed and self-employed Canadians who were directly affected by COVID-19. Those eligible receive C$2,000 (US$1,495) a month as a taxable benefit. The benefits program with a total estimated cost of $71.3 billion was repeatedly extended. Subsequently, the Senate national finance committee has urged the federal government and the provinces consider a UBI as a longer-term option.[22]

Another essential point is that the pandemic has revealed a need for a sort of UBI not only for individuals but also for the whole industries whose services proved to be essential in addressing the crisis and its adverse and wide-ranging implications. Particularly, the public interest journalism, suffering from the gradual collapse of its business model, turned to be a frontline defence against spreading the disinformation about coronavirus, known since then as "infodemic." The pandemic has seen an outburst of conspiracy theories, both well-known and novel ones. The outbreak of disinformation has revived severe political and social hostilities on a global scale, with Asians finding themselves the target of racists attacks. As demonstrated in the special report of European External Action Service's East StratCom Task Force, falsehoods and myths about the pandemic, in some cases conducted by state or state-sponsored actors, are fraught with "harmful consequences for public security, health and effective crisis communications." Equally important, misinformation and speculations about symptoms, unproven drugs and dubious therapy methods put lives at risk, therefore the World Health Organization (WHO) that had been authorized by the United Nations (UN) to coordinate emergency response to the novel coronavirus crisis, has designated a special section on its webpage to debunk myths about the pandemic. Nonetheless, reputable health practitioners emphasize the incontestably

[21] KASSAM, A. *Spain rekindles a radical idea: a Europe-wide minimum income.* The Guardian. https://www.theguardian.com/world/2020/jun/03/spain-rekindles-a-radical-idea-a-europe-wide-minimum-income. Published June 3, 2020; HORVATH, B., WIGNARAJA, K. *Universal basic income is the answer to the inequalities exposed by COVID-19.* World Economic Forum. Published 2020. https://www.weforum.org/agenda/2020/04/covid-19-universal-basic-income-social-inequality

[22] Office of the Parliamentary Budget Officer, Canada. Legislative Costing Note; 2020. https://www.pbo-dpb.gc.ca/web/default/files/Documents/LEG/LEG-2021-032-S/LEG-2021-032-S_en.pdf; CURRY, B. *Senators urge Ottawa to target income-support programs on economic recovery*. The Globe and Mail. https://www.theglobeandmail.com/politics/article-senators-urge-ottawa-to-target-income-support-programs-on-economic/. Published 2020.

key role of the traditional media in providing evidence-based information to the general public.[23]

Meanwhile, trusted news providers are struggling because of a steady decline in media revenues due to the dysfunction of its business models in the era of digital platforms and are less and less capable to perform their social functions effectively. The pandemic has fostered the environment conducive to the translation of the feasible policy options into concrete political steps, regulation and law-making, with Western governments all over the world responding to the demand for providing a lifeline to the quality press.

In multiple liberal countries, the industry lobbies have introduced proposals to keep the press afloat. In the UK, The National Union of Journalists has introduced a plan of action to save the industry, "essential" in keeping the governments in check.[24] The Magazine Publishers Association of New Zealand has petitioned the government for the national media industry being classified as an "essential service."[25]

The pandemic has moved governments in the West to act. The concept of journalism as part of critical infrastructure is gaining acceptance on the administrative level, with governments of Ireland and the Canadian province of Quebec including news organizations in their lists of the entities providing an "essential service."[26] Australia and New Zealand allocated tens of millions of dollars for the ailing media industry relief, stressing the essential role of news service.[27] (Meade, 2020, Faafoi, 2020.) In doing so, the politicians accommodate the popular demand coming from an overwhelming part of their constituencies. In Canada,

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[23] ZAROCOSTAS, J. *How to fight an infodemic*. The Lancet. 2020. 395(10225):676. doi:10.1016/S0140-6736(20)30461-X

[24] National Union of Journalists. NUJ launches News Recovery Plan. Published 2020. https://www.nuj.org.uk/news/nuj-launches-news-recovery-plan/

[25] EDMUNDS, S., COOKE, H. *Prime Minister "gutted" Bauer closing its doors, but says company refused wage subsidy.* Stuff, Published 2020. https://www.stuff.co.nz/business/120754944/publisher-of-metro-womans-day-closes-in-nz-amid-coronavirus-woes?rm=m

[26] Government of Ireland. COVID-19 (Coronavirus). www.gov.ie. Published 2020. Accessed October 7, 2020. https://www.gov.ie/en/publication/dfeb8f-list-of-essential-service-providers-under-new-public-health-guidelin; Gouvernement du Québec. List of essential services and commercial activities COVID-19. www.quebec.ca. Published 2020. https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/essential-services-commercial-activities-covid19/#c48457

[27] MEADE, A. *Dozens of Australian newspapers stop printing as coronavirus crisis hits advertising*. The Guardian. https://www.theguardian.com/media/2020/apr/14/dozens-of-australian-newspapers-stop-printing-as-coronavirus-crisis-hits-advertising. Published April 14, 2020; FAAFOI, K. (2020). *Media support package delivers industry request for assistance.* [online] The Beehive. Available at: https://www.beehive.govt.nz/release/media-support-package-delivers-industry-request-assistance.

most citizens support state funding to prevent failing news providers from closing down; nearly three-quarters of Canadians say social media platforms are less accurate than traditional media, according to the recent poll conducted by Nanos pollster for Friends of Canadian Broadcasting, a non-governmental organization, operating in the field of journalism (Nanos Research, 2020.) In Europe, members of the European Parliament have urged to rescue the media as a "pillar of democracy" and a deterrent to the fake news and the "infodemic."[28]

The current mixed crisis is a challenge not only for Europe's economic performance but as well for its values – social cohesion and solidarity. However, many governments will be tempted to focus on jobs and growth solely. That challenge is to be understood in a double sense, as a threat to and as an opportunity for social cohesion. In some countries, the crisis will generate an impetus towards a more sustainable and socially oriented society.

4. Recovery Instruments, Integration and Cooperation

4.1. Battle for the EU Single Market principles and recovery plan

The size and persistence of the socio-economic impact of the Covid-19 crisis are unknowable. The OECD indicated that global economic activity will fall by 6% in 2020 and OECD unemployment climbed to 9.2% from 5.4% in 2019. This is a scenario without a second wave. In the case of the second wave with renewed lockdowns, then the OECD estimated a drop of 7.6%, before climbing back to 2.8% in 2021.[29]

The European economy entered a sudden recession in the first half of this year with the deepest output contraction since World War II. To counter the spread of COVID-19, major containment measures were introduced around the world, voluntarily shutting down large parts of the economy. A string of indicators suggests that the euro area economy has operated at between 25% to 30% below its capacity during the period of the strictest confinement. Overall, the euro area economy is forecast to contract by about 8 ¾ % in 2020 before recovering at an

[28] A group of MEPs and media policy experts, LECLERCQ, C. *Health, trust and journalism: a Coronavirus Plan for the Media.* www.euractiv.com. Published 2020. https://www.euractiv.com/section/digital/opinion/health-trust-and-journalism-a-coronavirus-plan-for-the-media

[29] OECD (2020), OECD Economic Outlook, No. 107 (Edition 2020/1), OECD Economic Outlook: Statistics and Projection (Database), https://oecd.github.io/EO-Outlook_chart_2/

annual growth rate of 6% next year.[30] Pandemic time has turned to unprecedented government interventions across the EU avoiding the Single Market principles and freedoms. The current Covid-19 crisis has changed the conditions under which the common market operates. To adjust to the global structural economic changes and fluctuations requires creating a substantive common microeconomic and sectoral policy framework to continue the four freedoms that are beyond state intervention.

The White Paper on levelling the playing field as regards foreign subsidies by the EC recognises that State aids can distort the Single Market. "In the current context of the COVID-19 crisis, EU MS grant significant amounts of State aid to support individual undertakings and the EU economy as a whole. It is a situation in which State aid is an indispensable means at the disposal of public authorities to stabilise the economy and accelerate research in the coronavirus. The current situation illustrates the importance of preserving the level playing field within the internal market, even in exceptional economic circumstances."[31]

The response to COVID-19 – related economic challenges is changing the philosophy and economic behaviour as well as economic structures. In certain sectors, including health, the demands for reshoring production within the EU are becoming hard to resist. At the global level, the 'my country first' narrative is quite strong, the need to increase strategic autonomy of countries and ensure the security of supply, the desire to rescue companies that would be competitive in the post-COVID-19 as well as to save as many jobs as possible.[32]

However, as Covid-19 transmission rates have declined in European countries by June – July 2020, restrictions have been eased and economies opened up. In this situation, policymakers tried to balance continued suppression of the virus with a progressive restarting of economic activities, including cross-border flows such as tourism. In summer 2020 recovery plans are starting to be implemented at local, regional, national and European levels. The economic impact of the pandemic, and the capacity for recovery, vary greatly across sectors and regions, depending on national ability to control the spread of the virus, the duration and stringency of lockdown measures, regional economic structures and the scope to support economic activity and resilience. The massive economic, financial and social impact of the Covid-19 crisis presents a huge policy challenge at all levels

[30] European Commission. Press corner. European Commission – European Commission. Published May 6, 2020. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_799

[31] EUR Lex. EUR-Lex – 52020DC0253 – EN – EUR-Lex. eur-lex.europa.eu. Published June 17, 2020. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:253:FIN

[32] ZULEEG, F. *He Economic Impact of Covid-19 on the EU: From the Frying Pan into the Fire*. European Policy Centre; 2020. https://wms.flexious.be/editor/plugins/imagemanager/content/2140/PDF/2020/Economic_impact_of_COVID19_on_EU.pdf

of government. As the European Commission noted, "the impact and recovery potential also depend on each country's demographic or economic structure, with for instance those with a high number of small and medium-sized enterprises (SMEs) hit harder. This has a considerable knock-on impact on the Single Market and widens divergences and disparities between the MS. This is reflected in the fact that the recession will be close to 10% for some countries, compared to an average of between 6-7.5% elsewhere."[33] EU MS agreed in April 2020 on a 'road-map' for a recovery to relaunch the EU economy. The European Commission has now put forward proposals to implement the roadmap, including territorially focused interventions to support economic, social and territorial cohesion. Next Generation EU (NGEU) is a new recovery instrument of €750 billion which will boost the EU budget with new financing raised on the financial markets for 2021–2024. Besides this instrument, the Recovery Plan for Europe comprises a revised proposal for the Multiannual Financial Framework (MFF) for 2021–27 and further resources committed outside the EU budget.

The NGEU is based on three pillars: 1. Supporting the MS to recover, 2. Kick-starting the economy and helping private investment and 3. Learning lessons from the crisis. According to the A18 in Conclusions of the Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020,) "the MS shall prepare national recovery and resilience plans setting out the reform and investment agenda of the MS concerned for the years 2021-23. The plans will be reviewed and adapted as necessary in 2022 to take account of the final allocation of funds for 2023.[34] The abovementioned measures will lead to an advanced approach to the functioning of the Single Market and its instruments.

4.2. Baltic States as Strong Supporters of the Integration

Covid-19 is a major challenge for the Baltic small and open economies. In the 2008 crisis, Baltic States had very large imbalances such as unsustainable current account deficit, high inflation and pro-cyclical fiscal policy, credit and real estate bubble, booming private debt and overvalued real estate. The recovery took the Baltic States long years. The recent strong growth years with good fundamentals, such as fiscal discipline and surpluses in current accounts have all facilitated strong labour markets. Membership in the Eurozone guaranteed

[33] EUR Lex. EUR Lex – 52020DC0456 – EN – EUR-Lex. eur-lex.europa.eu. Published May 27, 2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:456:FIN

[34] European Council. European Council conclusions, 17–21 July 2020. www.consilium.europa.eu. Published July 21, 2020. https://www.consilium.europa.eu/en/press/press-releases/2020/07/21/european-council-conclusions-17-21-july-2020/

that the Baltic States are much better prepared to fight the current crisis; therefore, the long-term impact should be less pronounced. In general, the severity of the crisis in certain economic sectors could be relatively similar across EU countries. However, the tourism sector in the Baltics is not large and relatively less sophisticated manufacturing base with large food, wood and metal product sectors could also be more resilient to a downturn in demand despite more than 60% of the manufacturing is export-orientated depending on the demand in the EU, which required close ties with the rest of the bloc.[35] The spread of the virus at the beginning of the pandemic was less effective in the Baltic States than one expects; the lockdown measures have been much less severe than in other parts of Europe. The advantage of the Baltics in less densely populated territories, with a quick response to crises due to their size, as well as being relatively well digitalised, especially Estonia. However, European superpowers still are in a better position than the Baltics in larger healthcare spending, wider existing safety net, as well as more impressive additional fiscal stimulus. The governments in the Baltics are acting, providing support to both businesses and households without significant delays, however, the power of governments is limited compared with more wealthy partners in the EU. Overall, the recovery plans adopted at the EU level could help the Baltic States to recover with less socio-economic consequences relying on economic integration, cohesion and solidarity values. The crisis will ultimately change the way of doing business and working conditions and is likely to speed up the digitisation process of the European economies and shortening and simplifying the supply chains, bringing them closer to the customer. The transition to digitalisation is accelerated. Given the developed infrastructure, the Baltic States could be in a good position in the digitalisation process.

4.3. A territorial dimension of the Covid-19

According to the OECD study on the territorial impact of Covid-19, the socio-economic asymmetry of the pandemic consequences across Europe, countries and regions is largely shaped by the diversity of regional socio-economic characteristics. The regional and local impact of the COVID-19 crisis is highly heterogeneous, with a strong territorial dimension and significant implications for crisis management and policy responses (OECD 2020d.) The regional

[35] Ministry of Economics of Latvia. Government approves establishment of alternative investment fund to support enterprises affected by Covid-19 – Ministry of Economics. www.em.gov.lv. 2020. https://www.em.gov.lv/en/news/28479-government-approves-establishment-of-alternative-investment-fund-to-support-enterprises-affected-by-covid-19

differences appeared to be significant particularly in between more-developed and less-developed regions.

Many Southern regions in the EU are regarded as being the worst affected. The key differences among MS and EU institutions are on the scale and mechanism of the European Recovery Package, its size, importance of grants, loans and guarantees, the methods for allocating funding etc. resulted in the debate that clearly shows different national positions mostly between southern EU countries (Italy and Spain) and the smaller net payer countries (Austria, Denmark, Finland, Netherlands, Sweden) / The Eastern European MS, as well as Cyprus and Malta, would prefer a package predominantly or wholly made of grants. Most countries, including Bulgaria, France, Germany, Ireland, Italy, Romania and Slovenia, are in favour of the EC proposal of a mix of loans and grants. Furthermore, there is no clear consensus on links of the Recovery and Resilience fund (RRF) with the European Semester and concern about the absorption capacity for REACT-EU – Recovery Assistance for Cohesion and Territories of Europe, which mechanism is based on flexible cohesion policy grants for municipalities, hospitals, companies via MS' managing authorities. No national co-financing is required. Additional issues, prominent in the debate: the relationship between investment and reforms, the role of the EU Competition policy, especially the control of State aid. However, a Franco-German agreement had enabled the approval of the EC plan for recovery, in which the role of Cohesion policy in responding to the sectoral and territorial impact of the pandemic was recognised.[36]

Scholars and experts express their opinion that a successful response to COVID-19, which ignores societal or territorial borders, must build on cooperation. To do so also the analysis of impacts of COVID-19 needs to go beyond national borders and take a European approach. However, one-size-fits-all approaches will not be able to help all regions in their recovery, nor to utilise the diverse potential for recovery in Europe. Sectors that are less affected by COVID-19 policy responses might play a crucial role in the recovery processes.[37] EU leaders have to be fully aware to see the simultaneous challenge of a new global reality and the trends of internal weakening. Consolidation and improved functioning require bold innovation and a complete renovation in key areas of EU integration.

[36] BACHTLER, J., MENDEZ, C., WISHLADE, F. *The Recovery Plan for Europe and Cohesion Policy: An Initial Assessment.* European Regional Policy Research Consortium Paper 20/1. European Policies Research Centre, Glasgow and Delft; 2020.

[37] BÖHME, K., BESANA, F. *Understanding the Territorially Diverse Implications of COVID-19 Policy Responses.* 2020.

4.4. A Complex Concept of "Health for all and in all policies"

Health is "priceless"; achieving and maintaining the best health possible for individuals and the population is both costly and requires a considerable workforce. It is however increasingly recognised that health is a major contributor to the "wealth" of nations. Furthermore, in recent years it has become generally acknowledged that health is a much more complex concept than the absence of disease; health is seen as a strong predictor of economic growth. The concept of Health for All and Health in all Policies (HiaP) emerged in the 1970s-1908s. In 1981, Dr. Haldan Mahler, Director General (1973–1983) of the WHO, defined the basic elements of the concept as follows: "Health For All implies the removal of the obstacles to health – quite as much as it does the lack of doctors, hospital beds, drugs and vaccines."[38]

Health in All Policies (HiAP) was formally legitimated as an EU approach in 2006. It resulted from more long-term efforts to enhance action on considering health and health policy implications of other policies, as well as recognition that European-level policies affect health systems and scope for health-related regulation at the national level. However, the implementation of HiAP has remained a challenge. European-level efforts to use health impact assessment to benefit public health and health systems have not become strengthened by the new procedures. As a result of the Lisbon Treaty, European-level policymaking is expected to become more important in shaping national policies. HiAP has at the European level remained mostly as rhetoric but legitimates health arguments and provides policy space for health articulation within EU policymaking. HiAP is a broader approach than health impact assessment and at the European level requires consideration of mechanisms that recognise the nature of European policymaking.[39]

While the "Health in all policies (HiAP)" concept, by excellence an interdisciplinary approach, and the urgent need for its implementation is now widely recognized, its real implementation at all levels of government is lagging. As a result, the public health area of human endeavour, facing already for several decades, the need for reform.[40]

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[38] MAHLER, M. The Meaning of "Health for All by the Year 2000". *American Journal of Public Health*, 2016;106(1):36-38. doi:10.2105/ajph.2016.106136

[39] KOIVUSALO, M. The state of Health in All policies (HiAP) in the European Union: potential and pitfalls. Journal of Epidemiology & Community Health. 2010;64(6):500-503. doi:10.1136/jech.2009.102020

[40] BERLIN, A., Interdisciplinarity as an Increasingly Implied and Applied Concept, in: Interdisciplinarity in Social Sciences: Does It Provide Answers to Current Challenges in Higher Education and Research? (MURAVSKA,T., OZOLINA, Z., eds.). University of Latvia Press, 2011, p. 136.

The new European Policy for Health – Health 2020, and the European Action Plan for Strengthening Public Health was adopted by the 53 Member States of the Region during the sixty-second session of the WHO Regional Committee for Europe in September 2012.[41]

The current Covid-19 health crisis not only worsened but also highlighted the EU vulnerability to global challenges and turbulence. There is an imperative need to maintain the long-term goals of health policies and research responding to economic and social challenges. Moreover, the crisis requires to improve the resilience, wellbeing and mental health of the population and mitigate health inequalities during and after pandemics. The globally interconnected nature of health and the cross – and trans-disciplinary nature of health research is implemented within the European Research and Innovation Framework. A facilitated global research collaboration through Horizon Europe could ensure that Global Health innovations and solutions benefit all parts of the world including EU countries.[42]

As the crisis shows, there is growing confidence that reforms of health systems and increase of European Community competence in, for example, tackling cross-border health threats and strengthening health systems and healthcare workforce. Several instruments are suggested by the EC jointly supported by the MS. The most prominent is the investment of €9.4 billion from the EU's next long-term budget in the EU4Health programme, this is 23 times more than health funding for 2014-2020.[43] The programme will be launched in 2021 and will strengthen national systems by funding initiatives such as tailor-made support and advice to countries, training for healthcare professionals for deployment across the EU. Additionally, further investment in health will be provided through other EU programmes including the European regional development and cohesion funds for medical infrastructure, Horizon Europe for health research and innovation, Digital Europe programme, European Social Fund and rescEU – EU emergency response. A special focus in the EU programmes is on vulnerable groups.[44]

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[41] WHO. About Health 2020. Published 2012. Accessed October 7, 2020. https://www.euro.who.int/en/health-topics/health-policy/health-2020-the-european-policy-for-health-and-well-being/about-health-2020

[42] European Commission. *On Establishing the Specific Programme Implementing Horizon Europe-the Framework Programme for Research and Innovation*; 2018. https://ec.europa.eu/commission/sites/beta-political/files/budget-may2018-horizon-europe-decision_en.pdf

[43] European Commission (2020*). Opening Remarks by Commissioner Kyriakides at the Press Conference on the EU4Health Programme*. [online] European Commission – European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_20_965

[44] European Civil Protection and Humanitarian Aid Operations – European Commission. (2020). *EU budget for recovery: €2 billion to reinforce rescEU direct crisis response tools.* [online] Available

Furthermore, to support harmonisation of actions, the EU will create a common reserve of medical equipment, which is the first-ever common European stockpile of emergency medical equipment created under rescEU-EU emergency response to help fill the lack of resources, which the many Member States lacked while struggling in spreading the pandemic in Europe. The EC will finance 90% of the cost of the reservation, assigning the European Emergency response Coordination Centre to manage the distribution of the equipment. According to estimates, the initial EU budget for this reserve is 50 euros million euros.[45]

The efficient and better resilience of the national public health systems will be improved with their further harmonization based on the "one health approach" methodology. Investment in disease prevention programmes is foreseen in all MS. As a result of the joint efforts of the MS, national health systems become more efficient and resilient.

The above initiatives at the EU level could lead to a more harmonized approach to the public health and healthcare policies among MS and the stronger role of the EU and increase its competence in the long-term.

Health, as a human capital ingredient, is especially relevant for sustained economic development and social cohesion. These two political objectives figure now prominently on the EU agenda and play a central role in the European Union's Social and Cohesion policies.

5. The Other Side of the Pond: Deficit Soaring for the Sake of Well-being

Admittedly, the conceptually similar approach has been adopted by Western governments in various geographies and designed to ensure that people have food on the table and keep a roof over their heads. For Canada, the pandemic resulted in the recession in the first quarter of 2020, with national GDP falling unprecedentedly, by 11.6% in April. It had been preceded with, as per C.D. Howe Institute's Business Cycle Council definition, "a pronounced, persistent, and pervasive decline in aggregate economic activity," with GDP and employment as its main metrics.[46]

at: https://ec.europa.eu/echo/news/eu-budget-recovery-2-billion-reinforce-resceu-direct-crisis-response-tools_en.

[45] European Commission (2020a). *COVID-19: Commission creates first ever rescEU stockpile of medical equipment.* [online] European Commission – European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476

[46] GORDON, J., JOHNSON, K. *Canada GDP likely to rise 3 % in May on gradual reopening.* Reuters. 2020. https://www.reuters.com/article/us-canada-economy-gdp/canada-gdp-likely-to-rise

Thirty percent of the workforce or 5.5 million Canadians either lost their jobs or saw their working hours significantly reduced over March and April, with expected economy contraction by 6.8 percent in 2020, its sharpest drop since the Great Depression, before rebounding by 5.5 percent in 2021, according to the official forecast.[47]

To address the crisis, the government of Canada has taken decisive actions, coming up with a historic plan of emergency support measures, with spending levels not seen since the Second World War. The federal government expected that the deficit to hit C$343 billion (US$257 billion) in 2020 due to pandemic-related support programs. The government rejected the criticism, stressing the primary goal of the anti-crisis expenditures: the protection of the health and economic well-being of the nation, with policymakers' inaction fraught with a risk of loss of millions of jobs while "putting the burden of debt onto families and jeopardizing Canada's resilience."[48] Notably, Canada's economic response plan, representing nearly 14 percent of GDP, included more than $230 billion in measures to protect the health and safety of Canadians and provide direct support to citizens and employers, and up to $85 billion in tax and customs duty payment deferrals to meet liquidity needs of households and entrepreneurs. However, upon recovery from COVID-19, Canada was expected to maintain its low debt advantage among G7 countries. As a result of the government's handling of the pandemic, the popularity of governing parties across Canada skyrocketed, including Trudeau's federal Liberals which enjoyed the boost in support, the biggest for a minority government since the 1950s.[49]

It is apparent that the EU's way of interactions with its member states can be compared with the Canadian model of federal-provincial collaboration, where locally elected governments exercise significant autonomy in policymaking. That was once again illustrated by the counter-crisis measures, with Ottawa taking the lead in distributing federal money while provincial governments followed

-3-in-may-on-gradual-reopening-idUSKBN241217; C.D. Howe Institute's Business Cycle Council. Canada Entered Recession in First Quarter of 2020: C.D. Howe Institute Business Cycle Council. C.D. Howe Institute. Published 2020. https://www.cdhowe.org/council-reports/canada-entered-recession-first-quarter-2020-cd-howe-institute-business-cycle-council

47 Government of Canada. Overview of Canada's COVID-19 Economic Response Plan. canada.ca. Published July 15, 2020. https://www.canada.ca/en/department-finance/services/publications/economic-fiscal-snapshot/overview-economic-response-plan.html

48 TASKER, J-P. *Ottawa to post $343B deficit as spending hits levels not seen since Second World War.* CBC. Published 2020. https://www.cbc.ca/news/politics/bill-morneau-fiscal-update-budget-deficit-1.5641864

49 GRENIER, É. (2020). *Boost in support for Liberals the biggest for a minority government in 60 years*. [online] CBC. Available at: https://www.cbc.ca/news/politics/boost-in-support-for-liberals-the-biggest-for-a-minority-government-in-60-years-1.5633289

their own scenarios in tackling the spread of the coronavirus and multi-speed reopening.[50]

The similarity between the approaches to tackling the crisis invites broader comparison, including in the scope and essentiality of multilateral cooperation, both regional and international ones. For relatively small or midsize open economies like Canada's and those if some EU MS, the international cooperation is of vital importance; it will be economically essential to remain open and interlinked with the global economy and cooperate in the framework of partnership agreements with close allies, for instance, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) The latter has played an important role in paving the way for the post-pandemic economic recovery, notably by keeping essential medical supply chains open and, ultimately, reopening the EU's borders to citizens from 15 non-EU countries, including Canada, but excluding the US.[51]

The depth and nature of the crisis imply that there will be many structural changes, and the world's approach to economic development will be corrected over time to "a new normal". The crisis could generate an impetus towards more sustainable and socially oriented economies. However, many governments will be unable to shape the global environment individually but are reliant on cross-border trade, international trade and investment. Finally, the global nature of the crisis requires international cooperation, which, if maintained, can help in addressing other global crises – like climate change.

6. Conclusions

The spread of the novel coronavirus has underscored some fundamental problems related to state vs market contributing to Trump's protectionist era. A new wave of Marxist-institutionalist inter-disciplinary discussions attempting to explain the potential synergies between the public and the private domains in the functioning of societies is gaining strength as a result of a need for a different

[50] BOUTILIER, A. (2020). *Ottawa sending $19B to provinces for COVID-19 aid*. [online] thestar.com. Available at: https://www.thestar.com/politics/federal/2020/07/16/ottawa-sending-19b-to-provinces-for-covid-19-aid.html; TETREAULT, M. *COVID-19: Recovery and Re-opening Tracker.* McCarthy Tétrault. Published 2020. https://www.mccarthy.ca/en/insights/articles/covid-19-recovery-and-re-opening-tracker

[51] The Canadian Press (2020). European Union to rally Canada, allies to help WHO after U.S. halts funding. Global News. [online] 25 Apr. Available at: https://globalnews.ca/news/6867771/eu-who-funding-canada/; The Associated Press (2020). Canadians to be allowed into EU countries, but U.S. citizens shut out. [online] CBC. Available at: https://www.cbc.ca/news/world/european-union-travel-list-1.5632422

approach applied in tackling the 2020 crisis. The neoliberal agenda in 2008 has been changed to unprecedented state interventions by Western governments, greatly extending the generosity of the welfare state.

A stable economy is essential for Western countries and is a key part of the EU's role in the changing world. The need to reassess the role of the government and good governance is discussed at all levels. The crisis has highlighted solidarity as one of the fundamentals of the European integration and the opportunity to maintain the function of the Single Market based on four freedoms for economic benefits, cohesion and wellbeing of people. COVID-19 has shown that there can be no health policy and adequate social support to people without solidarity and strong state capacity. As the crisis shows, there is growing confidence that upcoming reforms of health systems and social support to the population could lead to an increase of the European Community competence in related policies. It is assumed that building a sustained economic recovery in the EU will require an unprecedented level of political and cooperation among governments, businesses, and individuals.

The same trend could be observed in the similar political, social, and economic setting across the Atlantic: in Canada at the federal and provincial levels. "Whatever it takes" is the motto to preserve lives and reduce economic declines. A transition to another growth model corresponding to "a new normality" has to be developed and aimed at public services, common goods and solidarity in the heart of the economy and social policies.

The above-indicated aspects are subject to further strong cross-disciplinary research with a comparative approach to outbreak response as well as impacts on social dynamics by different regions and countries in the West, considering societal and cultural structures, health system preparedness and resilience are needed. The results could show to the policymakers which interventions by governments and to what extent have been most successful in controlling the epidemiological dynamics and economic losses.

We conclude that in times of economic hardship it is important that universities, governments and businesses collaborate in research, innovation and development. With no clear end to the current economic situation in Europe, North America, and other parts of the world, there is more need than ever for strategic partnerships and cooperation between all partners.

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In the Shadow of the Global Pandemic: Deepening or Shrinking Cooperation Between China and the Baltic States?

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Summary: The paper addresses cooperation between China and the Baltic states and explores future scenarios of political and economic relations in the context of the global COVID-19 pandemic. The paper is divided into three major parts. The first segment outlines the Baltic perspective on China's global and regional activities and the proposed Health Silk Road. The second part focuses on structural factors and recent development of economic cooperation between China and the Baltic states. The third part speaks of strategic and political challenges in engaging with China during the pandemic and in its aftermath. The paper provides a prognosis that co-existing trends of both deepening and shrinking cooperation will transpire in the relations between the EU and China, and specifically the Baltic states and China. Latvia's choices, among others, will be impacted by international obligations, including the transatlantic ties.

Keywords: EU, China, Baltic states, COVID-19, trade, investment, Health Silk Road, trans-Atlanticism

1. Introduction

The global pandemic of COVID-19 has become a formative development on a global scale. The coronavirus was first identified in China and then spread exponentially around the world. It has brought the global population to a standstill. Apart from the epidemiological repercussions, the virus has contaminated

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and curtailed interstate relations and cooperation. The Baltic countries have advocated multilateral solidarity, relevance of inclusive international organizations and bilateral cooperative frameworks. The Baltic states have underlined importance and engagements with global centres of power. China remains one of such global political and economic players. However, apparently multilateralism and cooperation have been strongly tested by the global pandemic, which has also demonstrated divergence of societal models, approaches and narratives.

This study is aimed at the analysis of cooperation between China and the Baltic states and exploring future scenarios of political and economic relations in the context of the global pandemic. The paper is divided into three major parts. The first segment outlines the Baltic perspective on China's global and regional activities and the proposed Health Silk Road during COVID-19 pandemic. The second part focuses on structural factors and recent development of economic cooperation between China and the Baltic states. The third part touches upon strategic and political challenges in engaging with China during the pandemic and in its aftermath.

2. The symbolism of China's Health Silk Road and the Baltic perspective

China took an active and assertive stance during the COVID-19 pandemic, exploring avenues to turn COVID-19 into an opportunity for soft power achievements -- arguably, this goal has not been reached, as COVID-19 has contributed to more negative views on China globally[1]. It was for this reason that China's president Xi Jinping reiterated a proposal to build a Health Silk Road to Italy's Prime Minister Giuseppe Conte during the initial stage of the global pandemic. The concept had been in limited use since 2015,[2] and was noticed after the 2017, when an MOU on Health Silk Road was signed between China and the World Health Organization. According to WHO Director General Tedros Adhanom Ghebreyesus, pandemic prevention was one of the top goals of the proposed

[1] Silver, L., Devlin, K., Huang, C. *Unfavorable Views of China Reach Historic Highs in Many Countries.* [online]. Available at: https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/

[2] The National Health Commission of the People's Republic of China (the successor to National Health and Family Planning Commission. See. E.g., 国家卫生计生委关于推进"一带一路"卫生交流合作三年实施方案 *(2015-2017)* [National Health and Family Planning Commission on promoting the "Belt and Road" three-year implementation plan for health exchange and cooperation (2015-2017)]. [online]. Available at: http://www.nhc.gov.cn/wjw/ghjh/201510/ce634f7fed834992849e9611099bd7cc.shtml

cooperation from its initiation: "If we are to secure the health of the billions of people represented here, we must seize the opportunities the Belt and Road Initiative provides. … First, we must put in place systems to contain outbreaks or crises where they start and prevent them from becoming epidemics. WHO has proposed a strategic partnership with China to target vulnerable countries along the Belt and Road and in Africa?"[3]

The fact that, in 2020, China chose Italy, a G7 member and a developed high-income country according to the UN classification, rather than "vulnerable countries along the Belt and Road and in Africa" for re-announcing the Health Silk Road, can be explained both through opportunity and symbolism. From the perspective of opportunity, Italy had been experiencing an overwhelming wave of the pandemic, at that time matched only by the earlier situation in China. Therefore, it was coincidental that China's offer of supplies and expertise, framed to include PRC normative discourse, was made to Italy and not some other country. At the same time, the fact that it was, indeed, none other than Italy, which was the first G7 country to join BRI during the previous year and largely perceived as a symbolic "civilizational partner" in China, allowed China to reference a higher, new form of cooperation. When Italy joined BRI in 2019, Xi Jinping wrote in a signed article in *Corriere della Sera*: "China and Italy are both stellar examples of Eastern and Western civilizations, and both have written splendid chapters in the history of human progress. As early as over 2,000 years ago, China and ancient Rome, though thousands of miles apart, were already connected by the Silk Road."[4] Therefore, in the eyes of China, from several angles, Italy is particularly well-placed to become the launch-point for a new championing extension of the Silk Road, and the setting of the roll-out of the cooperation signals its high profile. Italy's initial positive reaction was largely influenced by both despair and disappointment. Foreign Minister Luigi Di Maio claimed that Italy requested European partners but did not receive support which could be comparable to that of China. Although rather slowly, eventually the EU has been able to mobilize its financial and medical resources and ensure support to the worst hit member states of the community. This has also allowed to take much more cautious stance with regard to China's initiatives essentially aimed to promote its economic interests and standing in Europe.[5]

[3] World Health Organization. *Towards a Health Silk Road.* 2017. [online] Available at: https://www.who.int/dg/speeches/2017/health-silk-road/en/

[4] Ministry of Foreign Affairs of the People's Republic of China. *Xi Jinping Publishes a Signed Article in Italian Newspaper.* 2019. [online] Available at: https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpdydlmngfggsfw/t1647543.shtml

[5] TAGLIAPIETRA, A. *The European Union Won't Be Fooled by China's Health Silk Road.* [online] Available at: https://www.gmfus.org/blog/2020/09/02/european-union-wont-be-fooled-ch

The Baltic reaction to COVID-19 and the subsequent humanitarian cooperation with China in the shadow of the pandemic has been mixed. During the initial stage, the decease outbreak was associated with China and some more densely populated globalized communities in other countries but was not perceived as an evident and immediate threat domestically. During this stage, the interest in COVID-19 related exchanges with China remained only among those directly involved with China – solidarity events were organized by the Latvian Chinese Studies Association, and an online charity art auction took place upon the initiative of Baltic China Agency for Cooperation of Commerce, Culture and Education, in close cooperation with the Embassy of the PRC in Latvia. Still, already during this stage, Estonia and Latvia were among the EU member states that provided assistance to China: "As of 21 February, over 30.5 tonnes of personal protective equipment to China has been provided by France, Germany, Italy, Latvia and Estonia. On 19 February, France sent a plane to Wuhan with a 20-tonne cargo of surgical masks, gloves, thermometers and disinfectant, which also included material from Latvia and Estonia."[6]

After solidarity came the perception of threat, as COVID-19 quickly approached the Baltic countries. The state of emergency was declared in all Baltic states: on February 26 in Lithuania, March 12 in Latvia, and March 13 in Estonia. It was during this stage that the humanitarian cooperation with China intensified and several medical supplies purchases from China were made by the Baltic states, some organized by individual countries, such as the deliveries operated by the Latvian national airline *airBaltic*[7], some – in regional cooperation, such as the joint Estonian-Latvian delivery. Several direct private donations reached the Baltic states organized by Baltic businesses trading with China and the local Chinese community members, e.g. the 10 000 masks donated to the Latvian Children's Hospital. Such donations were not used as large-scale publicity opportunities by the Embassy of the PRC, which remained a rather low-key actor during the process. As the supply purchase tension subsided and the spread of COVID-19 in the Baltic states reached a containment phase, it decreased the need for humanitarian cooperation with China. There was also a realization of the mistakes committed during the initial procurement campaigns from China.[8]

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6 European Commission. *The EU's Response to COVID-19. 2020.* [online] Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_307

7 Kinca, A. *«airBaltic» nogādā Latvijā teju miljonu sejas aizsargmasku un respiratoru.* [onlin.] Available at: https://www.lsm.lv/raksts/zinas/latvija/airbaltic-nogada-latvija-teju-miljonu-sejas-aizsargmasku-un-respiratoru.a353727/

8 VĒBERE, I. *Operācija "Izmisums": kā Latvija krīzes laikā pirka maskas.* [online] Available at: https://rebaltica.lv/2020/04/operacija-izmisums-ka-latvija-krizes-laika-pirka-maskas/

An interesting case of COVID-19 sparkling anti-PRC controversy took place in Lithuania: "Around 200 Lithuanian politicians and public figures sent an open letter to President Gitanas Nausėda earlier in April, asking him to support Taiwan in its dispute with the WHO and advocate for the country's international recognition,"[9] which was later overturned by the President. This case, however, should be analysed in the context of a wider anti-PRC sentiment sparked by several scandalous events in 2019, leading to the conclusion that Lithuania currently is the most China-critical country among the Baltic states, with COVID-19 having amplified this sentiment.

China clearly attempted to underline its importance and support through a variety of channels. To exemplify the exclusivity of 17+1 cooperation, China organized a video-call of epidemiologists from China and their counterparts from 17 countries involved in China's format of cooperation with Central and Eastern countries, including the Baltic states, on March 13 – a week earlier than a similar call was organized with the EU member-states.[10] The Baltic experts involved referred to the call as informative and not centring on political topics, although containing official Chinese messages.[11] However, overall a balance was struck between the needs of the Baltic states in countering the epidemic and China's actions. The Baltic states remained pragmatic, used the cooperation with China to procure the medical equipment unavailable elsewhere, and opted for scandal-less resolution of quality-related issues. Most importantly, the Baltic states did not use the COVID-19 crisis to challenge the EU or express any dissatisfaction with it. China, on the other hand, did not use the situation to assertively push its political agenda and pressure the Baltics to adapt its position.

Normally, a critical situation exposes issues between states and can serve as a catalyst for conflict. In the Baltic case, however, the COVID-19 lesson was rather the opposite. The crisis demonstrated, first of all, the potential of cooperation between the Baltic states themselves, and, secondly, the potential of joint, coordinated action in conducting cooperation with China. The joint repatriation flights run by *AirBaltic*[12] and Baltic negotiations on vehicle con-

[9] BNS/LRT.lt staff. *Calls to support Taiwan 'open provocation', says China's ambassador to Lithuania.* [online] Available at: https://www.lrt.lt/en/news-in-english/19/1169159/calls-to-support-taiwan-open-provocation-says-china-s-ambassador-to-lithuania

[10] YU, S. *Xinhua Headlines: China showcases spirit of sharing by offering CEE countries COVID-19 insights*. [online] Available at: http://www.xinhuanet.com/english/2020-03/14/c_138877712.htm

[11] BĒRZIŅA-ČERENKOVA, U. A. Latvia: Mask Diplomacy in Minor Key. [online] Available at: https://www.ifri.org/sites/default/files/atoms/files/etnc_special_report_covid-19_china_europe_2020.pdf

[12] *airBaltic to carry Baltic residents from Frankfurt and London to Riga.* [online] Available at: https://bnn-news.com/i-airbaltic-i-to-carry-baltic-residents-from-frankfurt-and-london-to-riga-211633

voys[13] with Poland serve as examples of efficient Baltic crisis coordination, whereas the joint medical equipment purchases organized by the Estonian side containing deliveries for Latvia[14] demonstrated coordinated action in doing business with China. Although these purchases did not fall under the "Partnership Agreement between the Ministry of Health of the Republic of Latvia, the Ministry of Social Affairs of the Republic of Estonia and the Ministry of Health of the Republic of Lithuania on Joint Procurements of Medicinal Products and Medical Devices and Lending of Medicinal Products and Medical Devices Procurable Centrally"[15] still, the existence of this partnership and joint procurements in the past have set an institutional framework that could be initiated during the time of crisis.

With regard to the rather vague idea of the Health Silk Road translating into Sino-Baltic cooperation, both a low-key and a high-key scenario seems probable. First of all, the already existing cooperation projects, such as the investment of the gene sequencing equipment producer BGI in a production facility in Latvia, could be identified as upgraded health cooperation. A second, more ambitious scenario would include "certain elements of the Health Silk Road being linked up to China's Digital Silk Road"[16], introducing med-tech cooperation in regions that are not interested in the traditional BRI infrastructure offer, such as the Baltic states. The Baltic states possess highly skilled human capital in medical and technical fields, but do not yet hold a well-established niche in the global med-tech market, therefore are fitting for new initiatives in this regard.

Although cooperation in the field of health, be it under the banner of Health Silk Road or otherwise, holds the potential for the Baltics to move away from the modest results of the BRI cooperation, at the same it must be contextualized with existing economic interests and political challenges. Clearly, as the cooperation will inevitably include aspects of information technology and patented

[13] LETA/BNS/TBT staff. *First convoy from Poland comes to Lithuania, Latvians, Estonians escorted to Latvia.* The Baltic Times, March 17, 2020.

[14] *The Kremlin claims the Estonian purchase of protective gear was Russian humanitarian aid.* [online] Available at: https://estonianworld.com/security/the-kremlin-claims-the-estonian-purchase-of-protective-gear-was-russian-humanitarian-aid/

[15] *Partnership Agreement between the Ministry of Health of the Republic of Latvia, the Ministry of Social Affairs of the Republic of Estonia and the Ministry of Health of the Republic of Lithuania on Joint Procurements of Medicinal Products and Medical Devices and Lending of Medicinal Products and Medical Devices Procurable Centrally.* Came into force – May 2, 2012. [online] Available at: https://likumi.lv/ta/id/248008-partnership-agreement-between-the-ministry-of-health-of-the-republic-of-latvia-the-ministry-of-social-affairs-of-the-republic-of-estonia-and-the-ministry-of-health-of-the-republic-of-lithuania-on-joint-procurements-of-medicinal-products-and-medical-devices-and-lending-of-medicinal-products-and-medical-devices-procurable-centrally

[16] LANCASTER, K., RUBIN, M. RAPP-HOOPER, M. *Mapping China's Health Silk Road.* [online] Available at: https://www.cfr.org/blog/mapping-chinas-health-silk-road

intellectual property, as well as Chinese med-tech companies wanting to operate in the EU, the upgraded health cooperation risks to actualize the ongoing controversies between China and the EU regarding data security, technology transfer and a level playing field, affecting the Baltic states.

3. Economic cooperation: structural interests and trajectories

The interaction between China and the Baltic states during the COVID-19 pandemic revives the wider debate on the character and prospects of the economic and political engagement. Trade, investment and connectivity cooperation indicate both structural opportunities and challenges, as well as prospects of future trajectories. Insofar, the picture of cooperation has been rather mixed.

Trade in goods and services between China and the Baltic countries has been, though increasing, rather limited. One of the considerable concerns of the Baltic countries are trade imbalances. Latvia-China trade relations are indicative to illustrate this general trend. Latvia's average annual export share to China from 2015 to 2019 amounted to only 1,2%, whereas the import share from China to Latvia is slightly higher: 3,2%. During these five years the export to China gradually increased, the biggest increase was identified in 2017 – by 22.3%. However, negative trade balance remained: in 2019 as compared with 2018 export dropped by 0,8%, but import increased by 4,1%. Trade asymmetries between China and the Baltic states are most likely to remain in the foreseeable future.

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.[17] Furthermore, Baltic exports to China are strong in the food sector (particularly dairy produce); while Chinese exports to the three Baltic states are strong in finished industrial products (machinery, technology). The terms of trade provide China's exports with an increasing price, meanwhile, the prices of the Baltic raw resources rise less quickly. Consequently, a gap in value increasingly opens up in China's favour and against the Baltic states. The pattern of Sino-Baltic trade also threatens to establish a neo-colonial pattern between primary resources

[17] KALENDIENE, J. DAPKUS, M. et al. *Nordic-Baltic Countries and China: Trends in Trade and Investment: A Business Perspective*. [online] Available 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

and finished industrial product.[18] Such structural imbalances are compounded by imbalances in relative importance: economic links with China are of rising significance for the three Baltic countries, but economic links with the Baltic countries are of much less significance for China.[19] This also gives China a greater power in negotiations with the Baltic states, who operate in structural terms from a position of relative weakness. As the examples of countries in South East Asia, including Vietnam[20] and Cambodia, show, economic overdependency on China, once a reality, is very difficult to shake, and it can also hold geopolitical implications.

As far as investments are concerned, trajectories are similar to those of trade. Investments are mutually insignificant but growing. Generally, Chinese firms demonstrate an increasing interest in opportunities for investment in the Baltic Sea Region, especially in the fields of natural resources, energy, and technology. The largest recipient of China's investment during the recent years was Lithuania -- the biggest country of the Baltic states. According to Chinese national statistics, it accounts for more than 75% of Chinese outward investment in the Baltic states. China's investment in Lithuania has increased from 2.3 million EUR in 2013 to 440.3 million EUR in 2017. Most of it is concentrated in manufacturing and technical services. For example, in 2012, China's largest producer of ATM machines, CRG Banking, that accounts for 23% of the Chinese market, made its first big investment in Lithuania. The importance of the transportation sector for Chinese investors is illustrated by the SF Express investment and cooperation with Lithuanian Post, the state-owned postal and shipping services company. Investment of SF Express is also one of the top 10 Chinese outward investments in transport and communications sector in EU. This cooperation agreement and investment were a good injection into the state-owned company that had problems in sustaining profitable activities and maintaining a competitive edge with private courier companies.

China's outward investment in the other two Baltic states – Latvia and Estonia – remains lower. Estonia is among the leading countries in Eastern and Central Europe regarding foreign direct investment per capita. Until 2013, Estonia was also the leading country in the Baltics to attract Chinese investment. Despite a good geographical location and favourable infrastructure for maritime roads, there have been only a few initiatives for China's investment in the transport sector. Most of the Chinese outward investment in Estonia is concentrated in

[18] SCOTT, D. China and the Baltic states: strategic challenges and security dilemmas for Lithuania, Latvia and Estonia. *Journal of Baltic Security*, 2018, no. 4(1), pp. 25–37.

[19] MARTYN-HEMPHILL, R., MORISSEAU, E. *Small Step for China – Giant Leap for the Baltics?* [online] Available at: https://www.baltictimes.com/small_step_for_china_-_giant_leap_for_the_baltics_/

[20] '*Vietnam's economy is much dependent on China', legislator warns*. [online] Available at: https://tuoitrenews.vn/society/10196/vietnams-economy-is-much-dependent-on-china-legislator-warns

electrical machinery manufacturing and business service sectors. In 2017, Estonia was lagging behind its Baltic neighbours, however a significant increase of Chinese FDI could be observed: from 42.7 million EUR in 2015 to 76.3 million EUR in 2017. Estonia is a leader in a number of start-ups among the Baltic states. Start-ups are usually funds-consuming. Chinese investors may find an opportunity here as some of them already did by supporting Estonian start-up Testlio – a global community of test engineers focused on bug finding and quality assurance. More cooperation opportunities between China and Estonia in educational, medical and health issues were confirmed since 2015, however, as China is becoming more securitized in the region, the fields of cooperation are also becoming narrower.

China's outward investment to Latvia stands slightly above the Estonian level. China ranks 51st among the foreign investors and 44th by the contributions to the share capital in Latvia. At the beginning of 2016, 166 companies had Chinese capital in the country. The 2019 BGI investment project of China in the field of life sciences has opened a new chapter in the Latvian-China economic relations. The world's largest DNA gene sequencing corporation with headquarters in Shenzhen, China recently has chosen Latvia as the main base for the production of gene sequencing equipment and reagents, as well as a research and development centre serving the whole Europe. The project is a multi-annual and multimillion investment with several stages of development: BGI Life Science Centre, Latvia BGI Wuhan Life Science, and Technology Park and BGI GC Centre, to be completed in 2022. This investment project of China is perceived with cautious optimism as a "success story". BGI shares are listed on the Hong Kong Stock Exchange; BGI employs more than 5,000 researchers in several countries around Europe, Asia, Australia and North America; the project in Latvia – Latvia MGI Tech, a company founded in Hong Kong, is the corporation's largest project outside China. The Chinese side has taken into account that Latvia is relatively well-developed in the field of life sciences, has a good reputation, and the field of life sciences has special support from the government of Latvia. Also, as Latvia can provide quality infrastructure avoiding issues specific to Western Europe -- production costs and queues, among others – BGI is interested in growing the Latvian subsidiary into an HQ for a Europe-wide platform. This project is a serious step towards the development of an infrastructure for the life sciences and technology genome on the European scale – if Latvia will use the project as a springboard to foster an international ecosystem, it could become one of the European leaders in the field of life sciences. It can be argued that the BGI/MGI investment project in Latvia is a key result of "17+1" cooperation, as it is both tangible and substantial.[21]

[21] *Opening of MGI Latvia Builds Foundation for China-Europe Life Science Cooperation.* [online] Available at: http://www.baltic-course.com/eng/good_for_business/?doc=152786

Latvia's strength is its geographical position. It is a natural transport hub with three largest ports and the biggest airport in the Baltics, as well as the upcoming inter-modal cargo terminal Salaspils TEN-T linked with the 1520 mm rail and Rail Baltica core line – the European standard track gauge of 1435 mm.[22] A perceived milestone for BRI was in November 2016 when a trial container train from Yiwu City in Zhejiang province in China arrived to Latvia after completing an 11,000 km journey over 12 days through North-eastern China and Siberia. A Memorandum on Strategic Cooperation was signed in September 2017 between the Freeport of Riga Authority and the Port of Lianyungang, with the goal to promote the development of multi-modal transport services along the Eurasian land transport corridor. Still, the political will alone was not enough to boost the routes, and no major logistic developments followed. Furthermore, as various Silk Road routes are proposed, the ongoing physical security of such infrastructure schemes becomes an issue not just for China but also for participating states like those in the Baltic.[23]

It is not surprising that Klaipėda – the important container port with its largest retail chain in Lithuania and the Baltic states – has already attracted Chinese interest. In 2016, the authorities of the Port of Klaipėda explored the possibility of cooperation with China Merchants Group for the creation of a new deep-water port able to receive large container ships of the Baltmax class gaining access through acquisition of Klaipedos Smelte, one of the Klaipeda port's biggest stevedoring companies,[24] but the deal fell through as the Lithuanian side did not want to give up the controlling stake.[25] A similar outcome came about in 2019, as China's interest to purchase a controlling interest in the Port of Klaipeda stocked suspicions that Beijing seeks political leverage that could be used to hamper NATO military operations in the North Atlantic in a crisis[26]. In this context, the Lithuanian President Gitanas Nauseda pointed out that Chinese investment into a deep-water port construction would be problematic due to European-wide security concerns and can undermine

[22] *Closed competition for Salaspils freight terminal design announced*. [online] Available at: https://www.railbaltica.org/closed-competition-for-salaspils-freight-terminal-design-announced/

[23] BUJAK, A., ŚLIWA, Z. Global aspects of security environment – the 'One Belt, One Road' project. *Ekonomia Prawo. Economics and Law* 15, 2016, no. 4, p. 442.

[24] GERDEN, E. *China Merchants to build deep-sea Lithuania port.* [online] Available at: https://www.joc.com/port-news/european-ports/china-merchants-build-deep-sea-lithuania-port_20160210.html

[25] *China Merchants Group fails in attempt to buy Klaipedos Smelte.* [online] Available at: http://www.baltic-course.com/eng/transport/?doc=118651

[26] GEHRKE, J. *'We need to control it': Lithuania resists Chinese efforts to poach key shipping port.* [online] Available at: https://www.washingtonexaminer.com/policy/defense-national-security/we-need-to-control-it-lithuania-resists-chinese-efforts-to-poach-key-shipping-port

national security.[27] The possibility of creating a trans-shipment centre for railway transport between China and Europe is also being considered. Currently only 50,000 containers are re-filled, which means less than 600 trains. Creation of a trans-shipment centre would be an alternative to the traditional, rather crowded corridor leading through Minsk and Brest towards Poland. According to the Lithuanian Confederation of Industrialists, China Merchant Group and Lithuanian Railways are discussing setting up a joint Lithuanian and Chinese company, which would provide freight forwarding and logistics services between Lithuania, Belarus and China.

Initially Estonia remained rather cautious about China's Silk Road initiative.[28] In part this is because of its trade deficit with China, in part because while Latvia has Riga and Lithuania has Klaipeda, Estonia's main port of Tallinn is not particularly well-positioned for the purposes of the Silk Road route. Nevertheless, Estonia signed a Silk Road Initiative Memorandum in November 2017, in which the Minister of Entrepreneurship and Information Technology Urve Palo argued that "for Estonia, the agreement means prospects for foreign investments and provides additional opportunities for connecting the Rail Baltic rail link with the East-West transport corridor".[29] Further hopes of increased Silk Road use were announced in the Cooperation Agreement signed between the Estonian Chamber of Commerce and Industry and the Beijing Chamber of Commerce in February 2018. A degree of competition seemed to emerge with Riga during that period, as Tallinn also appeared to entice China to use it as a transit corridor to the rest of the Nordic countries. Since 2019, however, the Estonian outlook on cooperation with China returned to the initial approach of caution, speaking to the fact that the risk perception has risen quite evenly across the region.

On one hand, Chinese companies can share their full-fledged experiences and technologies in infrastructure building to help the CEE countries where it is in demand.[30] 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, initially looked to China for investment. However, Chinese investment in the Baltic states

[27] JAKUČIONIS, S. *Chinese investment into Klaipėda port a 'concern' for national security, president says.* [online] Available at: https://www.lrt.lt/naujienos/news-in-english/19/1083021/chinese-investment-into-klaipeda-port-a-concern-for-national-security-president-says

[28] VEEBEL, V. The China New Silk Road Initiative: Why is Estonia Rather Cautious about It? In ANDŽĀNS, M. (ed.) *Afterthoughts: Riga 2016 International Forum of China and Central and Eastern European Countries*, Riga: Latvian Institute of International Affairs, 2016, pp. 53–57.

[29] Estonia Radio, November 2017.

[30] ZHANG, Y. *China's Economic Diplomacy Entered the New Era.* [online] Available at: http://www.chinesemission-vienna.at/eng/zgbd/t1455480.htm

would be a mixed blessing.[31] Chinese financing may build up a disadvantageous "debt model" for the small Baltic countries, given disadvantageous rates that are further tied into using Chinese companies and Chinese workforce to deliver.[32] Local industry can be undercut by greater volumes of cheaper Chinese imports which transport costs have been reduced through these infrastructure projects.

The question of reciprocity also stands in regard of Sino-Baltic exchanges[33], as elsewhere across the EU. 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.[34] This lack of reciprocity is an issue for the Baltic states as such projects leave the region at risk.[35] As the EU has proceeded with the signing of the Comprehensive Agreement on Investment (CAI) with China, the official communications signal that an agreement has been reached on the issue of reciprocity and other EU sensitivities.[36] The EU ambition is to ensure companies' access to the Chinese market equivalent to that enjoyed by Chinese companies in the EU market and to increase the transparency of Chinese state-owned enterprises. However, as the text of CAI has not been made available, questions remain as to the scope and the instruments of implementation of the Agreement, including dispute resolution. Following an online EU-China leaders' conference on 14 September 2020, both researchers and diplomats acknowledged that China is after "globalization with Chinese characteristics, which is less rules-based"[37].

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[31] SCOTT, D. China and the Baltic states: strategic challenges and security dilemmas for Lithuania, Latvia and Estonia. *Journal of Baltic Security*, 2018, no. 4(1), pp. 25–37.

[32] JAKÓBOWSKI, J., KACZMARSKI, M. Beijing's Mistaken Offer: the '16+1' and China's Policy Towards the European Union. *OSW Commentary*, Centre for Eastern Studies, 2017, no. 250, p. 3.

[33] ŠTEINBUKA, I., BĒRZIŅA-ČERENKOVA, U. A., SPRŪDS, A. "Going global" and regionalization in EU-China relationship: perspective from the Baltics. *European Studies*, Vol. VI, Olomouc, 2019, pp. 175–190.

[34] CASARINI, N. Is Europe to Benefit from China's Belt and Road Initiative? *IAI (Insituto di Affari Internazionali) Working Papers* 15, Rome, 2015, no. 40, pp. 1–11; Le CORRE, P., SEPULCHRE, A. *China's Offensive in Europe*. Washington: The Brookings Institution Press, 2016.

[35] HEIJMANS, P. *As CEE Warms to China, Experts Warn of Risk*. [online] Available at: https://asia.nikkei.com/Politics-Economy/International-Relations/As-CEE-warms-to-China-experts-warn-of-risk; JAKÓBOWSKI, J. China's Foreign Direct Investments Within the '16+1' Cooperation Formula: Strategy, Institutions, and Results. *OSW Commentary*, Centre for Eastern Studies, 2015. [online] Available at: https://www.osw.waw.pl/ sites/ default/files/commentary_191.pdf

[36] European Commission. *Key elements of the EU-China Comprehensive Agreement on Investment.* [online] Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2542

[37] Ambassador Michael Clauss, Permanent Representative of the Federal Republic of Germany to the European Union. *Outlook for the China work of the German Council presidency (and beyond).* MERICS Conference: Charting a new course for European China Policy. [online] Available at: https://www.youtube.com/watch?v=zM88tL7V0HU

In the worst-case scenario, the EU will impose "symmetrical restrictions" on Chinese companies, including equalization strategies such as the International Procurement Instrument (IPI), severely restricting their access to the EU market. Such an outcome would rapidly reduce Baltic opportunities for cooperation with China. Moreover, provided that China primarily invests in bilateral relations with major EU Member States, with which it will be able to reap the greatest accumulated long-term benefits, there is likely to be a lack of Chinese interest in the Baltic region.[38]

In the opinion of some political and economic analysts, the danger for the Baltic states is that Chinese initiatives like the Cooperation between China and Central and Eastern European Countries ("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 already become concerned that the increasing number of economic ties with China may bring both many benefits and certain threats, then the situation for much smaller and vulnerable Baltic economies presents even more risks.[39] The global pandemic has re-emphasized those concerns among the Baltic countries and in a wider European context. Clearly, given the impact of COVID-19 on the world economy, there is a possibility that European countries, including Latvia, will once again look at China as an opportunity to promote their economic recovery in 2021, Latvian entrepreneurs may return to the idea of China. as an economic partner. After all, a similar dynamic is taking place in East and Southeast Asia: "Southeast Asian nations will likely benefit from China's economic rebound as the country commands a "lion's share" of regional exports."[40] However, it should be kept in mind that the "Great Stone" in Belarus[41] is the only large-scale BRI project where China's official communication has pointed to the Baltic states. Given the official Baltic anti-Lukashenko stance since the spreading of protests in the aftermath of the national presidential election, it would be difficult to expect a positive cooperation outcome in this project.

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[38] Latvian State Research Project: Towards the Post-pandemic Recovery: Economic, Political and Legal Framework for Preservation of Latvia's Growth Potential and Increasing Competitiveness "reCOVery-LV". *Final Report*. November 2020.

[39] POPŁAWSKI, K. Capital Does Have Nationality: Germany's Fears of Chinese Investments. *OSW Commentary*, Centre for Eastern Studies, 2017, no. 230.

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4. European China's dilemma and the Baltics

Europeans are facing a dilemma in relations with China. On the one hand, there is mutual economic interest. A certain stagnation of economic interaction since 2017 notwithstanding, generally on the European level the cooperation was growing rapidly in terms of trade, and investment remains significant. Economic cooperation is a direct consequence of the EU policies, on one side, and China's "Go Global" strategy on the other, driven also by the accelerated internationalization process of large Chinese corporations.

On the other hand, EU-China relations have been impacted by an increasing European cautiousness and a U-turn in the US approach to multilateral system of trade relations and climate change and relations with China. The US-China tension during coronavirus crisis and ensuing trade war has facilitated the EU increasingly reconsidering its positions and engagement with China. Unlike the United States, European leaders did not blame Beijing for its initial domestic handling of the health emergency crisis. Europeans also consistently tiptoe around the most contentious problems in order to keep collaboration on climate change and multilateralism alive, but also to avoid fatal disruptions in the economic relationship. However, the EU is also turning from "naïve" to a more realistic approach in its relations with China. And it remains to be seen whether global pandemic will lead to significant reallocation of business back to the EU or the US.

Another important question is the future impact of the rolling out of the Health Silk Road as part of the Belt and Road framework. Beijing's initial strategy was to score points with countries most affected by the virus – such as Italy – by sending face masks and other medical gear, in an effort to demonstrate the benefits of friendly relations with China. This strategy rests on the assumption that times have changed, and that Europe needs China more than China needs Europe – especially when it comes to its economic recovery post-crisis. The toughening of Europe's stance toward China over the last two years, which saw the EU label it a "systemic rival," was not in Beijing's interest. Now, the Chinese leadership may see a chance for course correction. However, it is becoming an increasingly complicated task.

The EU has identified growing risks and aspires to ensure that China trades fairly, respects intellectual property rights and meets its obligations as a member of the World Trade Organization (WTO). However, China's investment in Europe, including the Baltic countries, raises a series of question marks. China has introduced capital controls and tightened investment rules for state firms in an effort to stop money moving out of the country and to stabilize its currency. At the same time, policymakers in Europe have become increasingly concerned

that state-backed companies in China are gaining too much access to key technologies and sensitive infrastructure while Beijing still shields its own economy. The traditional challenging issues surrounding China-EU cooperation, such as technology transfer, IPR, and a level playing field for businesses, if left untackled, will certainly remain on mutual agenda and complicate relationship.

Europe is also diverse and divided in its approach to China. Italy was the first G-7 country to join the Belt and Road Initiative. Italy's officials have mostly dismissed concerns that the country was becoming one of the weakest links in a chain and specifically allowing China to access its port facilities. According to Michele Geraci, an Italian economist who as Italy's undersecretary of economic development at the time, was actively promoting BRI membership, "China has already invested in all major European ports and almost manages 15 to 20% of European traffic."[42] French President Emmanuel Macron has instead voiced concerns and underlined the importance of European sovereignty or strategic autonomy with regard to other global centers of power, especially towards China.[43] The latter- increasingly watchful and circumspect approach has been increasingly shared by other European countries and institutions.[44]

The "17+1" format has also been perceived among many Europeans as tool for China's additional leverage on Central and East European countries. As in other "17 + 1" format countries, 2018/19 ushered in the period of conceptualising China as a security player in the region and, consecutively, a security threat. If the lack of concrete cooperation before could be explained by the low interest of Chinese entrepreneurs, then, starting from 2018, and especially in 2019, the Baltic states began to deliberately abandon Chinese projects due to risks. The level of convergence between the EU-China Comprehensive Strategic Partnership and the "17+1" varies from country to country[45], but it can overall be argued that the Baltics share the European dilemma vis-a-vis China.

[42] MAGISTAD, M. Italy is caught in the middle of the EU's tussle with its 'systemic rival', China. *The World*, September 21, 2020.

[43] *The Macron Doctrine: Conversation with the French President*. [online] Available at: https://geopolitique.eu/en/macron-grand-continent/?mc_cid=2098b98cc0&mc_eid=d4f533ee5c

[44] LE CORRE, P. *China's Challenging Year in Europe.* [online] Available at: https://www.echo-wall.eu/currents-context/chinas-challenging-year-europe?mc_cid=96dfb6a67d&mc_eid=d4f533ee5c

[45] ŠTEINBUKA, I., BĒRZIŅA-ČERENKOVA, U. A., SPRŪDS, A. "Going global" and regionalization in EU-China relationship: perspective from the Baltics. *European Studies*, Vol. VI, Olomouc, 2019, pp. 175–190.

5. Conclusions: future scenarios and striking the right balance

Global pandemic has become a formative event in societal experiences and global affairs. China has been and remains an important player and focal point during the crisis. The recent changes and deepening mistrust during pandemic and rethinking China supply chain dependency, make the path forward rather complicated. At the same time China might be emerging from COVID-19 disaster with its global standing enhanced through humanitarian assistance (Health Silk Road), use of soft power and messaging. It remains to be seen whether China will be able to efficiently contribute to global economic recovery, and how the Baltics will be engaged. This will be a delicate balance to strike for all involved parties.

The calls for reducing the European dependency on China and diversifying its economy are growing louder. The Baltic countries are aware of risks from reliance on China in connectivity or technology domains. China's handling of domestic dissent and rather assertive promotion of its image and interests globally, create considerable concerns. Moreover, the cohesion within European Union and strong links with the United States are foreign policy priorities of the Baltic states.

At the same time, slowdown of economic growth in the EU and the Baltic states in the years to come provide a precondition for exploring the ways to continue the cooperation with China, in particular in attracting investments for growth. The risks when carefully assessed, for instance, strategic investment screening, should not be exaggerated and should not overshadow new opportunities of EU – Baltics – China cooperation for growth and jobs creation. In the context of "exit strategy" and economic recovery after pandemic crisis, the Baltic countries have strong interest in exploring synergies between EU economic support programmes and China's potential investments in the framework of various cooperation formats. China can contribute to creation of new opportunities for the Baltic countries in terms of development transport connectivity, collaboration in the high-tech and other economic sectors.

The Baltic countries should seek to play an increasing role in shaping a common Baltic Sea Region and European strategy toward China that would balance concerns with commitments to maintain free and open trade and investment policies. Despite some reservations, the "17+1" mechanism could still bring opportunities for the Baltic states in attracting investments to enhance innovation and productivity growth. Even more appropriately, the Nordic-Baltic Eight (NB8), a regional cooperation format that has included China into its agenda, has

been brought closer together due to the impact of COVID-19, and has proven to be an efficient and lean instrument in tackling immediate regional issues. The aftermath of COVID-19 could bring the rise of integrated regional formats, and, therefore, increase the profile of NB8 as a channel of Sino-Baltic communication, in which the agenda is set not by China, but by the European partners.

Overall, a balance has been in making between the needs of the Baltic states in countering the epidemic and China's actions. The recent changes in the world order, EU approach to multilateral system and global pandemic consequences could give new impetus to the EU – China relations. Given high level of uncertainty and transforming character of the relationship, the pandemic apparently will lead to conflictual cooperation in the years to come. This partly two-track setting will involve a simultaneously co-existing trends of both deepening and shrinking cooperation between the EU and China, and specifically the Baltic states and China.

Furthermore, it is evident that the Baltic choices towards China will not depend solely on the interests expressed by entrepreneurs, they will be impacted by Latvia's international obligations, such as the relations with China at EU level and transatlantic ties.

Finally, the impact of the transatlantic factor on Baltic opportunities for co-operation with China will depend on the foreign policy agenda of the newly elected US President Joe Biden – the Baltic states have so far complied with US calls against cooperation with Chinese companies, as evidenced by the Joint Declarations on 5g Security[46] between the Baltic countries and the US, further reiterated in Joint Statements on Secure Telecommunications Infrastructure[47].[48]

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The Principle of Direct Effect in Criminal Law: Theory and Practice*

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Summary: The meaning of the general principles of EU law has been broadly developed by the Court of Justice of the European Union; however, for many years it had only limited competence in deciding criminal cases. The principle of direct effect is important for ensuring the efficient functioning of EU law. The aim of this research is to find out if and how this principle affects criminal justice. To reach this objective, the researchers examine how the substance and content of the principle, through the doctrine and the judgments of Court of Justice of the European Union, can influence national criminal law and criminal procedure. Afterwards, the actual impact of EU law on national criminal law is evaluated, taking Lithuania as an example. The analysis reveals that direct application of directives in material criminal law is highly unlikely, while in criminal procedural, law such a possibility is real if EU norms are clear, unconditional, and precise.

Keywords: Criminal law, European Law, EU cooperation in criminal matters, direct effect

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1. Introduction

There are no doubts regarding the importance of the general principles of EU law and their substantial implications in the areas they influence, as they are used to fill in the gaps in EU law, they are helpful for interpreting existing EU norms, and they are valuable instruments for judicial review,[1] i.e., deciding whether a specific national norm is violating a general principle of EU law. These aspects, and especially the first one, are significant in the field of EU criminal law,[2] as this branch of law is less developed than common market issues. This indicates that there are still many gaps the Court of Justice of the European Union (CJEU) could fill in by using general principles.

The doctrine of direct effect provides an opportunity for legal subjects to question actions of Member States in national courts applying EU law,[3] and it is one of the classic concepts on which the EU's *sui generis* system of law is based,[4] "therefore, it is believed that direct effect is an essential characteristic of the Community order."[5]

Initially, the principle of direct effect had narrow treatment, and it was applied only to the EU treaties themselves and to regulations,[6] as confirmed by the first cases in the CJEU,[7] as only these norms require no further action from national authorities or the community, i.e., they "are normative acts with *erga omnes* effect."[8] By contrast, directives "are never self-sufficient to be fully effective in the national legal systems,"[9] as they require national implementing measures and they "acquire general application with *erga omnes* effect through them."[10]

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1 MIETTINEN, S. *Criminal Law and Policy in the European Union.* London: Routledge, 2014, p. 103.

2 Ibid.

3 SOLOVEIČIKAS, D. Europos Sąjungos teisės tiesioginis veikimas ir jos taikymas – dvi skirtingos tapačios doktrinos dalys? [Direct Effect and Application of European Community Law: Two Distinct Parts of the Same Doctrine?]. *Jurisprudencija,* 2007, vol. 94, no. 4, p. 41.

4 Ibid.

5 VUKADINOVIC, R. D. The concept and faces of direct effect of European Community law. *Review of European Law*, 2011, Vol. 13, no. 1, p. 37.

6 Treaty establishing the European Economic Community, Rome, the 25 of March 1957, Art. 189. [online]. Available at: <http://data.europa.eu/eli/treaty/teec/sign> Accessed 23.03.2020.

7 For example, the CJEU statement: "Article 12 of the Treaty establishing European Community produces direct effect and creates individual rights which national courts must protect," in case 26/62, *NV Algemene Transport—En Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, par. 5.

8 KARAYIGIT, M. T. Are directives directly applicable? *Ankara Avrupa Calismalari Dergisi*, 2016, vol.15, no. 2, p. 67.

9 Ibid., p. 68.

10 Ibid., p. 67.

Afterwards, with development of CJEU case law,[11] other legal acts such as decisions and directives were given direct effect if they are clear, unconditional, and precise, i.e., satisfy established criteria of direct applicability.

So, the principle of direct effect means that if the EU norm matches three interrelated conditions, it may have direct effect, and individuals may use it for enforcement of their rights established in EU law in national courts, i.e., it "means that EU norm must be directly applicable in concrete situations," and it must have "priority over any conflicting provisions of national law."[12] The principle of direct effect together with the principle of supremacy "are necessary for the efficient functioning of the European Union"[13] as "both Member States and the institutions of the European Union are under a legal duty … to ensure that EU law is adequately applied and followed,"[14] i.e., to ensure effectiveness of EU law in practice.

With the Lisbon treaty, as certain areas of criminal law enumerated by EU Treaty were supranationalized,[15] the EU gained supremacy over national law in ten areas of criminal law treated as particularly serious crimes with cross-border dimensions.[16] The EU is allowed to intervene in these areas using directives as legal instruments and establishing minimum rules concerning the definitions of criminal offences and sanctions[17] besides its pre-Lisbon functional criminalization competence.[18] The question arises of how the principle of direct effect should

[11] In the *Grimaldi* case, the CJEU stated that "whilst under Article 189 Regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other measures covered by that article [directives and framework decisions] can never produce similar effects". Case C-322/88, *Salvatore Grimaldi v. Fonds*, ECLI:EU:C:1989:646, par. 11. For example, in Case C-9/70, the CJEU recognized that certain clauses of council decisions are directly applicable and that "it would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision… Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation." Case C-9/70, *Franz Grad v. Finanzamt Traunstein*, ECLI:EU:C:1970:78, par. 5.

[12] STEINER, J., WOODS, L. *EU Law*. *10th Edition*. Oxford: Oxford University Press, 2009, p. 106.

[13] GILBERT, E. Supremacy and direct effect: necessary measures? *North East Law Review,* 2017, vol. 5, p. 15.

[14] Ibid., p. 11.

[15] HERLIN-KARNELL, E. The Lisbon Treaty and the area of criminal law and justice. European policy analysis. *Swedish Institute for European Policy Studies,* 2008, vol. 3, p. 9.

[16] Consolidated version of the Treaty on the Functioning of the European Union. Official Journal 115, 09/05/2008 P. 0047-0388. Art. 83. [online]. Available at: <http://data.europa.eu/eli/treaty/tfeu_2008/oj> Accessed 23.03.2020.

[17] Ibid., Art. 83 (1).

[18] "as a means enabling the Union to achieve effectiveness with regard to its policies and objectives". MITSILEGAS, V. From overcriminalisation to decriminalisation. The many faces of

be interpreted in criminal law and what role it plays or could play in future in this very sensitive area of national law.

The researchers searched for the answer through an analysis of the academic literature and the jurisprudence of CJEU, afterwards taking Lithuania as an example, as "the doctrine's reception is unique in the practice of applying the law in each Member State."[19] The hypothesis of the article is that "criminal law is still not a branch among others but has some restrictions due to its character and close relation to state sovereignty."[20]

2. The Principle of Direct Effect in Criminal Law

Criminal law and criminal procedure law are one of four EU policy areas forming "the content of the criminal justice dimension in the area of freedom, security and justice,"[21] but they are traditionally treated as indicators of a state power and sovereignty,[22] i.e., part of national identity, which the EU must respect.[23]

In accordance with Arts. 82 and 83 of TFEU, which are traditionally associated with criminal procedure law (Art. 82) and substantive criminal law (Art. 83),[24] in both substantive and procedural criminal law, the EU is allowed to adopt directives, establishing minimum rules, which means that the EU gains certain powers while Member States have obligations to implement them taking "into account the differences between the legal traditions and systems of the Member States,"[25] i.e., that there is no full harmonization in this area of law and much space is left for national authorities. Both treaty articles use term "approximation of laws," which "means that national legislation is brought closer together without completely harmonizing or unifying it."[26]

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effectiveness in European criminal law. *New Journal of European Criminal Law*, 2014, vol. 5, no. 3, p. 419.

19 SOLOVEIČIKAS, D. supra note 3, p. 35.

20 SUOMINEN, A. Effectiveness and functionality of substantive EU criminal law. *New Journal of European Criminal Law*, 2014, vol. 5, no. 3, p. 388.

21 VERVAELE, J. A.E. European criminal justice in the European and global context. *New Journal of European Criminal Law*, 2019, vol. 10, no. 1, pp. 7–16, p. 10.

22 HUOMO-KETTUNEN, M. EU criminal policy at a crossroads between effectiveness and traditional restraints for the use of criminal law. *New Journal of European Criminal Law*, 2014, vol. 5, no. 3, pp. 301–326, p. 305.

23 KETTUNEN, M. *Legitimizing European criminal law: Justification and restrictions*. *Comparative, European & International Criminal Justice 2*. Helsinki: Springer, Cham, 2020, p. 173.

24 See for example, BIONDI, A., EECKHOUT, P., RIPLEY, S. (eds). *EU After Lisbon.* Oxford: Oxford University Press, 2012, pp. 335–336.

25 TFEU, supra note 16, Art. 82(2).

26 KETTUNEN, M., supra note 23, p. 67.

As already discussed, if EU norms satisfy certain conditions, the norms may have direct effect. This means that directives enacted on criminal law issues may have direct application at least in theory if they are clear, unambiguous, and unconditional. But is this possible in practice, evaluating the fact that criminal law is guided by certain principles also evaluating issues of sovereignty of state[27]?

The different impact of EU norms in substantial and procedural criminal law requires us to cover the matters in separate sections.

2.1. Direct Effect in Material Criminal Law

"Defining … criminal law is a difficult task … [as it] symbolises states' national identity and culture."[28] However the essence of material criminal law (the definition of offences and the determination of penalties) is that individuals and legal entities (when criminal liability for legal persons is established in criminal law) are obliged not to infringe criminal prohibitions or otherwise they will experience certain negative consequences, and it is common to every state, i.e., criminal law provides certain obligations.

EU interference in national criminal law is mostly related to increasing the efficiency and effectiveness of criminal law measures,[29] which means introducing criminal liability through the introduction of certain criminal offences, provision of common definitions, and giving certain guidelines regarding criminal sanctions following the EU triad that they should be effective, proportionate, and dissuasive.

The question arises, what happens if the Member State does not transpose directives correctly in time? This arose in the case *Pretore di Salo v. X*,[30] in which an Italian authority wanted to know whether a directive may have direct effect independently of national law.[31] The CJEU answered that a directive "cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that

[27] SEHNÁLEK, D., STEHLÍK, V. European "Judicial Monologue" of the Czech Constitutional Court – a Critical Review of its Approach to the Preliminary Ruling Procedure. *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 181–199; GOMBOS, K. Europeanisation Effects in the Court Jurisprudence. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 261–275.

[28] KETTUNEN, M., supra note 23, p. 47.

[29] See, for example, sec. 13 of Directive 2019/713 on combating fraud and counterfeiting of non-cash means of payment [2019] *OJ L 123*/18.

[30] Case C-14/86, *Pretore di Salo v X*, ECLI:EU:C:1987:275.

[31] Ibid., par. 18.

directive."[32] It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person,[33] but only as a measure of sanctioning a Member State and as a prevention measure for the state to take advantage of its own failure to comply with community law,[34] i.e., "allowing individuals to rely on their EU rights."[35]

The matter was further clarified in the *Kolpinghuis Nijmegen BV* case, in which a Dutch court asked if direct application of the directive is possible in criminal proceedings against a company for possible infringements of local acts. The main issue in the case was that infringements by the company took place on August 7, 1984, while the directive became national law on August 8, 1985,[36] i.e., it was not a part of national law on the day of the criminal offence. The court repeated the *Pretore* rule that it is not.[37] This case is also important, as it clarifies certain limits of Member States' obligations to interpret legislation in the light of the wording and the purpose of the directive to reach the result (also known as the doctrine of consistent interpretation[38]). This obligation "is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity,"[39] which means that in certain cases, there would be no possibility even using indirect effects of the directive to reach the result required by the directive, as it would infringe general principles.

This aspect was clarified in famous *Tarrico* saga,[40] notwithstanding the fact that the first decision was controversial.[41] The court indicated that the "provisions of criminal law must comply with certain requirements of accessibility

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[32] Ibid., par. 20.

[33] Case C-152/84, *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84, par. 48.

[34] *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, supra note 32, par. 49.

[35] PEREIRA, R. M. *Environmental Criminal Liability and Enforcement in European and International Law.* Leiden: Brill, 2015, p. 159.

[36] Case C-80/86, *Kolpinghuis Nijmegen BV*, ECLI:EU:C:1987:431, par. 2.

[37] *Pretore di Salo v X*, supra note 30, par. 14.

[38] HARTLEY, T. C. *The Foundations of European Union Law*. 7th Edition. Oxford: Oxford University Press, 2010, p. 235.

[39] *Kolpinghuis Nijmegen BV*, supra note 36, par. 13.

[40] Case C-105/14, *Tarrico and Others (Tarrico I)*, ECLI:EU:C:2015:555; Case C-42/17, *M.A.S. and M.B. (Tarrico II)*, ECLI:EU:C:2017:936.

[41] In its first decision, the CJEU stated that "the national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU" (*Tarrico and Others (Tarrico I)*, supra note 39, par. 660, i.e., requiring non-application of the time limitation established in the Italian criminal code, "which would lead to the defendant being subjected to longer time limitations than the ones applicable when the offence was committed" (MANACORDA, S. The Tarico saga: A risk or an opportunity for

and foreseeability, as regards both the definition of the offence and the determination of the penalty,"[42] while "the requirement that the applicable law must be precise … means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable."[43] This is not the case in criminal matters. The CJEU clearly explains in *Tarrico II* that in such cases when national criminal law infringes the requirements of EU legal acts (even treaties, which have priority over national law), it must not break important principles such as non-retroactivity, and that *nullum crimen*, *nulla poena sine lege* infringement can only be fixed by legislators,[44] which makes direct effect in substantial criminal law highly unlikely.

Why in criminal law is direct effect not evidentiary? Usually, direct effect is understood in the opposite sense—as an instrument of legal protection against national authorities,[45] but not as an instrument empowering the state. So, if the directive was not implemented properly, the state is at fault, and it cannot use the directive against individuals. The next reason that substantial criminal law is guided by the principles of legality, non-retroactivity, and legal certainty, among others is explained in the jurisprudence of the CJEU. "In the context of unclear regulations or unimplemented directives,"[46] these principles "could operate as a basis for avoiding criminal liability,"[47] i.e., it is evident that the directive alone cannot aggravate or be a basis for criminal liability. The only theoretical possibility of direct effect is if the directive provides certain norms that meet requirements of direct applicability and that are more lenient than the national ones, which is difficult to imagine in practice taking into account the present situation, in which the EU is allowed to establish only minimum rules.

2.2. Direct Effect in Procedural Criminal Law

Under Art. 82 of the Lisbon Treaty, for the first time, the European Union was given competence to set certain minimum standards in criminal proceedings (as

European criminal law? *New Journal of European Criminal Law,* 2018, vol. 9, no. 1, p. 6), suggesting infringement of basic principles of criminal law such as legality and non-retroactivity.

42 *M.A.S. and M.B. (Tarrico II)*, supra note 40, par. 55.

43 *M.A.S. and M.B. (Tarrico II)*, supra note 40, par. 56.

44 Ibid., par. 61–62.

45 VUKADINOVIC, R. D., supra note 5, p. 46.

46 HERLIN-KARNELL, E., supra note 15, p. 1120.

47 Ibid.

far as the protection of individual rights are concerned) and minimum standards for the protection of the rights of victims of crime.[48] So the situation in criminal procedure law is different regarding direct effect, as directives, introduced using Art. 82 of TFEU provide certain rights, which can be enforced by individuals in national courts if Member States do not implement them on time, i.e., the direct effect of directives is more realistic.

At the moment there are six directives[49] for the protection of certain rights of suspects or accused persons in criminal procedures (access to a lawyer, right to be present at the trial, presumption of innocence, right to information, right to legal aid, and right to translation) and two directives related to protection of victim rights.[50]

The most interesting legal act is a regulation on mutual recognition of freezing and confiscation orders,[51] which means direct application of regulation rules by national authorities in issues directly related to criminal procedure, as means of freezing and confiscation are directly connected with pre-trial investigation and afterwards with establishment of crimes. Its provision of a legal basis—Art. 82(1) of TFEU—even though such a form of legal act is not even mentioned in the article, indicates that the EU is expanding its competence. The form of the document is grounded on the principle of effectiveness that "mutual recognition and execution of freezing orders and confiscation orders … [can] be better achieved at Union level … in accordance with the principle of proportionality, as set out in article 5 TEU."[52] What does this mean for the future? EU competence may increase at the expense of Member States' powers and the principle of direct

[48] SAKALAUSKAS, G., BIKELIS, S., KALPOKAS, V., POCIENĖ, A. *Baudžiamoji politika Lietuvoje: tendencijos ir lyginamieji aspektai* [*Criminal Policy in Lithuania: Trends and Comparative Aspects*]. Vilnius: Teisės institutas, 2012, p. 52.

[49] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1; Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1; Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1; Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1; Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1; Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1.

[50] Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57; and directive 2011/99/EU on the European protection order [2011] OJ L 338/2.

[51] In force from December 19, 2020. Regulation 2018/1805 of November 14, 2018 on mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1.

[52] Ibid, Preamble of Regulation, sec. 51.

effect has gained power, as a regulation is a legal act with direct applicability. For example, the regulation provides a definition of "proceedings in criminal matters," which may be treated differently by national legislators. Thus, in cross-border cooperation, a Member State must ignore its national legislation and follow the requirements of the regulation. Even more interesting is the statement in the regulation that the procedural rights set out in the mentioned directives should apply to criminal proceedings covered by the regulation,[53] which strengthens the obligation to follow requirements established in the mentioned directives. The general activity of EU legislation in criminal procedure law, including the establishment of the EPPO, which "will enforce EU criminal law directly within the limits of its competence,"[54] indicates that the EU will gain more power in criminal procedure law issues and the principle of direct effect will accelerate in the near future.

Notwithstanding the potential of criminal procedure law at EU level and its direct effect if the directive satisfies the conditions for direct effect, the CJEU has not developed the matter further. However, there are two Bulgarian cases that are related to the questions of criminal procedure law for which the CJEU has provided interesting preliminary decisions.

In Case C-612/15, the Bulgarian court asks "whether, with respect to criminal offences in customs matters, Article 325 TFEU (protection of financial interests) must be interpreted as precluding national legislation that establishes a procedure for terminating criminal proceedings, such as that provided for in Articles 368 and 369 of the Code of Criminal Procedure."[55] The court basically repeats the *Tarrico II* result, i.e., that "real" solutions are changes by national legislators (adoption of the measures necessary to meet treaty obligations).[56] However, the next clause providing that "the referring court must also, without waiting until the national legislation at issue is thus amended by legislation or by any other constitutional procedure, give full effect to those obligations by interpreting that legislation so far as at all possible in the light of Article 325(1) TFEU, as interpreted by the Court, or, as necessary, disapplying that legislation"[57] could be seen as requiring disapplication of national law and giving priority to the treaty article, i.e., direct effect of the treaty norm against national law. However, the CJEU provides wide discretion regarding both the form and content of the grounding to the national court, stating that "it is for the court to decide whether it is necessary, to that end, to disregard all the requirements set out in Articles

[53] Regulation 2018/1805 of November 14, 2018, supra note 51, Section 18 of Preamble.
[54] KETTUNEN, M., supra note 23, p. 67.
[55] Case C-612/15, *Nikolay Kolev and Others*, ECLI:EU:C:2018:392, par. 48.
[56] Ibid, par. 65.
[57] Ibid, par. 65–66.

368 and 369 of the Code of Criminal Procedure, or whether it is appropriate to extend the time limits imposed on the prosecutor by those articles with respect to bringing the pre-trial stage of the proceedings to an end"[58] and the priority of fundamental human rights over EU financial interests is stressed.[59] How we should "translate" this ruling? Is there any difference from *Tarrico*?

It looks like it gives more flexibility and discretion than the first one, as the CJEU is silent regarding the principle of legality. However, protection of fundamental rights means that respect for Art. 47 of the EU Charter (besides others) must be given and the requirement that "everyone is entitled to a fair and public hearing within a reasonable time"[60] must be fulfilled.

In opinion of the authors, in the Bulgarian case, the judge would hardly risk infringing national laws when evaluating the facts of the case taking into account the arguments of the European Court of Human Rights (ECHR) relating to the reasonableness of the length criteria. The facts in Bulgarian case[61] indicate some fault of authorities and infringe the reasonableness criteria explained by the ECHR.[62] The fact that infringements of procedure occurred at least partially because an accused abused his or her rights and objectively prevented the prosecutor from carrying out the various procedural acts required by the law in opinion of the authors is not the central one. Arguments justifying long pre-trial periods[63] do not outweigh mistakes of authorities and really long period of pre-trial investigation.

In Case C-467/18, one of the questions related to direct effect is the compliance of Bulgarian norms of criminal procedure code with Art. 8(2) of directive

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58 *Nikolay Kolev and Others,* supra note 55, par. 67.

59 "Fundamental rights guaranteed by the Charter to the accused persons in the main proceedings are respected. … [They] cannot be defeated by the obligation to ensure the effective collection of the Union's resources." Ibid, par. 68.

60 European Union, Charter of Fundamental Rights of the European Union, 18 December 2000, 2000/C 364/01.

61 Due to the long period of pre-trial investigation (it took more than 6 years), the case was twice referred back to the competent prosecutor to draw up new charges, because they were not adopted by the competent body and infringements of procedural requirements were established; afterwards new infringements of essential procedural requirements were established by the national court on the ground that the new charges had not been disclosed to two suspects (out of eight) and the parts of the indictment concerning one suspect contained contradictions. Ibid, par. 26, 31.

62 This is evaluated using such aspects as the complexity of the case and the conduct of the applicant and the authorities dealing with the case. ECHR 20 January 2009, *Norkūnas v. Lithuania,* appl. no. 302/05 Par. 35–36.

63 The proceedings in the analyzed case may be deemed complex, given the number of participants (eight persons), the fact that they were officials (customs officers), and the nature of the offences (financial crimes and crimes against the civil service, done on the border, i.e., involving cross-border aspects and possibly many victims), *Nikolay Kolev and Others,* supra note 55.

2012/13: "Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive,"[64] which is defined by the CJEU as the clear, unconditional, and precise,[65] i.e., satisfying the criteria of direct effect, and that "the latter provision precludes any national measure which impedes the exercise of effective remedies in the event of a breach of the rights protected by that directive,"[66] even though the CJEU does not develop this line further.

By contrast, in the next paragraphs the method of consistent interpretation that is traditional in criminal cases and its limits are discussed,[67] while the court concludes "that Article 47 of the Charter, Article 8(2) of Directive 2012/13 and Article 12 of Directive 2013/48 must be interpreted as precluding national legislation," such as that at issue in the main proceedings "in so far as that legislation does not enable the court with jurisdiction to verify that the procedural rights covered by those directives were respected in proceedings prior to those before the court, which were not subject to such judicial review,"[68] i.e., it requires courts to apply the norms of the directive instead of national norms of criminal procedure, as it is not possible to solve the matter using consistent interpretation.

So in both analyzed cases, the CJEU indicates the priority of the treaty and directive article over national norm of criminal procedures, but it leaves much discretion to the national court regarding its actual implementation—whether to interpret national norms in accordance with the requirements of EU law, or whether to disapply national law.

Looking further, theoretically there could be situations when the direct effect of the EU norm is possible in practice. For example, Art. 5 of Directive 2012/29/EU requires Member States to ensure that victims can make complaints in a language they can understand or receive the necessary linguistic assistance. The norm is both clear and unconditional, allowing direct application in practice even if national authorities have not implemented it correctly.

This discussion indicates the first steps towards a possible direct application of certain EU clauses (treaties and directives) that are clear, unconditional, and precise, but this is still a very sensitive issue, as the balance between national sovereignty, the effectiveness of EU law, and the protection of human rights must be balanced and needs further clarification and development from the CJEU and

[64] Directive 2012/13/EU, supra note 49.
[65] Case C-467/18, *Rayonna prokuratura Lom*, ECLI:EU:C:2019:765, par. 57.
[66] Ibid.
[67] Ibid, par. 60–62.
[68] Ibid., par. 63.

national jurisprudence. New EU instruments—regulations and the EPPO—provide additional opportunities for this.

3. Effect of EU Law on National Criminal Law: The Case of Lithuania

The relationship between the EU and the national law in Lithuania is defined by Art. 2 of the Constitutional Act providing that "the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms [except the Constitution], they shall have supremacy over the laws and other legal acts of the Republic of Lithuania."[69] This is interpreted by some Lithuanian academics as the establishment of both the direct applicability and the direct effect of the EU norms.[70]

Lithuanian criminal law theory generally recognizes that EU legislation is a source of criminal law, and the implementation of EU legislation in national criminal law is possible only by harmonizing the provisions of national criminal law with the requirements of EU legislation using the following ways: (a) legislative, (b) supervisory, and (c) judicial.[71]

The legislative method of harmonization is widely applied in Lithuanian practice: 47 percent (14 cases) of amendments and additions to the Criminal code (CC) from 2004-2016 were related to the implementation of EU legislation.[72,73] As in Lithuania both criminal and criminal procedure norms (CPC) are codified, the usual procedure is that EU legal acts are transferred into these codes. Today there are 35 listed EU legal acts implemented in the CC and 22 EU legal acts implemented in the CPC.[74]

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[69] Constitutional act of the Republic of Lithuania on membership of The Republic of Lithuania in the European Union, Official Gazette, 2004, No. 111-4123. [online]. Available at: <https://www.lrs.lt/upl_files/Lietuvos_pirmininkavimas_ES/dokumentai/ CONSTITUTIONAL_ACT.pdf> Accessed: 23.03.2020.

[70] SOLOVEIČIKAS, D., supra note 3, p. 39; JARUKAITIS, I. Adoption of the third Constitutional Act and its impact on national constitutional system. *Teisė*, 2006, vol. 60, pp. 22–37.

[71] ŠVEDAS, G., VERŠEKYS, P., LEVON, J., PRAPIESTIS, D. *Lietuvos Respublikos baudžiamojo kodekso bendrosios dalies vientisumo ir naujovių (su)derinimo iššūkiai* [*Challenges in Harmonizing the Integrity and Novelties of the General Part of the Criminal Code*]. Vilnius: Vilnius University Press, 2017, p. 39.

[72] May 25, 2020.

[73] ŠVEDAS, G., VERŠEKYS, P., LEVON, J., PRAPIESTIS, D., supra note 71, p. 47.

[74] Each code has a section "Implemented EU acts" in which information is provided and updated by the legislator. Criminal Code of Lithuania. Approved in 2000 September 26 by law

The main supervisory body is the EU Commission, but there were no cases against Lithuania initiated by the commission for improper implementation of EU acts in criminal matters during the examined period.[75] On the other hand, Lithuanian doctrine makes some criticisms regarding the quality of supervision, as it is largely based on information from Member States and it covers only the assessment of whether EU legislation has been implemented fully, properly, and in a timely manner, without focusing on its practical application and impact assessment, or analyzing whether the national legal measures are in line with the general and specific objectives of EU law.[76]

The judicial method is applied in two ways: either consistent interpretation of the current norms of the CC/CPC in the practice of national courts in accordance with the EU legal act or the non-application of provisions of national law that have been declared incompatible with EU law.[77] So far there is only one case in Lithuania where negative harmonization has been indicated by the CJEU. The CJEU ruled that Regulation No. 1782/2003 precluded national legislation prohibiting the cultivation and storage of hemp grown for fiber covered by this regulation and that community law precludes a court of a Member State from applying national law that, contrary to the regulation, prohibits the cultivation and storage of hemp grown for fiber.[78]

There were several attempts from parties (accused or civil defenders) in criminal cases[79] to request the direct application of certain EU directives against national law and to request national courts to initiate applications to CJEU for clarification of their questions because of improper implementation of certain requirements of the EU directives by national authorities.[80] The court reasonably

no. VIII – 1968. Official Gazette, 2000, No. 89-2741. [online]. Available at: <https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/asr> Accessed 02.06.2020.

75 From 2004 until the end of 2018.

76 ŠVEDAS, G., VERŠEKYS, P., LEVON, J., PRAPIESTIS, D., supra note 71, p. 41.

77 Ibid., pp. 41–42.

78 Case C-207/08, *Babanov*, ECLI:EU:C:2008:407. [online]. Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-207/08> Accessed 03.03, 2020, par. 37.

79 Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], May 24, 2011, 2K-239/2011. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], June 19, 2014, 2K-317/2014. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Sept. 30, 2014, 2K-389/2014.

80 In these cases, the question of direct application was not directly related to the issues of criminal law or procedure, but to compensation for damage arising as a consequence of crime. National regulations at that time established a maximum limit for non-pecuniary damages (until November 12, 2009, 1,000 euros; until June 10, 2012, 2,500 euros; until October 31, 2018, 5,000 euros; only since November 1, 2018 has there been no concrete sum of non-pecuniary damages provided in the law), which was rather small, and the difference had to be paid by guilty person. The main argument was that national authorities improperly implemented an EU directive that established

rejected these requests in all three cases, indicating that "the national court shall not be obliged to refer to the Court of Justice if the question of the interpretation of European Union law which is raised in the case is irrelevant, i.e. the answer to this question, no matter what, cannot affect the outcome of the case."[81] This was grounded by two interrelated legal arguments: (1) the impossibility of interpreting national law in accordance with the directive (as the content is different, and in such a case it would infringe the principles of legal certainty and non-retroactivity); (2) no horizontal application for the directive (as the dispute is between two private parties—an insurance company and a natural person).

Notwithstanding the result, this example indicates that national courts know the main aspects of the principle of direct effect and its limits, while the issues of EU law are cropping up in national cases. The parties in criminal proceedings are starting to raise questions regarding direct applicability of directives.

3.1. Application of Directives in the Decisions of the Supreme Court in Criminal Cases

An analysis of the jurisprudence of the Court from May 1, 2004[82] to the end of 2019 was performed.[83] Reference to directives in national case law started in 2007 (3 years after becoming a member of EU), and there was a significant increase in 2018 and 2019,[84] which could be a clear indicator of the growing importance of EU law in national criminal law.

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no limit for non-pecuniary damages and that in such a case, national law should be explained in accordance with the requirements of the EU directive. In all three cases, the plaintiffs sought preliminary rulings from CJEU to determine whether the particular norm of EU directive 2005/14/EC was to be interpreted as not conferring on the Member State the right to limit damages on the basis that the damage to the person is pecuniary or non-pecuniary.

81 Case 2K-239/2011, supra note 79.

82 This is when Lithuania became a member of the EU.

83 The authors used the commercial database Infolex [Available at: http://www.infolex.lt/portal/start.asp, accessed 03.03.2020] to find the court decisions. The following search criteria were applied: only criminal cases from the Supreme Court of Lithuania [this is the highest court, and it investigates only cassation, but not factual issues], in which the word directive (without ending) was used. With these selection criteria, 57 cases were found. After content review, 51 court decisions remained [two documents were Supreme Court reviews, and the remaining four decisions either did not indicate any directive or had other irrelevant facts, for example, they concerned certain directives in the Netherlands], and they are analyzed in this section. This makes up about half a percent of the court decisions in criminal cases during this period [the total number of Supreme Court decisions in criminal cases in the system is 9,185].

84 2 (in 2017), 1 (2008), 2 (2009), 1 (2010), 3 (2011), 4 (2012), 7 (2014), 4 (2015), 6 (2016), 3 (2017), 9 (2018), 9 (2019).

The court decisions covered many EU directives, but EU Directive 2011/36/EU covering issues of trafficking in human beings is most frequently (nine times) referred to in court decisions. In the second place (eight cases), questions indirectly related to criminal law concerned insurance against civil liability in respect of the use of motor vehicles.[85] In third place (four times) was the directive against money laundering and terrorist financing.[86]

The most active party to the proceedings (i.e., the ones that refer to the EU directives) is the court. Such cases involved directives in 36 cases out of 51, but in more than half the cases, the court was "provoked" to react, answering to the statements of parties in the case (mostly to the arguments of accused/convicted person, who is mostly interested in a favorable result in criminal cases). Only in three cases was the reference made by the victim. In many cases, more than one party in the proceedings referred to the EU directives.[87]

After analyzing the content of the selected court decisions, two reasons for references to the EU directives were established:
(a) interpretation of national law in consistency with EU law;
(b) questioning existing national regulation.

3.1.1. Interpretation of National Law in Consistency with EU Law

This category dominates in court decisions. In most cases, the EU directive is cited as a supplementary legal act, grounding the necessity for certain national legal regulations, i.e., as an instrument strengthening court position. For example, in Case 2K-281-489/2019, the court stated that in the case law of the Court of Cassation, the recruitment of the victim to exploit her by inducing her to commit a crime also covers the suggestion to go abroad to steal from shops, promising to take her there, to accommodate her, to feed her, etc.[88] In another case, the court referred to the EU directive among other things to counter the argument that because prostitution is legal in a certain country, the organizer could not be held guilty for exploitation for prostitution.[89]

[85] Directive 84/51/EEC was referred to once, Directive 2005/14/EC was referred to four times, and Directive 2009/103/EC was referred to three times.

[86] Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L 309/15.

[87] For example, in Case 2K-317/2014, which related to criminal liability for infringement of traffic rules causing serious damage (severe bodily injury to a passenger), four parties in the proceedings (court, prosecutor, defendant, and victim) referred to the EU directives. Case 2K-317/2014, *supra* note 79.

[88] Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Nov. 28, 2019, 2K-281-489/2019, par. 24.

[89] The court indicated that the appellant's argument that his defendant could not be found guilty under Article 307 CC because where the alleged offenses were committed, prostitution is legal was unfounded, since legalization of prostitution does not eliminate responsibility for the exploitation

In three cases (out of 45) the court went further—it cited specific norms of directives, as there is no definite national regulation on specific aspects. In Case 2K-290-489/2019, the convict questioned his conviction for recruitment of a person for a fictitious marriage, as this form of exploitation was not established in Art. 147 of the Criminal Code when the crime was committed.[90] The court cited the relevant provisions of Directive 2011/36/EU[91] and used this definition as an argument for rejecting a cassation complaint of a convicted person, i.e., notwithstanding the fact that the specific form of exploitation was not criminalized in the national criminal code in accordance with the definition of the directive, it was covered by general term "other purposes of exploitation." There was a similar interpretation in the next case—this time, the Supreme Court cited Directive 2011/36/EU for the definition of "exploitation of criminal activities" as convicts challenged their convictions in this aspect, and this term is not defined in national law.[92]

The most progressive example is the last case,[93] in which the court not only quoted definitions from directives to explain of national norms, but also used them as court arguments (among others) grounding the decision of the court and acquitting E.J. of unlawful interception and use of electronic data:

Electronic (computer) data is any representation of facts, information or concepts in a form that can be processed by a computer system as well as a program by which a computer system can perform a specific function (Article 2 (b) of Directive 2013/40/EU)… The panel of judges rules that the abovementioned

of a person for prostitution. The court expressly stated that the accussed had profited from the victims of human trafficking, and that such acts are prohibited by both EU Directive 2011/36/EU and international law (the supplementary protocol of the United Nations Convention against Transnational Crime). Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Nov. 26, 2019, 2K-278-697/2019, par. 7.5.

90 This form of exploitation was introduced in Art. 147 of CC two weeks later (May 26, 2016), while the recruitment was from April 16 to May 25, 2016.

91 Other purposes of exploitation, which are understood as any other form of dangerous exploitation of a victim that constitutes a serious violation of fundamental human rights and dignity and physical integrity. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Dec.17, 2019, 2K-290-489/2019, par. 15.

92 Case 2K-281-489/2019, *supra* note 88, par. 24.

93 In this case E.J. unlawfully connected his USB flash drive with the "Spower Windows Password Reset Special" program to a computer located in the public security service video surveillance system and removed the login information belonging to the administrator of the ABK account. This allowed E.J. to access the system as an administrator of that system. E.J. was convicted for three offences: unlawful disposal of software (Art. 198-2), unauthorized access to an information system (Art. 198-1), and unlawful interception and use of electronic data (Art. 198). In his cassation appeal, E.J. disputed his conviction for all three indictments. E.J., besides other arguments, argued that interception of administrator rights did not involve electronic data. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], July 2, 2019, 2K-199-648/2019.

administrator rights, which were granted to E.J. by unauthorized access to a computer, do not constitute non-public electronic data within the meaning of Article 198 CC. In this respect, it should be noted that the automatic processing of computer data in an information system is based on the software installed in it; this equipment may be considered as part of an information system when considered as a whole (Article 2 (a) of Directive 2013/40/EU).[94]

The court practice indicates that still there is no direct effect in criminal cases, as in most cases it would be detrimental to the accused and against the principle of legality. But the court practice in 2019 indicates that consistent interpretation (indirect effect) of national law is gaining more power in criminal cases and this is likely to increase in future.

3.1.2. Questioning Existing National Regulations

This category is relatively rare, as out of 51 cases, it occurred in just six. In five cases,[95] references to the EU directives were only indirectly related to criminal law or procedure, as an issue of improper implementation of the EU directives (84/5/EEC, 2005/14/EC, and 2009/103/EC) relating to compensation for damage due to violation of the regulations governing road traffic safety or operation of vehicles causing damage (Art. 281 of the Criminal Code) was questioned.[96] In the last case, improper criminal procedure relating to improper implementation of directive 2010/64/EU was raised, which, in opinion of the accussed, resulted in unjustified court findings regarding his involvement in the commission of the offenses, and a request for direct application of the relevant directive was raised.[97] The court rejected the complaint, stating that a directive

[94] E.J.'s ability to operate the computer as an administrator was granted by unauthorized access to the information system, so obtaining such rights and the ability to use such rights was primarily related to the actions of E.J.'s unauthorized access to the system (Art. 198-1 CC). Case 2K-199-648/2019, supra note 93, par. 29.

[95] Cases 2K-239/2011, 2K-317/2014, 2K-389/2014, supra note 79; Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], May 12, 2015, 2K-242-511/2015; Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Jan. 12, 2016, 2K-52-942/2016.

[96] Basically, as already analyzed in Section 3.1 in all five cases, the parties were raising the same issue from different angles: that Lithuania being a member of the EU must ensure that all injured parties are compensated for their damage and that the amounts of insurance under national law were not lower than the minimum amounts laid down in the directives for personal injury and damage to property. However in all five cases, the complaints were rejected on the ground that the provisions of the mentioned directives cannot be applied in cases where the parties are only individuals (i.e., there is no direct horizontal effect), and even with a positive preliminary ruling from the CJEU, it would not be possible to impose on the individual an obligation to make good any non-pecuniary damage suffered.

[97] The convicted Vietnamese persons questioned the quality of provided interpreters—that no adequate, correct, and qualified translation was ensured in this case and that the directive should

is not a directly applicable legal act, but that the relevant provisions of the criminal procedure code must be interpreted as far as possible in the light of the provisions and objectives of the directive and as an example the case *Pupino*, C-105/03 is referred.

The last decision indicates that so far, the court has followed the position formulated in the jurisprudence of CJEU before the Lisbon treaty, when criminal law was an issue of intergovernmental cooperation expressed by framework decisions and it made no difference between the framework decision and the directive, which is not applicable after the Lisbon treaty. In opinion of the authors, the court had to discuss whether the directive was properly implemented, and if not, the test for the direct application of the certain norms of the directive should have been discussed in the case.

4. Conclusions

The hypothesis was confirmed, as it is difficult to compare criminal law with other sections of EU law due to its character and its close relation to state sovereignty, even though the strengthened role of the EU in the field of criminal law after Lisbon automatically limits the Member States' autonomy both in enacting and applying legislation on the matter.

The principle of direct effect in substantial criminal law is highly unlikely, as when national legislation does not allow consistent interpretation of the national norm, the principle of direct effect cannot be used to determine or aggravate criminal liability, as it would infringe the principles of legality, non-retroactivity, and foreseeability. Theoretically, if we find certain EU norm that is mitigating liability compared to national regulation, it could be applied directly, but is rarely possible in practice given that EU norms are not precise, but provide only minimum rules concerning definitions of crimes and only certain guidelines regarding criminal sanctions, i.e., much discretion is left to national authorities.

The situation in criminal procedure law is different than material law, as one of its attributes is the protection of basic procedural rights of parties in criminal cases, i.e., it may provide and require more protection of individual rights than national law, and basically it protects individual (accused, victim) from the state.

be applied directly in the case, as it was not properly transferred into national law. As a result it was violation of their rights – to a fair defense, to know what they are accused of – and it violated their right to testify in this case, leading to the recording of unlawful, untrue, false translations of one defendant's and another convict's testimony, making unjustified court findings regarding his involvement in the commission of the offenses, Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Apr. 11, 2019, 2K-7-648/2019.

The authors could not find examples of direct application of EU norms on issues of criminal procedure law, but it may be expected in the near future taking into account the newest EU legislation and the EU's ambition to move further in developing additional directives regarding rights in trial.

The case of Lithuania illustrates that the role of EU directives is slightly increasing in national criminal cases, mostly interpreting national law in consistency with EU legislation either to explain national criminal law or to strengthen court arguments in cases. Requests for direct application of directives so far have been unsuccessful, and the grounding of the courts in the cases indicates that courts still hold that direct effect is not possible in criminal law.

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The Construction of European identity in the Paradigm of Anthropocentrism and its Constitutionalization

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Summary: The research highlights the importance of European identity forming in the paradigm of anthropocentrism, reveals the nature, factors, mechanisms, peculiarities and problems related to this process. It is emphasized that the search for the most appropriate conceptual model for the construction of European identity is one of the important conditions for deepening the solidarity and unity of the peoples of Europe, the effective functioning of the European Union, the activation of European integration, the enhancement of synergies between supranational and intergovernmental components of integration processes. The practice of Ukraine on the constitutionalization of European identity and European integration, ie revision of the Constitution of Ukraine confirming the European identity of the Ukrainian people and the irreversibility of the European course of Ukraine, are investigated. The modern practice and doctrinal views on the issues discussed were analyzed. Prospects for the constitutionalization of European identity at the level of supranational integration are presented.

Keywords: European Union (EU) – integration processes – European integration – Europeanization – European identity – self-identification – human rights – fundamental rights

1. Introduction

Constructing European identity and finding its most appropriate conceptual model is one of the important conditions for deepening solidarity and "creating

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an ever closer union among the peoples of Europe"[1] (the preamble to the Treaty on European Union as amended by the 2007 Lisbon Treaty), the effective functioning of the European Union (EU), the activation of European integration. The European identity creation is influenced by the expansion of European self-identification, *inter alia* among EU citizens, the state of trust in its supranational institutions, above all in the European Parliament empowered to represent their interests, and in the European Commission, which directly influences the formation of pan-European narratives – one of the key element of European identity as a collective type of identity. Urgent to the EU are conceptual and other issues connected with the formation of European identity, which cannot be imposed by the management decisions of its institutions, thus it is the discursive-constructivist approach that provides greater opportunities for its theoretical understanding in the categories of multiplicity, variability, flexibility. It is rooted in the consciousness of the peoples of Europe, consolidating them on the basis of common values, political traditions, geographical proximity, commonality: historical experience, political culture, cultural heritage, etc. Social and civic components play an important role.

Respect for human rights as a component of common values is the cornerstone of the implementation of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part,[2] 2014 (hereinafter referred to as the EU-Ukraine Association Agreement) is a factor of the formation of European identity, the core of the conceptual foundations of the EU legal oder, and also serves as one of the decisive tasks in the process of realizing the constitutionally enshrined European integration of Ukraine, the European vector as a priority in the foreign policy of the state, its foreign policy guide. Moreover, according to the amendments made to the fifth paragraph of the preamble of the current Constitution of Ukraine, the European identity of the Ukrainian people and the irreversibility of the European course of Ukraine were confirmed.[3] It is important that the consolidation of the legal certainty of Ukraine's strategic course for EU

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union*. C 202/01. Volume 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN

[2] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. *Official Journal of the European Union*. L 161. Volume 57. 29 May 2014. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&qid=1580481775906&from=EN

[3] *Konstytutsiia Ukrainy* 254k/96-VR, redaktsiia vid 21 liutoho 2019. [online]. Available at: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

membership at the constitutional level is supported by: the proper and timely implementation of the EU-Ukraine "tailored"[4] Association Agreement, that it is a tool for European integration revitalizing and therefore slowing down the processes of Europeanization; "the introduction of EU evaluation by its internal methodology on the state of affairs with practical adherence to common values in Ukraine",[5] which is an essential element of the EU-Ukraine Association Agreement; carrying out the necessary real reforms targeted at the meeting of EU membership criteria; creating conditions for establishing a unified national identity in Ukraine and increasing European self-identification among Ukrainians.

2. Conceptualizing of European identity

There is a single European space around the EU that embodies the idea of a United Europe and has different dimensions: educational, cultural, etc. Formed on common values and interests, the concept of a common cultural heritage, the United Europe has absorbed the distinctive features of each nation and its identity, including them on a parity basis in a pan-European context. That is why the concept of the EU's cultural foundation, which is the base to the creation of European identity constructed by the efforts of the elite in the paradigm of anthropocentrism, has been actively discussed among the European political elite. Each European nation brings in its own unique features to the idea of the United Europe, enriching it, ensuring in such a way the dynamics of European integration changes, the development of integration processes in economic, political and spiritual spheres.

At the 1973 Copenhagen Summit aspirations, including reviving of integration processes, prompted EU Member States' leaders to endorse the Declaration on European Identity[6] and to incorporate the concept of European identity into public discourse. Conditionally defining for a multifaceted and multidimensional concept "European identity" is widely regarded as a geographical identity and

[4] Sii ŠIŠKOVÁ, N. The EU – Ukraine Association Agreement as an Instrument of a New Generation of so called "tailored" Association Agreements: the Comparative View. *From Eastern Partnership to the Association: A Legal and Political Analysis:* Collective monograph. Ed. by Naděžda Šišková. Cambridge: Cambridge Scholars Publishing, 2014. pp. 106–134.

[5] SHULHA, D. Intehratsiina dynamika vykonannia Uhody pro asotsiatsiiu: vysnovky ta rekomendatsii. *Intehratsiia u ramkakh asotsiatsii: dynamika vykonannia Uhody mizh Ukrainoiu i YeS*. Kyiv, 2019. S. 10.

[6] Declaration on European Identity. *Bulletin of the European Communities*. Luxembourg: Office for Official Publications of the European Communities. 1973. № 12. P. 118-122. [online]. Available at: https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf

narrowly – the existence of the EU and its borders. Currently, European identity is characterized as: inclusive; multidimensional, multiple, capable to incorporate different subnational, regional, national and supranational identities; intercultural, multicultural, which recognizes, respects and promotes the development of existing diversity but is also able to produce new identities; based on democracy and the democratic vision of the United Europe.[7] Accordingly European identity is a built phenomenon and its objective is to construct, *inter alia*, the formation of need and ability to live together preserving historical memory and ethnic identity, cultural and religious diversity, guided by common values and common interests. As N. Pelagesha notes the inclusivity of European identity means that under "others" are recognized not those who are outside the borders of nation states, but those who are outside the integration union. The transformation of the national identities of the EU Member States in the context of European integration takes place in this area,[8] accompanied by the emergence of different concepts of "otherness".

European identity is predominantly defined as belonging to a new type of collective identity,[9] coexisting with the national identity of the citizens of the EU Member States, not replacing or weakening it, but causing transformation in a way of reconfiguration and making it more inclusive. John Erik Fossum underlines that "...the prospects for a European nation-type identity to emerge are bleak indeed. Instead what was explored was whether we see a reassertion of national identity, or a transformation of national identities, or the emergence of a post-national identity... National identities are becoming more inclusive and there are signs of an emerging inclusive conception of European identity. The latter is far more akin to a post-national than a national type identity...".[10] The European identity forming is a purposeful project implemented by the European elite, *inter alia*, in the socio-cultural realm through the policy of European identity, its conceptualization. Despite widespread criticism or partial rejection,

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7 ZAGAR, M. *Enlargement – in Search for European Identity*. [online]. Available at: https://www.academia.edu/585043/Enlargement_In_search_for_European_identity

8 PELAHESHA, N. *Ukraina u smyslovykh viinakh postmodernu: transformatsiia ukrainskoi natsionalnoi identychnosti v umovakh hlobalizatsii*: *monohrafiia*. Kyiv: Natsionalnyi instytut stratehichnykh doslidzhen, 2008, s. 70.

9 EDER, K. A. Theory of Collective Identity Making Sense of the Debate on a 'European identity'. *European Journal of Social Theory.* 2009. Volume 12. Issue 4, p. 427; SCALISE, G. European identity construction in the public sphere: a case study on the narratives of Europe. *International Journal of Cross-Cultural Studies and Environmental Communication.* 2013. Volume 2. Issue 2, p. 59.

10 FOSSUM, J. E. Identity-politics in the European Union. ARENA Working Papers, WP 01/17. *Journal of European Integration*. 2001. Volume 23. Issue 4, p. 406. [online]. Available at: https://www.researchgate.net/publication/5014658_Identity-Politics_in_the_European_Union

it is in European identity that experts see considerable potential, recognizing it as an important condition for the progress of integration processes in Europe.

The European identity has a multiple nature as it includes local, regional, national and supranational levels cemented by EU values enshrined in Art. 2 of the Treaty on European Union as amended by the Lisbon Treaty 2007: "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 Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[11] Preamble of the Charter of Fundamental Rights of the European Union states: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities by establishing the citizenship of the Union and by creating an area of freedom, security and justice".[12] It is important to consider on the possible consequences of a reasoned proposal by the EU Council that there is a clear risk of a serious breach by a Member State or determination by the European Council of the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 as well as the potential of a preventative mechanism,[13] carefully researched by Professor Naděžda Šišková. The presence of common values and unique features in the EU does not prevent the citizens of each state to be proud of their unique traditions, history, culture. They tend to be in unity with others, depending on their respect and adherence to common values and other aspects of the spiritual essence of Europe.

[11] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union*. C 202/01. Volume 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN

[12] Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*. C 202/02. Volume 59. 7 June 2016. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN

[13] ŠIŠKOVÁ, N. European Union's Legal Instruments to Strengthen the Rule of Law, their Actual Reflections and Future Prospects. *The European Union – What is Next? A Legal Analysis and the Political Visions on the Future of the Union:* Collective monograph. Naděžda Šišková (ed.). Köln: Wolters Kluwer Deutschland, 2018, p. 143–144.

3. Mechanisms for constructing of European identity

European integration, as Johan P. Olsen points out, is: first, evidence of the existence of a particular social and cultural community with its own collective identity; second, as a result of calculated profit, when actors become a part of a wider system with an added value overwhelming their individual efforts; third, as a consequence of sympathy towards certain political principles, institutions and rules of political coexistence.[14] In the doctrine changes, reforms that take place in the internal and external dimensions of state practices under the impact of European integration processes and peculiar to them, *inter alia* in the socio-cultural realm, due to the implementation of the EU identity policy, are usually referred to as "Europeanization". The latter is implemented in the way of eliminating differences and inconsistencies, gradual convergence, implementation of the most effective mechanisms, procedures, practices developed in the process of interaction between supranational and national levels in order to consolidate and enhance the effectiveness of economic cooperation, strengthen human rights protection, etc.

It is noteworthy that European integration is accompanied by Europeanization, the conceptual model of which is to promote, support and accelerate European integration processes in the format Membership Europeanization, Accession Europeanization or Neighborhood Europeanization (does not involve membership). Therefore, Europeanization is a phenomenon characterized by multidimensional and multilevel approaches, in which individual states act not only as full entities, but also as objects of influence within the Europeanization process, which in this case serves as a tool for the implementation of EU foreign policy. Europeanisation should be understood, from the one hand, as a process of political and institutional adaptation to the European integration, and, from the other hand, as restatement or redefinition on national identity and creation of European identity.[15] Well-defined and thoroughly developed mechanisms for constructing of European identity, mostly by the efforts of the political elites, are: the development of the EU Citizenship Institute;[16] ensuring respect for human rights and the ability to protect fundamental rights at EU level,[17] the presence of European symbols; the

[14] OLSEN, Johan P. *Europe in Search of Political Order.* Oxford: Oxford University Press, 2007, p. 172–173.

[15] See FEATHERSTONE, K. KAZAMIAS, G. *Europeanization and the Southern Periphery*. London: Routledge, 2014, p. 282.

[16] See DENYSOV, V. N. Hromadianstvo Yevropeiskoho Soiuzu. *Entsyklopediia mizhnarodnoho prava*: U 3 t. / Red. kol.: Yu. S. Shemshuchenko, V. N. Denysov (spivholovy) ta in.; Instytut derzhavy i prava im. V. M. Koretskoho NAN Ukrainy. T. 1. A–D. Kyiv: Akademperiodyka, 2014, s. 649–650.

[17] See HAMUĽÁK, O. The Variations of Judicial Enforcement of EU Charter of Fundamental Rights vis-á-vis Union Institutions and Bodies. *European Studies – The Review of European Law, Economics and Politics*. 2018. Volume 5. Wolters Kluwer, pp. 98–112.

functioning of the European Monetary Union as a form of monetary integration for most EU Member States, in which they see considerable potential despite periodic crises; formation of pan-European information and communication space; implementation of a European collective memory policy; development of EU specialized libraries; stepping up EU policy in the field of culture; implementation of language policy at EU level; implementation of EU education policy, etc. Above mentioned mechanisms serve as factors of community cohesion,[18] thus a guarantee of the integration association unity. At the same time, authors who characterize European identity as "thick" tend to be critical of this concept, referring to it as being too content "thick" and not without significant methodological flaws, in particular when it comes to identification of European identity and EU legitimacy, on the interpretation of problems with the formation of European identity as the main obstacle to the development of European integration,[19] pan-European unification processes. "What matters here is timing and a sense of realism"[20].

4. Factors of European identity formation in the anthropocentrism paradigm and problems related to this process

There is a common statement that an integration association forms its own European identity which should legitimize it among the citizens of the Member States,[21] since the EU citizen must identify himself not only with the relevant state but also with the integration association of which the state is a member, under whose jurisdiction he is. In Article 8 of the second part of 1992 Maastricht Treaty "Citizenship of the Union" defined "citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union".[22] It is noteworthy that "EU citizenship is not, by

[18] PELAHESHA, N., op. cit., p. 68.

[19] WALKENHORST, H. The Conceptual Spectrum of European Identity: From Missing Link to Unnecessary Evil. *Limerick Papers in Politics and Public Administration*. 2009. № 3. P. 2. [online]. Available at: http://www.ul.ie/ppa/content/files/Walkenhorst_conceptual.pdf

[20] SCHNEEMELCHER, P., HAAS, J. Rules enforcement in the EU: "conditionality" to the rescue? *Bertelsmann Stiftung Policy Paper*. 28.05.2019. P. 11. [online]. Available at: https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/EZ_JDI_BST_Policy_Paper_Conditionality_2019_ENG.pdf

[21] PELAHESHA, N., op. cit., p. 163.

[22] *Treaty on European Union*, as signed in Maastricht on 7 February 1992. Luxembourg: Office for Official Publications of the European Communities, 1992. P. 15. [online]. Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf

its nature, a nationality under international and national law",[23] it is derivative, complementing national citizenship without replacing it. The introduction of EU citizenship does not abolish national which is inherent in the correlation of national and European identity, that is seen as an important condition for deepening the solidarity of the peoples of Europe, their cohesion, as well as the vitality, capacity and development of European integration. Thus, a peculiar feature of the EU at this stage is that the above forms of citizenship complement each other confirming the acceptability of the concept of coexistence of national and European identity which is a higher and comparatively new system measurement of human identification practices, approaches to these practices.

The introduction of appropriate EU symbolism also plays an important role in affirming European identity and consolidating its connection with EU citizenship. The basic idea behind the introduction of European symbols is the gradual modification of the consciousness of the peoples of Europe regarding the political community to which they belong,[24] since as Ioana-Sabina Prisacariu notes "... symbolic forms create identity and are active elements in social problems; they do not only express differences and power ration, but also shape relations through the emotional and ideological construction of images".[25]

The basis of European identity is not homogeneity, but rather "the diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe, all give the European Identity its originality and its own dynamism".[26] Up to these days Jean Monnet's famous statement, "if we had started to create the european community right from the beginning, we should have started from culture" has not lost its relevance. In this context is notable that the Reflection Group set up on the initiative of the European Commission concluded: "European culture, indeed Europe itself, is not a "fact". It is a task and a process".[27] The purpose of numerous activities,

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[23] DENYSOV, V. N., op. cit., p. 651.

[24] GOTTDIENER, M. Postmodern Semiotics: Material Culture and the Forms of Postmodern Life. Oxford, UK; Cambridge, USA: Blackwell, 1995, p. 227.

[25] PRISACARIU, I. S. The Symbols role in the Creation of a European Identity. Dissertation paper. 2007, p. 96. [online]. Available at: https://pdfs.semanticscholar.org/a11a/d8c7d95e2da2b672cef95a17f66017497c0e.pdf

[26] Declaration on European Identity. *Bulletin of the European Communities*. Luxembourg: Office for Official Publications of the European Communities. 1973. № 12. P. 121. [online]. Available at: https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf

[27] The Spiritual and Cultural Dimension of Europe. Reflection group: Concluding remarks / K. Biedenkopf, B. Geremek, K. Michalski. Vienna / Brussels: European Commission, Institute for

among which: the holding of European Weeks (European Mobility Week, etc.), European Years (European Cultural Heritage Year, etc.), the introduction of an EU citizen's passport, European driving licenses and the creation of unified license plate form for cars of EU citizens, is the formation of collective European consciousness and identity, the affirmation of mutual respect and trust through the Europeanisation of culture sphere, adhering to such multifaceted and in-depth approaches, as a unity in diversity and multiculturalism. Cris Shore stressed: "Behind these seemingly mundane cultural initiatives lay a more profound objective: to transform the symbolic ordering of time, space, education, information, and peoplehood in order to stamp upon them the "European dimension". In short, to reconfigure the public imagination by Europeanising some of the fundamental categories of thought",[28] shaping European identity in the paradigm of anthropocentrism, respecting human rights, and legitimizing the process of European integration.

It is important to create the conditions under which European identity can be formed and developed, that will actualise a relevant cultural and educational policy which can transform peoples differences into a pan-European value. There is a process of Europeanization of national educational policies[29] by using the educational system to form a feeling among EU citizens of belonging to the European community, legitimizing a supranational integration association. EU language policy has become a separate area of EU political activity, demonstrating its importance in integration processes. There are reasons to testify that, as stated in the European Commission's report, "Languages are at the heart of the European project: they reflect our different cultures and, at the same time, provide a key to understanding them".[30] The EU's activity in the digital culture area also proves the fact that the main aim is to create a European cultural space, which is an element of European identity based on a common European cultural heritage and international cooperation in this area, taking into account (including) the purpose of cultural enrichment. Professor Jurgen Habermas acknowledged that further development of integration depends on the communicative network of common European political publicity, which composes common political culture

Human Sciences; Luxembourg: Office for Official Publications of the European Communities, 2005. P. 8. [online]. Available at: https://ec.europa.eu/research/social-sciences/pdf/other_pubs /michalski_091104_report_ annexes_en.pdf

[28] SHORE, C. "In uno plures" (?) EU Cultural Policy and the Governance of Europe. *Cultural Analysis*. 2006. Volume 5, p. 15.

[29] ORTLOFF, D. H. Becoming European: A Framing Analysis of Three Countries' Civics Education Curricula. *European Education*. 2005. Volume 37. Issue 4, p. 49.

[30] Commission Working Document – Report on the implementation of the Action Plan "Promoting language learning and linguistic diversity" {SEC(2007)1222} /COM/2007/0554 final/. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0554

beared by civic society.[31] In fact, there is a transition to a knowledge society, and more often the prerequisites for political and structural change in Europe are being laid by the latest information and communication technologies.

The concept of common cultural identity is based, *inter alia*, on the common values and concept of the common cultural heritage of Europe as enshrined in the 1954 European Cultural Convention, States Parties of which, in particular, are all EU Member States. Professor M.M. Mikhievich emphasizes the importance of "developing European self-awareness for the formation of European cultural identity".[32] After all, the development of EU cultural policy, the formation of a European cultural identity, at the heart of which is the concept of a common European cultural heritage, cannot be understood out of the context of a broad political project for constructing a United Europe, the activation of the process of European integration, the importance of shaping European identity in the paradigm of anthropocentrism.

The process of self-identification of Europeans is complicated by urgent problems facing the EU. Despite the long period of its development and expansion, undeniable achievements, the integration processes in recent years that have made Europe's history virtually inevitable have been compounded by numerous challenges and threats. First of all, it concerns: inequality among EU Member States and the need to provide them with equal opportunities; the migration crisis; uneven economic development that has gradually led to a crisis in the functioning of the European Monetary Union and social exacerbations; the bureaucratic nature of the EU's organizational structure and law-making process; "integration fatigue" and reluctance to pursue expansion policies; revision of the current accession procedure and putting forward new criteria for EU membership; the application of double standards and the manipulating conditions that determine the opening of accession negotiations for the Western Balkan countries; the fiasco of EU Balkan policy, as a consequence, launching a redistribution of influence in the Western Balkans; centrifugal trends; the inevitable effects of Brexit; the need to further improvement of the European Neighborhood Policy, its southern and eastern dimensions; security challenges; terrorist threats. During this, Euro-optimism is inferior to Euro-skepticism and even European-pessimism. The prolonged migration crisis has tested the strength of the EU institutional system, necessitating political transformation in order to avoid "fragmentation" within the Union.[33] Problems related to interethnic relations, "internal Islam",

[31] HABERMAS, J. *The Inclusion of the Other: Studies in Political Theory.* Cambridge: John Wiley & Sons, 2015, p. 219.

[32] MYKIIEVYCH, M. M. *Mizhnarodno-pravovi aspekty spivrobitnytstva Yevropeiskoho Soiuzu z tretimy krainamy: monohrafiia.* Lviv: Vyd. tsentr LNU im. Ivana Franka, 2001, s. 11.

[33] FALALIEIEVA, L. Kopenhahenski kryterii yak chynnyky rozbudovy yevropeiskoi intehratsii. *Naukovi zapysky Instytutu zakonodavstva Verkhovnoi Rady Ukrainy*. 2017, № 2, s. 124.

religious intolerance in the EU Member States remain relevant, as the growth of non-Christian population in them has not become a consolidating factor for the formation of European identity. Muslim identity has proven to be so strong that sometimes it claims to dominate, impose its own value system, and this does not contribute to solving the identified conceptual problems and overcoming the crisis phenomena that accompany integration processes at the present stage. For political and strategic reasons Europeans face new pressing questions on assessing the process of European integration in terms of issues solving related to interethnic relations in EU Member States, the impact of enlargement on a feeling of cohesion and solidarity within the EU, etc. At the same time, the foundation of European identity is an awareness of value and strict respect for human rights, creation of a comfortable environment at the level the most favorable for life.

5. The constitutionalization of European identity in Ukraine

European integration is part of the foreign policy activities of many European countries, among which Ukraine is. According to Academician Y. S. Shemshuchenko, the norms of the Constitution of Ukraine are the political and legal basis for the implementation of the foreign policy state function based on its national interests and domestic policy, widely recognized principles and norms of international law.[34] At the same time, Professor V. M. Shapoval acknowledges that "the problem of the content of the constitution has different sides of the theoretical and practical nature among which special attention is paid to those that appear in the international legal context".[35] One of the peculiarities of the newest constitutions is the presence in their texts of provisions that "create legal prerequisites for the participation of states in various integration processes ...".[36] That is what the Law of Ukraine "On Amendments to the Constitution of Ukraine (concerning the strategic course of the state for full membership of

[34] SHEMSHUCHENKO, Yu. S. Konstytutsiia Ukrainy 1996. *Entsyklopediia mizhnarodnoho prava*: U 3 t. / redkol.: Yu. S. Shemshuchenko, V. N. Denysov (spivholovy) ta in.; Instytut derzhavy i prava im. V. M. Koretskoho NAN Ukrainy. T. 2. E–L. Kyiv: Akademperiodyka, 2017, s. 738; sii SHEMSHUCHENKO, Yu. S. Na shliakhu do onovlennia Konstytutsii Ukrainy. *Chasopys Kyivskoho universytetu prava*. 2013. № 2, pp. 4–5.

[35] SHAPOVAL, V. N. Soderzhanie Konstitucii v kontekste mezhdunarodnogo prava. *Mezhdunarodnoe pravo kak osnova sovremennogo miroporjadka. Liber Amicorum k 75-letiju prof. V. N. Denisova*: monografija / Pod red. A. Ja. Mel'nika, S. A. Mel'nik, T. R. Korotkogo. Kiev; Odessa: Feniks, 2012, s. 339.

[36] Ibid., s. 340.

Ukraine in the European Union and in the Organization of the North Atlantic Treaty)"[37] No. 2680-VIII of February 7, 2019 should be focused on and which came into force on 21 February 2019, according to which the Constitution of Ukraine was revised, in particular, the provisions on the European integration of the state: the definition of the bases for the implementation of the strategic course for the acquisition of full membership of Ukraine in the EU belongs to the powers of the Verkhovna Rada (paragraph 5 of Part 1 of Article 85 of the Constitution of Ukraine), the President of Ukraine, among other things, is the guarantor of the realization of the strategic course of the state for the acquisition of full membership of Ukraine in the EU (part 3 of Article 102 of the Constitution of Ukraine), and the Cabinet of Ministers of Ukraine provides implementation of this course (paragraph 1^1 of Article 116 of the Constitution of Ukraine).[38] The above, however, neither crucial nor significant for the realization of Ukraine's European integration, since it is completely correlated with the functions and powers of the above mentioned state authorities in the foreign policy area *(for example, the definition of the principles of domestic and foreign policy belongs to the powers of the Verkhovna Rada of Ukraine (paragraph 5, part 1, Article 85 of the Constitution of Ukraine), therefore, it is she (the Verkhovna Rada) who determines the principles of implementation of the strategic course of the state for EU membership)* and essentially does not approach the stated goal of integration.

The EU has explicitly reaffirmed its recognition of European identity, Ukraine's aspirations as a European state which shares a common history and common values with its Member States and is committed to realize those values while ensuring respect for them.[39] The stated provision of the preamble to the EU-Ukraine Association Agreement should not be interpreted as a "substitute" for the current constitutionally enshrined EU membership strategy, actually the latter also indicates the long-term prospect of achieving this goal. The question arises whether it was necessary to incorporate this provision into the constitutional text as well as to "confirm the European identity of the Ukrainian people"[40] once again

[37] *Pro vnesennia zmin do Konstytutsii Ukrainy (shchodo stratehichnoho kursu derzhavy na nabuttia povnopravnoho chlenstva Ukrainy v Yevropeiskomu Soiuzi ta v Orhanizatsii Pivnichnoatlantychnoho dohovoru): Zakon Ukrainy* № 2680-VIII vid 7 liutoho 2019. Vidomosti Verkhovnoi Rady Ukrainy. 2019. № 9, p. 50. [online]. Available at: https://zakon.rada.gov.ua/laws/show/2680-19#n2

[38] *Konstytutsiia Ukrainy* 254k/96-VR, redaktsiia vid 21 liutoho 2019. [online]. Available at: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[39] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. *Official Journal of the European Union*. L 161. Volume 57. 29 May 2014. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&qid=1580481775906&from=EN

[40] *Konstytutsiia Ukrainy* 254k/96-VR, redaktsiia vid 21 liutoho 2019. [online]. Available at: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

(preamble to the Constitution of Ukraine) that is obvious, already recognized by the EU in the preamble to the Association Agreement, thus European self-identification remains out of date mostly for Ukrainian society, because "progress, prosperity, security and a high standard of living" cannot be achieved by only declaring its Europeanness and commitment to European values.[41]

Procedures are necessary to preserve the fundamental values of a democratic society, the national sprouts of conceptual lawmaking, it actualises the need to improve the mechanism of drafting laws, to many of which society not only doesn't have time to react, but, *inter alia*, to understand and comprehend. Qualitative laws, especially the Basic Law, their proper substantive content, semantic unity and integrity, clear and detailed justification are not quickly created as well as others socially significant decisions. Besides, the text of the Constitution of Ukraine, like any other's state, cannot be revised and rewritten by electoral rhetoric of one or another political force with reference to messianic care for "safeguarding the country from possible political manipulation" in the future. Instead, it is crucial to defend the national interests, the international legal position of the state more resolutely and pragmatically, intensify and consolidate efforts to implement real visible internal reforms and proper implementation of international commitments.

It is not about situational constitutional and legal support for European aspirations but about a complex and long process of intensifying results-oriented efforts, first of all, towards completing the implementation of inclusive constitutional reform, a systematic approach to it, in order to create preconditions for concerted and consolidated actions to undertake visible in-depth internal reform transformations, proper and timely implementation of the commitments made under the EU-Ukraine Association Agreement. A number of conflicting provisions of the recently presented Concept of Amendments to the Constitution of Ukraine[42] are also to be updated and eliminated.

The practice of amending the Constitutions of Czech Republic, Slovakia, Poland, Estonia, Latvia, Lithuania, Hungary indicates that they mainly concerned: strengthening the role of the international treaty in national legal systems; recognizing the primacy of EU law over domestic law; fixing the possibility of transferring some of the sovereign rights to the EU in order to achieve common goals. EU membership in a supranational integration union causes for States restriction of their sovereign rights for an indefinite period, part of which they

[41] POPOVA, N. Kontseptsiia yevropeizatsii ta mozhlyvosti yii vykorystannia dlia analizu vidnosyn Ukraina – YeS. *Istoryko-politychni problemy suchasnoho svitu*: Zbirnyk naukovykh statei. Chernivtsi: Chernivetskyi natsionalnyi universytet, 2017, T. 35–36, s. 156.

[42] BRYZITSKYI, M. Shcho ne tak iz Kontseptsiieiu zmin do Konstytutsii. *Dzerkalo tyzhnia.* 2019. № 43–44 (439–440), s. 2.

pass on to it. "It is important that there is a tendency to establish the actual priority of international treaties governing the processes of pan-European integration with respect to certain provisions of the fundamental laws of the States Parties to these processes. The outlined trend provided for just by the constitutions themselves is reflected in the transfer of some of the powers of state bodies to relevant international organizations and institutions. However, such a trend does not deny the legal properties of the constitution as a fundamental law of the state, the importance of constitutional regulation for the organization and implementation of all functions of the state, including external ones".[43] The constitutions of some EU Member States provide for the transfer of sovereign rights in favor of inter-state associations. Thus, in paragraph 1 of Article 23 of the Basic Law (German Grundgesetz) of the Federal Republic of Germany 1949 as amended on 21 July 2010, stipulates that "in order to realize the idea of a United Europe…The Federation may transfer its sovereign rights",[44] in paragraph 1 of Article 24 established that "the Federation may by law transfer its sovereign rights to interstate associations",[45] and paragraph 2 of this article refers to the possibility of the Federation's consent "to such restrictions on their sovereign rights, which should result in the establishment and maintenance of a peaceful and stable order in Europe and in relations between peoples around the world".[46] Paragraph 2 of Article 28 of the Constitution of the Hellenic Republic 1975 as amended in 1986 and 2001, states: "For the sake of serving to important national interests and developing co-operation with other States, it is possible, through the conclusion of a convention or agreement, to recognize the competence of international organizations provided for by the Constitution …" and paragraph 3 of this article states that "Greece may, on a voluntary basis, by adopting a law…, restrict the exercise of national sovereignty if important national interests so require, as long as it does not violate human rights and the foundations of a democratic system, it shall be carried out on the basis of equality and reciprocity".[47] The constitution of the French Republic of 1958 (with amendments) contains a separate section XV "on the European Union", Article 88-1 of which states: "The Republic participates in the European Union founded by the free choice of states under the treaties they have concluded for the joint exercise of certain

[43] SHAPOVAL, V. N., op. cit., p. 339.

[44] *Konstitucii zarubezhnyh gosudarstv: Velikobritanija, Francija, Germanija, Italija, Evropejskij sojuz, Soedinennye Shtaty Ameriki, Japonija*: ucheb. posobie. Sost. V. V. Maklakov. 8 izd. M.: Infotropic Media, 2012, s. 188.

[45] Ibid., p. 189.

[46] Ibid.

[47] *Konstitucii gosudarstv Evropejskogo Sojuza*. Pod obshh. red. L. A. Okun'kova. M.: Izd. gruppa INFRA M–NORMA, 1997, p. 256.

powers".[48] Given the above, we are talking about practically significant issues that require constitutional regulation.

Having successfully fulfilled the commitments under the EU-Ukraine Association Agreement, meeting the criteria for EU membership and putting the real prospect of joining, there is an urgent need for Ukraine to ensure constitutional and legal regulation of the possibility of transferring sovereign rights to interstate unions. Therefore, the constitutional consolidation of the above provisions is not as necessary as determining the possibility and mechanism for the transfer of their sovereign rights to inter-state associations, it means that quite possible that the current Constitution of Ukraine will again need to be amended accordingly. Such fragmentary approach is increasingly being compared to the dotted repair of our roads. The Ukrainian doctrine of international law is already exploring the issues outlined above and relevant researches can become a theoretical and methodological basis for the subsequent constitutional changes and additions, which could have been avoided with the availability of a methodological basis of development, strategy for the development of the Basic Law, proper scientific substantiation, thoughtful and a well-balanced concept of its renewal, comprehensive approach to the latter. It would clearly be more farsightedly to envisage the possibility of transferring sovereign rights to interstate associations while amending the current Constitution of Ukraine to determine the strategic course of the state and to confirm the European identity of the Ukrainian people, or even better instead. This would be a manifestation of conceptual lawmaking, a systematic approach to constitutional and legal modernization, taking into account the experience and content of the constitutional practice of EU Member States as a methodological guideline for amending and improving the practical effectiveness of the Constitution of Ukraine, its optimal, balanced, thoughtful and reasoned update on the best traditions of constitutionalism.

6. Conclusion

Based on the above, we can summarize that maintaining the dynamics of European self-identification growth among Ukrainians, deepening and bringing to a new level of cooperation with the EU depend on the practical implementation of the existing legal foundations of regulation of the process of European integration of Ukraine, conceptual approach to it, the observance of common values, respect for human rights in particular, the level of cultural and civilizational self-identification of Ukrainians with Europeans and feeling like an organic part of them,

[48] Ibid., p. 681.

the development of Europe in Ukraine and its Europeanization. The nature of civilizational challenges and threats has recognized the changes, it should not be ignored, as well as the fact that constitutional stability is an important factor in the stability of the state and a driver for the democratic progress of society. At the same time, a qualitatively new stage of EU cooperation with Ukraine was launched, its evolution from *the Neighborhood Concept* to *the Association Strategy* is being crystallized, the effectiveness of concrete actions for the creation of which before the EU would mean the success of the Eastern Partnership policy, confirmation of the attractiveness of the regional integration European model, the logic of integration through law and democratization, as well as European self-identification.

From the foregoing it is seen that the constitutionalization of European identity at EU level will be of great practical importance, reaffirming and embodying the aspirations of Member States to deepen solidarity between their peoples, respecting their history, culture, traditions, national identity. Particularly relevant are the objective basic factors which could determine the presence or absence of European identity, focus on its complex and balanced formation, determine the differences between theoretical desirability and practical implementation. The mechanisms for constructing European identity resemble those with which it was formed and now national identities are being reconstructed. The formation of European identity is gradual, thought-out, balanced and cautious, possibly slow-moving, but has a growing impact on the internal socio-cultural environment of the EU Member States. Generally, the key structural elements and mechanisms for constructing by the efforts of the political elites of an integration association and / or its Member States, European identity, can be defined as follows: an approval of a pan-European political and legal space; presence of European symbols; the development of the EU Citizenship Institute; ensuring respect for human rights and the ability to protect fundamental rights at EU level; the functioning of the European Monetary Union as a form of monetary integration for most EU Member States; creation of a pan-European information and communication space; implementation of EU cultural and educational policies, development of a pan-European system of cultural and educational institutions and programs, in particular the *College of Europe*, *Jacques Delors Institute*, *Jean Monnet's instrument*, *EU Programme Erasmus+*, *EU Programme Europe for Citizens*, which serve to shape European collective memory, common historical consciousness, solidarity and cohesion around common values and basic principles.

The EU development dynamics has created the conditions for the formation of European identity as a result and a tool for the progress of integration processes in its framework, interaction in the process of European integration.

The creation of European identity and its conceptualization, on the one hand, have become a challenge for both EU citizens and its political elite, as well as the scientific community, and on the other – is an objective consequence of the EU becoming a supranational integration association, an independent actor in international relations and a fully-fledged international law entity. Difficulties in forming European identity based on geographical proximity, linguistic homogeneity, common historical experience and cultural heritage are expressed, which undoubtedly affects the EU's "integration capacity", but European identity is a cohesive factor that will influence not only the EU and its Member States. The use of a discursive-constructivist approach and methodological refinement of constructivists contributes to a critical rethinking of the concept of European identity, without unduly underestimating or exaggerating its role in the development of European integration. European identity is an important component of European integration, providing it with a coherent, systemic vision, gradually moving away from a superficial institutional approach. Search of the most appropriate conceptual model for European identity creation is one of the important conditions for deepening solidarity and consolidation of the peoples of Europe, effective functioning of the EU, activation of European integration, strengthening synergy between supranational and intergovernmental components.

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Penetration of the Charter of Fundamental Rights of the European Union into the Constitutional Order of the Czech Republic – Basic Scenarios

Ondrej Hamuľák*

Summary: This paper deals with the question, whether, how and to what extent the Charter of Fundamental Rights of the EU could enter the scene of constitutional review before the Czech Constitutional Court. In connection to Czech Republic, this question must react on the special constitutional category – Czech constitutional order, which includes also international agreements on human rights which are binding for the Czech Republic. The paper analyses the question, whether EU Charter can be understood as such international commitment or not and what are the options of its application by the Czech Constitutional Court and also how we can define its relation to the constitutional order. Paper distinguishes 3 scenarios: 1) inclusion of the EU Charter into the constitutional order of the Czech Republic; 2) refusal of formal inclusion of the EU Charter into the constitutional order of the Czech Republic; and 3) understanding of the EU Charter as association of constitutional order, capable to be used within the constitutional order even without the formal inclusion into the set of Czech constitutional rules.

Keywords: EU Charter, constitutional order, constitutional review, Czech Republic.

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1. Introduction

Charter of the Fundamental Rights of the European Union (hereafter "EU Charter") represents one of the most important milestones in the development of EU law. Since 2000, when it was created, it has become one of the main themes of doctrinal discourses. Over the past almost 20 years, the academia and legal doctrine created an enormous amount of studies, texts, books and articles devoted to this document, dealing with the plethora of issues (e.g nature and content of the EU Charter; the impact of the EU Charter at the EU legal system as such; strengthening the democratic legitimacy and the rule of law in the EU; interpretation of so-called horizontal provisions = articles 51-54 of the EU Charter; the impact of the EU Charter within specific areas of protection of fundamental rights and the impact of the EU Charter in the framework of national practice etc.). The vast majority of these academic texts deals with horizontal topics, or they offer the comments on selected case law. Such general (of in other words constitutional) issues related to the EU Charter certainly deserve academic attention, especially given the fact that the EU Charter is to certain extend still an "unexplored territory".[1]

In the following text, we will address issues related to the penetration of the EU Charter into national practice and its implications for the system of protection of fundamental rights. More specifically, this text offers an insight into the question of how the position of the EU Charter can be defined and understood within the constitutional system of the Czech Republic. Our research is based on the claim of robust potential of the EU Charter to impact the national judicial practice. EU Charter brought the kind of new federal impetus[2] into the EU legal system in two layers. Firstly, it opened the discussions about more 'bounding' tendencies within the integration project[3] as it binds also the Member States

[1] For the overview of the most significant doctrinal contributions see HAMUĽÁK, O. Analysing the Fundamental Rights Messiah – Review Article on the Edited Book SVOBODOVÁ, M., SCHEU H. CH., GRINC, J. (eds.) *EU Charter of Fundamental Rights: 10 year in the practice - evaluation and prospective views*. In Czech yearbook of Public and Private International Law, 2020, vol. 11., pp. 515–519.

[2] Not immune from the critics. See DI FABIO, U. A European Charter: Towards a Constitution for the Union. *Columbia Journal of European Law*, 2001, vol. 7, pp. 159–172.

[3] EECKHOUT, P. The EU Charter of Fundamental Rights and the Federal Question. *Common Market Law Review*, 2002, vol. 39, pp. 945–994; KNOOK, A. The Court, the Charter, and the vertical division of powers in the European Union. *Common Market Law Review*, 2005, vol. 4l, pp. 367–398; HAMUĽÁK, O. *National Sovereignty in the European Union – View from the Czech Perspective*. Springer, 2016; SPAVENTA, E. Federalisation versus Centralisation: tensions in fundamental rights discourse in the EU. In CURRIE, S., DOUGAN, M. *50 years of the European Treaties: Looking backwards Thinking Forward*, Hart publishing, 2009, p. 343.

(article 51 para 1 of the EU Charter).[4] Thanks to this diagonal[5] binding force, it can be enforced against the Member states in infringement proceedings before the Court of Justice (articles 258-260 TFEU)[6] and secondly it widely penetrates into the national practice as the instrument of the human rights review before the judicial authorities of the Member States. The scope, limits and interpretation of particular EU Charter provisions must follow the unified rules and national bodies must take due account of the authority of the case law of the Court of Justice. Having two variables in a mind = 1st – decentralized applicability of the EU Charter and 2nd – general applicability of the EU law before all national law-enforcing authorities, we are facing the need to debate and research on the impact of the EU Charter on national constitutional law and activities of national constitutional courts. EU law establishes an overall obligation to apply/reflect the EU rules before all national courts in all of their procedural activities and does not distinguish between situations whether the application authority is part of system of general judiciary or whether it is a special constitutional court.[7] This notion was recently (albeit indirectly) approved by the CJEU in "hard" constitutional cases like Melloni[8] and Taricco[9]. Additionally, we must give a due respect to the principles limiting national procedural autonomy, namely the principle of effectiveness and equal treatment. According to these principles, entitlements under EU law must be protected to the same extent and with the same quality as similar entitlements under national law.[10] In addition, Members States must adhere to the principle of effective judicial protection under article 19 para. 1 TEU and principle of sincere cooperation (article 4 para. 3). As approved by the CJEU in its recent *ASJP* judgement, the Member States are „[...] obliged [...] to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law [... and] to establish a system of legal remedies

[4] See further HAMUĽÁK, O., MAZÁK J. The Charter of Fundamental Rights of the European Union vis-à-vis the Member States – Scope of its Application in the View of the CJEU. *Czech Yearbook of Public & Private International Law*, 2017, vol. 8, pp. 161–172.

[5] See further NAGY, C. I. The diagonality problem of EU rule of law and human rights: Proposal for an Incorporation à l'européenne. *German Law Journal*, 2020, vol. 21, no. 5, pp. 884–903.

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

[7] See BOBEK, M. Learning to talk: Preliminary rulings, the courts of the new Member States and the Court of Justice. *Common Market Law Review*, 2008, vol. 45, no. 6, pp. 1611–1643. See also KUSTRA-ROGATKA, A. The Kelsenian Model of Constitutional Review in Times of European Integration – Reconsidering the Basic Features. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 7–37.

[8] C-399/11 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

[9] C-105/14 *Taricco and Others*, ECLI:EU:C:2015:555.

[10] STEHLÍK, V. *Aplikace národních procesních předpisů v kontextu práva Evropské unie* [The Application of national procedural rules in the context of EU law], Prague: Leges. 2012.

and procedures ensuring effective judicial review in those fields."[11] This duty is understood as integral part of the rule of law protection within the EU and reflects the common values on which EU is founded. All of these arguments led us to conclusion of wide pertinence of EU Charter in proceedings before the national constitutional courts as the systemic part of law-enforcing system within the EU.

2. Preliminary note – International Human Rights Treaties as constitutional *lex specialis*

Before we can deal with the position of the EU Charter within the Czech constitutional law, it is necessary to explain evenly the specific question of the constitutional status of international treaties on human rights.

Until the so-called "Euro" amendment of the Constitution of the Czech Republic came into force in 2002[12], international human rights treaties enjoyed a special constitutional status. According to the then wording of article 10 of the Constitution, they took precedence over the ordinary law and the Constitutional Court (hereafter "CCC") held specific powers to assess the compatibility of Czech ordinary laws with these international documents. However, the "Euro" amendment in 2002 formally removed this double-track nature of human rights and other presidential international treaties and deprived the CCC of its privileged position by introducing a decentralised model of compliance. According to new wording of article 10 of the Constitution, all presidential international treaties "form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply." Thanks to this incorporative norm, the human rights treaties became applicable before the ordinary courts and it´s should be their role to review the compatibility of statutes with them. This novelty brought a big turn in approach to fulfilment of international human rights obligations in order to achieve faster and more efficient courts´ decisions.[13] However, Constitutional court in the widely discussed[14] decision Pl. ÚS 36/01

[11] See C-64/16 *Associação Sindical dos Juízes Portugueses*, ECLI: EU:C:2018:117, para 34.

[12] Constitutional act no. 395/2001 Coll.

[13] See BARTOŇ, M. Novela Ústavy č. 395/2001Sb. (tzv. euronovela Ústavy). *EMP*, 2002, vol. 9, no. 1/2, pp. 30–32.

[14] Critically see KÜHN, Z., KYSELA, J. Je Ústavou vždy to, co Ústavní soud řekne, že Ústava je? Časopis pro právní vědu a praxi, 2002, vol. 10, no. 3, pp. 199–2014; or FILIP, J. Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem, *Právní zpravodaj*, 2002, vol. 3, no. 11, P) pp. 12–15. In favour of CCC decision see MALENOVSKÝ, J. Euronovela Ústavy: „Ústavní inženýrství" ústavodárce nebo Ústavního soudu či obou? In KYSELA, J. (ed). *Deset let Ústavy České republiky – východiska, stav, perspektivy.* Prague: Eurolex Bohemia, 2003. pp. 173–189 nebo HOLLÄNDER, P. Dotváření Ústavy judikaturou Ústavního soudu.

("Bankruptcy Trustee" case) opposed the above-mentioned conceptual change and stated that the special status of international human rights treaties within the Czech legal system should be maintained. Within the framework of the obiter dictum, CCC created a construction according to which even after the "Euro" amendment to the Constitution there was no restriction in its powers, because international human rights treaties, despite the removal of explicit reference from the Constitution text, will continue to serve as a reference criterion for the review of constitutionality of ordinary laws as an immanent part of the constitutional order of the Czech Republic: "The constitutional basis of a general incorporative norm, and thereby the overcoming of the dualistic concept of the relationship between international and domestic law, can not be interpreted in terms of removing the reference point of ratified and promulgated international agreements on human rights and fundamental freedoms for the evaluation of domestic law by the CCC with derogative results. The scope of the constitutional order concept can not be interpreted only with regard to article 112 para. 1 of the Constitution, but must be interpreted in view of article 1 para. 2 of the Constitution and must include ratified and promulgated international agreements on human rights and fundamental freedoms. For these reasons article 95 para. 2 of the Constitution must be interpreted to the effect that a general court has an obligation to present to the CCC for interpretation a matter in which it concludes that a law which is to be used in resolving the matter is in conflict with a ratified and promulgated international agreement on human rights and fundamental freedoms."[15]

The CCC thus gave a broad interpretation of the concept of constitutional order. By this it overcame the existing opinion on the exclusivity and closed character of this constitutional notion.[16] Indirectly, CCC created the conditions for a later debate on the possibility of extending the constitutional order also by the text of EU Charter (or extension to EU law in general).[17] The relevance of this question is appropriate, in particular for the following reasons:

a) EU Charter could be understood as international treaty on human rights. Following the entry into force of the Lisbon Treaty in 2009, EU Charter has acquired the same legal status as the Treaties. Although EU Charter itself has not been directly adopted as an international treaty, there are several

In KYSELA, J. (ed). *Deset let Ústavy České republiky – východiska, stav, perspektivy.* Prague: Eurolex Bohemia, 2003, pp. 122–139.

[15] https://www.usoud.cz/en/decisions/2002-06-25-pl-us-36-01-bankruptcy-trustee

[16] MLSNA, P. Komentář čl. 10 Ústavy. In RYCHETSKÝ, P. a kol. *Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář*. Prague: Wolters Kluwer, 2015, pp. 110–112.

[17] BOBEK, M., KÜHN, Z. What about that "Incoming Tide"? The Application of the EU Law in the Czech Republic. In LAZOWSKI, A. (Ed). *The Application of EU Law in the New Member States – Brave New World*. Hague: TMC Asser Press, 2010, pp. 325–356.

arguments in favour of conclusion, that materially it is an international treaty[18] as it is a result of agreement among the Member States negotiating and adopting the Lisbon Treaty.[19]

b) EU Charter forms the part of EU law, which enjoys the special status within the Czech legal (and constitutional) order formally but also materially. As for the former, we could state, that EU law is endowed with a certain exclusive, stronger status in comparison to other international rules binding the Czech Republic.[20] This view is based on the systemic argument, as the Constitution itself distinguishes the so-called integration treaties under Article 10a of the Constitution on the one hand and other "presidential" international treaties on the other (treaties under article 10 or 49 of the Constitution). In addition, it can be based on the fact of autonomous nature of EU law and its dominance in application, which are a basic prerequisite for the functioning of the EU legal system and which has been widely accepted by the CCC in its previous case-law.[21]

3. What about the EU Charter?

When seeking an answer to the question whether the EU Charter forms a part of the constitutional order of the Czech Republic or not, respectively, what role this document should play in the decision-making process of the CCC, there emerge several scenarios/variants of solutions, which I will introduce below. The key premise, or better said starting point for this evaluation is the question, how should EU Charter itself be comprehended from the perspective of Czech law and its developments? Do we tend to see it as an international document serving

[18] KÜHN, Z. Listina základních práv EU a český ústavní pořádek. In KLÍMA, K., JIRÁSEK, J. (eds.) *Pocta Jánu Gronskému*. Pilsen: Aleš Čeněk, 2008, pp. 112–120.

[19] See further KUSTRA-ROGATKA, A., HAMUĽÁK, O. Keeping the Safe Distance – Chapters from Randomized (Non) Application of the EU Charter of Fundamental Rights before Polish Constitutional Tribunal. *Baltic Journal of European Studies*, 2019, vol. 9, no. 4, pp. 72–107.

[20] MUCHA, J. The Presentation of Czech Experiences. In MAVČIČ, A. (ed). *The Position of Constitutional Courts Following Integration into the European Union.* Ljubljana: Ustavno sodišče Republike Slovenije, 2004, p. 166. Available at: http://www.us-rs.si/media/zbornik.pdf

[21] HAMUĽÁK, O. The Unbearable Lightness of Being Guardian of the Constitution (Revolt and Revolution Dilemma in the Approach of Czech Constitutional Court Vis-à-Vis EU and Supranational Legal Order). *European studies – The Review of European Law, Economics and* Politics. 2014, vol. 1, pp. 103–112. HAMUĽÁK, O. New Fighter in the Ring: The Relationship between European Union Law and Constitutional Law of Member States from the Perspective of the Czech Constitutional Court. *Journal of Eurasian Law*, 2011, vol. 3, no. 2, pp. 279–303. HAMUĽÁK, O. Double "Yes" to Lisbon Treaty – Double Yes to the Pooled Sovereignty Concept. Few Remarks on Two Decisions of the Czech Constitutional Court. *University of Warmia and Mazury Law Review*, 2010, vol. 2, no. 1, pp. 39–59.

to protect human rights, i.e. a new international human right agreement binding the Czech Republic? Or do we consider it to be ordinary source of EU law which is supposed to have the same status in our legal order as other EU law norms? Or we should prefer to approach the EU Charter as special legal source with original features and impact, distinguishing it from both previously mentioned options?

3.1. Charter as international human rights obligation – inclusion into the constitutional order

This scenario could be based on the assumption, that EU Charter certainly represents an international document on the protection of human rights?[22] Although Charter itself has not been directly adopted as an international treaty, it cannot be denied such status at least from a material point of view. This assumption is based on several arguments. Firstly, the Charter has been negotiated and signed as an international treaty (more precisely as part of an international treaty) in connection with the creation of the Treaty establishing a Constitution for Europe, and in the same form it was symbolically re-proclaimed on 12th December 2007. Secondly, the negotiation of the Lisbon Treaty implied also the negotiation of the Charter, as evidenced by the adoption of Protocol 30 and a number of declarations annexed to the Lisbon Treaty, which deal with the Charter.[23] Thirdly, the wording and the formulation of the reference in article 6 para. 1 TEU implies the above-mentioned shifts towards material understanding of the status of Charter. The formula used in 13 language versions of contemporary art. 6 para1 of the TEU introduces the legally binding force of Charter by using the phrase "same legal value as the Treaties"[24] The same legal value means not only placing the Charter

[22] The fact that the CFR has not been signed, promulgated and ratified as a separate document cannot, in my view, deny the contractual nature. The CFR is a fully-fledged part of the Lisbon Treaty system, which has undergone the negotiation, promulgation and ratification process. The form of the make a "commitment" out of the CFR was certainly not traditional. However, the result is a new, international human rights catalogue, which is binding for the Member States (and hence the Czech Republic).

[23] Declaration (no. 1) concerning the Charter of Fundamental Rights of the European Union; Declaration (no. 53) by the Czech Republic on the Charter of Fundamental Rights of the European Union; Declaration (no. 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union; Declaration (no. 62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.

[24] ES – valor jurídico; DA – juridiske værdi; DE – sind rechtlich gleichrangig; EL κύρος (validity but also prestige); EN – legal value; FR – valeur juridique; IT – valore giuridico; MT – valur legali; NL – juridische waarde; PT – valor jurídico; RO – valoare juridică; FI – oikeudellinen arvo; SV – rättsliga värde.

in a certain level within the pyramid of the sources of EU law (i.e. primary law), but also the same legal status with all its consequences, i.e. the understanding of the Charter as a (materially) binding international agreement.

Could its non-inclusion into the constitutional order be regarded as an inadmissible "restriction of the already achieved procedural level of protection of fundamental rights and freedoms," as argued by the CCC in the Bankruptcy Trustee case?

It can certainly be argued that the EU Charter was not a legally binding source before the adoption of the Lisbon Treaty and has never been (could not be) directly applied by the CCC and therefore not incorporating it into the framework of the constitutional order does not cause a reduction of the "procedural level of protection". This problem is closely related to the way how we understand the implications of the Bankruptcy Trustee decision itself. Does the argumentation of the CCC affect only the promulgated and ratified international treaties on human rights that had been binding for the Czech Republic before the Euro-amendment of the Constitution? Or is it an open category covering all other treaties on human rights concluded in the future? Arguments of the CCC, including the application of article 1 para. 2 of the Constitution suggests that this decision is not only a petrifying case, but it is also applicable pro futuro and thus also with possible impacts on the EU Charter. If we accept that, apart from being a source of EU law, the EU Charter also brings new international human rights obligations, we could justify its inclusion in the constitutional order of the Czech Republic. But such a conclusion opens a space for many doubts and brings the relevant risks. In the context of doctrinal debates, there prevails the opinion that the direct extension of the constitutional order by the EU Charter would not be appropriate.[25] The main reason is to maintain the autonomous nature of this Czech constitutional category.[26] If the EU Charter was incorporated into the constitutional order, this part of the constitutional order would be subject to the interpretation power of the Court of Justice of the EU. Apart from the distortion of the independent nature of the constitutional order and the possibility of significantly weakening the specific position of the constitutional justice,[27] this could also bring significant

[25] See in particular the discussion papers by Z. KÜHN, J. KOMÁREK, P. BŘÍZA, D. KOSAŘ and others on the blog Jiné právo (Another Law) dated 30 November 2007 entitled: Bude Listina základních práv EU součástí ústavního pořádku ČR? (Is the Charter of Fundamental Rights of the EU Going to be Part of the Constitutional Order of the Czech Republic?) and a rich discussion to it. Available at: http://jinepravo.blogspot.cz/2007/11/bude-listina-zkladnch-prv-eu-soust.html.

[26] See KÜHN, Z. Listina základních práv EU a český ústavní pořádek. In KLÍMA, K., JIRÁSEK, J. (eds.) *Pocta Jánu Gronskému.* Plzeň: Aleš Čeněk, 2008.

[27] In relation to this see also KOMÁREK, J. Why National Constitutional Courts Should Not Embrace EU Fundamental Rights. *Law Society and Economy Working Paper Series* WPS 23-2014 December 2014. Available at: https://www.lse.ac.uk/collections/law/wps/WPS2014-23_Komarek.pdf

practical complications, because where the EU Charter materially overlaps with the Czech Charter of Fundamental Rights and Freedoms, different views on the interpretation of a specific human right by the Court of Justice (interpreting the EU Charter) and the CCC (interpreting the Czech Charter) might occur. The incorporation of the EU Charter of Fundamental Rights into the constitutional order could also be considered contrary to the requirements of EU law. With respect to the concentrated form of constitutional control in the Czech Republic, the issue of contradiction between the Czech norms and the EU Charter (as a part of the constitutional order) would have to be obligatory submitted by the general courts to the CCC as a monopoly "watchdog" of contradictions between ordinary law and norms of constitutional order.[28] However, this would conflict the requirement for effective and urgent application of the EU law, which is one of the basic principles of EU law application.[29]

3.2. The EU Charter as an "ordinary" EU law – exclusion from the constitutional order

The second possible scenario is based on the looking for parallels between position of EU Charter and effects of EU law in general within the Czech legal system. Indeed, the CCC has paid considerable attention to the question of whether EU law can serve as a reference criterion for assessing the constitutionality of national laws, which is directly linked to the problem of the possible extension of the constitutional order by EU norms.[30]

From the outset, the CCC has taken a reserved stance on the existence of its power to assess the conflict between EU law and ordinary national law. As soon as in the decision no. Pl. ÚS 19/04,[31] it rejected its jurisdiction and left the resolution of possible conflicts between EU and national law to the ordinary courts. It reiterated its negative attitude even in other decisions. The decision in the matter of the so-called Drug Decree, Pl. ÚS 36/05[32] was a key

[28] Similarly, see the opinion of Z. Kühn in the discussion on its post on the *blog Jiné právo* (Another Law) dated 30 November 2007 entitled: Bude Listina základních práv EU součástí ústavního pořádku ČR? (Is the Charter of Fundamental Rights of the EU Going to be Part of the Constitutional Order of the Czech Republic?). Available at: http://jinepravo.blogspot.cz/2007/11/bude-listina-zkladnch-prv-eu-soust.html

[29] Judgment of the Court of Justice C-106/77 *Simmenthal*, ECLI:EU:C:1978:49; C-188/10 a C-189/10 *Melki a Abdeli*, ECLI:EU:C:2010:363.

[30] I comment on this issue more in detail, for example, here HAMUĽÁK, O. Flexibilita ústavního pořádku, právo Evropské unie a marginalia k Listině základních práv Evropské unie. In ML-SNA, P. Ústava ČR – vznik, vývoj a perspektivy. Prague: Leges, 2011, pp. 288–308.

[31] CCC decision Pl. ÚS 19/04 *Povaha tzv. zlatých akcií*, ECLI:CZ:US:2006: Pl.US.19.04.

[32] CCC decision Pl. ÚS 36/05 *Léková vyhláška*, ECLI:CZ:US:2007:Pl.US.36.05.1.

one.[33] In its decision, CCC responded negatively to the question of the possible use of EU law as a reference framework for the review of Czech laws. This view was based on separate functions of the constitutional and European judiciary. CCC does not perceive itself as a court called to deal with questions of conformity of national law with EU law. In the system of a decentralized European judiciary, this matter appertains to ordinary courts and the Court of Justice. CCC in its case law accepts the so-called Simmenthal principle[34] and stresses the obligation of general courts to resolve the conformity issues of national and Union norms separately without the inherence of the constitutional judiciary.[35]

By taking a negative approach to the issue of the possible extension of the mass of benchmarks of constitutionality by EU law, the CCC shows that it respects the triangular construction of the European judiciary consisting of the Court of Justice, general national courts and constitutional courts of the Member States, in which these parts have their specific tasks.[36]

Therefore, if we consider the EU Charter from a purely technical point of view as another ordinary part of EU law, we must conclude that this document does not form part of the constitutional order taking into account the binding case law of the CCC.

On the other hand, the CCC does not reject EU law completely and it notes that in interpreting the Czech constitutional order – formally used as a benchmark for the constitutionality review of ordinary laws – it will follow requirements of EU norms and take into account the case law of the Court of Justice. It does not understand EU law as a formal part of the constitutional order, however, on the other hand, in the words of Michal Bobek and Zdeněk Kühn, it treats it as a binding constitutional argument while assessing the constitutionality of ordinary national law.[37]

When coming to this conclusion, we may return to the question of the EU Charter. Even in that case it is not possible to rule out such an indirect effect in the form

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[33] The importance of the question of the possible incorporation of norms of EU law into the framework of the constitutional order is also underlined by the fact that when seeking the answer, the Judge-Rapporteur (Jiří Nykodým) even requested the expert opinion of the relevant departments (mainly the department of constitutional law) of Czech faculties of law.

[34] Judgment of the Court of Justice C-106/77 *Simmenthal*, ECLI:EU:C:1978:49.

[35] CCC, in addition to the aforementioned decisions, also repeats its rejection of its power to assess compliance between national law and European Union law in decisions II. ÚS 1217/08, ECLI:CZ:US:2008:2.US.1217.08.1 or Pl. ÚS 12/08, ECLI:CZ:US:2008:Pl.US.12.08.1.

[36] Similarly, see BOBEK, M. Learning to Talk: Preliminary Rulings, the Courts of the New Member States and Court of Justice. *Common Market Law Review*, 2008, vol. 45, no. 6, p. 1629.

[37] See BOBEK, M., KÜHN, Z. What about that "Incoming Tide"? The Application of the EU Law in the Czech Republic. In LAZOWSKI, A. (Ed). *The Application of EU Law in the New Member States – Brave New World*. Hague: TMC Asser Press, 2010.

of an interpretative model while interpreting the Czech law, including the norms of the constitutional order. It is indisputable that the EU Charter forms a part of EU law and that is why the national courts are obliged to take account of its content when interpreting national law. It is clear that the CCC itself has begun to use the EU Charter as an inspirational source or a certain supporting argument in its case law.[38] It thus confirms its "positive" relationship to the indirect effect of EU law norms, which plays a key role in its approach to EU law in general.[39] Such an indirect application of the EU Charter is twofold. Firstly, the EU Charter may be used as an additional supportive argument to conclude that certain national sources of law or action by public authorities does comply with the standards of constitutional order or not (in particular with the Charter of Fundamental Rights and Freedoms) – this is a quasi-indirect effect when the EU Charter (and reference to it) does not affect the outcome of decision-making of the CCC in substantive way. Secondly, there may be cases where the EU Charter will be used as an interpretative guide by the CCC in connection with interpretation of the Czech constitutional norms, i.e. as a source the existence of which will influence the outcome of the proceedings. This is the real indirect effect of the EU Charter when its existence and use by the CCC determines the outcome of the proceedings.

3.3. The EU Charter as a "special" EU law – association of constitutional order

Contrary to the above conclusion, however, another alternative approach can be considered in relation to the EU Charter. The question is whether the EU Charter cannot be understood by the CCC differently as a specific part of EU law which is not covered by the general approach to this legal system? Assuming that the EU Charter is a source that national courts shall use, in conjunction with the understanding of the CCC as an authority that (like all other law enforcement bodies) is obliged to apply EU law[40], there is space for the direct application of

[38] See for example cases: II.ÚS 164/15 *Zákaz konání shromáždění z důvodu zvláštní ochrany zájmu dětí*, ECLI:CZ:US:2015:2.US.164.15.1; III. ÚS 1956/13 *Právo podezřelého na nahlížení do policejního spisu a přiměřenost nařízení a provedení domovní prohlídky*, ECLI:CZ:US:2014:3.US.1956.13.1; Pl. ÚS 12/14 *K protiústavnosti výluky soudního přezkumu u pozastavení výplaty části dotace*, ECLI:CZ:US:2015:Pl.US.12.14.2. For further analyses see SVOBODOVÁ, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního Soudu ČR. *Acta Universitatis Carolinae – Iuridica*, 2018, vol. 64, no. 4, pp. 53–63.

[39] For details see HAMUĽÁK, O., KERIKMÄE, T. Indirect Effect of EU Law under Constitutional Scrutiny – the Overview of Approach of Czech Constitutional Court. *International and Comparative Law Review,* 2016, Vol. 16, No. 1, pp. 69–82.

[40] See BOBEK, M.: Learning to talk: Preliminary rulings, the courts of the new Member States and the Court of Justice. *Common Market Law Review*, 2008, vol. 45, no. 6, pp. 1611–1643. For

the EU Charter as a source of constitutional review of Czech norms or decisions of Czech public authorities. In such a case, EU Charter would no longer act merely as a "stand-by" interpretation guide, but it would become part of the benchmarks used in the constitutional review, thus in practice producing the same effects as the norms of the constitutional order of the Czech Republic even without the explicit inclusion of the EU Charter into this special constitutional framework. The simple proposal here is, that CCC should use the EU Charter if the case falls within the scope of EU law in a same way as norms of constitutional order, but without claiming the monopoly for the review (as in the case of using the norms of constitutional order) and degrading the roles of general courts. The CCC has already indicated this role of the EU Charter in some of its decisions[41] and lifted it into the practice of constitutional review. By following this scenario, we shall avoid the main risks connected with the inclusion of the EU Charter into constitutional order, concretely the risk of universal applicability of the EU Charter even outside the scope of article 51 para. 1 and deprivation of the autonomous character of the Czech constitutional order. Contrary to that risk, by using the EU Charter within the constitutional review not as a part of constitutional order, but as an associated source of protected rights, we will reach acceptable and euro-consistent results. Here the EU Charter should be used only when the case falls within the framework of "application" of EU law. Such a conclusion is also supported by the current approach of the CCC, which, in connection with the possible use of the EU Charter, carries out the test by article 51 para. 1. For example, in cases I. ÚS 1904/14[42] and II. ÚS 1135/14[43] it pointed out that the issue of expropriation of land for the purpose of transport construction does not fall within the scope of EU law and thus the issue is not covered by the EU Charter.[44]

special Czech insights see: SEHNÁLEK, D.; STEHLÍK, V. European "Judicial Monologue" of the Czech Constitutional Court – a Critical Review of its approach to the Preliminary Ruling Procedure. *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 181–199.

41 See e.g. decisions III. ÚS 2782/14 *Střet letounu s ptákem*, ECLI:CZ:US:2014:3.US.2782.14.1; or Pl. ÚS 14/14 Ústavnost pětiprocentní uzavírací klauzule pro volby do Evropského parlamentu, ECLI:CZ:US:2015:Pl.US.14.14.1.

42 CCC decision I. ÚS 1904/14 *K otázce spravedlivé náhrady za vyvlastněný majetek*, ECLI:CZ:US:2015:1.US.1904.14.1.

43 CCC decision II. ÚS 1135/14 *Spravedlivá a přiměřená náhrada za majetek vyvlastněný ve veřejném zájmu*, ECLI:CZ:US:2015:2.US.1135.14.1.

44 Under the same limited regime, the Austrian Constitutional Court also incorporated the CFR into constitutional review in its debated decisions U 466/11-18 and U 1836/11-13 as of 14 March 2012. For commentary on the Judgement, see e.g. KLAUSHOFER, R. a PALMSTORFER, R. Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law, *European Public Law*, 2013, vol. 19, no. 1, pp. 1–11.

4. Conclusion

It is worth noting here that we are currently in a situation where the definitive answer to the question of the relationship (inclusion) of the EU Charter and the constitutional order of the Czech Republic does not exist yet. There is neither a clear final position of the CCC (similar to the one pronounced in the "Bankruptcy Trustee" case in connection with international treaties on human rights), nor settled case law offering some indirect signs of the approach of the CCC to the question of (non-)incorporation of the EU Charter into the constitutional order. However, increasing relevance of the EU Charter[45] makes it very likely that the catalogue of fundamental rights of the EU will not be left aside and it will be reflected in the work of the CCC in growing way. To sum up, the Charter ensures the unified application and unique interpretation of Union fundamental rights law but does not totally unify the level of human rights' protection within the Member States. The correct understanding of the notion of "implementation of EU law" according to article 51 para. 1 of the EU Charter and the systemic use of this formula in harmonised way, are the prerequisites for any further development and potential impact of the EU Charter on national (not only) constitutional human rights enforcement. On the other hand, because Member States (from procedural point of view) are free to apply their internal procedures and instruments for human rights review, we must count with the appearance of diversity and differences in approach of particular national authorities.[46] Differences have already appeared in the very understanding of article 51 para 1 and the extent of applicability of the Charter.[47] It is also clear that neither the EU Charter, nor the general norms of EU law require

[45] The increasing relevance of the CFR is pointed out by the increasing number of significant judgments of the Court of Justice based on this catalogue (case C-293/12 Digital Rights Ireland, ECLI:EU:C:2014:238; C-131/12 Google Spain, ECLI:EU:C:2014:317; C-236/09 Test-Achats, ECLI:EU:C:2011:100), as well as the increasing number of questions referred to the Court of Justice by national courts for interpretation of the CFR, see the Annual Report of the Commission on the application of the CFR (available at: http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm).

[46] See in particular BURGORGUE-LARSEN, L. (ed.): *The EU Charter of Fundamental Rights seized by the national judges*, Paris: Pedone, 2017. For some national reports see MAZÁK, J., JÁNOŠIKOVÁ, M. et al. *The Charter of Fundamental Rights of the European Union in Proceedings Before Courts of the Slovak Republic*. Košice: Pavol Jozef Šafárik University, 2016; HAMUĽÁK, O. Listina základních práv Evropské unie jako okolí ústavního pořádku České republiky. *Acta Iuridica Olomucensia*, 2015, vol. 10, no. 3, pp. 7–30 or SVOBODOVA, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního soudu ČR. *Acta Universitatis Carolinae –Iuridica*, 2018, vol. 64, no. 4, pp. 53–63.

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

the protection/application of EU rules on human rights in the form of a special constitutional review. At the same time, they do not exclude such constitutional protection either (provided that it does not unnecessarily delay or complicate the effective enforcement of Union requirements).[48] Therefore, it is primarily up to the CCC itself in what way it will approach this issue. On the other hand, the EU Charter is one of the sources of EU law and all the characteristics of EU law apply to it, which must also be respected by the CCC (which, moreover, has confirmed this in its rich case law)[49] and is therefore not possible to ignore the EU Charter in its work. The approach of the CCC to the EU Charter appears to be positive. Already in the first Lisbon judgment, the CCC unequivocally admitted that the EU Charter could serve both as an interpretative guide and as an applicable source of individual rights.[50] Such a view of the EU Charter is being confirmed by the appearing case law of the CCC[51], which clearly shows that the EU Charter does not stand aside from its interest. Developing reflection and use of the EU Charter by the CCC has a potential to raise interesting constitutional issues. The most doctrinally attractive one, i.e. whether the EU Charter will be included into the constitutional order, as well as other international treaties on human rights, has not been (re)solved by the CCC yet. Personally, I do not consider the inclusion of the EU Charter into the constitutional order to be particularly suitable especially because of the risk of mixing interpretative authorities within one system (CJEU vs. CCC) At the same time, however, I do not see it as a problem when the CCC actively uses the EU Charter in the context of the constitutional review. In such a case, the EU Charter will be equated with the norms of constitutional order (the source of constitutional review and the reason for the derogation of the norms of ordinary law). Here, the EU Charter brings a change in the approach of the CCC to the issue of the general constitutional relevance of EU law. In general, the CCC unequivocally refuses to use the norms of EU law as a direct source of constitutional review, but on the contrary, it uses it widely as a source of euro-consistent interpretation of the norms of the constitutional order. This phenomenon, described elsewhere as a problem of quantitative resistance and qualitative revolution,[52] might be not only developed, by also to certain extent overcame by the active use of the EU Charter.

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[48] Generally, see C-188/10 a C-189/10 Melki a Abdeli, ECLI:EU:C:2010:363.

[49] For more details, see HAMUĽÁK, O. *Právo Evropské unie v judikatuře Ústavního soudu České republiky.* Praha: Leges, 2010. 256 p.

[50] See CCC decision Pl. ÚS 19/08 *Lisabonská smlouva I*, ECLI:CZ:US:2008:Pl.US.19.08.1.

[51] See SVOBODOVA, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního soudu ČR. *Acta Universitatis Carolinae –Iuridica*, 2018, vol. 64, no. 4, pp. 53–63.

[52] STEHLÍK, V., HAMUĽÁK, O., JIRÁSEK, J. BONČKOVÁ, H., PETR, M. *Unijní právo před českými soudy*. Praha: Leges, 2014, 304 p.

The presence of the EU Charter in the decision-making activities of the CCC irritates the scholars so that they repeat the Hamlet dilemma. Without an explicit reply from the CCC, we may endlessly ask whether or not the EU Charter should be included into the constitutional order. However, there remains the fact that the EU Charter simply exists! And it is finding its role in the case law of the CCC. It could confirm the constitutional norms (as "supporting argument"), it may shift their traditional interpretation (as matrix for "euro-consistent interpretation"), or supplements them (as "the source of constitutional review outside the constitutional order").

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The European Perspective on the Notion of Precedent – are EU and Czech Court Decisions Source of Law?*

David Sehnálek**

Summary: The article focuses on the substance and effects of judicial decisions. Judgements of domestic courts and those of the Court of Justice of the EU are examined separately in terms of their nature. Specifically, the article deals with the question of their binding effect and also whether they can be considered a source of Czech and EU law. The author discusses and questions the opinion, which is currently prevailing among Czech authors, that decisions of supreme courts should be considered binding and simultaneously a source of law comparable to precedents, as they are known in Anglo-American law. The article further points out that the alleged similarity between judgements rendered by the Czech courts and the Court of Justice of the EU is merely ostensible, as each of them has a different nature and effects in the Czech legal environment. The conclusion is, in simple terms, that judgements of domestic courts generally cannot be considered a source of law, that they do not contain any new legal norms and, finally, that they comprise merely a simple and changeable interpretation of legal norms created by the law-making body.

Keywords: Court decision; Court of Justice of the EU decisions; Precedent; Source of Law; Persuasive Judgment; Binding Effect of the Judgment.

1. Introduction

The question of the nature of judicial decisions is certainly not new,[1] but has yet to be conclusively resolved (and I should add, on a rather pessimistic note,

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1 Just a list of domestic literature would cover at least one page of this text. Šrůtková provides an overview of all important articles on the topic. See ŠRŮTKOVÁ, J. Závaznost rozhodnutí

that it might never be resolved). This is so despite all the considerable attention paid to this question, not only in Czech legal literature. If we take a closer look at Czech contributions to the debate on this topic, we can see that their scheme resembles – with a slight exaggeration – the popular story about a smart princess written by famous Czech 19th century novelist Božena Němcová. Just like the ingenious princess in that story both arrived and not arrived, dressed and not dressed at the same time, in the view of various legal theorists, judicial decisions are simultaneously binding and not binding,[2] and are not a source of law formally, although they are one in reality.

Legal texts, usually dull and concise, often become a work of art and incite fantasy when it comes to judicial decisions (or, in English terminology, case-law). And this really is not common for legal texts. Instead of exact conclusions, various works almost poetically refer to a "***certain*** *normative force*"[3] of judicial decisions or "*some binding effect*" on their part, or that they are "*normative in a certain sense*".[4] The authors thus, however, ultimately undermine their own conclusions. In any case, they try to interconnect the terminology and institutions of the civil-law system with concepts and institutions of common law. However, the risk entailed in such an approach is that by concentrating on sometimes seeming, but elsewhere actual, similarities of individual aspects, one could miss the broader context.[5]

However, it is not the aim of this paper to criticise or question the quality of my colleagues' work. I would just like to add my small contribution to the debate and, in doing so, outline a certain system of individual judicial decisions depending on whether they are rendered by Czech courts or the Court of Justice of the EU. The key question remains the same: are judgements of these courts a source of law? And are these judgements generally binding? I am well aware that the topic is too extensive in its substance to be dealt with in a relatively short text. I will therefore not be able to answer a number of questions to the full extent as they would otherwise deserve.

Ústavního soudu z pohledu doktríny a judikatury. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*. 2009, vol. 4, p. 294.

2 KACZOROWSKA-IRELAND, A. *European Union Law*. Routledge: 2016, p. 150.

3 KÜHN, Z. Nová koncepce normativity judikatury obecného soudnictví na pozadí rozhodnutí Ústavního soudu. [New Conception of Normativity of Case-law of Common Courts Against the Backdrop of Rulings of the Constitutional Court.] *Právní rozhledy*. 2001, no. 6. p. 265 et seq.

4 ŠRŮTKOVÁ, J. Závaznost rozhodnutí Ústavního soudu z pohledu doktríny a judikatury. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] Časopis pro právní vědu a praxi. 2009, no. 4, pp. 293–301, p. 297.

5 General differences in the system of separation of powers and in the mechanism of checks and balances, and specifically different mechanisms of appointing judges, different mutual links and powers of courts within the judicial system, different emphasis on individual methods of interpretation, different manner of creating and capturing the contents of written law, etc.

2. Background

I believe that any debate on the nature of judicial decisions should start with properly defining the basic terms and setting their meaning. Individual authors ascribe different contents to these terms and tend not to understand each other. Their approach to the nature of judicial decisions is also influenced by their legal-philosophical opinions. These opinions are, however, only rarely revealed. One and the same phenomenon is therefore perceived in different ways depending on the chosen theoretical and legal background. But no simple synthesis can be carried out in this regard as the initial subjective view of each author is determinative of the eventual conclusions.

The influence of the social context on Czech jurisprudence, primarily in the 1990s, also represents a no less significant problem. Fragmentation of opinions in the judiciary and the poor quality of decision-making at the lowest levels often resulted in completely illogical different solutions to otherwise factual and legal problems. The ensuing frustration on the part of supreme courts must have been considerable.[6] It will therefore come as no surprise that their case-law, too, perhaps overly inclined towards emphasising uniformity of the legal order, and thus also uniformity of judicial decision-making.

It is thus quite possible that some of the opinions expressed in the past in professional literature or case-law would never have been presented under standard conditions of development of the legislation in a country belonging to the system of civil law.

2.1. The notion of binding effect

But let us return to the issue of terminology. This issue can well be demonstrated on the notion of *binding effect*. E.g. Kühn claims that a concept of binding effect where each norm or decision is either binding or not binding has already become obsolete.[7] He concludes that various levels of binding effect can in fact be seen between the two antipoles. Instead of a black-and-white view of the problem, we should thus adopt a "*fifty-shades-of-grey*" attitude, admitting a possible existence of various intensities of the binding effect.[8]

[6] Cf. KÜHN, Z. O velkých senátech a judikatorních odklonech vysokých soudů. [On Large Chambers and Deviations in Case-law of Supreme courts.] *Právní rozhledy.* 2013, no. 2, p. 39 *et seq*.

[7] KÜHN, Z. Nová koncepce normativity judikatury obecného soudnictví na pozadí rozhodnutí Ústavního soudu. [New Conception of Normativity of Case-law of Common Courts Against the Backdrop of Rulings of the Constitutional Court.] *Právní rozhledy*. 2001, no. 6, p. 265 *et seq.*

[8] Similar to Kühn, *Smejkalová* also speaks about various degrees of binding effect, being inspired by the same author – theorist *Aleksander Peczenik.* She distinguishes between formal binding

I believe that this concept of binding effect includes both a phenomenon that could be denoted, without a moment of hesitation, as a "*legal binding effect*", and something that would be better described as "*persuasiveness*" or "*convincingness*", or even "*authority*".

Indeed, a certain idea, rule or decision might not be respected because of its formal nature *(legal binding effect*), but rather in view of its contents (*persuasiveness*). Not because it would have to be respected, but because it *deserves respect*. But this characteristic does not make it legally binding in any shade of grey or even black. These are completely different categories.[9]

An authority may also follow from the position of the body that formulated the given idea or rule or which issued the given decision.[10] While the authority of a decision can be associated with specific judges, it will more likely relate to the institution that rendered the decision.[11]

The same is true of cases where a lower-instance court deals with a case in the light of case-law of higher instances. The fact that such a lower court will surely approach a case in the same way as it would be assessed by its superior court, in order to avoid potential reversal of its decision, need not necessarily be tied with a potential binding effect of a decision rendered by the higher court, but may also be a manifestation of the principle of legal certainty, economy and procedural economy.[12] These principles, of course, are binding under the Czech laws. But that is no longer true of decisions made by superior courts.[13] A judge may deviate from such

effect, normative force, supporting argument and exemplary or other value. I believe that the effects of case-law can indeed be divided in this way also in the conditions of our legal order. However, we need not go beyond the established terminology and artificially extend the meaning of the notion of binding effect. And the reason is not merely formalistic. By using a certain term, we attribute to a decision certain characteristics that it might actually not have. This phenomenon is well known, e.g., in medicine – especially in the case of psychiatric terminology. SMEJKALOVÁ, T. K otázce normativity judikatury v České republice. [On the Question of Normativity of Case-Law in the Czech Republic.] In *Dny práva – 2008 – Days of Law*. Brno: Masaryk University, 2008. pp. 1302–1311.

9 As a matter of fact, it is also true that a non-binding rule can be persuasive, just like a binding rule can be quite unconvincing.

10 As pointed out by *Posner*, decisions of a higher court may have a higher authority than rulings rendered by lower courts, e.g. because the choice of their judges is subject to stricter criteria. Consequently, the chances that they will decide correctly may be higher than in the case of judges of lower courts. POSNER, A. R. The Jurisprudence of Skepticism. *Michigan Law Review.* 1988, vol. 86, p. 841.

11 POSNER, A., R. The Jurisprudence of Skepticism. *Michigan Law Review.* 1988, vol. 86, p. 843.

12 And also fairness, justice and impartiality. See McGREGOR, D. B.; ADAMS. C. M. *The International Lawyer's Guide to Legal Analysis and Communication in the United States*. Aspen Publishers, 2008, p. 16.

13 In this case I refer to a general situation, ie. not to a case of a higher instance court decision in one and same proceedings.

a decision but has to consider the possible consequences this could have for him or her in relation to the said principles, rather than the preceding decision as such.[14]

I acknowledge, nonetheless, that if our intention is to convince lower-instance courts that they should pay attention to how other courts make their decisions,[15] and in particular, how supreme courts decide their cases, we should talk to them in a language they will understand, and use terms that will put more emphasis (than would otherwise be necessary) on the fact that such considerations are indeed appropriate. But this changes nothing about the fact that, in formal terms, the variable of *binding effect* can only have two values – either there is such effect or there is not. Anything between is not a binding effect, but rather persuasiveness or worth, whether based on authority related to the contents or on the institution or judges that made the decision.

Moreover, a binding effect can also have various dimensions in the case of judicial decisions. A decision may be binding itself, in a form communicable *erga omnes* or, more traditionally – in the conditions of the Czech legal order – *inter partes*; in other cases, the binding effect will be carried merely by a certain part of a judicial decision (typically, the operative part, or operative part and reasoning);[16] and in yet other cases, the binding effect may be attached to the manner of interpretation as such, and not to the arguments and reasons that led to the given interpretation.

We can also say that a binding effect is directed outwards, in relation to citizens, or inwards. The direction inwards can affect all bodies of the State and courts, or could even be construed narrowly as the binding effect of a certain solution or rule issued by a certain court for that very court, or even more narrowly for a specific chamber or specific judge. Indeed, the aforesaid principles undoubtedly prevent the occurrence of a situation where, for example, one chamber rules in some way in a certain case, and later makes a different decision in a matter involving the same facts and legal questions, without providing any justification.

Similarly, the binding effect can be understood – in somewhat simplified terms – as a sign of a precedential nature of judicial decisions. It then tends to be inferred that if a court decision is binding (without distinguishing in which of the ways mentioned above), then such a decision must necessarily be *a source of law*. And then, in order to downplay this assertion, it is added that such a decision is, of course, not a formal,

[14] *Posner* also notes that if we were to place another court instance above the last-instance court, it is likely that decisions of the current last instance would often be reversed. POSNER, A., R. The Jurisprudence of Skepticism. *Michigan Law Review.* 1988, vol. 86, p. 841.

[15] This also entails the question of suitable publication of the decisions of all domestic courts in such a way that they will also be accessible to the public. It is surprising that, in view of today's technical possibilities, all the decisions of all court instances are still not available to the public by electronic means in a single database.

[16] Šrůtková summarises the debate on this issue. See ŠRŮTKOVÁ, J. Závaznost rozhodnutí Ústavního soudu z pohledu doktríny a judikatury. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*. 2009, vol. 4, p. 295.

but rather a factual source of law. The court thus creates or complements the law, and other courts – usually those which are subordinate to the given court – then have the duty to follow the thus-created law as they are bound by it.

It tends to be neglected, however, that while a binding effect is a qualitative feature of a legal norm, "source of law" is (in formal terms) only a form in which legal norms are embedded, i.e. through which the law is communicated. Therefore, one cannot be equated to the other. These are two completely different categories, albeit interconnected through the given legal norm. Separate debates must therefore be held with regard to whether a judicial decision is a possible source of law, on the one hand, and as to what part of a decision is or can be binding and in what way, i.e. whether this is, e.g., a legal norm encompassed in it or the manner of interpretation of a legal norm which, however, is enshrined in some other source, on the other hand.

At the same time, the concept of a court judgement as a source of law also has its legal and philosophical dimension closely related to faith. Indeed, different answers will be reached if we believe in the existence of gaps in the law, on the one hand, and if we deny their existence, on the other hand.[17] The role of a judge and thus also the nature of a judicial decision are perceived in different ways, depending on our position.[18] And even if we believe in gaps in the law, the process of filling the gaps is a process of interpretation[19] in the conditions of our legal order,[20] rather than that of law-making, as might perhaps appear

[17] The issue of gaps in the law goes beyond the scope of this paper. I therefore refer to professional literature in this regard. *Hlouch* provides an excellent summary of the current trains of thought. See HLOUCH, L. Teorie mezer a současné právní myšlení. [Theory of Gaps and Contemporary Legal Thinking.] Časopis pro právní vědu a praxi. 2013, no. 2, pp. 129–136.

[18] The differences follow from how various authors approach the role of a judge when he or she works with the legislation in a situation where, in view of its general nature, its text does not provide any direct solution. One group considers the judge's work, who complements the legal regulation, to be law-making, while the other does not. In the first concept, the judge creates the law together with the legislature, while in the second, the judge's work is limited to mere interpretation. Textualism then takes things to the extreme. This approach is defined by *Sobek* as a theory *of "interpretation of legal regulations which emphasises the separation of powers, and therefore rejects that judges could ignore, under various pretences, that the legislature has explicitly laid down something, and thus play the legislature.* SOBEK, T. *Argumenty teorie práva*. *[Arguments of Theory of Law.]* Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2008, p. 283. For interpretation of this concept, see also ŠKOP, M. Interpretace práva jako literární interpretace. [Interpretation of the Law as Literary Interpretation.] In Dávid, R., Sehnálek, D., Valdhans, J. (eds.) *Dny práva – 2010 – Days of Law. Brno*: Masaryk University, 2010, p. 2983 *et seq.*

[19] TÝČ, V., SEHNÁLEK, D., CHARVÁT, R. *Vybrané otázky působení práva EU ve sféře českého právního řádu*. *[Selected Questions of the Influence of EU Law in the Czech Legal Order.]* 1st edition. Brno: Muni PRESS, 2011, p. 157.

[20] However, this is also true of European Union law.

from contemporary professional literature dealing with the nature of judicial decisions.[21]

Work of a judge is often perceived as a truly norm-making process. Such an approach, however, downplays or even overlooks boundaries set by the written law to the judge's discretion compared to the breadth of the freedom of policy-making that is generally available to the legislator. The quality of the so-called "law making" or "creation of law" is therefore fundamentally different. I myself identify with Istrefi, who claims that even in situations where judges "create" the law, they ought, as representatives of the legislator, comlement it in a way the legislator would make it.[22]

2.2. The notion of precedent

Another key notion, which is often neglected, is *precedent*. Decisions are said to have precedential nature if they have to be followed by other courts, naturally those of lower instances, on the grounds of their alleged binding effect or persuasiveness.[23] This concept corresponds to the general Czech language, in which the notion of "precedent" is understood as a *model solution to a certain problem* or situation that will be repeated in the future. The reasons for such repetition are neglected as they are not decisive. Thus, even a solution that is followed solely because it was first of a kind is thus denoted as a precedent.

In this paper, I will understand a precedent as a *communicable form*, i.e. a decision that is a consequence of a specific situation that cannot be resolved on the basis of an already existing legal norm. The court therefore formulates – in highly simplified terms – a new rule which it accompanies by an appropriate reasoning,[24]

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[21] *Komárek* claims the opposite. He is right to state that a number of theoretical legal approaches actually perceive law-making in a judge's work. But not all of them. And primarily, they disregard the fact that a judge is limited by written law, as compared to the freedom enjoyed by a law-maker in the creation of policies. Their "law-making" therefore fundamentally differs in terms of quality. KOMÁREK, J. Reasoning with Previous Decisions: Beyond the Doctrine of Precedent. *The American Journal of Comparative Law*, 2013, vol. 61, no. 1, p. 167 *et seq.*

[22] ISTREFI, K. The Application of Article 103 of the United Nations Charter in the European Courts: The Quest for Regime Compatibility on Fundamental Rights. European Journal of Legal Studies, Winter 2012, vol. 5, no. 2. [online]. Available at: https://ejls.eui.eu/wp-content/uploads/sites/32/pdfs/Autumn_Winter2012_2013/ UNITED_NATIONS_CHARTER_IN_THE_EUROPEAN_COURTS_%20THE_ APPLICATION_OF_ARTICLE_103_OF_THE_.pdf

[23] Foreign literature therefore distinguishes between "*binding precedents"* and "*persuasive precedents",* see e.g. McGREGOR, D. B., ADAMS. C. M. *The International Lawyer's Guide to Legal Analysis and Communication in the United States*. Aspen Publishers, 2008, pp. 18 and 19.

[24] As pointed out by *Posner*, the said conception, where the judge fills gaps in the law that have not been filled by the legislature, is naturally a simplification, also because of many differences in institutional and procedural terms. POSNER, A. R. The Jurisprudence of Skepticism. *Michigan Law Review*, 1988, vol. 86, p. 862.

and communicates the rule to the public through its decision – a precedent as a kind of "carrier".

And this is precisely where there is an enormous difference between a civil-law judge and an Anglo-American judge. What appears identical if viewed from a distance, i.e. the creation of law by an Anglo-American judge and the "creation" of law by a civil-law judge in the process of filling gaps, are in fact very different processes.[25] But the differences become perceptible only if we disregard the categories of "*binding effect*" and "*precedent*" and take a look under the hands of the judge dealing with a given matter.

For an English judge, the absence of a clear and specific legal norm in a legal regulation is not a problem, but rather a challenge and an opportunity to freely create a new rule.[26] The judge will make a decision based on a rule he/she would create him/herself if he/she were the legislature.[27] For a civil-law judge, the same situation poses no smaller challenge to identify an already existing rule of written law, which he/she will then apply to the given case based on *analogia legis* or *analogia juris.*

The consequence are different approaches to interpretation of written legal norms.[28] For an English judge, extensive interpretation of legal norms of written law means in fact a restriction of his/her own freedom and his/her intellectual potential to create a new rule. It also means that the judge subjects him/herself to the legislature's authority in a situation where this is not actually required. The practical consequence is therefore a lesser willingness to undertake extensive interpretation and the related greater emphasis on the linguistic method of interpretation.[29] In the case of English courts, this is manifested, e.g., by a preference for interpretation based on a "*plain meaning rule*" in a situation where a civil-law judge might be inclined to use teleological interpretation.[30]

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[25] Even if they may seem identical or similar at first glance. For a detailed explanation, see KISCHEL, U. *Rechtsvergleichung*. C. H. Beck, 2015. p. 464.

[26] In a same situation a German or a Czech judge would fill the gap through the "creative" interpretation of some already existing norm which is something the common law judge cannot. See BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation.* Cambridge, 2018, p. 127.

[27] POSNER, A. R. The Jurisprudence of Skepticism. *Michigan Law Review*, 1988, vol. 86, p. 862.

[28] Brenncke refers to the different roles of the English and German judges and to the different starting point settings which results from a different constitutional doctrinal setting and which are manifested in a different emphasis on the various methods of interpretation. The result is fundamentally different approach to the gap filling in the legislation. BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation.* Cambridge, 2018, p. 129.

[29] BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation.* Cambridge, 2018, p. 127 and 128.

[30] Viz CANOR, I. Primus inter pares. Who is the ultimate guardian of fundamental rights In: Europe? *European Law Review*, 2000, no. 25, footnote 32.

On the other hand, if it is found that a legal norm is absent or is overly general, a civil-law judge will find him/herself in an irregular and, as a matter of fact, quite unpleasant situation.[31] The judge will then try and resolve the problem by creative interpretation of existing written legal norms. He/she will not compete with the legislature, but will rather be subordinate to the latter in view of the system of separation of powers in law-making. At the same time, he/she will be forced to co-operate with the legislature. This is what it means when it is said that a judge *complements the law*. The judge seeks a specific rule in legal norms that have already been created by the legislature, first on the basis of linguistic interpretation, which is always the initial approach, and then also with regard to their sense, purpose, intent, logic or system.

When an English judge is to create a precedent, he/she focuses his/her intellectual power on creating a new rule that will resolve a certain situation and, in this process, he/she has freedom and potential to express his/her own policy, i.e. promote his/her own understanding of the right solution to the given situation. In contrast, a civil-law judge directs his/her energy towards creative interpretation of a rule that already exists and he/she therefore does not, or should not, form any policy of his/her own.[32] The judge is bound by the policy expressed in the rule he/she is to interpret.[33]

Furthermore, it could be postulated that the problem of contemporary Czech jurisprudence lies in its considerable dependence on sources from the Anglo-American legal environment and a concealed, but still discernible, influence of the English language. Indeed, the very notion of *"case-law*" has found

[31] I admit that this claim applies primarily to first instance courts. In the case of supreme courts, especially the Constitutional Court, a different approach can often be observed. It seems to me as if some of judges saw in the possibility to work creatively with the law on the mere edge of law making and policy determination, some sort of their self-realization and the main purpose of their activities.

[32] The French legislation even explicitly prevents such creativity on the part of a judge – Article 5 of the Code of Civil Procedure states: *"Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises."*

[33] I add that a legal norm communicated in a decision that we denote as a precedent can then itself serve as an object of interpretation in further court decision-making. However, it is always the law, i.e. the manner in which written law has been construed, and not an earlier decision rendered by domestic courts, that is interpreted in the Czech legal order. Such earlier decisions are often approached mechanically, reading primarily the "headnotes", which, in substance, are a bizarre result of an attempt to generalise otherwise comprehensive legal problems. The same is true of interpretation of decisions rendered by the Court of Justice. This court, too, works with its decisions in this way. It mechanically refers to "headnotes" of earlier decisions without any indication of a more thorough analysis. According to *Streinz*, this creates an impression of major and complex dogmatics, which often lacks even the most basic foundations. See STREINZ, R. *Europarecht*. 10th edition. 2016. C. F. Müller. p. 228.

its way into our legal environment and is used in cases where judicial decisions rendered by Czech courts, the Court of Justice of the EU and the European Court of Human Rights are referred to in English. But the Czech expressions "*ustálená judikatura*", German "*Rechtsprechung"* or French "*jurisprudence constante*" have somewhat different connotations – they are not a "*law*".

A natural consequence is a suppression of the actual nature of judicial decisions. By choosing the English designation, like it or not, we ascribe to them properties of rulings made by *common law* courts. This creates the deluding impression that these two are (almost) identical. But they are not. While new legal norms can be found in English precedents, *civil-law* judgements comprise merely a reversible interpretation of legal norms.[34] While precedents actually form the law, the same is only interpreted or complemented in *civil-law* rulings.[35]

It should be noted that this approach has also been adopted by the courts themselves. E.g. the Court of Justice commonly refers to its previous decisions as *case-**law*** in English. This may indicate how it approaches the nature of its decisions and thus subliminally influences everyone who later works with them. It suggests that these are not earlier decisions, but rather *decisions which, in aggregate, form a **law***. Czech practice is more moderate in this respect as it tends to refer to *"ustálená judikatura" ("settled decision-making")*.[36] There is indeed a fundamental difference between *settled decision-making* in this sense and *precedents*, as they are the result of different intellectual processes.[37]

The language also influences the perception of judicial decisions in one other way. In parts dealing with the question of binding effect of judicial decisions, Czech treatises follow basically exclusively from English authors and sources. There is a vast quantity of English literature written by English-thinking authors comparing *common law* with the system of *civil law*. *Audi alteram partem*, one would tend to say. Why are we not listening that much to German or French authors?[38]

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[34] KISCHEL, U. *Rechtsvergleichung*. C. H. Beck, 2015. p. 463.

[35] This is true not only of Czech, but also of German legal environment. See the ruling of the first chamber of Bundesverfassungsgericht, File No. 1 BvR 418/71 of 19 February 1975.

[36] *Pound* and *Dawson* mention the decision-making practice of the French Cour de cassation and note that the court does not quote its previous decisions consistently. POUND, R., DAWSON, J. The French Bifurcation in LASSER, M. de S.-O.-l'E. *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*. Oxford: Oxford University Press, 2009, 2010. p. 32.

[37] KISCHEL, U. *Rechtsvergleichung*. C. H. Beck, 2015. p. 464.

[38] For example *Kühn* utilizies and quotes German sources, but draws different conclusions. He plays down conceptual differences between the activities of a judge of the continental legal system and common law by putting an emphasis on a looser concept of bindingness. In this respect, Brenncke's publication, which carefully and systematically maps the differences in the work of judges from both legal systems and confirms the existence of the differences, is extremely valuable. See BRENNCKE, M. *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation*. Cambridge, 2018; and KÜHN, Z. The binding nature of

Jurisprudence itself might actually be contributing to the impression that judicial decisions are something more than they in fact are. Looking at articles, as well as academic textbooks, we can see that they often concentrate primarily on individual judicial decisions. This becomes absolutely clear in the case of the European Union law and its Court of Justice. An unbiased observer might feel that this is the only, or the most important, institution standing behind the entire process of European integration and development of EU law.

I do not deny the influence of the Court of Justice; it was undoubtedly substantial but if it were not for the Member States as law-makers, it would never have become reality. The Member States were the ones that created the legal framework in which the Court of Justice makes its decisions, and they are also the ones that voluntarily ensure, via their national courts, that the solutions inferred by the Court of Justice are implemented in practice. And it is also jurisprudence in the Member States and their courts who warn the Court of Justice from time to time that it might be venturing beyond the limits of mere, even if creative, interpretation.

While the role of case-law of the Court of Justice is admittedly considerable, it would be incomplete without primary and secondary law. Without voluntary subordination by the Member States and their courts, it would also be absolutely irrelevant. As a matter of fact, a similar ethos was also developed around the rulings of the European Court of Human Rights and decisions of Czech supreme courts, and especially those of the Constitutional Court.

It is symbolic that the binding effect of case-law and its "precedential nature" are primarily mentioned by the courts themselves and also by their judges. This is true of both European Union law[39] and of domestic law. It is only logical that if someone is in a position where he or she can influence others, he/she will hardly tell them: *do not listen to me*.[40] But without such a power being enshrined in a legal regulation, ideally in the Constitution, such a statement will merely be a simple expression of an opinion maintained by one of the parties involved.[41]

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the European Court of Justice 's decision for human rights for domestic justice. *Právní rozhledy*, 2005, no 1, pp. 1 et seq.

[39] In the case of European Union law, this effect is inferred from the judgment of the Court of Justice of 6 October 1982 in Srl CILFIT and Lanificio di Gavardo SpA v Ministero della sanità (Case 283/81).

[40] From this point of view it is worth noting that Pavel Rychetský, the President of the Czech Constitutional Court, declared one of the decisions of this institution to be wrong, he also said he is ashamed of it and most importantly that this decision should not be followed. Strictly speaking, this declaration by the highest representative of the most important Czech court *de facto* denies the thesis of the precedential character of the Constitutional Court's decisions. The verdict concerned is the Constitutional Court's decision of April 17th, 2019, file no. II. ÚS 3212/18.

[41] Cf., e.g., the powers to provide legal interpretation enshrined in Art. 5 (1) of Constitutional Act No. 91/1991 Coll., on the Constitutional Court of the Czech and Slovak Federal Republic, or

Under the current circumstances, therefore, any considerations regarding the precedential or generally binding effect of case-law in the Czech legal environment merely express a stance of one component of power in the country. This, however, is an opinion that gets constantly repeated, and maybe that is why it is gradually becoming the truth.[42]

The fact that judges often disseminate their own ideas, as well as ideas of their colleagues by means of commercial lectures and also in the form of education of future lawyers, or in professional articles and commentaries, is also not negligible in terms of perception of the nature of case-law. I would not reproach them for doing so; this is quite understandable. But this, too, contributes to the impression that a judicial decision is something more than it actually is. And listeners like listening since the role of jurisprudence as an important source of recognition of law, e.g. in Germany, often lags behind the development of case-law. However, criticism can also be targeted at legal theorists – many articles or other publications only passively take the former conclusions of supreme courts, therefore, the Czech jurisprudence does not "actively" shape the law, but only retrospectively and passively maps it.[43]

The problem may also be that academic staff at Czech faculties ought to critically reflect on judicial decisions and thus contribute to the formation of law in a similar way as in Germany and France. This, however, is effectively prevented by the existence of personal links, where those who are employed full time as decision-makers tend to have another full-time job as lecturers at faculties and elsewhere.

3. On the nature of Czech judicial decisions – a normative point of view

I am convinced that judgements rendered by Czech courts cannot be considered a source of law nor can they be considered to have a general legally binding effect

similar powers of the Court of Justice embedded in Article 19 of the Treaty on European Union, which will further be analysed in this text below.

[42] As a matter of fact, the rule has stood the "test of time", as mentioned by *Posner*, and it thus, pragmatically speaking, "has to" be true. However, he also adds that the existence of a long-term consensus on a certain conclusion or idea need not necessarily mean that the given conclusion or idea is indeed the truth. *Posner* points out that the Earth thus used to be flat and the Sun used to orbit around it. POSNER, A. R. The Jurisprudence of Skepticism. Michigan Law Review, 1988, vol. 86, p. 855.

[43] It is too often possible to find in Czech articles and commentaries the conclusion *"only the judicial practice will show what the solution to the problem will be "*. But that is not, and cannot be, a true conclusion to any article or other scientific work.

in any shades of grey. Article 15 (1) of the Czech Constitution quite clearly vests the legislative power in the Parliament. Only this body forms the policies in this country and puts them into practice by means of law-making, thus prescribing the way our society will function.[44]

The courts lack the power to make norms in this country's system of law. That would be at variance with the basic principles of separation of powers. Consequently, where theory refers to judicial filling of gaps in the law, this means an activity that takes place at an imaginary level which is below the actual law-making. From this point of view, a court is not in a position equivalent to the legislature and is therefore not a law-maker itself, as it operates solely within the limits set by the legislature. There is, in fact, no other way – the law cannot be case-specific in it substance. A certain degree of creativity is therefore expected of the courts. However, this is not a matter of independent and law-making creativity, as it is strictly bound by the limits laid down by existing law. It is implemented not generally and politically, as is true of the activities of a law-making body (and in some cases, English courts), but exclusively in individual cases.[45]

According to the Constitution, a judge is bound in his/her decision-making by the law and international treaties.[46] Not by the law and international treaties as interpreted by another court. A judge is independent, and this independence has to be understood broadly, i.e. also as independence of any other court or judge and their legal opinion. But not of the law as created by the legislature. Any exceptions to this rule are strictly defined by the law and are, in principle, limited only to aspects of superiority and subordination in particular court cases.[47]

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[44] It is true that the executive branch can also participate in the creation of norms which, in their aggregate, form a part of the law applicable in the Czech Republic. In this case, the communicable form consists in law-making international treaties. But this kind of law-making takes place in co-operation with other members of the international community, under control of the Chamber of Deputies and within the limits of the Constitution.

[45] In these very reasons, I perceive the main differences between the concept described here and the approach taken, e.g., by *Komárek*. I do not deny the creative role of a judge; I merely do not believe that the law is created in a manner that is characteristic of a law-maker. I can see substantial differences in the quality of work of a judge and that of the legislative body. See KOMAREK, J. Reasoning with Previous Decisions: Beyond the Doctrine of Precedent. *American Journal of Comparative Law*, 2013, no. 1, pp. 149–172. at p. 167.

[46] Article 95 of the Constitution.

[47] This is a matter of *"cassation binding effect"*. Šrůtková points out that there actually exist certain problems in this regard as well. Indeed, there is no consensus in the Czech Republic whether only the operative part or the operative part together with the fundamental reasons is what carries the binding effect. See ŠRŮTKOVÁ, J. Závaznost rozhodnutí Ústavního soudu z pohledu doktríny a judikatury. [Binding Effects of Rulings of the Constitutional Court in Terms of Doctrine and Case-law.] *Časopis pro právní vědu a praxi*, 2009, no. 4, p. 295.

Historical comparison also provides an argument for exclusion of a binding or precedential nature. In Art. 5 (1) of Constitutional Act No. 91/1991 Coll., on the Constitutional Court of the Czech and Slovak Federal Republic, the Czechoslovak legislation explicitly granted the Federal Constitutional Court the power to provide legal interpretation.[48] There is no such provision in the new legislation; the Constitutional Court, just like any other court, thus cannot have such a competence.[49] Section 20 of Act No. 6/2002 Coll., on courts and judges, which is to ensure unification of case-law, cannot play this role. On the one hand, this is a simple – rather than constitutional – law, which cannot change the separation of powers as laid down in the Constitution, and moreover, the nature of the provision is procedural.[50]

Czech supreme courts quite naturally perceive the situation differently, and the precedential nature and a "certain binding effect" of judgements tend to be inferred on the basis of their own decisions.[51] But it has to be emphasised that this is the view of merely one component of power in this country, which goes beyond what is stated in the Constitution.

This case-law of supreme courts has also found its reflection in written law, specifically in Section 13 of the Civil Code. However, the rule contained therein – and one can entirely agree with *Lavický* in this regard – represents a mere procedural

[48] It stated that "*[i]n disputable cases, the Constitutional Court shall provide interpretation of constitutional laws enacted by the Federal Assembly. The conditions shall be laid down in a law enacted by the Federal Assembly.*"

[49] It has to be noted that the binding and precedential nature of judicial decisions is also often inferred on the basis of Art. 89 (2) of the Constitution and Section 82 (2) of Act No. 6/2002 Coll., on courts and judges. However, in both these cases, the legal provisions are read by the courts in a manner that goes well beyond the simple meaning of the text of the two provisions. See ŠIMÍČEK, V., FILIP, J., MOLEK, P., BAHÝĽOVÁ, L., PODHRÁZKÝ, M., SUCHÁNEK, R., VYHNÁNEK, L. Ústava České republiky – Komentář. *[Constitution of the Czech Republic – Commentary.]* Prague: Linde Praha, 2010. pp. 1286 and 1287.

[50] I.e. it provides the procedure in achieving the broadest possible consensus regarding the correct interpretation, but does not give the power to create a norm nor does it form the basis for the power to provide legal interpretation.

[51] Unfortunately, in view of the scope of the present paper, it is not possible to provide a thorough analysis and a summary of all court decisions comprising this conclusion. I therefore refer to professional literature, especially commentaries. See LAVICKÝ, P. Komentář k občanskému zákoníku: Předmět úpravy a její základní zásady (§ 13). [Commentary on the Civil Code. Subject of Regulation and its Basic Principles (Section 13).] In LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část. (§ 1 až § 654). Komentář.* [Civil Code I. General Part. (Sections 1 to 654). Commentary.] Prague: C. H. Beck, 2014, p. 118 et seq.; further, MACKOVÁ, A. Předmět úpravy a její základní zásady (§ 13). [Subject of Regulation and its Basic Principles.] In ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I. (§ 1 – 654).* [Civil Code. Commentary. Volume I. (Sections 1 to 654.] Prague: Wolters Kluwer, 2014. pp. 963–992, at p. 61 et seq.; and also MELZER, F., TÉGL, P. Komentář k § 13 OZ. [Commentary on Section 13 of the Civil Code.] In MELZER, F., TÉGL, P. et al. *Občanský zákoník – Velký komentář – Svazek I. § 1–117*. [Civil Code – Large Commentary – Volume I. Sections 1 to 117.] Prague: Leges, 2013. p. 227 et seq.

requirement, rather than a substantive rule.[52] Consequently, according to this provision, earlier court decisions cannot be understood as forming one binding whole and one binding legal norm in the broader sense together with the law that they interpret and complement, but rather in that the conclusions contained therein affect the procedural duties of judges in the future. Consequently, if a judge resolves to approach a case involving identical facts in a different way than other courts in their earlier decisions, he/she must comply with procedural duties consisting in proper explanation of the reasons for his/her conclusions. Nothing more, nothing less.[53]

Since Section 13 of the Civil Code comprises a simple procedural rule, rather than a substantive rule, this provision cannot be relied on to make a conclusion on a precedential nature of judicial decisions. The rationale behind the mentioned provision is different. It clearly aims to limit the influence of individual and subjective factors affecting qualification, interpretation and decision-making, including the aspects of "*pre-knowledge*" and "*pre-understanding*".[54] It is also supposed to contribute to better awareness of the principles of procedural economy, economy and legal certainty. These principles would be binding on every judge even without this provision of the Civil Code. However, they were often not adhered to in the past.

Moreover, it is easier in practice to reflect earlier court decisions. By doing so, the court borrows someone else's authority and simplifies its own work especially in terms of providing reasons for its decision – this is the substance of the aforesaid *persuasiveness*. The earlier judgement is thus not binding; it is a mere shortcut (or abbreviation). On a similar note, it is pleasant and effective for an attorney-at-law to adopt arguments and conclusions from earlier case-law than to arduously conceive own conclusions and arguments. It is then all the more valuable when someone can oppose such deep-rooted and comfortable manner of operation. These cases become medialised and the lawyers involved often eventually find their way into the supreme judiciary.

I have already pointed out that – in order to make good on the assertion that a judicial decision cannot be a precedent in our system – professional literature tends to speak about a certain factual form of binding effect of judicial decisions. However, if drawn *ad absurdum*, such a binding effect could also be inferred

[52] LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část. (§ 1 až § 654). Komentář.* [Civil Code I. General Part. (Sections 1 to 654). Commentary.] Prague: C. H. Beck, 2014, p. 115.

[53] Similarly, the manner of resolving variances in the case-law of our courts through the work of grand chambers of the Supreme Court's divisions and the extended chamber of the Supreme Administrative Court also has procedural nature. Cf., in this regard, KÜHN, Z. O velkých senátech a judikatorních odklonech vysokých soudů. [On Large Chambers and Deviations in Case-law of Supreme courts.] *Právní rozhledy*, 2013, no. 2, p. 39 et seq.

[54] On both these notions, see ŠKOP, M. *... právo, jazyk a příběh. [... the Law, Language and Story.]* Prague: Auditorium, 2013, p. 73

from Section 13 of the Civil Code in the case of decisions made by foreign courts which are applied in our legal environment.

This is so because, in respect of certain provisions of the Civil Code, the legislature in no way denied that inspiration had been taken from foreign legal environments. It is then only logical from this point of view that it was not the legislature's intention to adopt the simple text of foreign legal norms without reflecting on the meaning attributed to them in practice of the given country. Quite naturally, the legislature thus had to adopt both the law formed by the legislature, as embodied in the text of the given legal norm, and also the "judge's law", formed by judicial work. Indeed, the opposite would be an expression of the condemned and obsolete simple view of the law.[55]

If we acknowledge that judges complement the law by filling the gaps and also the thesis on a *certain form* of a binding effect of case-law filling these gaps, we then necessarily have to conclude that Czech courts also have to reflect on foreign case-law insofar as it relates to legal norms taken from abroad. This will be true at least with regard to those rules where the legislature admitted in the explanatory memorandum that it had found inspiration in foreign laws. Simply because it relates to such an adopted provision, such case-law has to be *persuasive and worthy of following* with regard to the common origin. However, I am not sure whether this conclusion is one that our courts would like to hear. I sincerely doubt that they would be able to systematically monitor and evaluate case-law of German, Austrian, Canadian and other courts.[56] That, in my opinion, should primarily be the task of jurisprudence.[57]

By the way, the above-described approach is not foreign to courts in the Anglo-American environment; to the contrary, it is considered a matter of course.[58]

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[55] KÜHN, Z. K otázce závaznosti rozhodnutí Evropského soudu pro lidská práva pro domácí soudnictví. [On the Binding Effect of Decisions of the European Court of Human Rights for Domestic Judiciary.] *Právní rozhledy*, 2005, no. 1, p. 1 et seq.

[56] It should be noted that the Czech highest courts manage this and often do so as can be demonstrated on their decisisions adopted in the area I am familiar with. For example the Czech Constitutional Court in its judgment on the Lisbon Treaty had no problem identifying the case-law of its German counterpart as "interesting" and inspiring for its own decisions. See Constitutional Court decision of November 26th, 2008, file no. Pl. ÚS 19/08, paragraph 60 and paragraphs 116–118 or the admission to the German Federal Constitutional Court doctrine in the decision of the Constitutional Court of January 31st, 2012, file no. Pl. ÚS 5/12, in the case of the so-called "Czechoslovak pensions".

[57] As a matter of fact, where persuasiveness is mentioned in this paper, according to *Posner*, the opinions of jurisprudence should, under normal circumstances, have a greater persuasive effect than the courts' conclusions, even if the courts were to agree on them across the individual instances. He sees the reason in the scientific methods of work. POSNER, A., Richard. The Jurisprudence of Skepticism. *Michigan Law Review.* 1988, vol. 86, p. 841.

[58] ROUDIK, P. The Impact of Foreign Law on Domestic Judgments. [online]. [retrieved on 2019-05-03]. Available at https://www.loc.gov/law/help/domestic-judgment/impact-of-foreign-law.pdf

At the same time, the influence of court decisions originating from some other legal order is perceptible both among federal states[59] and with regard to foreign rulings.[60] This is precisely the influence which is classified by American authors not in the category of *"certain binding effect*", as is true in this country in similar cases, but rather in the category of "*persuasiveness*". However, this will always be easier for these courts because of the common language they share – they understand one another. Moreover, they mostly rely on a single legal tradition.

I personally again consider the existence of the Constitution and the way the power is separated in this country to be the strongest arguments against such interpretation of Section 13 of the Civil Code, as well as of any other norm in the Czech legal order that would be invoked in an attempt to infer a precedential effect of judicial decisions. The legislature, as the creator of norms, is subject to direct political control by the people. On the other hand, the judicial branch quite naturally lacks any such accountability. Any control by the people, as well as by other branches of power, is strongly limited. Consequently, if we admitted the possibility of any law-making activity by the courts, this would ultimately mean that law-making, and thus also decision-making on political issues, would be entrusted to a branch that is under very limited control and that is not directly accountable to the people for its acts. We would thus be in the process of forming an elite in our environment that does not operate in line with the principles of representative democracy.

What is therefore the role of earlier decisions (case-law) in the Czech legal environment?

Primarily, it is manifested in the mutual relationships among various court instances. It is claimed that a decision of a lower court may later be cancelled or changed if it is at variance with decisions of a court of higher instance.[61] While this may be true, it need not occur if the case is later dealt with by a chamber of a superior court with a different approach to the matter. In view of how the courts operate in the Czech Republic, this certainly is not unlikely, but the risk has been lower following the legislative changes made after 2000.[62]

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[59] McGREGOR, D. B., ADAMS, C. J. *The International Lawyer's Guide to Legal Analysis and Communication in the United States*. Aspen Publishers, 2008, p. 17.

[60] This issue is extensively empirically dealt with by MAK, E. *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*. Hart Publishing, 2013.

[61] However, all the above is conditional on filing a remedy. While this can be expected, it is neither automatic nor certain.

[62] KÜHN, Z. *Judikatura a precedent v kontinentálním a angloamerickém právu.* [Case-law and Precedent in Civil-Law and Anglo-American Legal Systems.], in ŠÁMAL, P., RAIMONDI, G., LENAERTS, K. *Závaznost soudních rozhodnutí - vnitrostátní a mezinárodní náhledy. [Binding Effect of Judicial Decisions – National and International Views.]* Prague: Wolters Kluwer, 2018.

Furthermore, case-law manifests itself at the procedural level. If a judicial decision is identical with previous decisions, reference to such a decision may serve as an abbreviation (or shortcut). The court thus relieves itself of the duty to provide a detailed explanation of the reasons for its decision if they are obvious from previous case-law. If a new decision differs from previous judgements, the judge is required to properly explain the reasons that led him/her to make the decision and to deal with arguments put forth in earlier case-law.[63] In that case, neither earlier case-law nor any part of its contents is binding as the binding effect is attached to general legal principles that the judge must follow in procedural terms.

In this approach, the nature of case-law of Czech courts is, in my opinion, similar to the nature of judgements rendered by German and French courts. Judicial decisions are thus not a source of law and the only effect they can have on other courts is informal and persuading. The authority of case-law is thus not connected with its form and thus official, but rather follows from its contents and persuasiveness.[64] In this concept, the courts and judges are independent and mutually equal both at one and the same instance and among individual instances.

4. On the nature of rulings of the Court of Justice of the EU – a normative point of view

An important proviso has to be made in the introduction to this part. The nature of a court decision is often conceived in general, regardless of whether the decision is made under national or other law. But the characteristics attached to court judgements under Czech law cannot be automatically transposed to decisions adopted in some other system of law. Moreover, when several legal systems are approached simultaneously, one has to deal with the issue of their mutual relationships, which also needs to be reflected in evaluation of any potential effect of a court decision across these systems.

European Union law has an autonomous position in relation to Czech law. It has its own sources of law and, at the same time, the potential for its interpretation by Czech courts is limited. Indeed, self-interpretation of the founding treaties and the law issued by the Member States on their basis was limited by the TEU nad TFEU, and the task of their binding interpretation was entrusted to the Court of Justice of the EU.

[63] Or proceed pursuant to Section 20 of the Courts and Judges Act, i.e. refer the case for a decision to the Grand Chamber of the Supreme Court. However, the substance (absence) of powers in the area of law-making and provision of legal interpretation remains unchanged.

[64] Cf. KISCHEL, U. *Rechtsvergleichung*, C. H. Beck, 2015. p. 265.

In the very founding treaties, and specifically in Article 19 of the Treaty on the Functioning of the European Union, the Member States granted this institution an exclusive position in interpretation of European Union law. *Týč* infers that this exclusivity consists in the power to determine which line of interpretation is correct and thus binding on the other bodies of the European Union and the Member States.[65] The Court of Justice has had this competence from the very beginning of its existence.[66] In this regard, the position of the Court of Justice fundamentally differs from the powers vested in Czech courts.

However, it cannot be inferred from this specific position of the Court of Justice of the EU that it also has a law-making power. Quite to the contrary, the founding treaties did not entrust any such power to this authority. The Member States are therefore the exclusive law-makers in terms of primary law, and the Union itself in the case of secondary law. Even unwritten general legal principles are not created by the Court of Justice; the Court merely determines such principles.[67] As a matter of fact, even the concept of a preliminary ruling procedure as such gives the Court of Justice – subject to possible assessment of the validity of secondary law – exclusively interpretative, rather than law-making, power.[68]

Thus, if we apply the terms defined above to rulings of the Court of Justice, we can conclude that although they are not a source of law (precedent), they contain elements which are generally binding – in the domain of interpretation of law. Nonetheless, the professional public sometimes claims that decisions of the Court of Justice do have a precedential nature. The most common reasons stated in this regard as summarised by *Kaczorowska* include, in particular:

- exceptionality of deviations by the Court of Justice from its previous case-law;[69] and thus

[65] TÝČ, V. *Základy práva Evropské unie pro ekonomy. [Basics of EU Law for Economists.]* 7th edition. Prague: Leges, s.r.o., 2017, p. 108.

[66] Article 31 of the Treaty establishing the European Coal and Steel Community, Article 136 of the Treaty establishing the European Atomic Energy Community, and Article 164 of the Treaty establishing the European Economic Community, as well as Article I-29 of the Treaty establishing the Constitution for Europe, and the current wording of Article 19 of the Treaty on the European Union have materially identical wording and have not undergone any change over time that could affect the concept and role of the Court of Justice of the European Union in interpretation of EU law.

[67] It often uses the induction method when it infers the existence and contents of principles from national laws and international law.

[68] Nonetheless, some Czech authors approach the problem in factual terms. E.g. Komárek thus considers rulings of the Court of Justice to be a source of law. KOMÁREK, J. Federal elements in the Community judicial system: Building coherence in the Community legal order. *Common Market Law Review*, 2005, vol. 42, č. 1,pp. 15 et seq. See also STEHLÍK, V. Účinky rozhodnutí Evropského soudního dvora v řízení o předběžné otázce. *Právny obzor*, 2005, vol. 88, no. 4, pp. 312–334.

[69] the Court of Justice *de facto* respects the principle *of stare decisis*.

- stability of case-law, related to the motivation of the Court of Justice not to impair its own authority;
- coherence, stability and consistency of opinions expressed in its decisions;
- the principle of legal certainty and predictability of judicial decision-making;
- the conclusions inferred in relation to Art. 267 (3) TFEU and exemption from the duty of a last-instance court to initiate a preliminary ruling procedure in cases of *acte eclaire;*
- systematic references to previous decisions;[70]

However, *Kaczorowska* unambiguously rules out at the same time that decisions of the Court of Justice could be a source of law. We can agree with this assertion as it is based on what is (and what is not) enshrined in the founding treaties. This actually is also implied by the Court of Justice itself. However, further specification is required for conclusions concerning the precedential or binding character judgements rendered by this institution.

In my opinion, all the reasons mentioned above merely describe the actual state of affairs. They characterise how the Court of Justice decides its cases but say nothing about how it should make decisions in relation to its previous decisions. They are a simple expression of the general legal principles identified above. Indeed, in our European legal environment, these principles necessarily form a part of any legal order, and thus also of European Union law, which was created on the basis of national laws.

A ruling rendered by the Court of Justice can thus factually influence the General Court in the same way as judgements of higher instances affect subordinate courts in the Czech Republic. But the situation is different with regard to courts of the Member States. There can naturally be no talk about any instances. However, based on the principle of sincere co-operation, the courts of Member States are obliged to comply with European Union law. They are thus required to apply it correctly and thus, pursuant to Article 19 of the EU Treaty, as interpreted by the Court of Justice.

Pítrová states in this respect that sources of European Union law include indirectly, as interpretation of specifically defined sources of EU law, also case-law of the Court of Justice,[71] from which one can infer that interpretation provided by the Court of Justice is binding. She states in fact that the Court of Justice complements the law as it fills gaps (also called loopholes) in its activity.[72] But

[70] See KACZOROWSKA-IRELAND, A. *European Union Law*. 4th edition. Routledge, 2016. p. 150.

[71] SYLLOVÁ, J., PÍTROVÁ, L., PALDUSOVÁ, H *et al*. *Lisabonská smlouva. Komentář. [The Lisbon Treaty. Commentary.]* 1st edition. Prague: C. H. Beck, 2010, p. 11.

[72] The problem with gaps and interpretation by courts has already been pointed out and, therefore, this notion is used as an abbreviation.

such an activity, and it is irrelevant at this point how we will approach and denote it in terms of legal terminology, is basically pursued by any court in some form, including national courts. But the substance lies elsewhere.

If European Union law is an enclosed system, within which the Court of Justice was entrusted with interpretation by Article 19 of the Treaty on the European Union, and Article 267 of the Treaty on the European Union created an internal mechanism for unifying interpretation, the decisions of the Court of Justice cannot be treated in the same way as decisions of courts in a single Member State. The purpose of the mentioned provisions is to secure compliance with EU law as a supranational system of law and to ensure its uniform interpretation. It can therefore be concluded that national courts do not enjoy full freedom to interpret EU law, as they have to respect it as a whole, i.e. not only in the form in which it is formally captured, but also as interpreted through internal mechanisms.[73]

The aforementioned duty can be inferred from the general duty of sincere co-operation as laid down in Art. 4 (3) of the Treaty on the Functioning of the European Union.[74] National courts, as bodies of the State, have the duty of sincere co-operation, which can also be construed in that they are also bound, pursuant to Art. 4 (3) of the Treaty on the Functioning of the European Union, by loyalty to the Court of Justice and the manner in which EU law is interpreted.

In my opinion, the difference compared to other methods of interpretation provided by other international courts, such as the European Court of Human Rights, lies in the fact that they often lack a provision analogous to Article 19 of the EU Treaty and also provisions excluding self-interpretation.

The situation is further complicated by two problems. They both stem from the Court of Justice itself. First, the Court of Justice often goes beyond the limits of interpretation in the sense that it suggests to national courts not only how the EU rule in question should be interpreted, but also how it should be applied, or even how national law should be interpreted or whether it is in accordance with

[73] However, *Malenovský* points out an interesting fact. In systematic terms, the competence to decide on preliminary questions can be found, in *Malenovský's* words, "*at the very end of the list of its powers, next to the competence to resolve disputes on compensation for damage and employee disputes".* The latter, *Malenovský* notes, are now decided by the General Court, rather than directly by the Court of Justice. According to *Malenovský*, this indicates that the original concept of the preliminary ruling procedure and thus also of the role of the Court of Justice in interpretation of European Union law was to be merely complementary. See Malenovský, J. Triptych zobrazování Soudního dvora ES: arbitr, "motor integrace" nebo "velký manipulátor"? [The Triptych of Depicting the Court of Justice of the EC: an Arbitrator, "Driving Force of Integration" or "Great Manipulator"?] *Právník: Teoretický časopis pro otázky státu a práva*, 2007, no. 10, p. 1068.

[74] STREINZ, R. *Europarecht*. 10th edition. 2016. C.F. Müller. p. 249.

EU law.[75] But the Court of Justice lacks power to do any of that. Consequently, the relevant part of the judicial decision is *obiter dictum* and is not binding on anyone, i.e. not even on the court that made the reference for a preliminary ruling.

Second, the Court of Justice is forced to work with law that is, at least at the level of primary law, general and full of gaps.[76] This fact enables it to creatively fill this space in the legislation. There are many examples, and let me therefore mention only the best known and most striking – Van Gend en Loos,[77] Costa,[78] Gravier,[79] Chernobyl,[80] Francovich,[81] Mangold,[82] Metock[83] and others. These rulings are characterised by purpose-driven interpretation, *effet utile* arguments, and weak or methodologically problematic reasoning of both the decision itself and the power to make the decision.[84] By virtue of those decisions, the Court of Justice created and promoted the policy of ever closer integration.[85] This, however, was done at the cost of often only a limited respect for the wording of the founding treaties.[86]

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[75] In *Miret*, e.g., the Court of Justice stated: *"It would appear from the order for reference that the national provisions cannot be interpreted in a way which conforms with the directive on the insolvency of employers and therefore do not permit higher management staff to obtain the benefit of the guarantees for which it provides. If that is the case, it follows from the Francovich judgment, cited above, that the Member State concerned is obliged to make good the loss and damage sustained as a result of the failure to implement the directive in their respect."* See judgement of the Court of Justice (Fifth Chamber) of 16 December 1993 in Teodoro Wagner Miret v Fondo de garantía salarial (Case C-334/92), paragraph 21.

[76] TÝČ, V., SEHNÁLEK, D., CHARVÁT, R. *Vybrané otázky působení práva EU ve sféře českého právního řádu.* [Selected Questions of the Influence of EU Law in the Czech Legal Order.] 1st edition. Brno: Muni PRESS, 2011, p. 156.

[77] Judgement of the Court of Justice of 5 February 1963 in NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen (Case 26/62).

[78] Judgement of the Court of Justice of 15 July 1964 in Flaminio Costa v E.N.E.L. (Case 6/64).

[79] Judgement of the Court of Justice of 13 February 1985 in Françoise Gravier v Ville de Liège (Case 293/83).

[80] Judgement of the Court of Justice of 4 October 1991 in European Parliament v. Council of the European Communities (Case C-70/88).

[81] Judgement of the Court of Justice of 19 November 1991 in Andrea Francovich and Danila Bonifaci and others v Italian Republic (Joined Cases C-6/90 and C-9/90).

[82] Judgement of the Court of Justice (Grand Chamber) of 22 November 2005 in Werner Mangold v Rüdiger Helm (Case C-144/04).

[83] Judgement of the Court of Justice (Grand Chamber) of 25 July 2008 in Blaise Baheten Metock and others v Minister for Justice, Equality and Law Reform (Case C-127/08).

[84] Cf. STREINZ, R. *Europarecht*. 10th edition. 2016. C.F. Müller. p. 228.

[85] In the case-law of the Court of Justice of the EU, the above is manifested in the form of an argument by *"an ever closer union among the nations of Europe"*, which can be seen as an expression of the legislature's intention and which could also be approached more abstractly as one of possible arguments in teleological interpretation *(argumentum ad Unionis Europaeae)*

[86] TÝČ, V., SEHNÁLEK, D., CHARVÁT, R. *Vybrané otázky působení práva EU ve sféře českého právního řádu.* [Selected Questions of the Influence of EU Law in the Czech Legal Order.] 1st

As a matter of fact, all these cases could have been decided in a different way. All these decisions, with the exception of the one in the Chernobyl case, could have ended by merely stating that the issue in question is not addressed by European Union law and thus does not fall within its framework. This would not mean an absence of law, but merely that the relevant problems would be assessed according to the rules of national law.

Legal literature legitimately and frequently criticises this creative activity of the Court of Justice.[87] At the same time, however, this case-law creates a tension between the Court of Justice and national courts. Indeed, the latter are well aware of the scope of power on the part of the Court of Justice. Nonetheless, there is a clear tendency on the part of national courts to follow and comply with decisions of the Court of Justice of the EU, even where the case at hand appears to be problematic in terms of theory of law.[88]

Šadl points out a remarkable aspect in the functioning of the Court of Justice.[89] Indeed, it is strange how it treats its previous decisions in new rulings. The Court of Justice regularly refers highly assertively and self-confidently to

edition. Brno: Muni PRESS, 2011, p. 153.

87 Quite well known is Lord Denning's statement: *„The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. The have foregone brevity. They have become long and involved…In consequence, the judges have followed suit. How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty, there are gaps and lacunae. These have to be filled in by the judges, or by regulations and directives. It is the European way."* Cited from SHARPSTON, E. The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law. In: MADURO, M. P.; AZOULAI, L. *The Past and Future of EU Law. The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty*. Oxford: Hart Publishing, 2010, p. 257.

88 The Court of Justice thus a high authority and its decisions are therefore very persuasive. *Týč* notes that this authority was not explicitly vested in the Court of Justice by the founding treaties, but was rather gradually built by the Court. Ibid., p. 167. *Malenovský* describes this development in similar terms. See MALENOVSKÝ, J. Triptych zobrazování Soudního dvora ES: arbitr, „motor integrace" nebo „velký manipulátor"? [The Triptych of Depicting the Court of Justice of the EC: an Arbitrator, "Driving Force of Integration" or "Great Manipulator"?] *Právník*, 2007, no. 10, pp. 1065–1084.

89 ŠADL, U. Case-Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments. *European Constitutional Law Review,* vol. 9, no. 2, 2013. Differences between the EU legal system and comon law with regard to the concept precedent see also STEHLÍK, V. *Řízení o předběžné otázce v komunitárním právu*. Olomouc: Univerzita Palackého v Olomouci, 2006, pp. 140–141.

its own case-law (its previous judgements) without addressing, however, what *common law* courts do absolutely regularly and as a matter of course.[90] Therefore, judgements of the Court of Justice lack any detailed analysis of facts in relation to the rule on the basis of which the decision was made. In principle, it merely constantly repeats its general conclusions[91] until it creates the impression of a law – a precedent.

In order to avoid confrontation with the rulings of the Court of Justice, some courts deal with cases on a factual basis. They have created a doctrine based on which they do not rule on the case itself (*in rem*) and are therefore not required to refer preliminary questions to the Court of Justice. The Czech Constitutional Court is one of these courts.

Such an approach is not particularly brave and is primarily needless. As mentioned above, rulings of the Court of Justice are not a source of law and their binding effect is limited only to those parts which provide interpretation of EU law. This gives national courts some space for their own assessment of the disputed matters in relation to the facts of the case and the legislation concerned. It should be noted that this space is not too broad and the Court of Justice has gradually begun to guard it, which strikingly resembles the efforts to achieve a unity of interpretation on the part of domestic supreme courts.[92] What is important in this regard is that the Court of Justice enforces its ideas on the basis of Art. 267 (3) of the Treaty on the Functioning of the European Union.[93] Consequently, the infringement does not lie in the fact that a national court has interpreted EU law incorrectly and at variance with previous case-law of the Court of Justice, but rather in the fact that it has failed to initiate a preliminary ruling procedure. And here, in my opinion, lies a substantial difference as regards the possible concept of rulings of the Court of Justice as a source of law or as a source of single correct interpretation of the law. Indeed, the procedure of the Court of Justice implies that not even this court ultimately conceives its case-law in this way.

In view of the above, I do not consider the decisions rendered by the Czech Constitutional Court in the case of Czechoslovak pensions[94] and by the Danish court in Ajos wrong, as a matter of principle. Similarly, I do not consider it incorrect that, in its ruling[95] responding to the decision of the Court of Justice

[90] Ibid.

[91] Ibid.

[92] Judgement of the Court of Justice (Fifth Chamber) of 4 October 2018 in European Commission v French Republic (Case C-416/17).

[93] And in infringement proceedings pursued against a state.

[94] Judgement of the plenum of 31 January 2012, File No. Pl. ÚS 5/12 in the case of "Czechoslovak pensions".

[95] Judgement of the Danish Supreme Court in Case 15/2014 of 6 December 2016.

in Ajos,[96] the Danish Supreme Court assessed the situation differently than would follow from the decision of the Court of Justice.[97] Indeed, it managed to avoid the requirements of the Court of Justice by relying on the Danish accession legislation, which lacks any explicit legal basis for a transfer of power enabling the Court of Justice to order a Danish court, with a direct effect for individuals, not to apply Danish legislation that is in contradiction with unwritten general legal principles of the European Union.[98] But it would already be a mistake, in my opinion, if the national court itself interpreted a specific European Union norm in a different way, at variance with an earlier decision of the Court of Justice.[99]

Consequently, the decision of the Czech Constitutional Court is problematic not in that the court expressed its own legal opinion regarding the given facts, even if I disagree with it, but primarily in that it did not itself initiate a preliminary ruling procedure.[100] As a matter of fact, the Danish court very elegantly avoided the above binding nature of interpretation of EU law provided by the Court of Justice and did so in a much better way than its Czech counterpart. It interpreted its own national law and a treaty concluded on its basis. Nevertheless, the Dutch court might have erred in that it probably should have continued in the judicial dialogue with the Court of Justice and referred to it a second preliminary question.

However, the question is different. It is not about the binding effect of case-law of the Court of Justice or its precedential character. The question stands whether or not the two national courts should nevertheless have continued in, or rather established, a judicial dialogue with the Court of Justice by virtue of making a preliminary reference – the second in the case of Denmark and the first

[96] Judgement of the Court of Justice (Grand Chamber) of 19 April 2016 in Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen (Case C-441/14).

[97] The ruling of the Court of Justice called for a change in the previously settled case-law of the Supreme Court of Denmark.

[98] See the ruling of the Danish Constitutional Court in Case 15/2014 of 6 December 2016 (English translation), p. 12, available at http://www.supremecourt.dk.

[99] The Danish court's approach is also supported by the scientific literature. For example. *Schilling* concludes, that a distinction should be drawn between the formal and material powers of the Court of Justice to interpret the law Of the European Union with the view that the role of the Court of Justice of the EU is only advisory in matters of competence and the strength of its argument lies not in the binding effect of its decisions but in their persuasivness. This is a somewhat controversial argument as it is based on national constitutional law as well as on international public law and there is no support fot it in written law of the European Union. The regulation of the preliminary ruling procedure in Article 267 of the TFEU does not make any such distinction. See SCHILLING, T. The Autonomy of the Community Legal Order: An Analysis of Possible Foundations. *Harvard International Law Journal*, 1996, no. 37.

[100] Another error lay in an attempt to use a non-existent institute of *amici curiae.*

in the case of the Czech court. It is also a question what these courts actually achieved by their quarrelsome decisions.

5. Conclusion

The basic conclusions intertwine the entire text, which is already too long anyway. Nonetheless, each of the questions addressed here could be analysed in more detail, but that would go beyond the scope of the present paper. Its aim is to point out that the nature of judicial decisions, as systematically presented in Czech case-law and professional literature, lacks a corresponding basis in the legislation and may be owing to the time when the case-law was developed. Condemning a conservative approach to it as something that is already obsolete, socialist and simplifying[101] ultimately itself represents a simplifying view of the world. An ideology drawn from the Anglo-American environment is not the only possible way to approach the problem under scrutiny. Inspiration can also be found in the German and French doctrines, which are much closer to us and our legal system. Although this might not be clear at first sight, European Union law also originates from this very environment. We should thus also perceive rulings of the Court of Justice from this angle. Nonetheless, I am aware of the force of a self-fulfilling prophecy. And the thesis on a binding effect of case-law and its precedential nature is already deeply rooted in Czech jurisprudence.

Equating the nature of Czech judicial decisions and those of the Court of Justice is also problematic. Indeed, there are fundamental differences between them which relate to the powers vested in these courts and the law that these courts work with. Unlike Czech courts, the Court of Justice is authorised to provide legal interpretation of EU law on the basis of Article 19 of the EU Treaty; the existence of a binding effect of such interpretation is also supported by purpose-driven interpretation of Article 267 of the Treaty on the Functioning of the European Union, and finally, the binding effect of the Court of Justice's interpretation is confirmed, in relation to both said articles, by the duty of sincere co-operation as laid down in Article 4 of the Treaty on the EU, which binds both the Member States in general and their courts.

[101] See KÜHN, Z. K otázce závaznosti rozhodnutí Evropského soudu pro lidská práva pro domácí soudnictví. *Právní rozhledy*. 2005, no. 1, pp. 1 et seq.

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The Europeanisation of Energy Policy – What Scenario for Effective Institutionalism?*

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Summary: The energy policy has been part of the path to the (post-Lisbon) European Union as we know it today since the very beginning of this project in form of the both European Coal and Steel Community or Euratom. However, in past years/decades the energy topic shifted from 'low' to 'high' politics[1]. Despite energy policy being a delicate issue that has been at the discretion of the Member States, the Lisbon Treaty established energy as the shared competence between the European Commission and the member states Since then, the Commission has been very active in driving the integration of the energy policies[2], resulting in establishing the Energy Union and gradually coupling the energy with climate variable[3], ultimately, creating a platform for occurring energy transition. Nevertheless, the EU is heavy energy-importer but the Member States are endow differently in terms of the structure of energy mix, imports/exports and energy security, which challenges the institutional framework and governance of the energy sector within the EU in the future. The ultimate question reflecting the institutionalism approach is, how the EU institutional structure respond to the Energy Union project and division of competences both in vertical and horizontal perspective, from the point of effective decision-making and implementation of energy policy.

Keywords: energy policy – institutionalism – Europeanisation – Member States interest – Energy Union – differentiated integration – intergovernmentalism

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1. Introduction

The European Union (hereinafter as the "EU") is "without question the most densely institutionalized international organization in the world"[4]. The foundation and development of the EU is characterised by strengthening power of the EU institutions and Europeanisation of the policies, i.e. the ambition of integration and concentration of decision-making in the centre.

In the original European Coal and Steel Community Treaty (hereinafter as "ECSC") the institutional structure simple refer to a Commission, a Parliament, Council and a Court. The ECSC Treaty placed the Commission as the main body, by setting "the duty to ensure, that objectives of the Community would be attained" (Article 8). To fulfil this duty, the Commission was entitled to adopt decisions, recommendations and opinions. (Article 14). The Parliament and the Council were considered as the peripheral. The Parliament had advisory position (Article 24) and the Council's role was "to harmonise the action of the Commission and that of the Governments, which are responsible for the general economic policies of their countries" (Article 26)[5]. Although the ambition of all three European communities founded in 1950s was the integration based on the common interests, the supranational character had to be built. The supranational character of European communities was visible in the decision-making of the Commission, but in the very limited areas of policies. The cooperation between original six countries was balancing between supranationalism (implementing through Commission's powers preferably in area of common market) and intergovernmentalism (implementing through consensus of Member States within Council's meetings in other policy areas).

Despite the supranational and intergovernmental development, the formal change was presented only in 1986 within Single European Act (hereinafter as SEA). The strengthening of the Council position (presenting qualified majority voting), including formal incorporation of the European Council into institutional structure and innovations of the decision-making processes strengthening the Parliament's positions (presenting cooperation position) represents not only the supranational approach, but also confirm the ambition of the Commission and European Communities members of the Europeanisation of the processes and building internal market. The core reform presented in the SEA was than not only the presentation of new and deepen competences of the Community's bodies and institutions, but also the reformed institutional structure.

[4] POLLACK, M. A. Rational Choice and Historical Institutionalism. In WIENER, A., BÖRZEL, T., RISSE, T. (eds*). European Integration Theory* (3rd edition). New York: Oxford University Press, 2019, pp. 108–128

[5] Treaty establishing the European Coal and Steel Community, 1951.

The implementation of the SEA had practical implications. The idea of internal market was immanently followed by the idea of economic and monetary union. Delors report[6] inspired the discussion between Member States and Community institutions, leading to organisation of Intergovernmental conferences. The output of the conference in Maastricht in 1992 became efficient in the form of Maastricht Treaty on the European Union in 1993. That presents significant step into integration in area of internal market and strengthening of the Commission position within the European Communities. Meanwhile the Europeanisation ambitions in other policies as foreign affairs, security policy, judicial and policy cooperation and internal affairs rely in the hands of the Council and Member States. Article A of the Treaty on the European Union established accordingly separate international multilateral cooperation in the form of the European Union. The European Communities had represented the supranational approach and refer competences to EC institutions, while the EU referred to intergovernmental structure and left decision-making in hands of the Council and agreement of Member States.

This development was followed also in incoming Amsterdam Treaty (1997) and Nice Treaty (2001). The main challenge for both treaties was to settle, how the institutional structure and existing decision-making processes that worked for 12 states may work for twice the number. As Schutze argued, "the widening was only one aspect of the demand for constitutional change. The Union equally wished to deepen its evolution towards political union by establishing more democratic and transparent institutions"[7]. Both treaties presented minor changes in institutional structure and did not provide sufficient institutional and policy background for the Europeanisation of the cooperation between Member States.

Each Treaty amendment from SEA to Nice had presented pragmatic approach, reflecting ongoing development and introduced it into the text of Treaty. Each political compromise in areas of concrete policies (as immigration, asylum, cohesion, energy, social, innovations etc) had been admitted to the advanced European integration, but mainly in the legal pragmatic formulation.

The following Lisbon Treaty differs significantly from the previous ones. It presented new constitutional structure and the European Union had replaced its predecessor European Communities. It means meaningful change in understanding the process of integration, by shifting some competences from Member States to the European Union and using more precise definitions in the text. According

[6] THYGESEN, N. The Delors Report and European Economic and Monteary Union. *International Affairs*, 1989, vol. 65, no.4, pp. 637–652.

[7] SCHÜTZE, R. *European Union Law (2nd edition)*. Cambridge: Cambridge University Press, 2018, pp. 1–916.

to Laeken Declaration[8], Lisbon Treaty aimed at a better division and definition of Union competences. The Treaty of Functioning of the European Union (hereinafter as "TFEU") therefor introduced new title on "categories and areas of Union competence". The Laeken declaration also aimed to "more democracy, transparency and efficiency in the European Union"[9]. As such, the Lisbon treaty presents different attributes on the way to political union, including obligation to follow democratic principles (Article 2, TEU), representative democracy (Article 10(1))[10] and again strengthen competences of the EU institutions.

This legal and political environment presents unique conditions to development and deepening of the integration in several field of internal market and related policies.

Our research is focused on the on the development of the energy policy and creation of the Energy Union and the position of the relevant EU institutions in decision-making and implementation, as set in the strategic documents and legislative acts. The theoretical basis of the research is the historical institutionalism, which goes beyond the formal institutions approach by expanding the analysis on which and how the institutions matter. As defined by Fioretos, Falletti, and Sheingate, "Historical institutionalism is a research tradition that examines how temporal processes and events influence the origin and transformation of institutions that govern political and economic relations"[11]. We analyse how EU institutions, procedures and norms contribute to the development of the Energy Union and how the role of EU institutions should be identified in transition of the competence in energy policy from Member States to EU and its institutions from the point of building the most effective institutional structure for the successful implementation. As such, we will apply the model developed by the Mahoney and Thelen, by presenting "innovations in historical institutionalist theorizing and arguing that previous historical institutionalism had focused on continuity rather than change, and that, to the extent that it had theorized change, had seen such change as exogenously driven and sudden"[12].

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8 EU. *Presidency Conclusions of the Laeken European Council* (*14 and 15 December 2001*). [online]. Available at: < https://www.consilium.europa.eu/media/20950/68827.pdf>

9 EU. Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, pp. 47–390.

10 EU. Treaty on European Union. OJ C 326, 26.10.2012, pp. 13–390

11 FIORETOS, O., FALLETTI, T.G., SHEINGATE, A. Historical Institutionalism in Political Science. In: FIORETOS, O., FALLETTI, T .G., SHEINGATE, A. (eds). *Oxford Handbook of Historical Institutionalism*. New York: Oxford University Press,2016, pp. 3–28.

12 MAHONEY, J., THELEN, K. A Theory of Gradual Institutional Change. In: MAHONEY, J., THELEN, K.(eds). *Explaining Institutional Change*. New York: Cambridge University Press, 2010, pp. 1–37.

2. From ECSC to Energy Union

2.1. Historical development of Energy Union

The energy policy has been integral part of the European Union since the establishment of the ECSC and subsequently Euratom. However, the provisions of the founding treaties of both emphasized and prioritized their political and economic dimensions, rather than stipulated a comprehensive energy policy on a supranational level. The political perspective was relatively straightforward. The principal intention was to create and safeguard the peace by "substitution of historic rivalries" (primarily between the France and Germany) for "fusion of their essential interests" and "the foundation of a broad and independent community among peoples long divided by bloody conflicts"[13], moreover, the nuclear energy had been recognized as an essential resource for "effecting progress in peaceful achievement"[14]. Furthermore, the fact that coal, steel and nuclear energy are crucial resources in the arms industry, necessary for military mobilization, should not be neglected in the context of ever-lasting peace initiative.

In the context of economy, the motivation was the creation of integrated common market (regarding the coal, steel and the nuclear energy), ensuring "the raise of the standard of living" in the Member States and economic growth, supplemented by the foundation of the barrier-less general common market and customs union by the *Treaty of Rome*[15], establishing the European Economic Community (EEC). Moreover, at that time, the "member states have been opposed to an EU-wide energy policy," because the "countries [were] endowed differently in terms of energy resources, and [had] different import needs and consumption patterns"[16].

Ergo, the ECSC's and Euratom's political and economic focus overshadowing the imprecise guidelines for energy policy and the lack of political will among the member states to shift towards 'energetic federalization', resulted in the failure of formulation and implementation of common energy policy for the member states.

The turning point came in the 1970s – times, when "the ECSC was increasingly marginalized by the rapidly rising use of oil." Eventually, the coal's share on energy market was drastically on decline as oil "had surpassed coal as the most important

[13] Treaty establishing the European Coal and Steel Community, 1951.
[14] Treaty establishing the European Atomic Energy Community, 1957.
[15] Treaty establishing the European Economic Community, 1957.
[16] HAALAND MATLÁRY, J. *Energy Policy in the European Union*. New York: St. Martin's Press, 1997, pp. 1–174.

fuel supply," with "natural gas rapidly catching up"[17]. An urge to broaden the energy cooperation between the member states was triggered by 1973 oil crises, consequently leading to the adoption of the *Council Resolution concerning a new energy policy strategy for the Community*[18] in 1974 emphasizing the closer coordination between the member states and outlining the guidelines concerning the improvement of the security of the energy supply (diversification of supplies and promotion of nuclear energy) and furthermore, more rational energy demand, together with the consideration of the problems of environmental protection, targeting the year 1985[19]. This also reflects "international discussion on new human right to environment."[20]

The further development of EU energy policy was aimed on the liberalization of the energy market. Eikland indicates that European Commission had a vision of a nondiscriminatory internal energy market concept on the legislative basis, ensuring a free and fair competition and improvements of efficiency, prices, consumer protection, etc.: "Internal market policy has since [1988] gone through distinct stages ending with revision of legislation aimed at bringing speed to market opening. These are now called the first, second, and third internal energy policy packages, denoting clusters of directives and regulations targeting different aspects of liberalization of the electricity and gas markets. The first package took several years to negotiate and ended up with the 1996 Electricity and 1998 Gas Directives as major outputs. The second package was enacted in 2003 and contained revised Electricity and Gas Directives as well as specific regulations to harmonize trade and operation of infrastructure across national borders. The third package was finally enacted in July 2009, containing further revisions of the Gas and Electricity Directives, the cross-border regulations as well as an additional regulation establishing an independent agency for boosting cooperation between national energy regulators."[21]

Moreover, based on the support of "a majority of EU citizens [who believed] that Europe is the best level for determining energy challenges"[22], Commission

[17] BIRCHFIELD, V. L.; DUFFIELD, J. S. Introduction. In: BIRCHFIELD, V. L., DUFFIELD, J. S. (eds). *Toward a Common European Union Energy Policy: Problems, Progress, and Prospects*. New York: Palgrave Macmillan, 2011, pp. 1–9.

[18] COUNCIL OF THE EUROPEAN UNION. Council Resolution of 17 September 1974 concerning a new energy policy strategy for the Community. OJ C 153, 09/07/1975, pp. 1–2.

[19] LANGSDORF, S. *EU Energy Policy: From the ECSC to the Energy Roadmap 2050*. [online]. Available at: < http://archive.gef.eu/uploads/media/History_of_EU_energy_policy.pdf>

[20] JANKUV, J. Protection of the right to environment in international public law. *International Comparative Law Review*, 2019, vol. 19, no. 1, pp. 146–171.

[21] EIKLAND, P. O. EU Internal Energy Market Policy: Energy Market Policy: Achievements and Hurdles. In BIRCHFIELD, V. L., DUFFIELD, J. S. (eds). *Toward a Common European Union Energy Policy: Problems, Progress, and Prospects*. New York: Palgrave Macmillan, 2011, pp. 13–40.

[22] EUROPEAN COMMISSION. *Special Eurobarometer: Attitudes towards Energy.* [online]. Available at: <http://ec.europa.eu/public_opinion/archives/ebs/ebs_247_en.pdf>

developed a strategic framework and objectives of common EU energy policy, constructed on three pillars: security of supply, competitiveness and sustainable development[23]. The document *An energy policy for Europe*, denoting the beginning of the more integrated European energy policy, endorsed by the European Council, set three predominant quantifiable targets to be reached until 2020, so-called 20-20-20 goals: a) a reduction of EU greenhouse gas emissions of at least 20%, which could be eventually increased to 30%, below 1990 levels, in case that other developed countries decide to join the international cooperation; b) a reduction of the energy consumption within the EU by 20%, achieved via improvement of the energy efficiency; c) an increase of the utilization of renewable energies in the energy mix by 20%[24][25].

Another important milestone in the pursuit of common European energy policy was the ratification of the Lisbon Treaty, which finally comprehended a title on energy, bringing "energy policy for the first time fully within the competence of the Community organs"[26]. The Lisbon Treaty introduced a profound legal basis for the energy sphere with creation of Article 194 of Treaty on the Functioning of the EU. The aim of the policy, appealing on the solidarity between the Member States, was to 1) ensure the smooth and effective functioning of the energy market; 2) fortify the security of energy supply in the European Union; 3) endorse the energy efficiency and recommend the further development of alternative and renewable forms of energy; and 4) promote the interconnection of energy networks on European level. Hence, energy became part of the shared competences between the Member States and the EU, adhering to the principles of subsidiarity and proportionality[27].

For the better comprehensibility see *Table 1*, consisting of EU documentation, selected on the basis of their energy goal-orientation and incorporation of integration patterns.

[23] SENCAR, M., POZEB, V., KROPEC, T. Development of EU (European Union) energy market agenda and security of supply. *Energy*, 2014, vol. 77, pp. 117–124.

[24] COMMISSION OF THE EUROPEAN COMMUNITIES. *An energy policy for Europe* (COM(2007) 1 final). [online]. Available at: < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0001:FIN:EN:PDF>

[25] LANGSDORF, S. *EU Energy Policy: From the ECSC to the Energy Roadmap 2050*. [online]. Available at: < http://archive.gef.eu/uploads/media/History_of_EU_energy_policy.pdf>

[26] BIRCHFIELD, V. L., DUFFIELD, J. S. Introduction. In: BIRCHFIELD, V. L., DUFFIELD, J. S. (eds). *Toward a Common European Union Energy Policy: Problems, Progress, and Prospects*. New York: Palgrave Macmillan, 2011, pp. 1–9.

[27] EU. Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, pp. 47–390.

Table 1: Overview of EU's major pre-Energy Union strategic documents with energy focus

Year	Name of the document	Objective of the document
1974	*Council Resolution concerning a new energy policy strategy for the Community*	Call for coordination of energy policies within the Community and adoption guidelines for energy supply and demand
1996 (1998)	*Directives 96/92/EC (98/30/EC) of the European Parliament and of the Council concerning common rules for the internal market in electricity (natural gas)*	First of three legislative packages designed for liberalization and harmonization of EU's internal energy market
2003	*Directives 2003/54/EC and 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and natural gas*	The repeal and revision of 1996 and 1998 directives, harmonizing the cooperation between MSs
2007	*An energy policy for Europe*	Energy action plan, emphasizing deeper integration, focusing on security of supply, competitiveness and sustainable development
2009	*Directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and natural gas*	So-called 'Third Energy Package' amended the 2003 directives and was aimed on further liberalization of internal electricity and gas market
2009	*Lisbon Treaty*	Creation of specific legal provision for the energy field – platform for the share of competences between a Member State and EU (TFEU)
2010	*2020 Energy Strategy*	Communication from European Commission elaborating on *An energy policy for Europe*, targeting the energy sustainability and efficiency
2011	*Energy Roadmap 2050*	Response to a request by European Council. The post-2020 strategy focused on the EU's decarbonization objective while ensuring security of energy supply and competitiveness
2013	*Green Paper*	A 2030 framework for climate and energy policies, a follow-up to *2020 Energy Strategy* with specific attention to climate and environment
2014	*European Energy Security Strategy*	The document sets out areas and concrete actions that need to be implemented in the short and longer term to respond to energy security concerns
2015	*Energy Union Package*	Introduction of strategy for the Energy Union

2.2. How much competence to EU institutions?

Lisbon Treaty transition of energy policy to the competence of the European Union also means diversification of competences between EU institutions. The main 'engine' is the European Commission, but the role of European Council and Council of the European Union are still considered as strategic. The activism of the Commission in acceleration of the Energy Union development is visible both in relation to internal market development and in relation to drafted and adopted legislation. The European Council and Council are still main communication channels of national interests, although the legislative initiative is in hands of Commission itself.

The **European Commission** could be easily identified as an actor with agenda setting power firmly in the hands. Naturally, the integration of the energy sector may be perceived as a logical consequence of the spill over effect stemming from the cooperation in other sectors.

However, the argument is that Commission is a neofunctional driver of the integration within the energy segment. The Commission, in order to enhance the EU competences in energy governance – to shift loyalties – is pushing a political spill over through the interconnection between the significant aspects of energy policy, namely: a) energy security; b) internal market; c) energy sustainability and efficiency; and d) climate change. The overlap of the policies enables the Commission to adopt the integrative approach when suggesting solutions and actions with a view to marginalize the Member States' resistance and weaken their national positions towards particular issues. Hence, the legislative proposals or action plans are clustered and tend to form packages consisting of interlinked topics. This pattern may be traced for example in the following documents (as well as in other legislative proposals): *An energy policy for Europe* set out three predominant points of interest – sustainability, security of supply and competitiveness – but also appeals on the internal energy market, renewable energy, technology, international energy policy, etc.[28]. *Directive 2009/28/EC* on the promotion of the use of energy from renewable sources besides renewable energy emphasize the energy security and sustainability[29]. The Third Energy Package with the primary mission to further coordinate the liberalization of the gas and electricity internal market with the focus on consumer protection acknowledges that the energy security is "an essential element of public security and therefore inherently connected to

[28] COMMISSION OF THE EUROPEAN COMMUNITIES. *An energy policy for Europe* (COM(2007) 1 final). [online]. Available at: < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0001:FIN:EN:PDF>

[29] EU. Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

the efficient functioning of the internal market" in gas and electricity, and also mentions the sustainability of the energy in the context of the climate change[30]. *Regulation (EU) No 994/2010* concerning measures to safeguard security of gas supply linked the security of supply with the functioning of the internal market and environmental impacts[31]. Furthermore, the Commission's policy paper *Energy 2020 – A strategy for competitive, sustainable and secure energy* stipulates strategic priorities for the timeframe of 10 years and includes: energy efficiency, fully integrated market, energy security, research and innovation, and external dimension of energy market[32]. In the *Green Paper – A 2030 framework for climate and energy policies,* Commission elaborates on the 2020 framework, which "integrates different policy objectives such as reducing greenhouse gas (GHG) emissions, securing energy supply and supporting growth, competitiveness and jobs through a high technology, cost effective and resource efficient approach," with the special focus on the "long term climate objectives"[33]. Finally, the European Energy Security Strategy document incorporated and embraced the concept of integrated market, development of associated technology and the external aspect of the energy policy[34]. This should contribute to effective strenghtening of the EU position internationally, as the "EU uses to be supporter of the green agenda, in internal policies as well as in the external relations."[35]

Moreover, from the social constructivist perspective, the European Commission in fact needed "motivation for the European integration, and member states delegation of competences to the supranational level in energy policy." Hence, the Commission as a "policy entrepreneur" gradually socially constructed guiding norms and structures regarding an adequacy of supranational actions, countering the pressing issues, endangering the EU in which the Member States' measures would be insufficient. Therefore, primarily in the context of the energy security

[30] EU. Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

[31] EU. Regulation (EU) No 994/2010 of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC.

[32] EUROPEAN COMMISSION. *Energy 2020: A strategy for competitive, sustainable and secure energy* (COM(2010) 639 final). [online]. Available at: <https://ec.europa.eu/energy/sites/ener/files/documents/2011_energy2020_en_0.pdf >

[33] EUROPEAN COMMISSION. *GREEN PAPER: A 2030 framework for climate and energy policies (COM(2013) 169 final).* [online]. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0169:FIN:en:PDF>

[34] EUROPEAN COMMISSION. *European Energy Security Strategy (COM(2014) 330 final).* [online]. Available at: < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0330&from=EN>

[35] BLAŽO, O., KOVÁČIKOVÁ, H., MOKRÁ, L. European Environmental policy and public procurement – connected or disconnected? *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 239–265.

(and 2006/2009 gas disruptions), the activity of the Commission "in the form of problem-solution coupling and 'discourse framing'", resulted in the acceptance to a certain extent of supranationalism in energy policy by Member States "as a mechanism to increase their individual and collective energy security"[36].

Furthermore, the Commission as the actor in energy policy contributes to institutionalisation of the climate as integral part of the energy policy governance[37]. The clean energy transition as the main idea of the *Clean Energy for all Europeans*[38] legislative framework represents the key tools and measures to be implemented aligned with the Energy Union objectives. It imposed obligations to Member States by setting energy efficiency and renewable energy as common targets following adopted international climate commitments. The competence of the Commission as the main EU institution in implementation of Energy Union was enhanced by adoption of *Regulation on the Governance of the Energy Union and Climate Action*[39]. That allows Commission to monitor and assess the progress of Member States in implementing Energy Union goals on the basis of their National Energy and Climate Plans (so-called NECPs). The monitoring role and competence of the Commission to access the progress in Regulation application strengthen the position of the Commission and noticeably contributes to deepening integration in area of energy policy. Since its adoption it is regular part of the Commission programme, reflecting the ongoing development in this area.

Nevertheless, the **Council of the European Union** (hereinafter as "Council") plays important role in presenting Member States position. Before the ratification of the Lisbon Treaty, the position of the Council was stronger than the one of the Commission. Positions of the Member States had been discussed within the specific rotation of national ministries.

The decision on Energy Union shifted position of the Council to consultative body and refers decision-making process to the Commission. The role and

[36] MALTBY, T. European Union energy policy integration: A case of European Commission policy entrepreneurship and increasing supranationalism. *Energy Policy*, 2013, vol. 55, pp. 435–444.

[37] 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.

[38] EUROPEAN COMMISSION. *Clean Energy for All Europeans*. [online]. Available at:
< https://publications.europa.eu/en/publication-detail/-/publication/b4e46873-7528-11e9-9f05-01aa75ed71a1/language-en>

[39] 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.

position of Council is still important, as it provides guidelines and strategic positions of Member States. In relation to the Energy Union application, "the Council adopted a set of conclusions on the future of energy systems in the Energy Union. They identify priorities and principles for future policy-making aimed at ensuring the energy transition towards an affordable, safe, competitive, secure and sustainable energy system"[40]. The conclusions are set against the background of the recently completed *Clean Energy for all Europeans* legislative package and the Commission Communication *A Clean Planet for All*, which sets out a strategic vision for the EU's future climate policy. They also recall the European Council conclusions on climate change of 13-14 December 2018, 21-22 March 2019 and 20 June 2019[41].

To illustrate the position of the Council, the Conclusions of 2019 contains highlights and calls in relation to concrete actions, such as development of reliable and cost-effective energy networks, development and deployment of innovative technologies, promotion of sector coupling and sector integration. Concrete ideas are formulated in the form of recommendations and calling the Commission to present proposals to further development and legislation drafts (see points 28-30)[42]. However, it is full discretion of the European Commission to draft the legislation proposal (Article 17)[43].

The position of the **European Council** in this area is limited in constitutive way, although it has political power due the institutional structure itself. European Council on the last three summits (2018 and two in 2019) had confirmed interest to continue in implementation of the Energy Union as introduced by the Commission in 2015. The role of the European Council is mainly in setting the agenda and underlining its importance, including the observation of fulfilment international political obligations. As stated in the TEU: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions." (Article 15(1))[44]. For the implementation of the adopted conclusions, the intervention of the Council or Commission is needed.

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[40] COUNCIL OF THE EUROPEAN UNION. *Council outlines principles and priorities for the future of energy systems in the Energy Union* (Press Release). [online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/06/25/council-outlines-principles-and-priorities-for-the-future-of-energy-systems-in-the-energy-union/>

[41] COUNCIL OF THE EUROPEAN UNION. *Conclusions on the future of energy systems in the Energy Union to ensure the energy transition and the achievement of energy and climate objectives towards 2030 and beyond – Council conclusions (25 June 2019)* (10592/19). [online]. Available at: < https://www.consilium.europa.eu/media/40028/st10592-en19.pdf>

[42] Ibid.

[43] EU. Treaty on European Union. OJ C 326, 26.10.2012, pp. 13–390.

[44] Ibid.

In 2018, the Conclusions of the European Council "underline the need for the Single Market to evolve so that it fully embraces the transition to a greener economy" (point 2.2)[45] and for the continuation of "the work on the elements outlined in the Communication "A Clean Planet for all" together with the Council. The European Council will provide guidance on the overall direction and political priorities in the first semester of 2019, to enable the European Union to submit a long-term strategy by 2020 in line with the Paris Agreement (point 10)[46].

Conclusions of the European Council in first half of 2019[47] focused more in detail on climate change, as the particular agenda. In individual point II, the European Council "reiterates its commitment to the Paris Agreement and recognises the need to step up the global efforts to tackle climate change in light of the latest available science (point 5(1)), emphasises the importance of the EU submitting an ambitious long-term strategy by 2020 striving for climate neutrality in line with the Paris Agreement (point 5(2)) and calls on the Council to intensify its work on a long-term climate strategy (point 5(5)).

The European Council on its second regular session in 2019[48] repeatedly underlined the importance of the climate change in the policies and international obligations to UN and Paris Agreement. As stated in point 4 of the Conclusions: "the European Council invites the Council and the Commission to advance work on the conditions, the incentives and the enabling framework to be put in place so as to ensure a transition to a climate-neutral EU in line with the Paris Agreement1 that will preserve European competitiveness, be just and socially balanced, take account of Member States' national circumstances and respect their right to decide on their own energy mix, while building on the measures already agreed to achieve the 2030 reduction target." The recommendations of European Council go far beyond sole political declaration, when asking Member States " to remain committed to scaling up the mobilisation of international climate finance from a wide variety of private and public sources and to working towards a timely, well-managed and successful replenishment process for the Green Climate Fund" (point 5).

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45 EUROPEAN COUNCIL. *European Council meeting (13 and 14 December 2018) – Conclusions* (EUCO 17/18). [online]. Available at: <http://data.consilium.europa.eu/doc/document/ST-17-2018-INIT/en/pdf>

46 Ibid.

47 EUROPEAN COUNCIL. *European Council meeting (21 and 22 March 2019) – Conclusion*s (EUCO 1/19). [online]. Available at: <http://data.consilium.europa.eu/doc/document/ST-1-2019-INIT/en/pdf>

48 EUROPEAN COUNCIL. *European Council meeting (20 June 2019) – Conclusions* (EUCO 9/19). [online]. Available at: < https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf >

3. Intergovernmentalism or differentiated integration – what scenario for EU energy policy to effective institutionalism?

As to the institutionalism applicable we can follow Moravcsik's liberal **intergovernmentalism**[49], which seeks to explain the outcomes of the EU's grand institutional bargains, such as the Treaty of Rome, the SEA, and the Maastricht Treaty. Moravcsik[50] explains these institutional choices as a three-step process. "First, domestic societal actors form preferences for cooperation or policy coordination at the EU level, partly as a result of their position in the international political economy. States aggregate societal interests and thereby demand some level of European cooperation. Second, state executive representatives armed with these preferences bargain in the EU arena, attempting to supply their constituents with the desired outcomes. Third, states choose institutional arrangements that maximize the credibility of their commitment to cooperate." Outcomes, according to Moravcsik, result from the interaction of preferences and bargaining power.

Moravcsik's approach refers to intergovernmentalism perspective of the EU institutions working, which could be applied mainly in period before 2009. The cooperation between Member States in area of energy policy varied and depended on both internal and external factors. Internal factors included missing competences of the EU institutions to implement energy policy as the shared one, rather than it had coordinated character. The domestic actors' preferences for cooperation became part of the Council's meetings, however only introduction of article 194 TFEU implies the possibility of the Commission to act directly and within ordinary legislative procedure. External factors presented the different approaches of some Member States and its national energy policy, including dependency on external gas resources and other international obligations. However, as Sandholtz argues, counter to intergovernmentalism, that "the national interests of Member States do not have independent existence; they are not formed in a vacuum and then brought to Brussels. Those interests are defined and redefined in an international and institutional context that includes the European Communities. States define their interests in a different way as members of the European Communities than they would without it"[51]. The important and decisive factors are then two:

[49] MORAVCSIK, A. Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *Journal of Common Market Studies*, 1993, vol.31, no. 4, pp. 473524.

[50] MORAVCSIK, A. 1998. *The Choice for Europe: Social Purpose and State Power From Messina to Maastricht*. Ithaca, NY: Cornell University Press, pp. 1–514.

[51] SANDHOLTZ, W. Choosing union: monetary politics and Maastricht. *International Organisations*, 1993, vol. 47, no. 1, pp. 1–39.

political will of the national actors (having the executive competence to represent it on European level) and membership in the EU.

The Lisbon Treaty changed energy policy character, when the role and competences of the EU institutions have been strengthened, and the Member States had decided to rely on the common approach and to build Energy Union rather than discuss and negotiate particular issues during Council meetings or summits. The political consensus leads to adoption of several secondary legislation (regulations and directives) and also strategic documents and packages. The energy policy' objectives together with the impact of the external factors as UN Sustainable development agenda 2030 and Paris Agreement, helped to strategic decision on **Europeanisation** of energy policy by drafting strategy to create Energy Union. Although the Commission achieved new competences in area of energy policy and became the most relevant actor in developing Energy Union, there still exists conditions for differentiated integration, considering individual Member States obligations to Paris Agreement and to UN in SDG2030 agenda. The other area of potential differentiation rather than integration is transition to climate-neutral and carbon-free EU due different material conditions of Member States. As stated in the European Council Conclusions[52], Member States have right to decide on their own energy mix, depending on their national conditions. Similar differentiated approach is apparent in relation to allocation of finances to contribute to Green Climate Fund. Meanwhile we underline, that both energy mix decision and Member State contribution to Green Climate Fund had been announced and declared by the European Council, urging Commission and Council to work on the concrete strategy and guidelines for its effective implementation. Although the role of Commission in energy policy was strengthen (including decision-making and legislative competences), the position of the other two involved institutions – European Council and Council, remains important as the communication channel within the EU multilevel governance system between Member States and the EU and also as supervisor in the sense of upholding internal and external obligations of Member States in the energy policy. Such distribution of powers between EU institutions in materiae refers to the principle of effective institutionalism, that institutions are working effective when "they have significant effect on the state behaviour"[53].

The differentiated integration should be considered as the interim measure applicable in time, due different national conditions. European Commission should

[52] EUROPEAN COUNCIL. *European Council meeting (20 June 2019) – Conclusions* (EUCO 9/19). [online]. Available at: < https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf >

[53] MARTIN, L. L., SIMMONS, B. A. Theories and Empirical Studies of International Institutions. *International Organization*, 1998, vol. 52, no. 4, pp. 729–757.

observe that all Member States fulfil obligations stated in the Energy Union strategy in determining time. European Commission in cooperation with Council and European Council may effectively contributes to the Europeanisation, by active sharing of its work (rather than coordination) and constant contribution to decision-making, legislation drafts and adoption and implementation of goals stated in strategic documents, which fulfilment should create Energy Union. The monitoring of assigned international obligations fulfilment by the European Council may help to effectively work on Europeanisation of energy policy considering different positions of individual Member States, but building the Energy Union as the concept based on common values and transfer of competences to the European Union, to deepen integration in another policy area.

4. Conclusion

The cooperation between Member States of the European Union in energy policy has been existing in the different extent since the foundation of European Coal and Steel Community as one of its predecessors. As the energy portfolio has been developed throughout the time including different resources of energy, requirement of environment protection, sustainability of energy etc., the coordination between Member States became more significant. Intensification of coordination was supported by the ambition of European Commission in area of internal market development, to which the energy policy is mainly connected with. The ambition to deepen coordination of Member States interests lead to the Europeanisation of the agenda, particularly by introduction of Article 194 TFEU in Lisbon Treaty. The energy policy has been regulated by European law and Treaty provisions explicitly. The Commission received more competences especially in legislative area and together with the European Council and Council had presented the concept of Energy Union in 2015. Since that, all three institutions have been intensively working in cooperation with Member States on achievement of set goals. Although the energy policy character is shared, the effective implementation requires deliberation of different national material conditions. This means challenge to EU institutions, because the effective institutionalism in energy policy means to create Energy Union including all Member States, rather than involve some in different perspective. Alongside, the different material conditions in transition to clear energy concept, de-carbonisation and related energy goals may be achieved by individual Member States in different time-period, but by all-in-all in the common one agreed. The differentiation should be considered as the preliminary step to fully harmonised policy. EU institutions play the most important role in the process of Energy Union implementation.

As Mahoney and Thelen added to the institutionalism in a way to explain endogenous sources of change, they focus on "the power-distributive effects of institutions, which are defined as "distributional instruments laden with power implications"[54]. Institutions then "lock in advantages for winners, who might be expected to support existing institutions, and losers, who might be expected to challenge them. Hence all institutions contain within them a dynamic, endogenous source of contestation, with dissatisfied actors constantly pressing for institutional reforms that will favour them. Such reforms, moreover, may occur not suddenly, at a critical juncture, but gradually or incrementally over time, as dissatisfied actors seek to move institutions marginally away from the status quo"[55].

The current institutional structure refers to the goals adopted in the strategic documents in energy policy however the role of European Commission, European Council and Council has to be balanced with the national interests of those Member States. The effective institutionalism should mean in relation to Energy Union, that European Commission as the engine of the integration, in the horizontal perspective should prepare and justify proposals of legislations and adopts decision, which will be properly discussed and implemented by the executive European institutions with the consensus of the Member States. That is the task of the European Commission with strong political support of European Council, that the potential dissatisfied actors would rather discuss the concrete proposals within the Council's meeting and in the legislative process then to refuse them and slow down the whole process of Energy Union building. In vertical perspective, that is more task of the European Council to consult and discuss potential areas of cooperation with Member State leaders and executive representatives, to avoid negative connotations within other EU institutions' meetings and especially in Council meetings and COREPER work (Committee of the permanent representatives as the Council support body in internal structure). The effective institutionalism is then the solution when the Member States will follow its national interest transferred to the strategy on building Energy Union and European Union institutions will adopt the relevant legislation and implement it effectively and influence the Member State behaviour and implementation of adopted strategies and plans to achieve goals in the agreed period.

[54] MAHONEY, J., THELEN, K. A Theory of Gradual Institutional Change. In: MAHONEY, J., THELEN, K. (eds). *Explaining Institutional Change*. New York: Cambridge University Press, 2010, pp. 1–37.

[55] POLLACK, M. A. Rational Choice and Historical Institutionalism. In WIENER, A., BÖRZEL, T., RISSE, T. (eds). *European Integration Theory* (3rd edition). New York: Oxford University Press, 2019, pp. 108–128.

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The Public Law Procurement System and its Macroeconomic Effects in Germany and in the Czech Republic Regarding its Compliance with EU Law

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Summary: As one of the essential parts of government administration public procurement system utilizes a significant share of GDP. The purpose of public procurement system is to award timely and cost-effective contracts to qualified contractors and to keep safe that buying of goods and services in the public authorities is done in the legal manner. Furthermore, public procurement should generate the intended development and economic growth. The principal aim of this research is to conduct a comparison of macroeconomic effects of German and Czech public procurement system. Equally, the study intends to assess both similarities as well as outcomes. Based on the available studies, it is estimated that public procurement entails 15 % of GDP in Germany and 14 % in Czech Republic. The study utilizes secondary research methods to generate data which is analyzed with help of quantitative techniques. The most notable similarities include; the types of public procurement contracts and use of e-procurement to enhance efficiency and transparency. Moreover, some divergences were found,

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where the German procurement system seems to be more efficient compared to the Czech Republic.

Keywords: procurement system, macroeconomic effects, similarities, divergences, efficiency

1. Introduction

Public spending an important part of shaping a country's economy and this is the reason why every state has a formally designed public procurement system to enable it exploit the opportunity. Studies indicate that public spending in most countries accounts for approximately 15 to 20 percent of the national GDP while in the developing and emerging economies, governments spend an estimated value of 25 to 30 percent of their GDP according to OECD statistics[1]. In Europe, public procurement in most countries accounts for approximately 14 percent of the GDP and it ranges to procurement of small things such as stationery to large government contracts such as construction of infrastructure[2]. One of the traditional goals of public procurement process is to build an economy by providing the necessary procedures for acquisition of public goods and services to ensure funds are utilized for the benefit of state while ensuring there is economic growth[3]. Essentially, the philosophy of economic growth through public procurement system is that an efficient system plays a major role in cost reduction and ensuring the products and services procured are of best quality and significant benefit to the economy.

The purpose of this paper is to conduct a comparison on the economic impact of public procurement systems between Germany and the Czech Republic with the aim of identifying any similarities and divergences. Both countries belong to the European Union, which means they have a lot of similarities in terms of their policies and spending of public funds. However, being separate nations with different government administrations, it is highly likely that their systems have significant divergences based on local policies and strategies of ensuring individual economic growth. Some of the items that will be analyzed in the paper include

[1] BUDAK, J. & RAJH, E. 2014. *The Public Procurement System: A Business Perspective*. EIZ Working Papers, pp. 1–29.

[2] GRANDIA, J., MEEHAN, J. 2017. Public procurement as a policy tool: using procurement to reach desired outcomes in society. *The International Journal of Public Sector Management*, vol. 30, no. 4, pp. 302–309.

[3] KUNZ, P., POSPÍŠIL, R. 2017. Has European public procurement law improved the competitiveness of public procurement?. European Studies. *The Review of European Law, Economics and Politics*, vol. 4, 2017, pp. 111–112.

efficiency in public procurement system and percent of total public spending on the total GDP to identify any similarities and differences. Before analyzing the individual countries, the paper will conduct a review of each country's public procumbent process to provide the basis of understanding the similarities or disparities in the data collected as well as for discussion of findings.

1.1. Overview of Public Procurement System in Germany

In Germany, the public procurement system is comprised of approximately 30,000 contracting authorities who range from government agencies to universities and pension insurance institutions. These contracting authorities perform more than 2.4 million contractual procedures per year whose annual volume according to the Federal Government of Germany estimates amount of 280-360 billion Euros per year. These volumes account for between 10-15 % of the country's GDP per annum which is within the estimation of most European Union countries[4]. Since the country is a federal state made up of various local governments, the structure of public procurement system is decentralized with each level having its contracting authority. However, every level of the government is expected to ensure a high level of efficiency with the federal level handling only 12 % of procurements while the regional and municipal/local levels handle 30 % and 70 % respectively[5]. The countries regulations on the public procurement system are that all levels should always give priority to the most economically advantageous tender (MEAT) for the awarding of any public contract.

1.2. Overview of Public Procurement System in Czech Republic

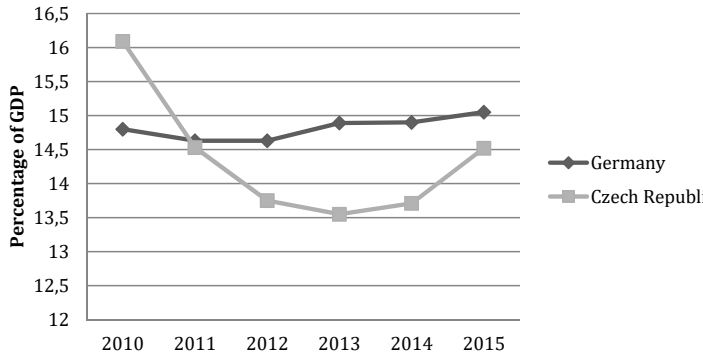
The structure of public procurement system in the Czech Republic is decentralized since the contracting authorities in every level of the system are independent of the central government. Moreover, they have the powers to process their individual procurement without central coordination. However, in spite of lack of central procurement body at the national level, the government ensures that efficiency in procurement process where there efforts to increase aggregate procurement demand in all levels. In ensuring that the public procurement

[4] SOLBACH, T. 2018. Public Procurement in Germany: Workshop on the Public Procurement Strategy Package – Panel 2. Brussels: Federal Ministry for Economic Affairs and Energy, pp. 1–19.

[5] dtto as above.

system in the country contributes to economic growth, the parliament passed a public procurement reform with the main objective of increasing efficiency and improving the country's public confidence in the procurement process. According to the country's report public procurement is a significant contributor to economic growth and plays above average role in building of the economy. The country's public procurement accounts for 14 % of the total GDP with an amount of 21.4 million Euros being spent on procurement every year[6], as shown in the figure bellow.

Figure 1. Trends in Public Procurement as Percentage of GDP



Source: own processing

1.3. Research Problem

To determine the similarities and divergences in the public procurement system in Germany and Czech Republic.

1.4. Research Statement

a) To assess the contribution of the public procurement system in each country's GDP.
b) Identify any similarities in the procurement process and how they affect the overall outcome.

[6] EUROPEAN UNION 2014. Public procurement – Study on administrative capacity in the EU: Czech Republic Country Profile. European Union.

c) Identify any divergences in the two countries procurement process and how they affect the outcome.
d) Assess efficiency in the procurement process to identify similarities or divergences in time wasted.
e) Assess public perception or confidence in public procurement systems in the two countries.

2. Methodology

The objective of this paper is to conduct a comparison on economic impact of public procurement system in both Germany and Czech Republic. The specific goal of the chapter is to describe the approach that has been used throughout the paper and in addressing the research question to achieve the aims and objectives. The chapter explain the rationale behind every criteria used in data collection and analysis in fulfilling the research objective. The research was conducted in the criteria discussed below.

2.1. Research Setting

The research entails a comparing of procurement systems between two countries; hence, it was important to have a clear understanding of the procurement process in each country. The research conducts an analysis of public procurement systems in both Germany and Czech Republic to gain an insight on their procurement process and their contribution to the respective country's economic growth. Subsequently, based on the individual analyses the findings are then compared to identify and similarities and divergences which are recorded in the results part and discussed in details in the discussion part of the paper. The main focus in conducting the analysis is anything to do with cost and efficiency in the public procurement systems.

2.2. Research Method

This research was conducted using secondary research method as it has a wide scope that would be a challenge to achieve using primary research method. This method involves use of information from other sources for previous studies or data from census to help in fulfilling the research objectives[7]. It is more

[7] JOHNSTON, M. P. 2017. Secondary data analysis: A method of which the time has come. *Qualitative and Quantitative Methods in Libraries*, vol. 3, no. 3, pp. 619–626.

efficient than primary research method in case the scope of research is too big such that it is a challenge to collect raw data and the researcher can assess materials from various databases. The main advantage of this method is that it is cheaper than primary method and less time consuming since the information as the researcher can access data from other studies without having to visit the field which sometimes can be hectic and might take a lot of time to cover. Besides, information from secondary sources are usually themed which means it is easier for the researcher to easily identify the area that contains the data they want easily unlike in primary research where coding has to be done by the researcher themselves requires a lot of expertise and knowledge on research. Other than saving time, secondary research is also advantageous as it helps in accessing a lot of data from one source hence it is easy to conduct a comparison without having to employ a lot of logistics. In other words, it is a convenient method of carrying out comparative studies which is what this research is all about.

Efficiency is one of the methods used in the data collection to assess how fast the system processes any contracts to ensure that they process as many as possible and contribute to the economic growth. The following formula is used to calculate the efficiency in public procurement system for the two countries.

Where *e* stands for efficiency, stands for total and stands for total time taken to process the procurements.

Similarly, this research relied heavily on secondary method where information and data collection was done using various sources available in search databases. The reason for using the method is because data collection on economic impact of the public procurement system in the two countries would require a lot of field visits which are highly costly since they are two different countries with independent systems. Also, the fact that the research involves an analysis of a complicated process which is public procurement system, it would be a challenge to access all information pertaining the procurement and the information obtained might too large and vague making it hectic for the researcher to narrow down and get what they want. The language barrier is also another problem as primary research would require interaction with the officials from the systems in the two countries which speak different languages hence the researcher will have to be conversant with both of them or high a translator which is an additional cost. Secondary research method makes it easier as the materials accessed from the search databases are translated into the desired language.

2.3. Research Approach

Depending of the purpose of research, there are two approaches that can be taken in fulfilling the objective and they include qualitative and quantitative research approaches. For this study, the most appropriate research approach identified is quantitative as it specifically deals with numbers and this research requires comparing facts and figures in procurement systems of the two countries to identify any similarities or divergences. There various advantages of this approach which makes it appropriate over qualitative method. First, it deals with facts and figures hence eliminate the problem of emotions in data analysis. Besides, it is easier to conduct multiple datasets to see if the tally and eliminate any suspicious information which could be varying significantly from the rest of the sources. Also, the researcher can automate data analysis in case there is huge data to be analysed making it faster than qualitative research approach.

In case of this study, quantitative approach was identified to be more appropriate due to a number of reasons. First, the objective of this study is to conduct a comparison of economic impact of the two countries which means the data collected will mainly be in form of figures such as time taken to complete a procurement process or volumes of procurements completed in each country per year among others. It is from these figures that the research will discuss the findings making the approach more appropriate for the study. One of the main challenges of this approach to this study is that it does not address behaviors and it will be difficult to understand how people's attitude on the public procurement systems for their respective country affects economic outcomes.

2.4. Research Population

The research is a comparison between systems in two countries to identify any similarities or divergences which are conducted through secondary research method. Consequently, unlike many studies where there is large number of research population, there are only to subjects in this study which will form the basis for research analysis in the result part of this paper. In other words, the countries have been treated as the research subjects and not the people who work in those systems.

2.5. Data Collection Procedure

As indicated above, this study will use secondary research methods in collecting data as it is considered more convenient in terms of time and less costly. Due

to limited resources concerning public procurement systems in both countries, huge amount of data collected in this research was accessed from country reports from European Union in which both countries belong. The materials or sources used in the research were mainly accessed from internet databases but only published and reliable sources were considered. Also, in spite of the two countries belong to the European Union, only information about procurement system in the specific country was considered and any information that was general about the EU nations was disregarded.

2.6. Inclusion and Exclusion Criteria

The information used in the result recording was accessed by searching through various databases where words such as public procurement system in Germany/ Czech, economic impact of public procurement in Germany/Czech and country reports for Germany and the Czech Republic were used to search for available information. The information that was considered for this study had to be either a published report or academic journals as these were considered to be more reliable as opposed to other publications such as blogs and social media posts. The first criteria for inclusion was any source that provided comprehensive data about procurement in both countries that is not more than five years old as any source more than five years old was considered to be our dates and does not present the true picture. Also, references in which the source got information was important to avoid people's personal opinion and deal only with verifiable information. Any report or resource from European Union was given a priority as it keeps tracks and reports of each country in the region and any information contained in these reports is credible and verifiable.

2.7. Evidence of Validity Trustworthiness

Establishing trustworthiness and validity of a research is crucial as it provides the basis for replicability of the research by future researchers who would be interested in similar topic or anyone who would like to expand one of the objectives in their study[8]. Unlike in qualitative research where trustworthiness is based on researchers' judgment on the quality of information used[9], quantitative research requires the researcher to ensure that the figures used are based on facts and can

[8] COPE, D. G. 2014. Methods and meanings: credibility and trustworthiness of qualitative research. *Oncology nursing forum*,vol. 14, no.1, pp. 89–91.

[9] LEUNG, L. 2015. Validity, reliability, and generalizability in qualitative research. *Journal of family medicine and primary care*, vol . 4, no. 3, pp. 324.

be confirmed through reports and other source documents. In the case of this study, evidence of trustworthiness is established through a number of factors which include referencing of sources where the figures used were accessed from as well as confirming reliability and credibility of the sources.

2.7.1. Reliability

The methods used for data collection are crucial in assessing reliability of the research where a different researcher can used similar methods of data collection to arrive at the same results. In most cases, reliability is assessed by replicating a research using same study population[10]. In this research, the study was done using to countries which means there is no study group but the systems in the two countries form research subjects. However, the study was carried out using secondary research methods. This research is based on facts about public procurement in the two countries hence it was crucial to ensure that any source where the data was collected was correctly referenced. In addition to inserting in-text citation on any idea that is not primarily from the research, a reference page of all the materials used is attached as the last page of the paper such that it is possible for any person interested in the research to confirm their correctness. The materials referenced are not from any blogs or media sources which could have some bias based on the attitude of the publisher.

2.7.2. Dependability

Dependability is another criterion that is used to establish consistency and reliability of the results to confirm trustworthiness of the research methods as well as the outcomes[11]. Using the dependability criteria, any auditor who is conversant or an expert in research can identify any irregularities or lack of them there confirming whether the information from the findings can be replicated in future studies[12]. In establishing dependability, this research outlines the study methods used as well as the study approach including the reason why the methods were used as opposed to various other study methods. Also, in the introduction, the study provides the formula used to calculate the results for the user of the researcher to understand the steps they need to follow to arrive at similar outcomes.

[10] AMANKWAA, L. 2016. Creating protocols for trustworthiness in qualitative research. *Journal of Cultural Diversity*, vol. 23, no.3.

[11] MUNN, Z., et al. 2014. Establishing confidence in the output of qualitative research synthesis: the ConQual approach. *BMC medical research methodology*, vol. 14, no. 1, pp. 108.

[12] CONNELLY, L. M. 2016. Trustworthiness in qualitative research. Medsurg Nursing, pp. 435.

2.7.3. Credibility

Credibility is important as it ensures that the information in the study can be relied upon and replicated by other researchers[13]. Similar to the referencing section, credibility in this research was establishing by ensuring that the data collected is from reliable sources which include reports and academic journals[14]. The reports are important as they provide the audience with opportunity to confirm any figures from the sources to assure them that the study was based on facts and not predictions. Also in ensuring correctness of the figures used, comparison between different reports and sources were done and any information that varied from more than three other sources was not used in this study as it was considered unreliable or erroneous. Also, in ensuring credibility, the study used sources that are not more than five years as any information older than five years was considered outdated and might not represent the true picture of public procurement systems in the two countries. World is changing and each day new strategies to increase efficiency are being implemented hence it is important to ensure that the information used is as current as possible.

2.7.4. Transferability

Transferability of a research is important is important as it provides the basis for further studies or provides other researchers with information crucial for identifying research gap that needs to be addressed[15]. In addressing this issue, any formula used in arriving at the results is adequately explained to help the audience understand how the results and conclusions were arrived at. Also, the methodology purpose is explained in this paper to ensure that any interested party will have an idea of how the results were reached at and can use similar methods to reach at the same conclusions.

2.7.5. Confirmability

Confirmability is one of the crucial criterion of establishing credibility, especially in qualitative research approach[16]. Though this study is conducted using

[13] MacCOUN, R. J. 2018. Enhancing research credibility when replication is not feasible. Behavioral and Brain Sciences, pp. 41.

[14] LINCOLN, Y. S., GUBA, E. G. 2017. In all the above, triangulation is naturally vital in confirming the credibility of qualitative research outcome in multiple-case holistic studies. Triangulation, or cross-examination between multiple points (in spite of the "tri" meaning at least two po. Case Study Strategies for Architects and Designers: Integrative Data Research Methods, pp. 70.

[15] NOBLE, H., SMITH, J. 2015. Issues of validity and reliability in qualitative research. *Evidence-Based Nursing*, vol. 18, no.2, pp. 34–35.

[16] TONG, A. & DEW, M. A. 2014. Qualitative research in transplantation: Ensuring relevance and rigor. Transplantation, vol. 100, no. 4, pp. 710–712.

quantitative approach, confirmability is considered to be useful as there paper is based on secondary research method which means there is need to confirm the information provided to ensure that they are correct and they are not based on assumptions[17]. Consequently, in establishing credibility different sources addressing public procurement system in German and the Czech Republic were analysed and information that was consistent in more than one study was included in this research. In addition, all the sources where the information was accessed from are reference to provider the user of this with proper evidence as they can search the references from various databases and confirm their existence.

2.8. Ethical Issue

In most cases, ethical issues are considered to be most crucial in primary research data collection method especially where respondents are human beings since they have to give consent before being included in the research. However, ethical issues are also crucial in secondary research as there are some aspects of research that need to be considered[18] which includes avoiding plagiarizing of other people's work. Specifically, ethical considerations ensure that the research followed the laid down guidelines of ethics and privacy in carrying out the study[19]. In ensuring that there was not plagiarism in this research, any information that is not the original idea of the researcher is correctly referenced using in-text citations to recognize the efforts of the primary data collector and publisher. Also, there was no copy pasting of information and most of all, any source that is used for this research was reviewed to ensure there are no restrictions on replication of ideas.

2.9. Data Analysis

This is the process where the researcher gathers and organizes data collected into meaningful information that will help them deliver findings and conclude on the results[20]. The analysis of any research is crucial as the researcher records the

[17] EGERTON, T., et al. 2017, Ensuring the quality of the findings of qualitative research: Looking at trustworthiness criteria. *Osteoarthritis and cartilage*, vol. 25, no. 5, pp. 625–638.

[18] TAVERNE, B. 2018. Elements of Ethical Practices for Scientific Research Conducted in Resource-Limited Countries. French National Research Institute for Sustainable Development, pp. 24–27.

[19] VAYENA, E., et al. 2016. Elements of a new ethical framework for big data research, vol. 72, no. 5, pp. 1–24.

[20] PEERSMAN, G. 2014. Overview: Data collection and analysis methods in impact evaluation. UNICEF Office of Research-Innocenti, pp. 1–10.

data collecting to help them in discussing information in the finding and make interpretation that is relevant to the study. In this research, data collection and recording of the results was based on various themes that were considered crucial in determining the economic impact of public procurement system for the two countries in question. The themes used in the study recording the results include:
(1) Total procurements done in each country in a year
(2) Number of days taken to make decisions of contracts
(3) Percentage of corruption in the system
(4) Number of contracting authorities in the country

3. Results

The results presented below are based on reports from EU as both countries belong to the Union and the body monitors the performance of its member countries and published the respective reports. The information is based on a report that was published in 2014 from data collected in previous year. However, in the case of percentage procurement of the total GDP information from OECD is incorporated as it contains figure for both 2014 and 2015 in addition to the ones for 2013. As mentioned in the methodology part, data collected was recorded according to themes which are identified below.

3.1. Percentage public procurement of the total GDP

According European Union reports Germany total procurement for the year 2013 amounted to 401.7 billion Euros which was approximately 15 % of the country's GDP. Of the total tenders handled by the public procurement system, 8 % were from a national level while 43% were from local and regional level[21]. In addition 20 % were from bodies governed by public law while 29 % were from other tenderers (European Union, 2014). Tenders in Germany were divided into works 44 %, services 29 %, supplies 27 % and framework agreement 13 %[22]. In the case of Czech Republic the total procurements for the year 2013 according to European Union report amounted to 21.48 billion Euros which was 14 % of the total GDP. Of the total tenders awarded 25 % were at the national level, 25 % at the regional level while 24 % were for body governed by public law and 26 %

[21] SOLBACH, T. 2018. Public Procurement in Germany: Workshop on the Public Procurement Strategy Package – Panel 2. Brussels: Federal Ministry for Economic Affairs and Energy. pp. 1–19.
[22] Dtto as above.

were for others[23]. The contract type in the country was divided into 33 % services, 17 % works, 50 % supplies and 8 % framework agreement[24]. The next table gives the survey of public procurement in Germany and in the Czech Republic.

Table 1. Overview of Public Procurement System in Germany and in the Czech Republic

Overview	Germany	Czech Republic
Total Procurement	401,730,000,000€	21,480,000,000€
Procurement % of	15%	14%
2013 GDP	2,809,480,000,000€	156,932,600,000€
Contracting Authorities	30,000	1,989
No of Days Decision	104.2	57.9

Source: own processing

The table indicates that the Germany public procurement system in 2013 amounted to a total of 401.7 trillion Euros, which is an estimated 15 % of the country's GDP the same year. As indicated earlier, the country has a total of 30,000 procurement authorities which are decentralized that spread across all public institutions including, government agencies and education institution.

3.2. Number of days taken to make decision of contracts

In terms of efficiency in making decisions, Germany proved to be more efficient as it took an average of 57.9 days to make decision about a tender and award a contract. A total of 20,734 contract awards were awarded by the contacting authorities. The number of contracts awarded is lower than the number of contract notices issued or published which was 24,960[25]. On the other hand, Czech took longer days than Germany in making decisions as it took an average of 104.2 days to give feedback about a tender or issue a contract award. A total of 5,951 contracts were awarded in by the contracting authorities. The number of contracts awarded is high against the number of contract notices issued which was 5,376[26].

[23] EUROPEAN UNION 2014. Public procurement – Study on administrative capacity in the EU: Czech Republic Country Profile. European Union.

[24] Dtto as above.

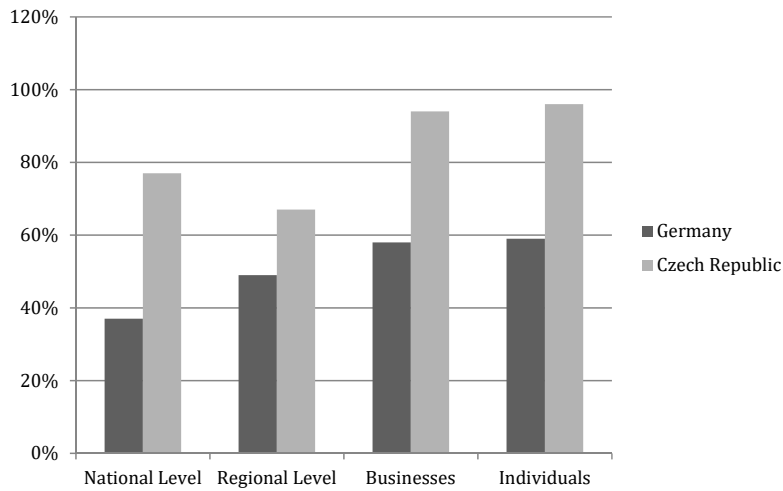
[25] EUROPEAN UNION 2014. Public procurement – Study on administrative capacity in the EU: Czech Republic Country Profile. European Union.

[26] Dtto as above.

3.3. Percentage of corruption in the system

The figures under this theme are a perception based on assessment by European Union and other transparency bodies. In Germany public procurement process, transparency requirements are fully met in the issuance of tenders or contracts and e-notifications are mandatory as well as e-submission. The corruption in the system at the national level is perceived to be 37 % while at the region level is at 49 %. In the case of Czech Republic, transparency is fully met as well and e-notification is mandatory. However, e-submission is partially mandatory. Also, in Germany's procurement process, EU rules are fully met while in the Czech Republic they are partially met. Corruption in the system at the national level is perceived to be 77 % and 67 % at the regional or local level. The overview of the corruption in Germany and in the Czech Republic at four different levels gives the next figure.

Figure 2. Corruption in the Procurement System



Source: own processing

3.4. Number of contracting authorities

Germany has a total of more than 30,000 contracting authorities which are spread across all sectors and levels of the decentralized federal government[27].

[27] SOLBACH, T. 2018. Public Procurement in Germany: Workshop on the Public Procurement Strategy Package – Panel 2. Brussels: Federal Ministry for Economic Affairs and Energy, pp. 1–19.

Though each level or institution is responsible for procurement procedures in their specific region with minimum interference for the national government, there is a central body that ensures the correct procedures are adhered to and transparency is guaranteed. On the other hand, the Czech Republic has a total of 1,989 contracting authorities which are also decentralized and spread at every level of the economy[28]. The country however has no central body at the national level which oversees the overall functions and effectiveness of public procurement system.

4. Discussion

4.1. Similarities

(1) From the results, both countries' public procurement system contributes significantly to the economic development of the country. Though the figures for Germany might seem high in terms of monetary contribution of public procurement, the percentages between the two countries is almost the same and the difference can be interpreted as a result of difference in size of the economy where Germany has a bigger budget than the Czech Republic.
(2) The other similarities are that both countries have decentralized the public procurement system which issue tenders and award contracts in their respective levels. The tenders vary from supplies and works to services and framework agreement. These tenders and contract awards are aimed providing the necessary economic development for their respective countries. Without these tenders that are handled by the contracting authorities in these countries, the country's economy might become stagnant as there is no mechanism of ensuring that the right people are handed the job.
(3) The other similarity is that the public procurement systems are responsible for ensuring that there is transparency in the awarding of contracts in the respective countries. Besides, it is the duty of the public procurement system in the two countries to ensure that the contracts are awarded to the most economic advantageous tenders. These systems ensure that tenders meant for economic development and public welfare are not handed to unqualified personnel who might not deliver the expected outcomes but to those who will create economic impact and more the country towards the right direction.

[28] EUROPEAN UNION 2014. Public procurement – Study on administrative capacity in the EU: Czech Republic Country Profile. European Union.

4.2. Divergences

(1) Though both countries' public procurement systems are decentralized, the governing of the two institutions are totally different which could be one of the main reason for their difference in performance. While the Germany's system has a central governing body, Czech Republic's has no central body. Consequently, there is divergence in the efficiency of delivery of decisions where it takes 57.9 days to make a decision in Germany and on the other hand, it takes 104.2 days to make the decisions. This is a huge difference and it shows that the central governing body in the Germany procurement is efficient in ensuring contracts are no delayed and they are processed as fast as possible to contribute to the economy. Delay in processing of contracts in the system lie in the case of the Czech Republic slows the growth of the economy.

(2) In spite of reports indicating that there is perceived corruption in both systems, the problem is much higher in Czech Republic's system where data shows the extent of corruption at the national level is estimated 77 % while at the regional level is at 67 % compared to Germany's 37 % and 49 % at the national and regional levels respectively. Corruption is usually dangerous and a barrier to economic growth as resources that are meant for development and delivery of services usually end up looted and in the pockets of the chosen few[29]. Though the level of corruption is still high in the German system, the country seems of be tackling it much better that in Czech Republic. This could be the reason why public procurement in Germany contributes a higher percentage to the total GDP the in Czech Republic. The level of corruption among other factors could be the main reason why procurement as a percentage of GDP has declined sharply in Czech Republic while it has been rising in Germany. Also corruption can affect efficiency in delivery of decisions and it could be the reason why Czech Republic takes more days to deliberate about contract awards than Germany[30]. Efficiency in this cases is considered to be the average number of days taken in processing tenders. Though on may argue that Germany has huge number of contracting authorities as a reason for efficiency in delivery, it also handles more procurements that Czech Republic.

(3) Lastly, the other divergence noticed is in the form of meeting the requirements in e-procurement adoption. Fully adopting e-procurement is important

[29] IONESCU, L. 2014. The adverse effects of corruption on growth and development. *Economics, Management and Financial Markets*, vol.9, no.4, pp. 125.

[30] RANDRIANARISOA, L. M., et al. 2015. Effects of corruption on efficiency of the European airports. Transportation Research Part A: Policy and Practice, pp. 65–83.

as it minimizes the chances of corruption in the system that is made easier through manure handling of procurement process[31]. In the case of the Czech Republic, though e-notification in mandatory, e-submission is partial which means some of the procurements and submission of tenders are handled manual. This partial e-submission is a loophole for lack of transparency and perpetration of corruption that is hurting the economy. On the other hand, in case of Germany, both e-notification and e-submission are mandatory which could be the reason for lower levels of corruption in the system[32].

5. Conclusion and Recommendations

In summary, both Germany and the Czech Republic are countries within EU and most of their activities are according to the guiding principles of the Union. However, this paper focuses at the individual similarities and divergences on their contribution on the economic impacts of their public procurement systems. The research uses secondary research method as it is challenging to collect primary data from the two systems in terms of time and cost. Besides, secondary research has been credited as the most appropriate method of carrying our comparative analysis as it is what this paper is about. The paper also uses quantitative analysis as it is easier to identify using statistical data the economic impact of each system in their respective system. The results of the paper are that some of the similarities in the system is that they contribute almost similar percentage of GDP and the system is used to award all contracts aimed at increasing economic growth in their respective countries. Some of the divergences include higher corruption levels in Czech Republic system than in Germany and also higher efficiency in terms of processing tender in German system than in Czech Republic.

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[31] NEUPANE, A., et al. 2014. Willingness to adopt e-procurement to reduce corruption: Results of the PLS Path modeling. Transforming Government: People, Process and Policy, vol. 8, no.4, pp. 500–520.

[32] VAYENA, E., et al. 2016. Elements of a new ethical framework for big data research, vol. 72, no. 5, pp. 1–24.

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Responsibility of Local Self-Government for Infringement of the European Union Competition and Public Procurement Rules and Its Enforcement in Slovakia*

Ondrej Blažo**

Summary: The paper will analyse the position of local self-government (i.e. municipalities and self-governing regions) in the framework of enforcement of internal market, its impact and effectiveness. The analysis of the legal framework of Slovakia has shown, that there are three ways in which the central government can compel local self-governmental authorities to follow rules of internal marker, including competition rules: (1) state aid rules, (2) public procurement rules and (3) "other" rules of competition. Legal analysis is complemented by the analysis of quantitative data regarding sanction policies in respective areas.

Keywords: EU law, EU competition law, state aid, public procurement, local self-government, sanctions

1. Introduction

Local self-government, within the constitutional structure of a state, represents the outcome of historic development and at the same time expression of values and ideas on governance in a certain territory.[1] There are several advantages of decentralized governance, e.g. (1) democratic participation, representation and accountability, (2) public politics and effectiveness of governance and (3) representation and satisfaction of territorial, ethnic, cultural and language differences[2]. The decentralization charges local authorities with powers to organize social, cultural as well as economic life within their territories. Supported by the theory

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1 TRELLOVÁ, L. Ústavnoprávne aspekty územnej samosprávy. Bratislava: Wolters Kluwer SR, 2018, p. 8.

2 TRELLOVÁ, L. *Ústavnoprávne aspekty územnej samosprávy*, p. 9.

of public choice[3], it is natural, that local representatives will tent to favour local citizens and local economy. Being invested with substantial independence local self-governmental bodies shall still follow principles of solidarity to other regions and to international community as well.

Therefore, activities of local authorities can also have impact on the functioning of internal market of the European Union (hereinafter "EU") created and protected by Art. 28 et seq. of the Treaty on the Functioning of the European Union (hereinafter "TFEU").

EU law has created some measures un order to compel sub-state governmental entities to align with rules of internal market, some of them were left to the Member States within their procedural autonomy.

The analysis of the legal framework of Slovakia has shown, that there are three ways in which the central government can compel local self-governmental authorities to follow rules of internal marker, including competition rules: (1) state aid rules, (2) public procurement rules and (3) "other" rules of competition. Thus, the paper will analyse the position of local self-government (i.e. municipalities and self-governing regions) in the framework of enforcement of internal market, its impact and effectiveness.

2. Independence and responsibility of local self-government vis-à-vis responsibility of Member States for violation of EU law

The well-functioning internal market is inevitably a cornerstone of European integration. The existence of a free internal market shall be still guarded, although, currently other EU policies and issues have pushed back questions linked to this policy, e.g. migration, Brexit, rule of law.

The Member States, or their authorities, are inevitably templated to favour local production, e.g. via market regulation and regulation of business-to-business practices[4] or via buy-national-like campaigns[5]. However, there is no equa-

[3] WECK-HANNEMANN, H. Globalization as a Challenge for Public Choice Theory. In: *Public Choice* [online], 2001, Vol 106, No 1/2. Available at: http://www.jstor.org/stable/30026185; WALLER, S. W. Public Choice Theory and the International Harmonization of Antitrust Law. In: *The Antitrust Bulletin* [online]. 2003, Vol 48, No 2. DOI: 10.1177/0003603X0304800206.

[4] E.g. BLAŽO, O., KOVÁČIKOVÁ, H., PATAKYOVÁ, M.T. Slovakia. In: PISZCZ, A., JASSER, A. eds. *Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries*. Warszawa: University of Warsaw, 2019, p. 246–250.

[5] E.g. GORMLEY, L.W. Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles ? In: *Fordham International Law Journal*. 2015, Vol 38, No 4, p. 997 et seq.

tion between the notion "Member State" and "central government of a Member State". On the one hand, the EU shall respect internal organization of the Member States [Art. 4(2) TEU] and thus accept the active or control role of sub-state entities of the Member States. The sub-state entities, such as constituent parts of federations, lands, regions, autonomous regions, provinces, districts, counties, municipalities have different levels of autonomy and powers and can be directly or indirectly involved in representing the Member State during the law-making process on the EU level[6]. Moreover, there can be also constitutional duty to take into account positions of local governments[7].

On the other hand, all bodies of a Member State shall properly implement EU law, notwithstanding their position in the system of separation of powers (legislative, administrative, judicial[8]), or level of government or self-government: "An individual may therefore plead that provision before the national courts and, (…) all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it."[9] The Court of Justice confirmed not only the principle of precedence of EU law vis-à-vis regional and municipal law and decisions[10] but also included local self-governing bodies into the framework of duty of loyalty of Member States to properly implement EU law: "It is settled case-law that the Member States' obligation arising from a directive to achieve the result prescribed by the directive and their duty (…) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of the Member States (…), including decentralised authorities such as municipalities."[11] Such a principle applies to all levels of self-government – from municipalities[12], districts to regions and entities of federation[13].

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6 E.g. SKOUTARIS, N. The Role of Sub-State Entities in the EU Decision-Making Processes: A Comparative Constitutional Law Approach. In: *Federalism in the European Union* [online]. 2014, No 1, p. 212. DOI: 10.5040/9781472566164.ch-009 et seq.

7 BERTOLINO, C. State accountability for violations of EU law by Regions: infringement proceedings and the right of recourse. In: *Perspectives on Federalism*. 2013, Vol 5, No 2, p. 158.

8 DAVIES, A. State liability for judicial decisions in European Union and international law. In: *International and Comparative Law Quarterly* [online]. 2012, Vol 61, No 3, p. E.g. DOI: 10.1017/S0020589312000218; VARGA, Z. The Application of the Köbler Doctrine by Member State Courts. In: *ELTE Law Journal*. 2016, No 2

9 C-103/88, *Fratelli Costanzo/Comune di Milano*, EU:C:1989:256, par. 32.

10 E.g. C-103/88, *Fratelli Costanzo/Comune di Milano*, EU:C:1989:256; C-224/97, *Ciola*, ECLI:EU:C:1999:212, C-91/92, *Faccini Dori/Recreb*, ECLI:EU:C:1994:292.

11 C- 438/99, *Jiménez Melgar*, ECLI:EU:C:2001:509, par. 32.

12 E.g. Ayuntamiento de Los Barrios in C- 438/99, *Jiménez Melgar*, ECLI:EU:C:2001:509, Commune di Milano in C-103/88, *Fratelli Costanzo/Comune di Milano*, EU:C:1989:256.

13 E.g. Land Vorarlberg in C-224/97, *Ciola*, ECLI:EU:C:1999:212 and C-91/92, *Faccini Dori/Recreb*, ECLI:EU:C:1994:292.

Hence, the Commission launched several successful infringement procedures for violation of EU law by local self-governmental authorities caused by their activities, omission or delay.[14]

While in the case of local authorities that are branches of a central government, the influence of the central government on the actions of local self-governmental units is usually restricted. The concepts of independence and responsibility are enshrined in Art. 3(1) of the European Charter of Local Self-Government: "Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population." Three pillars of such a concept are apparent: (1) right to regulate and manage, (2) limitation by law only and (3) following interest of local population. Moreover, the local self-government can be seen as a "fourth power" within the state since citizens, as a source of power in a democratic state, do not exhaust their constitutional rights via legislative, executive and judicial power but also via *pouvoir municipal*[15]. The study of Baker, Van De Valle and Skelcher shows that the desire for strengthening powers and activities of local self-governments varies across Europe, from more than two thirds in Czechia and Malta in favour of local self-government to approximately one half of respondents against strengthening self-government in Hungary.[16] Indeed, in countries in which the presence of activities and responsibilities of local government is significant enough, there the support for more powers to the self-government may be lower.[17] Notwithstanding differences to approaches to local self-government across the EU, different range of competence and existing constitutional and legal framework (or non-existing[18]), local governments can undoubtedly shape the level of competition and economic activities within their territory and thus influence the functioning of the internal market of the EU itself.

Taking into account the independence and constitutional rights of the local self-government, the central government faces the legal challenge: on the one hand it is responsible for actions of local self-government vis-à-vis the EU and on

[14] E.g. C-33/90, *Commission v. Italy*, ECLI:EU:C:1991:476; C-211/91, *Commission v. Belgium*, ECLI:EU:C:1992:526; C-503/06, *Commission v. Italy*, ECLI:EU:C:2008:279, C-516/07, *Commission v. Spain*, ECLI:EU:C:2009:291; C-573/08, *Commission v. Italy*, ECLI:EU:C:2010:428, C-427/17, *Commission v. Ireland*, ECLI:EU:C:2019:269.

[15] TRELLOVÁ, *Ústavnoprávne aspekty územnej samosprávy*. p. 14–16. and literature cited therein.

[16] BAKER, K., VAN DE WALLE, S., SKELCHER, C. Citizen support for increasing the responsibilities of local government in European countries: A comparative analysis. In: *Lex Localis* [online]. 2011, Vol 9, No 1, p. 9. DOI: 10.4335/9.1.1-21(2011).

[17] BAKER, VAN DE WALLE, SKELCHER, Citizen support for increasing the responsibilities of local government in European countries: A comparative analysis, p. 11–13.

[18] RØISELAND, A. Local self-government or local co-governance? In: *Lex Localis* [online]. 2010, Vol 8, No 1. DOI: 10.4335/8.2.133-145(2010).

the other hand, it can have limited scope of legal instruments to instruct or shape decisions (or omissions) of self-government because of respecting its statutory (or even constitutional) autonomy.

3. Aids granted by local self-government as aids granted by "States"

Art. 107(1) TFEU prohibits any anti-competitive "(…) aid granted by a Member State or through State resources in any form whatsoever (…)" as contrary to internal market. The ECJ explained that the term "aid granted by states" covers aid provided not only by central governments but also aid provided by local self-government: "The fact that the aid programme was adopted by a state in a federation or by a regional authority and not by the federal or central power does not prevent the application of [Art. 107(1) of the TFEU] if the relevant conditions are satisfied. In referring to 'any aid granted by a member state or through state resources in any form whatsoever' [Art. 107(1) of the TFEU] is directed at all aid financed from public resources. It follows that aid granted by regional and local bodies of the member states, whatever their status and description, must be scrutinized to determine whether it complies with [Art. 107 of the TFEU] [references updated]"[19].

The aim of the prohibition of aid granted by states[20] is clearly stipulated in provision of Art. 107(1) TFEU itself: avoid any act of public authority that "distorts or threatens to distort competition […], in so far as it affects trade between Member States." Although it employs similar notions and concepts to those used in competition rules for undertakings (Art. 101 and 102 TFEU) (e.g. distortion of competition), the concept is completely different from philosophical and economic point of view. Art. 101 and 102 TFEU are stemming from the ordoliberal idea of necessity to protect competition against accumulation of private economic power through an appropriate institutional order[21]. Art. 107 TFEU is

[19] C-248/84 Germany v. Comission, ECLI:EU:C:1987:437, par. 17.

[20] For more details regarding definitions and concepts of state aid see e.g. KUBERA, P. State Aid rules and public financing of infrastructure . The Case of Autostrada. In: *TalTech Journal of European Studies* [online]. 2020, Vol 10, No 1. DOI: 10.1515/bjes-2020-0005; PÄRN-LEE, E. The Origins of Supranational State Aid Legislations : What Policymakers Must Know and Adhere to . The Case of Estonia. In: *TalTech Journal of European Studies* [online]. 2020, Vol 10, No 1. DOI: 10.1515/bjes-2020-0007; CORTESE, B. State Aid Law as a passepartout: Shouldn't We Stop Taking the Effect on Trade for Granted? In: *Bratislava Law Review* [online]. 2020, Vol 4, No 1. DOI: 10.46282/blr.2020.4.1.194.

[21] DOLD, M., KRIEGER, T. Competition or Conflict? Beyond Traditional Ordoliberalism. In: HIEN, J., JOERGES, C. eds. *Ordoliberalism, Law and the Rule of Economics*. Oxford and Portland: Hart Publishing, 2017, p. 246.

linked back to Art. 28 et seq. TFEU and Art. 110 TFEU, i.e. rules barring the Member States to segmentize internal market by their actions, particularly of protectionist or discriminatory nature. On the other hand, Art. 107 TFEU does not deal with depriving undertakings and other persons of their individual economic freedoms as such, but "merely" with cases where such rights are being distorted. Thus, it can be sometimes hard to identify a "victim" of infringement of Art. 107 TFEU. Notwithstanding the question of economic effectiveness and efficacy, consumers can benefit from such an infringement of competition rules owing to possible lower prices, amount of provided goods or services. However, it is more "redistribution" of benefits, rather than "manna from heaven" because funding of the aid is inevitably created by tax incomes (directly or indirectly).

In the case of violation of Art. 107(1) TFEU, the responsibility for violation of EU law is attributed to a Member State itself. This attributability for EU law infringements is apparent from Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (hereinafter "SA Rules on Procedure")[22]:

a) notification duty of the Member State concerned (Art. 2 SA Rules on Procedure),
b) request for information addressed to the Member State (Art. 5 SA Rules on Procedure),
c) decision to close formal investigation addressed to the Member State concerned (Art. 9 and 31 SA Rules on Procedure),
d) injunctions to suspend or provisionally recover aid addressed to the Member State concerned (Art. 13 and 31 SA Rules on Procedure),
e) decision on allegedly unlawful state aid to the Member State concerned (Art. 15 and 31 SA Rules on Procedure),
f) decision requiring the Member State to take all necessary measures to recover the unlawful aid from the beneficiary (Art. 16 and 31 SA Rules on Procedure),

Since the Member States are the only addressees of the decision, they undoubtedly have standing in cases of actions for annulment under Art. 263 TFEU. Although beneficiaries of state aid as well as local authorities granting aid concerned are not addressees of the Commission's decision, they can challenge it at General Court under Art 263(4) TFEU.[23]

Hence regulation of responsibility of sub-state bodies regarding infringement of state aid rules is completely within the ambit of rules enacted by the Member State.

[22] OJ L 248, 24.9.2015, p. 9–29.

[23] E.g. T-461/12 *Hansestadt Lübeck v Commission*, ECLI:EU:T:2014:758, T-778/16 *Ireland e.a. v Commission*, ECLI:EU:T:338.

In Slovakia, this framework is created by the Act on State Aid[24] which gave powers of national coordinator of state aid to the Antimonopoly Office of the Slovak Republic (hereinafter "AMO").[25] The AMO is not empowered to impose fines for violation of Art 107 TFEU itself, merely for violation of procedural rules enshrined in the Act on State Aid. Fines under § 15(1) and (2) of the Act on State Aid do not even cover possible violation of duty to recover unlawful state aid under § 10 of the Act on State. The power to enforce recovery decision of the Commission by other body of central state administration and the right to withhold income from recovery in own budget of such body is the only "sanction" for the provider of a state aid that fails to enforce recovery decision. The AMO may impose a fine up to 35 000 euro to provider that fails to notify state aid to the AMO prior to granting such aid. However, imposition of the fine is not mandatory due to § 15(1) of the Act on State Aid[26].The system od fines and sanctions is not the only vehicle for the central government to ensure proper application of EU state aid rules. "Soft structures", i.e. training, consultations and educational activities are well-spread and well-established across EU (as well as EEA) Member States[27] and also the AMO strongly relies on this policy.[28] To sum up, the public limb of enforcement of state aid rules is mainly oriented at prevention of granting aid contrary to EU law and in the case of granting unlawful aid to recover it. One way or another, there is no substantial threat to public budgets. Moreover, the public body is not obliged (in fact it is not allowed) to recover unlawful state aid if it is contrary to general principles of EU law,[29] particularly when legitimate expectations on legality of aid were created.[30]

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[24] Act No. 358/2015 Coll. on regulation of certain relations in the field of state aid and aid de minimis and on the amendment certain laws (act on state aid).

[25] The AMO does not apparently consider this competence important since it does not even mention it on the English version of its webpage www.antimon.gov.sk (last visited 11 September 2020).

[26] The AMO is not eager to impose such fines, see PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2018* [online]. 2019 [acessed 14.02.2020]. Available at: https://www.antimon.gov.sk/data/att/2044.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2016* [online]. Bratislava, 2017 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/1899.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Správa o činnosti Protimonopolného úradu Slovenskej republiky za rok 2017* [online]. 2018 [acessed 22.02.2020]. Available at: https://rokovania.gov.sk/RVL/Material/22972/1

[27] BERGER, C. How to Ensure State Aid Compliance at Local and Regional Level? In: *European State Aid Law Quarterly* [online]. 2017, Vol 16, No 3, p. 467–478. DOI: 10.21552/estal/2017/3/16.

[28] E.g. PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY, VÝROČNÁ SPRÁVA/ANNUAL REPORT 2018 [online] [acessed 14.02.2020]. Available at: https://www.antimon.gov.sk/data/att/2044.pdf

[29] Art. 16(1) of SA Rules of Procedure.

[30] For details regarding test of legitimate expectations see RITZENHOFF, L. Legitimate Expectations in Reasonable Delay – Regional aid to Hotels in Sardegna. In: *European State Aid Law*

Compared to "public" enforcement of state aid rules, "private" enforcement of those rules can raise substantial claims form undertakings. In this context, Art. 108 (3) in fine TFEU and direct effect thereof are the focal point of such claims: "The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision." The ECJ confirmed powers of the courts of the Member State to enforce Art. 108(3) TFEU not only in cases of recovery decision of the European Commission, but also in "stand alone" cases: "The last sentence of Article 88(3) EC is based on the preservative purpose of ensuring that an incompatible aid will never be implemented. That purpose is achieved first, provisionally, by means of the prohibition which it lays down, and, later, definitively, by means of the Commission's final decision, which, if negative, precludes for the future the implementation of the notified aid plan. The intention of the prohibition thus effected is therefore that compatible aid may alone be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision."[31] The European Commission is quite optimistic regarding effectiveness and scope of private enforcement of state aid rules covering five groups of remedies: (a) preventing the payment of unlawful aid; (b) recovery of unlawful aid (regardless of compatibility); (c) recovery of illegality interest; (d) damages for competitors and other third parties; and (e) interim measures against unlawful aid[32]. Although Member States are addressees of Art. 108(3) TFEU, providers of aid, including authorities of local self-government can directly face claims arising from violation of said provision. On the other hand, application of Art. 108(3) TFEU by national courts is limited by procedural rules of respective Member States.[33]

Quarterly. 2014, Vol 13, No 4, p. 733.; PINTO, C. S. The "Narrow" Meaning of the Legitimate Expectations Principle in State Aid Law Versus the Foreign Investor ' s Legitimate Expectations. In: *European State Aid Law Quarterly*. 2016, Vol 2, No 2.

[31] C-199/06, *CELF I*, ECLI:EU:C:2008:7.9.

[32] Commission notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1–22), par. 26.

[33] PASTOR-MERCHANTE, F. The Protection of Competitors under State Aid Law. In: *European State Aid Law Quarterly* [online]. 2016, Vol 15, No 4. DOI: 10.21552/estal/2016/4/5; KÖHLER, M. Private Enforcement of State Aid Law – Problems of Guaranteeing EU Rights by means of National (Procedural) Law. In: *European State Aid Law Quarterly* [online]. 2017, Vol 11, No 2. DOI: 10.21552/estal/2012/2/279; MARTIN-EHLERS, A. Private Enforcement of State Aid Law in Germany. In: *European State Aid Law Quarterly* [online]. 2017, Vol 10, No 4. DOI: 10.21552/estal/2011/4/255; GYÁRFAŠ, J. Hic Sunt Leones: Private Enforcement of State Aid Law in Slovakia. In: *European State Aid Law Quarterly* [online]. 2017, Vol 16, No 3. DOI: 10.21552/estal/2017/3/14; JOUVE, D. Recovering Unlawful and Incompatible Aids by National Courts: CELF and Scott/Kimberly Clark Cases. In: *European State Aid Law Quarterly* [online]. 2017, Vol 16, No 3. DOI: 10.21552/estal/2017/3/6; ORDÓÑEZ-SOLÍS, D. Waiting for National

Limits of private enforcement of EU state aid rules can be documented by practice of Slovak judiciary (even though it is rather exuberant to call one judgment practice). The case *Trnava v City Aréna*[34] is interesting because of different aspects. First, it was genuinely stand-alone case without existence of previous positive or negative decision of the Commission. Secondly, the provider of alleged aid, the City of Trnava, itself raised an action against the beneficiary of alleged unlawful aid. Thirdly, the City of Trnava sought annulment of contracts on purchase and lease of real estate. The District Court of Trnava dismissed the action on the grounds that even in the case of unlawfulness of an aid there is no provision of EU law requiring nullity of the contract and the provider of an unlawful aid is obliged to recover (merely) those benefits granted to beneficiary that represent state aid within the meaning Art. 107(1) TFEU. Therefore, the court made a distinction between private enforcement of antitrust rules (nullity of agreements restricting competition is directly enshrined in Art. 101 TFEU) and private enforcement of state aid rules. Since the case was dealt by the first-instance court and it was not challenged by appeal, the court did not decide to ask for preliminary ruling.

4. Public procurement

EU public procurement rules are based on "flexible" harmonization provision of Art. 114 TFEU. EU public procurement regime is not a separate policy of the EU but it is linked to freedoms of internal market, as it is explained by the Public Procurement Directive[35] : "The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well

Judges in Infringement Proceedings on State Aid. In: *European State Aid Law Quarterly* [online]. 2017, Vol 16, No 3. DOI: 10.21552/estal/2017/3/7; GOYDER, J., DONS, M. Damages Claims Based on State Aid Law Infringements. In: *European State Aid Law Quarterly* [online]. 2017, Vol 16, No 3. DOI: 10.21552/estal/2017/3/10; HONORÉ, M., JENSEN, N. E. Damages in State Aid Cases. In: *European State Aid Law Quarterly* [online]. 2017, Vol 10, No 2. DOI: 10.21552/estal/2011/2/227; STEHLÍK, V. Interim measures before national courts in the context of EU and Czech law. In: *International and Comparative Law Review* [online]. 2018, Vol 12, No 2. DOI: 10.1515/iclr-2016-0084.

[34] Judgment of 14 September 2018, *Mesto Trnava v City-Arena, a.s., City-Arena PLUS, a.s.*, case No 39C/30/2017, ECLI:SK:2117221806.

[35] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65–242) (hereinafter „Public Procurement Directive").

as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition."[36] Thus, the EU established by secondary law (directives) the regime of public procurement under an understanding that without such supplementary regime the rules of primary law and general principles regarding internal market are inadequate in order to secure their "practical effect".[37] The harmonization of public procurement rules within the EU is only one of the aspects of national public procurement regimes. Effective spending, securing public interest, good governance and transparency are also the interest of national lawmaker. The third group of interests joins the EU and national pane – interest of individual undertakings and competitors. Providers of goods and services seek their right for fair treatment, equal opportunities on market as inherent elements of market-oriented economy. Also the case law of the CJ EU moved towards boosting increased enforceability of individual rights of candidates and tenderers.[38] Putting together all abovementioned concepts, along with other goals, the national public procurement rules based on EU harmonization directives is aimed to secure individual rights of undertakings stemming from the establishing of internal market of the EU.

Despite substantial rules on public procurement being profoundly harmonized, procedural framework established to secure enforcement of public procurement rules remained within the scope of procedural autonomy[39] of the Member States under framework harmonization by the Remedies Directive.[40]

Compared to current agenda within antitrust regime and harmonization thereof[41], harmonized system of enforcement of public procurement rules was not

[36] Recital 1 of the Public Procurement Directive.

[37] WEATHERILL, S. EU Law on Public Procurement: Internal Market Law Made Better. In: BOGOJEVIC, S., GROUSSOT, X., HETTNE, J. eds. *Discretion in EU Public Procurement Law*. Oxford: Hart Publishing, 2019, p. 41.

[38] SANCHEZ-GRAELLS, A., KONINCK, C. de. *Shaping EU Public Procurement Law: A Critical Analysis of the CJEU Case Law 2015–2017*. Alphen aan den Rijn: Wolters Kluwer, 2018, p. 47.

[39] GITNER, C., SIMOVART, M. A. The Remedies Directive 89/665 etc. In: STEINICKE, M., VESTERDORF, P. L. eds. *EU Public Procurement Law*. Baden-Baden: C.H. BECK; Hart Publishing; Nomos Verlagsgesellschaft, 2017, p. 1387.

[40] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33–35).

[41] KOVÁČIKOVÁ, H. Directive (EU) 2019/1 as Another Brick into Empowerment of Slovak Market Regulator. In: *Yearbook of Antitrust and Regulatory Studies* [online]. 2019, Vol 12, No 20. DOI: 10.7172/1689-9024.YARS.2019.12.20.6; PATAKYOVÁ, M. T. Independence of National Competition Authorities-Problem Solved by Directive 2019/1? Example of the Antimonopoly

established and the Member States developed their own approaches to compel contracting authorities to prudently follow public procurement rules.

The legislative framework in Slovakia relies on the system of administrative fines that the Office for Public Procurement (hereinafter "OPP") can impose on contracting authorities, including central governmental bodies, as well as local self-government.

In order to analyse the impact of fines imposed due to infringement of the public procurement rules on the budgets of contracting authorities, set of 371 decisions of the OPP from the timespan from 2011 to 2020 in which the OPP imposed a fine have been exmined.[42] During that period, three different acts on public procurement were in force in Slovakia with different provisions on fines: Act No 523/2003 Coll. (§ 123), Act No 25/2006 Coll. (§149) and Act No 343/2015 Coll. (§ 182). Moreover, all these acts were amended multiple times and respective types of violations were described differently and re-grouped in different ways. For the purpose of analysis, 38 types of infringements of public procurement law were created by the author of this paper in order to make it possible to sort and compare levels of imposed fines during evaluated period and these violations were labelled from "A" type of infringement to "ZM" type of infringement.[43] The types of the most serious violations of public procurement

Office of the Slovak Republic. In: *Yearbook of Antitrust and Regulatory Studies* [online]. 2019, Vol 12, No 20. DOI: 10.7172/1689-9024.YARS.2019.12.20.5; SZOT, P. The Polish Leniency Programme and the Implementation of the ECN+ Directive Leniency-related Standards in Poland. In: *Yearbook of Antitrust and Regulatory Studies* [online]. 2019, Vol 20, No 12. DOI: 10.7172/1689-9024.YARS.2019.12.20.1; CSERES, K. The Implementation of the ECN+ Directive in Hungary and Lessons Beyond. In: *SSRN Electronic Journal* [online]. 2019, Vol 2019, No November. DOI: 10.2139/ssrn.3489903; VALENTINA, G. D. Competition Law Enforcement in Italy after the ECN+ Directive : the Difficult Balance between Effectiveness and Over-enforcement. In: *Yearbook of Antitrust and Regulatory Studies* [online]. 2019, Vol 12, No 20. DOI: 10.7172/1689-9024.YARS.2019.12.20.3; SURBLYTĖ-NAMAVIČIENĖ, G. Implementing the ECN+ Directive in Lithuania : Towards an Over-enforcement of Competition Law ? In: *Yearbook of Antitrust and Regulatory Studies* [online]. 2019, Vol 12, No 20. DOI: 10.7172/1689-9024.YARS.2019.12.20.7; REA, M. New Scenarios of the Right of Defence Following Directive 1 / 2019 by. In: *Yearbook of Antitrust and Regulatory Studies* [online]. 2019, Vol 12, No 20. DOI: 10.7172/1689-9024.YARS.2019.12.20.4.

[42] Database created by the author on a basis of decisions published on the OPP's webpage https://uvo.gov.sk (last visited 10 September 2020)

[43] A: CA bypassed application of PPA or direct award without fulfilling conditions for such award, B: CA deviated from criteria for award, C: CA divided of contract in order to avoid PPA, D: violation of publication duties for direct award, E: violation of conditions and procedures of conclusion of contract, F: violation of rules regarding amendments to contracts, G: violation of duties regarding publication of conditions of participation or award criteria, H: contract awarded notwithstanding tender documentation or bid, I: direct award of framework agreement or excessive time framework of FA, J: contract with a person outside list of ultimate beneficents, K: violation of notification duties before conclusion of contract, L: delay of fulfilment of duties or

rules were present in all three acts on public procurement (type A, B, and C) during the whole period and the infringement is punished by a fine equal to 5 % of the value of contract. Some types of serious infringements appeared later, e.g. conclusion of contract with a person that is not registered in the register of ultimate beneficiaries. There has been also a group of types of infringements that have not been fined during researched period.[44] The "A" type of infringement, i.e. avoiding public procurement procedures or direct award without fulfilling conditions, appeared as the most frequent violation of public procurement rules – it was detected in 112 cases and total amount of fines reaches 6,788 mil. euro, i.e. 30 % of all cases and 71 % of the value of all cases. The second most common infringement is the "V" type of infringement – violation of the principle of transparency, equal treatment or non-discrimination[45].

Comprehensive data are shown in Tables 1, 2 and 3. For the purpose of the analyses, all branches as well as enterprises established by the central government

avoiding to conclude contract, M: CA did not fulfil duty ordered by the decision of the OPP, N: CA did not fulfil duty to maintain proper documentation and/or to provide such documentation to the office or AMO, O: violation of prohibition to request certain legal form of consortia, P: CA did not properly evaluate fulfilment of criteria for participation or bids, Q: CA did not notify outcome of award selection to all parties, R: CA used prohibited criteria for award, S: CA did not exclude "double" bids, T: CA did not follow procedures for awarding contract under limits of directive, U: non-employment of accredited person, V: violation of principle of transparency , equal treatment or non-discrimination, W: clean vehicles procurement, X: CA violated the duty to confirm reference, Y: violation of publication duties in the profile of contracting authority, Z: violation regarding expected value of contract, ZA: violation of duties regarding conflict of interests, ZB: violation of reporting and publication duties, ZC: violation of some duties regarding subcontractors, ZD: violation of duties regarding documentation of tender, ZE: violation of duties regarding returning of deposit and interests thereof, ZF:CA did not protect competition in the case of consultations, ZG: CA failed to provide information of the OPP, ZH: CA failed to provide expected amount or price(tenders out of the scope of the Public Procurement Directive), ZI: CA failed to announce results (tenders out of the scope of the Public Procurement Directive), ZK: CA failed to publish data on concessions in profile (tenders out of the scope of the Public Procurement Directive), ZL: CA failed to notify direct award, ZM:CA failed to publish low-price awards.

[44] Type I, O, R, S, U, Z, ZB, ZC, ZE, ZF, ZG, ZH, ZI, ZJ, ZL, ZM.

[45] MOUKIOU, C.P. The Principles of Transparency and Anti-Bribery in Public Procurement: A Slow Engagement with the Letter and Spirit of the EU Public Procurement Directives. In: *European Procurement & Public Private Partnership Law Review* [online]. 2016, Vol 11, No 2. Available at: https://www.jstor.org/stable/10.2307/26643496; ABAZI, V., TAUSCHINSKY, E. Reasons of Control and Trust: Grounding the Public Need for Transparency in the European Union. In: *Utrecht Law Review* [online]. 2015, Vol 11, No 2. DOI: 10.18352/ulr.319; BOVIS, C. H. The effects of the principles of transparency and accountability on public procurement regulation. In: *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* [online]. 2009, Vol 3, No 1. DOI: 10.4337/9781848449206.00019; KOVÁČIKOVÁ, H. Conflict of interest: Case of the public procurement in Slovakia. In: *Strani pravni zivot* [online]. 2019, Vol 71, No 4. DOI: 10.5937/spz63-24010.

and local self-government were attributed to central government and local self-government respectively, except hospitals.

Table 1 – Total amount of fines for public procurement infringements

Type	Total (€)	Central government (€)	Universities (€)	Regional self-government (€)	Hospitals (€)	Other (€)
A	7 453 910,33	4 264 198,02	–	2 973 899,99	194 144,47	21 667,85
B	50 928,11	–	–	50 928,11	–	–
C	680 044,46	309 685,00	–	260 365,48	109 993,98	–
D	3 246,00	–	3 246,00	–	–	–
E	16 440,00	–	–	16 440,00	–	–
F	64 335,10	15 000,00	–	33 835,10	–	15 500,00
G	369 302,04	20 000,00	–	349 302,04	–	–
H	84 962,83	–	–	1 000,00	60 605,40	–
J	47 063,62	–	–	35 587,79	–	11 475,83
K	46 944,64	28 000,00	6 500,00	11 944,64	–	500,00
L	120 000,00	60 000,00	–	40 000,00	–	20 000,00
M	117 256,00	76 150,00	900,00	31 659,00	300,00	8 247,00
N	32 550,00	17 050,00	5 000,00	10 500,00	–	–
P	19 950,00	7 500,00	6 000,00	6 450,00	–	–
Q	3 500,00	–	–	2 500,00	1 000,00	–
T	47 200,00	32 700,00	–	14 500,00	–	–
V	340 200,00	143 400,00	600,00	131 750,00	31 850,00	32 600,00
X	1 950,00	500,00	–	1 450,00	–	–
Y	2 000,00	–	1 000,00	–	1 000,00	–
ZA	1 500,00	–	–	1 500,00	–	–
ZD	2 000,00	–	–	1 500,00	–	–
ZK	5 000,00	–	–	5 000,00	–	–
Proc.[46]	2 000,00	–	–	2 000,00	–	–
Total	9 512 283,13	4 974 183,02	23 246,00	3 982 112,15	398 893,85	109 990,68€

Source: decisions of the OPP, author

[46] Procedural infringements.

Table 2 – Distribution of the amount of fines for public procurement infringements among different levels of contracting authority

Type	Central government	Universities	Regional self-government	Hospitals	Other
A	57%	0%	40%	3%	0%
B	0%	0%	100%	0%	0%
C	46%	0%	38%	16%	0%
D	0%	100%	0%	0%	0%
E	0%	0%	100%	0%	0%
F	23%	0%	53%	0%	24%
G	5%	0%	95%	0%	0%
H	0%	0%	1%	71%	0%
J	0%	0%	76%	0%	24%
K	60%	14%	25%	0%	1%
L	50%	0%	33%	0%	17%
M	65%	1%	27%	0%	7%
N	52%	15%	32%	0%	0%
P	38%	30%	32%	0%	0%
Q	0%	0%	71%	29%	0%
T	69%	0%	31%	0%	0%
V	42%	0%	39%	9%	10%
X	26%	0%	74%	0%	0%
Y	0%	50%	0%	50%	0%
ZA	0%	0%	100%	0%	0%
ZD	0%	0%	75%	0%	0%
ZK	0%	0%	100%	0%	0%
Proc.	0%	0%	100%	0%	0%
Total	52,29%	0,24%	41,86%	4,19%	1,16%

Source: decisions of the OPP, author

Table 3 – Number of imposed fines for infringement of competition rules and average level of fine in thousands of euro

Type	Total		Central government		Universities		Regional self--government		Hospitals		Other	
	No	Avg.	No	Avg.	No	Avg.	No	Avg.	No	Avg.	No	Avg.
A	113	66,0	35	121,8	0	-	64	46,5	11	17,6	3	7,2
B	2	25,5	0	-	0	-	2	25,5	0	-	0	-
C	30	22,7	10	31,0	0	-	18	14,5	2	55,0	0	-
D	1	3,2	0	-	1	3,2	0	-	0	-	0	-
E	1	16,4	0	-	0	-	1	16,4	0	-	0	-
F	9	7,1	1	15,0	0	-	6	5,6	0	-	2	7,8
G	7	52,8	2	10,0	0	-	5	69,9	0	-	0	-
H	3	28,3	0	-	0	-	1	1,0	1	60,6	0	-
J	5	9,4	0	-	0	-	3	11,9	0	-	2	5,7
K	7	6,7	1	28,0	1	6,5	4	3,0	0	-	1	0,5
L	3	40,0	1	60,0	0	-	1	40,0	0	-	1	20,0
M	55	2,1	17	4,5	3	0,3	26	1,2	1	0,3	8	1,0
N	9	3,6	4	4,3	1	5,0	4	2,6	0	-	0	-
P	7	2,9	2	3,8	1	6,0	4	1,6	0	-	0	-
Q	3	1,2	0	-	0	-	2	1,3	1	1,0	0	-
T	14	3,4	3	10,9	0	-	11	1,3	0	-	0	-
V	90	3,8	17	8,4	1	0,6	57	2,3	8	4,0	7	4,7
X	3	0,7	1	0,5	0	-	2	0,7	0	-	0	-
Y	2	1,0	0	-	1	1,0	0	-	1	1,0	0	-
ZA	1	1,5	0	-	0	-	1	1,5	0	-	0	-
ZD	2	1,0	0	-	0	-	1	1,5	0	-	0	-
ZK	1	5,0	0	-	0	-	1	5,0	0	-	0	-
por	3	0,7	0	-	0	-	3	0,7	0	-	0	-
Total	371	25,6	94	52,9	9	2,6	217	18,4	25	16,0	24	4,6

Source: decisions of the OPP, author

It is possible to draw the following conclusion from the analysed data. Overall amount of fines imposed to central government bodies is slightly higher and represents 52 % of the whole sum of fines, compared to local self-government

(42 %). On the other hand, there is substantial difference in the number of infringements that were detected – 217 fining decision addressed to local self-government authorities compared to 94 issued to central government. Thus, the average fine imposed to local self-government authorities is lower (18,4 thousand euro) comparing to central governments (25,6 thousand euro). In the category of the most frequent infringement of public procurement rules – type "A" and type "V" infringement, infringement is more frequent in the case of local self-government: 64 compared to to 35 in the type "A" and 57 compared to 17 in the type "B".

It must be noted, that two factors can have impact on data regarding the sums of fines. First, the OPP reduces the level of the fine to 50 % if the contracting authority in issue fully agrees with conclusions of the OPP regarding the infringement and the level of the fine. In the analysed period, overall reduction of fines was 954 920,36 € and 293 096,24 € was the sum of reduction of fines of the central governmental bodies and 635 801,42 € was overall reduction of fines of regional self-government, thus local government benefited more from the reduction of fines. Moreover, the second aspect is the approach of the OPP to local self-government since it considers the fact that the contracting authority is a local self-governmental body as a mitigating factor for the fine.[47]

Administrative fines imposed by the OPP are undoubtedly a severe form of punishment for violation of public procurement rules and one of the forms of compelling contracting authorities, including local self-governmental bodies to obey them. Thus, the central government (via the OPP) has apparatus strong enough to enforce freedoms of internal market that could be deprived by distortions in public procurement. However, there can be also a different view on severity of fines. The financial fines represent financial transfer from the budget of the offender to the budget of an authority imposing the fine. However, the impact on of central government and local self-government is different. Imposing the fines to central governmental bodies is "inhouse" transfer and the fine is becoming an income of the general state budget. Even if the offending central governmental body is obliged to pay a certain part of its budget, it does not prevent the situation that in the case of partial deficit of said institution, some additional financial transfer will be granted to that offender from the general state budget. On the other hand, this situation cannot be expected in the case of offences of local self-government. Therefore, infringements by local self-governmental authorities entailed in transfer of 3 982 112,15 € in favour of the budget of the central government. Due to this fact, citizens of municipality or region may suffer from errors and infringement (notwithstanding whether intentional

[47] E.g. decision of the OPP No 3817-3000/2019 of 28 March 2019, par. 61.

or not) by lower efficacy of spending (i.e. from errors of public procurement itself), by fine imposed by the OPP and also, in some cases, by sanctions related to financial interests of the EU, if the procured goods and services are financed by the EU's budget.[48]

The aim of activities of the OPP shall be to maintain a well-functioning system of public procurement, including freedoms of internal market. Such pure financial transfers may not prevent accidental errors of local self-governmental bodies. Moreover, these bodies may feel unjustly prosecuted by the central government. De lege ferenda, rather than "deadweight" transfer to central government, establishing of trustee can be alternative to the fine. A trustee could be appointed by the OPP and should be paid by party that had violated public procurement rules. The responsibilities of a trustee will cover the review of internal mechanisms that lead to infringement of public procurement rules and they shall "countersign" all activities of the contracting authority within the stipulated period. The model of trustee can be drawn from the concept used in merger regulation or budgetary rules in force in Slovakia.[49]

5. Other competition infringements by local self-government

While in many EU countries the local self-government can be caught by competition rules, other than state aid rules, only in exceptional cases[50], Slovakia (along e.g. Czechia) is one of the jurisdictions that allow the national competition authority to prosecute competition infringements of state and self-governmental authorities.[51] The wording of the substantive provision of competition infringement of public authorities, i.e. not undertakings, is quite broad: "State administration authorities in the exercise of state administration, municipalities and self-governing regions in the exercise of self-governance and transferred state administration, and professional self-governance bodies in the exercise of

[48] KOVÁČIKOVÁ, H. Verejné obstarávanie ako problematický aspekt čerpania štrukturálnych fondov. In: *Právo fondov EÚ v teórii a praxi*. Bratislava: Úrad podpredsedu vlády pre investície a informatizáciu Slovenskej republiky, 2018.

[49] Cf. § 19 of Act No 583/2004 Coll. on Budgetary Rules of Local Self-Government and on Amendmet Other Laws.

[50] REPAS, M. Public Entities as Undertakings under Competition Rules. In: *Lex Localis* [online]. 2010, Vol 8, No 3. DOI: 10.4335/8.3.227-243(2010).

[51] LAPŠANSKÝ, L. Nástroje protiprávnych zásahov orgánov verejnej moci do hospodárskej súťaže. In: VOZÁR, J. ed. *Míľniky súťažného práva*. Bratislava: Ústav štátu a práva, Slovenskej akadémie vied, 2015.

transferred state administration must not provide evident support giving advantage to certain undertakings or otherwise restrict competition".[52] Although § 39 covers violations of state bodies as well, the AMO may impose administrative fines up to 66 000 euro to self-government only.[53]

Due to its general wording, § 39 of the Competition Act can be considered too far reaching. However, it shall be understood as "*lex generalis*" to all other competition infringements of public authorities prosecuted by other law, such as public procurement rules or state aid rules, hence its application is auxiliary. Moreover, this power cannot be understood as a power of the AMO to annul the illicit act of local self-government.[54] The AMO may impose the fine in the case of infringement of order to terminate illegal behaviour, but it does have power to make steps against validity of the measure in issue itself, not even standing in annulment procedure.

From Table 4 it is apparent that in recent 10 years the AMO has almost ceased activities regarding the application of § 39 of the Competition Act[55].

[52] § 39 of Act No 136/2001 Coll. on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organisation of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended as amended (hereinafter „Competition Act").

[53] § 38(2) of the Competition Act.

[54] Judgment of the Regional Court in Bratislava No 2S 11/2007 of 18 September 2009.

[55] Data based on Annual reports of the AMO PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Výročná správa/Annual report 2004* [online]. Bratislava, 2005 [acessed 14.02.2020]. Available at: https://www.antimon.gov.sk/data/att/91.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Výročná správa/Annual report 2005* [online]. 2006 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/89.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Výročná správa/Annual report 2006* [online]. 2007 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/88.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Výročná správa/Annual report 2007* [online]. Bratislava, 2008 [acessed 14.02.2020]. Available at: https://www.antimon.gov.sk/data/att/87.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Výročná správa/Annual report 2008* [online]. Bratislava, 2009 [acessed 14.02.2020]. Available at: https://www.antimon.gov.sk/data/att/86.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Výročná správa/Annual report 2009* [online]. Bratislava, 2010 [acessed 14.02.2020]. Available at: https://www.antimon.gov.sk/data/att/85.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2010* [online]. Bratislava, 2011 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/84.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2011* [online]. 2012 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/77.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2012* [online]. Bratislava, 2013 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/76.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2013* [online]. Bratislava, 2014 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/1404.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2014* [online].

Table 4 – Activities of the AMO in application of § 39 of the Competition Act

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004
Complaints	0	11	11	4	4	0	16	n.d.								
Investigations	4	14	12	1	0	6	10	15	n.d.							
Administrative procedures (1 instance)	1	0	0	0	0	1	0	1	4	1	0	5	3	3		
Decisions (1st instance)	1	0	0	0	0	1	0	1	4	1	0	5	3	3		

Source: annual reports of the AMO, author

All three infringement decisions in the recent 10 were addressed to municipalities: the Capital City of Bratislava[56], the Town of Rimavská Sobota[57] and the Town of Šurany[58] and the fines were in the range from 8 000 to 10 000 euro. In Bratislava and Rimavská Sobota cases, the AMO identified cases discriminatory and unfair practices in funerary services. In Šurany case, the AMO fined measures of the municipality blocking undertakings to open new pharmacies in town's territory. Although that practice can be linked to freedoms of internal market, the AMO did not mention this aspect in its decision. Moreover, this competence of the AMO appears to be "Cinderella" of competences of the AMO (without a prospect to become a princess) and its minor importance was also reflected in the prioritization policy of the AMO[59]. Despite not being often employed, § 39 of the

Bratislava, 2015 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/1665.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2015* [online]. Bratislava, 2016 [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/1797.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY, VÝROČNÁ SPRÁVA/ANNUAL REPORT 2016 [online] [acessed 01.02.2020]. Available at: https://www.antimon.gov.sk/data/att/1899.pdf; PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY, VÝROČNÁ SPRÁVA/ANNUAL REPORT 2018 [online] [acessed 14.02.2020]. Available at: https://www.antimon.gov.sk/data/att/2044.pdf

[56] Decision of the AMO No 2012/39/2/1/023 of 30 May 2012and decision of the Council of the AMO No 2012/39/R/2/050 of 27 December 2012.

[57] Decision of the AMO No 2014/KH/1/1/033 of 29 October 2017.

[58] Decision of the AMO No 2019/OHS/POK/1/32 of 2 October 2019 and decision of the Council of the AMO No 2020/OHS/POK/R/14 of 15 May 2020.

[59] PROTIMONOPOLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. *Prioritisation Policy of the Antimonopoly Office of the Slovak Republic* [online]. Bratislava, 2015, p. 4 [acessed 15.02.2020]. Available at: https://www.antimon.gov.sk/data/att/1636.pdf

Competition Act can effectively serve as fallback competence against restrictions of freedoms on internal market caused by measures of local self-government.

6. Nullity of acts of local self-government

As noted above, neither the AMO nor the OPP may annul a decision or act of the local self-government itself.

If, as a result of erroneous public procurement procedure, a contract is concluded, there is special civil law procedure to declare such a contract null and void. Under § 181(1) of the Act on Public Procurement, every candidate, tenderer or other person that might have an interest in the tender and their rights were frustrated by the contracting authority's procedures may file an action for annulment of the contract in issue. The action for annulment of the contract can be effective measure for enforcement of public procurement rules and thus securing also freedoms of internal market.

The public prosecutor has an important role in safeguarding legality of the acts of local self-government. The prosecutor is, inter alia, empowered by § 22 of the Act on Public Prosecution[60] to protest against administrative acts and issue a notice (warning). The measures of the prosecution can be employed against both, individual decision acts and measures, as well as normative acts of assemblies – "generally binding orders". The public prosecutor may also file an action against generally binding order of municipality or self-governing region claiming its illegality. However, the court is not empowered to encroach self-government and cannot annul the order, it may declare its unlawfulness, only.[61]

7. Conclusions

Although all three competences of central government (state aid rules, public procurement rules and additional powers of the AMO) as well as the competence of public prosecution may be powerful tools for securing internal market of the EU, their enforcement is unbalanced. Comparing to other two policies of the AMO, the OPP has strong powers to enforce public procurement rules as one of the aspects of the EU's internal market. The sum of fines, even justified by serious infringements, cannot escalate forever and there is also time to rethink

[60] Act No 152/2001 Coll. on Public Prosecution as amended.

[61] For more details see VRABKO, M. Preskúmavanie všeobecne záväzných nariadení orgánov územnej samosprávy. In: *Originálna právomoc a prenesený výkon štátnej správy na orgány územnej samosprávy*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2019.

the sanction and enforcement apparatus and to also take into consideration alternative forms of sanctions. Sanctions addressed to local self-government cannot represent mere "deadweight" budgetary transfer without any complementary enforcement tools aimed to change the pattern of behaviour of governmental bodies and to avoid future faults.

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Sharing Economy in Digital Single Market EU – a Phenomena with Future Potential

Daniela Ježová*

Summary: The sharing economy is a rising phenomenon in the digital world and has expanded in last years to most of the industries. Article deal with the phenomena of sharing economy, tries to find its definition using different approaches. The personal data aspects of the sharing economy are also discussed as a valuable asset. The last section of the article deals with Uber as a digital platform or perhaps more? Analysing the Uberized economy with mentioning also the breach of personal data security in Uber through different countries.

Keywords: European Union, sharing economy, collaborative economy, online platforms, digital single Market, Uber

1. Introduction

European Union founds important to extend the current EU single market, which consist of free movement of goods, services, labour and capital. The single market makes the EU territory without any barriers. Currently four freedoms included in the internal market needs to reflect the development of the society and the digital era. After creating the Digital Single Market, the European Union can enjoy its full potential.[1] The creation of a Digital Single Market is definitely a priority of the Union. Data protection reform is an important part of the formation of digital single market where the goal is to make the covers the European Union without any digital barriers. The 21st century is considered as the era of digital technologies. The process of "internetization" has covered all areas of human life. The world is completely dependent on electronic

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[1] JEŽOVÁ, D. EU Digital Single Market – Are we there yet? *AD ALTA: journal of interdisciplinary research*, 2017 year 7, no. 2, pp. 100.

technologies. The most important political, economic and social projects are carried out via the internet.[2]

Nowadays sharing economy is growing and is playing an important role in the economy. The establishment of the digital single market is getting closer. In communication of the Commission[3] and its mid-term review[4] where the Commission proposes to extend the DSM strategy "to keep up to date with emerging trends and challenges such as those related to online platforms, the data economy and cybersecurity." The so-called sharing economy has flown out of its nest. Far from being seen as the novel phenomenon society and regulators used to look almost unanimously favourably upon, it has sparked many debates in terms of competition, distribution of value, taxation and labour rights, to name a few.[5]

In case we try to find out the definition of the shared economy currently we will not be able to. Author Hatzopoulos differs between the sharing economy and collaborative economy, where base on his research the collaborative economy refers to an economic model that focuses on providing access to products and services through renting, trading or sharing instead of traditional ownership. The sharing economy is subset of the collaborative economy that focuses solely on the outright sharing assets. The collaborative economy is known by different labels: the sharing economy, the gig economy, the platform economy, the on-demand economy, the peer-to-peer (P2P) economy and even Uberized economy.[6] The sharing economy indicates a system whereby the involved actors behave differently: an online platform performs the passive role of the matcher of demand and supply while a service provider and a user exploit their perspective expertise or resources, such us a car ride, baby-sitting, translation and household chores. Often the sharing economy as such does not imply an economic gain; rather, it solely ensures mutual benefit between the two parties, so much so that this notion basically refers to the ideal archetype of a consumer as well as ecological awareness developed in order to rediscover human relationships among

[2] NAPETVARIDZE, V.; CHOCIA, A. Cybersecurity in the Making – Policy and Law: a Case Study of Georgia', *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 155.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee And the Committee of the Regions A Digital Single Market Strategy for Europe, COM(2015) 192 final.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy A Connected Digital Single Market for All, COM(2017) 228 final.

[5] SMICHOWSKI, B. C. Data as a common in the sharing economy: a general policy proposal. 2016 [online]. Available at: <https://vecam.org/IMG/pdf/carballa_smichowski_bruno_2016_-_data_as_a_common_in_the_sharing_economy_a_general_policy_proposal_cepn_wp_.pdf> (14.04.2020).

[6] HATZOPOULOS, V. *The Collaborative Economy and EU Law*. Hart, Oxford, 2018.

neighbours and put in place common idle goods and capacities, including time and even professional knowledge.[7] Currently the model is changing and shared economy became the business model for the purpose to gain profit.

A definition of the term "collaborative economy" was stated by the Commission: the term "refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.[8]"

Sharing economy is also known as P2P services. The model came from long time ago, where people usually knowing each other where helping each other with lending thinks, money. In the digital era the model changed where online platform is established and connect people having thins to borrow with people wanting thinks, money to borrow. The advantage is that the service becomes more affordable, there is no need of people knowing each other and a wide range of service and things is available on the market. The profit became part of the economy.

The concept of sharing – in the new business era of decentralized internet production and intangible assets – may be understood as a form of micro capitalism[9]. Sharing is the foundation of a market where the surplus production capacity of personal goods can be used in different businesses in which individuals look for income generation – some scholars call this phenomenon sharing market.[10]

In a recent study using a new empirical methodology, Eljas-Taal et al. estimate annual revenues of the collaborative economy in four sectors to represent 0.17% of EU GDP. They estimate that the collaborative economy provides

[7] INGLESE, M. *Regulating the Collaborative Economy in the European Union Digital Single Market*, Springer, Switzerland, 2019.

[8] Commission Communication 'A European agenda for the collaborative economy', COM(2016)356 final, at 1.

[9] PETRIE, C. Emergent collectives Redux: the sharing economy. *IEEE Internet Computing*, 2016, 20(4), pp. 84–86, [online]. Available at: <https://ieeexplore.ieee.org/document/7529012?denied=> (12.04.2020).

[10] CÓRDOVA, R. *Sharing economy: becoming an Uber driver in a developing country*. [online]. Available at: <https://www.researchgate.net/publication/332181710_Sharing_economy_becoming_an_Uber_driver_in_a_developing_country> (12.04.2020).

work for approximately 395,000 people active across the EU, representing about 0.15% of EU employment.[11] With access to sufficiently liquid peer-to-peer rental markets, owners of durable goods can temporarily supply their non-utilized capacity to others who may prefer to rent this capacity instead of owning their own asset because their average utilization levels or income levels are too low. Correspondingly, the prospect of future rental (much like the prospect of future resale created by secondary markets) might make consumers more willing to invest in asset ownership. The introduction of peer-to-peer rental markets will thus affect the value of the associated underlying assets.[12]

2. Usage of personal data in sharing economy

Based on the Commission Digital single market strategy[13] the Digital Single Market must be built on reliable, trustworthy, high-speed, affordable networks and services that safeguard consumers' fundamental rights to privacy and personal data protection while also encouraging innovation. Based on the EU agenda for the collaborative economy[14] in any event, like any other controllers collecting and further processing personal data in the EU, collaborative platforms must comply with the applicable legal framework on the protection of personal data. Ensuring adherence to the rules for processing personal data will help increase the trust of individuals, whether providers or consumers (including peer to peer) using the collaborative economy, so they know that when it comes to their personal data they will have the protection they are due.

In platforms the data are collected from the users such us consumers and the registered providers of services. The platforms use a whole spectrum of different data such us mandatory data provided by users at the registration, that the personal data obtain via usage of the application (location data, financial data, etc.),

[11] See the study Policy Department for Economic, Scientific and Quality of Life Policies (2019): Contribution to Growth: *The European Single Market, Delivering economic benefits for citizens and businesses*. [online]. Available at: <https://www.bruegel.org/wp-content/uploads/2019/02/IPOL_STU2019631044_EN.pdf> (01.04.2020) – ELJAS-TAAL, K., KAY, N., PROSCH, L., SVATIKOVA, K. *A methodology for measuring the collaborative economy*, 2018.

[12] FRAIBERGER, S., SUNDARARAJAN, A. Peer-to-peer Rental Markets in the Sharing Economy. *NYU Stern School of Business Research Paper*, 2017. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574337> (13.04.2020).

[13] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee And the Committee of the Regions A Digital Single Market Strategy for Europe, COM(2015) 192 final.

[14] Commission Communication A European agenda for the collaborative economy, COM(2016)356 final, at 1.

also passively collected data by the platform, via cookies, preferences, also the technical data ex. photos from your mobile phone and also the self-presentation data voluntarily disclosed. The analysis of the acquired data is provided by the digital platforms. Also, platforms actively collect data for marketing purposes such us Facebook's lucrative advertising model relies on data collected not only on Facebook, but also by the use of third-party websites and apps via Facebook's embedded tools. Such off-Facebook data collection is usually not predicted by Facebook users.[15]

Conceptually, the mere existence of a sharing economy brings about questions of privacy as it involves the simultaneous sharing of consumer data (in exchange for participation on sharing platforms) and consumer-owned goods, spaces, and services. For both categories of users involved, both consumers and providers, optimal privacy is achieved when they reach a solution that allows them to both take part in the sharing economy and corresponds to a desired level of exposure to peers and organizations. Additionally, when the sharing system involves a monetary exchange, different motivations and expectations can alter the privacy calculus of all the users involved. Privacy in data sharing is two-fold: data exchanges take place between users and platform-organizations, and between users and peer-users.[16] In other words, the sharing data comes from more sides than just two as it is on general web pages. Data shall be shared from consumers, service provider and the digital platform. Different type of data is shared even personal and non-personal in digital platform of sharing economy.

In order to participate in the sharing economy, both providers and consumers must disclose a certain amount of information to the platform organization in exchange for access to the platform on which the exchange takes place. The use of goods by others[17] may be an intrusion into private and personal physical spheres[18], when other people literally enter one's own home or use one's own car[19].

[15] BOTTA, M. WIEDEMANN, K. (2018) EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita. *Max Planck Institute for Innovation and Competition Research Paper*, 18-08, pp. 64. [online]. Available from: https://ssrn.com/abstract=3184119 (14.04.2020) and also MAZÚR, J., PATAKYOVÁ, M.,T. Regulatory Approaches to Facebook and Other Social Media Platforms: Towards Platforms Design Accountability. *Masaryk Law Journal*, 2019, p. 219.

[16] RANZINI, G., ETTER, M., LUTZ, CH., VERMEULEN, I. Privacy in the Sharing Economy. *Horizon 2020*. [online]. Available at: <https://www.bi.edu/globalassets/forskning/h2020/privacy-working-paper.pdf> (12.04.2020).

[17] TEUBNER, T., FLATH, C. M. Privacy in the sharing economy. Working Paper, 2016.

[18] BIALSKI, P. Becoming intimately mobile. 2012, Frankfurt, Germany: Peter Lang also BIALSKI, P. Technologies of hospitality: How planned encounters develop between strangers. *Hospitality & Society*, 2012, 1(3), pp. 245–260.

[19] BUCHBERGER, S. Hospitality, secrecy and gossip in Morocco: Hosting Couch Surfers against great odds. *Hospitality & Society*, 2012, 1(3), pp. 299–315 also RANZINI, G., ETTER, M.,

Nowadays we share a lot of different data voluntarily on different platforms on Internet. In an era of 'self-portraiture'[20], others influence how we present our extended self and the idealized view of oneself, which might also impact the way one's past is constructed[21]. It is through photos that we post online of our "house, the kind of car we drive, and our stock portfolio"[22] that we display ourselves for the whole world to see.[23] Belk's notion of the extended self indicates a critical risk associated with sharing: besides the risk of physical damage, sharing also increases the risk of (perceived) interpersonal contamination in the form of the violation of one's personal space. The perceived risk of interpersonal contamination is more pronounced when we are less familiar with the person sharing a space or good – which is a key characteristic of online sharing services.[24] As we can see our extended selves are cars, houses we use on regular basis. Those extended self we share with others in the model of sharing economy. That personal space is shared together with personal data of users of digital platforms.

An essential characteristic of sharing economy is a remuneration for the exchange, sharing of items, services. Can personal data be considered as a remuneration? What about voluntary exchange of personal data to the subject providing services in shared economy? Definitely yes, the personal data are used as currency often in digital world. Legally the idea is used in the directive on certain aspects concerning contracts for the supply of digital content and digital services[25] in recital 24 is addressed that digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader. It is clear that personal data are valuable asset and are actively used for obtaining digital content "for free" on the other hand the protection of personal data is fundamental right. The same is mentioned in article 3 para 1. Based on recital 67 of the directive where the digital content or digital

LUTZ, CH., VERMEULEN, I. Privacy in the Sharing Economy, *Horizon 2020*. [online]. Available at: <https://www.bi.edu/globalassets/forskning/h2020/privacy-working-paper.pdf> (12.04.2020).

[20] SCHWARZ, O. On friendship, boobs and the logic of the catalogue: Online self-portraits as a means for the exchange of capital. *Convergence*, 2010, 16(2), pp. 163–183.

[21] VAN DIJCK, J. Digital photography: communication, identity, memory, *Visual Communication*, 2008, 7(1), pp. 57–76.

[22] BELK, R. W. Extended self in a digital world. *Journal of Consumer Research*, 2013, 40(3), pp. 477–500.

[23] RANZINI, G., ETTER, M., LUTZ. CH., VERMEULEN, I. Privacy in the Sharing Economy, *Horizon 2020*. [online]. Available at: <https://www.bi.edu/globalassets/forskning/h2020/privacy-working-paper.pdf> (12.04.2020).

[24] LUTZ, Ch., HOFFMANN, Ch., BUCHER, E., FIESELER, Ch. The role of privacy concerns in the sharing economy, *Information Communication and Society*, 2018.

[25] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, L 136/1.

service is not supplied in exchange for a price but personal data are provided by the consumer, the consumer should be entitled to terminate the contract also in cases where the lack of conformity is minor, since the remedy of price reduction is not available to the consumer. Voluntary transmission of personal data can be definitely used as remuneration in digital environment. Personal data became economically valuable asset with the ability to obtain services or goods on Internet. The World economic Forum 2010 study highlighted the relevance of personal data as an economic asset that could be perceived as the new 'oil'[26]. The metaphor of personal data as oil is an interesting one. It covers both the use of personal data as a product in itself and as being a substance that is basic to a large number of economic activities. A general feature of data is that it can be sold repeatedly without loss of its intrinsic value. The copy is just as good as the original, enabling multiple offers without loss of price or value. A single item of personal data thus will hardly have a commercial value.[27] The case of Shawn Buckles is an interesting illustration. Shawn Buckles[28], set up an auction in April 2014 to sell his personal data to the highest bidding organization. The firm that offered the highest price for his personal data would acquire a subscription of a year to data that were collected on Shawn Buckles. These data encompassed his personal profile, his location track records, his train track records, his personal calendar, his email conversations, his online conversations, his consumer preferences, his browsing history, and his thoughts. The highest bidder for this data set was The Next Web which offered 350,- € for the full data set. Shawn Buckles used the auction to raise awareness for the commercialization of personal data and the consequences for privacy.[29] This is a clear example where a person not even got "free" item on platform but transformed his data to money.

The discussion was also lead about the ownership of the data[30] where the distinction between a raw data in which the data subject clearly retains a strong and enduring interest and demographically aggregated information which is the corporation´s work product through the processes and algorithms used to create demographics but in which the data subject still has an affected interest. Article 7 of GDPR put uses the interest of data rather than ownership.

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[26] World Economic Forum. Personal Data: the emergence of a new asset class. *World Economic Forum,* 2010. [online]. Available at:

[27] VAN LIESHOUT, M. The Value of Personal Data. *IFIP Advances in Information and Communication Technology*, 2015, doi: 10.1007/978-3-319-18621-4_3.

[28] <http://shawnbuckles.nl/dataforsale/> (13.04.2020).

[29] VAN LIESHOUT, M. The Value of Personal Data. *IFIP Advances in Information and Communication Technology*, 2015, doi: 10.1007/978-3-319-18621-4_3.

[30] SHREIR, D., L. Beyond GDPR. *Trusted data: A New Framework for Identity and Data Sharing*, Massachusets Institute of Technology, 2019, pp. 218.

2.1. The right to data portability and online platforms

The right of data transfer was new right included in GDPR and includes the right to receive personal data in a structured, commonly used and machine-readable format, and the right to transmit this data to another operator without hindrance from the operator to which the personal data have been provided. The right includes the right to transfer data directly from one operator to another. This means that data controllers who externally process data or process data together with other controllers must have clear contractual terms for assigning each party's responsibility in responding to data portability requests and implementing specific procedures in that regard. Under the wording of Article 20 there is only the word 'technically feasible'. The explanation of the Article 29 WG lies rather in the fact that no obligation is imposed on the data controller, which would only require them not to create obstacles in the transfer. In practice, this could lead to blocking the real use of the right with the indication of the operator that the transfer is not technically feasible.[31] The right to a direct transmission of personal data between controllers shall simplify the sometimes-complex switch between service providers. It was the legislator´s intention to allow individuals to move their online profiles from one platform to another with just in one click. This gives rise to the question in which cases such direct transmission is technically feasible, such as where providers of rather different services are involved.[32] Feasibility depends on level of investment in technology that has been made.

The data portability is fundamental not only for privacy, but also for the growth of the Digital Single Market. It is obvious that the right to data portability will improve the power of the data subject on his data. The right to data portability can be used together with the right to erase data. If a user can take a copy of the data, from the digital platform and after he obtains them ask to delete the data ask, he has more contractual power in the platform relationship.

What about shared economy? How do we find balance between the sharing data and the rights of data subjects? The GDPR does not solve the question but it underlines that the right to data portability "shall not adversely affect the rights and freedoms of others". The Article 29 Working Group try to extend the application of the right to data portability also to the data which involve more than one data subject. In particular, they said that when a data controller process "information that contains the personal data of several data subjects", he "should

[31] JEŽOVÁ, D. Data Protection Reform in the EU as a Part of the Forming Digital Single Market. *European Studies, The Review of European Law, Economics and Politics*, Wolkers Kluwer, 2018, vol. 5, pp. 299–300.

[32] VOIGT, P., VON DEM BUSSCHE, A., *The EU General Data Protection Regulation (GDPR): A Practical Guide*. Springer, Berlin, 2017, p. 175.

not take an overly restrictive interpretation of the sentence "personal data concerning the data subject". In this case the data controller should response to the data portability request because the data are also concerning the data subject, but if such data are then transmitted to a new data controller, the new data controller "should not process them for any purpose which would adversely affect the rights and freedom of the third-parties"[33] The Article 29 WP in Guidelines proposed "foster opportunities for innovation by means of sharing of personal data between data controllers in a secure manner under the constant control of the data subject". Practically the issue of data transfer in the sharing economy is not closed as far in sharing economy the data of other subject which are connected with your data are important. Not being able to use on other platform the data all together (the data of the data subject and of others) as a package the options of the consumer to change the platform will be again limited. The consumer might than chose rather to stay on the platform than not being able to use the data as whole.

The already mentioned Digital Content Directive[34] (article 13 and 16) provides with the right to indirect portability after contract termination by the consumer, enabling retrieval of all content provided by the consumer and any other data consumer produced or generated through the digital content´s use. The second is the Regulation on the Free Flow of Non-Personal Data[35], which applies to the storage or other processing of electronic non-personal data.[36] Based on recital 31 "in order to be effective and to make switching between service providers and data porting easier" the EU leaves regulation to the codes of conduct which should be comprehensive and should cover at least the key aspects that are important during the process of porting data. The new term porting data is used in this regard.

Article 20 GDPR refers to "data concerning him or her, which he or she has provided to a controller". "Data provided" can be interpreted in two different ways: restrictively and extensively. According to the restrictive interpretation, "data provided" means only personal data that the subject has explicitly provided in a written or anyway explicit form, e.g., filling a registration form, answering to questions, etc. On the other hand, according to the extensive interpretation, "data provided" means all personal data that data controllers have collected upon

[33] MARTINELLI, S. Sharing data and privacy in the platform economy: the right to data portability and "porting rights". *Entrepreneurship Ecosystem in the Middle East and North Africa* (MENA), 2019.

[34] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, L 136/1.

[35] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, L 303/59.

[36] See also ELFERING, S. Unlocking the Right to Data Portability: An Analysis of the Interface with the Sui Generis *MIPLC Studies*, 2019, p. 32.

consent or according to a contract, e.g., through GPS (location data), cookies, preferences, etc.[37]

Data in shared economy which are valuable for consumers and also for the providers of services are references. References of other users of the digital platform are the value based on which other considering using the services provided are helping with the decision. Shall references also be subject to the right to data portability? References include also the name of the person giving them. In case the references as a reputation will not be portable the power of the platform will be still higher than the data subjects (registered consumers and registered service providers) and the goal of the data portability right was not met.

3. Uber as an online platform in sharing economy. Or perhaps more?

One of the used terms for the shared economy is the Uberized economy, which come from Uber. Therefore, I choose to explain that phenomena in this article too.

Nowadays, car sharing has been impacted majorly due to new internet technologies that enabled the entrance of individuals that do not take into consideration the responsible consumption necessary to collaborate with the urban mobility or reduce car ownership costs. Rather than sharing a car, ridesharing includes common origins, destinations and routes; differently, Uber is a ride sourcing service.[38]

Uber is an electronic platform available via smart phone application. The application a consumer can order a ride from a specific place to another specific place for a fee by a non-professional driver. The idea behind is a P2P service where once a consumer has a ride to work with several places free in the car, he/she gives a ride to a third person having the same direction. On the other side the practice developed the initial idea to a business where several individuals are driving whole day based on the consumers demand very similar to taxi service.

[37] DE HERT, P., PAPAKONSTANTINOU, V., MALGIERI, G., BESLAY, L., IGNACIO, S. The right to data portability in the GDPR: Towards user-centric interoperability of digital services. *Computer Law & Security Review*, 2018, vol 34, issue 2, pp. 193–203.

[38] SHAHEEN, S. A., CHAN, N. D., GAYNOR, T. Casual carpooling in the San Francisco bay area: understanding user characteristics, behaviors, and motivations. *Transport Policy*, 2016, 51, pp. 1–9. [online]. Available at: <https://www.researchgate.net/publication/292208482_Casual_Carpooling_in_The_San_Francisco_Bay_Area_Understanding_User_Characteristics_Behaviors_and_Motivations> (12.04.2020).

and also CÓRDOVA, R. Sharing economy: becoming an Uber driver in a developing country.

The individuals driving the car using Uber application do not hold any licence. However, in some countries most of the counties of the European Union the taxi service is subject to licence procedure. That is also in Spain where the Elite taxi case[39] has its roots. Is Uber an information society service or a transport service?

Uber has created a smartphone application that allows it to provide a range of services. One of the services was so-called UberPOP, which Uber refers to as a "peer-to-peer rideshare service" which enables a rider to "share" the use of a vehicle with the driver and owner of that vehicle (which Uber refers to as "partner-drivers") against the payment of a fee. This service was subject to a case Elite taxi. Spanish taxi drivers did not like the idea that Uber drivers are "taking their job" and do not have to fulfil the licence requirements and regulations. Therefore, the association of the taxi drivers in Barcelona filled an action against Uber in Spain where a preliminary reference was initiated to Court of Justice of EU. The court held that "must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport". Consequently, such a service must be excluded from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce. It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which such services are to be provided[40]. The case was discussed where also digital application has to follow "traditional" licence system in Member states. In a concise albeit sharp reasoning, the Court of Justice acknowledged the opinion expressed by Advocate General and denied Uber the qualification of information society service. The Court recognize the nature of the Uber service: 'an intermediation service consisting of connecting a nonprofessional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle […] and each of those services, taken separately, can be linked to different directives or provisions of the TFEU Treaty on the freedom to provide services"[41] However, the Court then only apodictically states that this overall service "must be qualified not as "an information society service"", but as a transportation service. There are two possible doctrinal explanations for the incompatibility of the control element with an information society service. First, one might argue that the legal consequences of qualifying a composite service simultaneously as a transportation and as an information society service are incompatible. This

[39] Judgment of 20 December 2017, C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain SL, EU:C:2017:981.

[40] Press release no. 136/17 of the Court of Justice of the EU dated 20 December 2017.

[41] Case C-434/15, para 34.

may be what attorney general Szpunar has in mind when he states that the classification of UberPop as an information society service "would not permit the attainment of the objectives of liberalisation underpinning Directive 2000/31".[42] This is due to the specific regulatory framework surrounding transportation: the freedom to provide services does not apply, neither through Article 56 TFEU nor through the Services Directive. […] However, the Court seems to base its conclusion not to qualify the platform service as an information society service on the unitary qualification of the overall service as a transportation service. This suggests a better doctrinal explanation that follows the reasoning of the Advocate General in his opinion: the control element transforms the digital intermediation service into an overall service that, at least primarily, is not delivered electronically and at a distance, but physically and on the ground directly between the involved parties.[43]

It is likely that the model of collaborative economy will grow as various activities historically carried out by humans (such as, for instance, taxi dispatchers or booking agents) can now be performed by software applications.[44] Already Airbnb has become a powerful player in the hospitality industry drawing criticism from hotels it is largely free from the regulatory burden they are subject to. The broad question is how to reach the dual objective of ensuring that online intermediation platforms are allowed to provide their (usually efficient and attractive) services, while ensuring that they comply with the regulatory requirements needed to correct clearly identified market failures. While Uber's services have been subject to challenges in many countries inside and outside the European Union, Geradin strongly believes that the right approach for regulatory authorities is to adopt regulatory regimes that achieve the dual objective identified above.[45]

Uber´s key technologies are artificial intelligence, machine learning and autonomous vehicles. Its core services, which use these technologies are disrupting public transportation, as well as taxi and limousine services. However,

[42] SZPUNAR, A. G. Opinion of 11 May 2017 in case C-434/15 Asociación Profesional Elite Taxi, EU:C:2017:364.

[43] HACKER, Ph. UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociación Profesional Elite Taxi Judgment of the CJEU. *European Review of Contract Law*. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116143> (11.04.2020).

[44] MARC, A. Why Software Is Eating the World. *The Wall Street Journal*, 20 August 2011, [online]. Available at:
<www.wsj.com/articles/SB10001424053111903480904576512250915629460> (11.04.2020).

[45] GERADIN, D. Uber and the Rule of Law: Should Spontaneous Liberalization be Applauded or Criticized?, *Competition Policy International*, 2015, [online]. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693683> (11.04.2020). also GERADIN, D. Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case. [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759379> (11.04.2020).

its technologies and expertise are sought after by different types of organizations in multiple industries. Uber is a disruptor innovator, which utilizes applications to provide its users with more convenient services. Uber´s core strength is its technology platform expertise, and it has sought to integrate its service with that of other providers, ex.: in accommodation industry, hotels. Uber also integrated its services with Amazon Echo and users have had the option of ordering an Uber by speaking to Alexa, the virtual assistant behind Amazon Echo.[46]

The ethical dilemmas[47] associated with the Uber service sets the stage for a broader critique of the platform/gig economies and their lack of regard for the social good. It is particularly challenging because a service such as Uber enjoys widespread popularity while also being immensely problematic for those with the least power and mobility. The ethical challenges here largely touch upon the predator/prey dichotomy that has been symptomatic of the broader culture in which Uber has been developed. The cases surrounding gender-based violence for riders, and Uber's developers; racist practices by drivers; systemic sexism and racism in the company still coming to light; and privacy issues arising from unethical treatment of user data[48] all speak to the profoundly troubling social issues that continue to plague the company.

As mentioned above the Uber is as a digital platform using combination of different personal data. Any personal data can be used to provide benefits for the user or potentially misused to provide benefits for third parties. The example of battery life tracking capacity can be used. Normally, most people would think about this information as useless. On the other side based on the research made by Uber, customers with smartphones on low battery are willing to pay even ten times more for a car ride than usual.[49] The Uber´s economy research states that Uber has found that those with a low battery tend to accept the surge price regardless because they need a ride home that minute, instead of waiting an extra 15 for the surge to possibly go down.[50]

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[46] PERERA, Y., ALBINSSON, P. *Uber*, ABC-CLIO, LLC, California, USA, 2020, pp. 74–76.

[47] CHEE, F. An Uber ethical dilemma? Examining the social issues at stake. *Journal of Information, Communication and Ethics in Society*, vol. 16, no. 3, 2018, pp. 261–274.

[48] HILL, K. "God view": Uber allegedly stalked users for party-goers' viewing pleasure (updated), *Forbes*, 2014, 3 October. [online]. Available at: <www.forbes.com>, CHEE, F. An Uber ethical dilemma? Examining the social issues at stake, *Journal of Information, Communication and Ethics in Society*, vol. 16, no. 3, 2018, pp. 261–274.

[49] ZEZULKA, O. The digital footprint and principles of personality protection in the European Union. *Prague Law working paper series*, Charles University Law Faculty, 2016/III/2, pp. 3.

[50] CARSON, B. You're more likely to order a pricey Uber ride if your phone is about to die. *Business Insider*, 12 September 2016. [online]. Available at <http://www.businessinsider.com/people-with-low-phone-batteries-more-likely-to-accept-uber-surge-pricing-2016-5> (12.04.2020).

Information and empowerment of data subjects is key for the effective protection of their personal data. Platform users are already more active than the average consumer. It is only fit that they actively choose how their data will be processed once 'trained' to become more mindful about their control over their data. In line with the self-regulation culture enshrined in the collaborative economy, platforms could give data subjects the option of data processing every step of the way, through pop-up boxes and comprehensible questions, instead of lengthy, all-inclusive Terms and Conditions.[51]

Uber as one of the biggest digital platforms also faces challenges and data breaches. Uber drivers in the UK filled a lawsuit against the company over allegations the firm has continuously broken European data protection laws. The drivers claimed it had breached the regulations by repeatedly failing to provide them with information, such as the duration of time they spent logged onto the platform, their individual GPS data, and trip ratings in 2017.[52]

In November 2018, Uber was fined £385,000 for paying off hackers who had stolen the personal details of 2.7 million UK customers. Uber hadn't informed its customers about the breach. Using credential stuffing (injecting usernames and password pairs into sites until they found a match), the hackers accessed Uber's cloud-based storage system and downloaded names, phone numbers and emails of customers, as well as 82,000 driver records. Following this, Uber paid the attackers a $100,000 ransom so that they would destroy the data, but it took the company more than a year to tell the affected customers and drivers. Due to the size of the breach, the sensitivity of the data stolen and the length of time it took Uber to notify those who were affected, it was fined £385,000.

Alongside this, 174,000 people in the Netherlands were also affected, leading the DPA (Dutch Data Protection Authority) to impose a separate £532,000 for the same reason.[53] The Uber concern is fined because it did not report the data breach to the Dutch DPA and the data subjects within 72 hours after the discovery of the breach. In USA the Uber also faced a data protection breach allegation which was ended with the settlement of 168 million Eur for data breach in 50 US countries. In USA the state of Washington filled Complaint against Uber in the matter of

[51] HATZOPOULOS, V. The role of personal data in the collaborative economy: data as a currency. [online]. Available at: <https://blogdroiteuropeen.com/2018/04/09/data-protection-in-the-collaborative-economy-by-vassilis-hatzopoulos/#_ftn5> (12.04.2020).

[52] CHLOE, T. *Uber faces fresh legal challenge over driver data*. [online]. Available at: <https://www.cnbc.com/2019/03/22/uber-faces-fresh-legal-challenge-over-driver-data.html> (11.04.2020).

[53] See: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/11/ico-fines-uber-385-000-over-data-protection-failings/> also <https://medium.com/golden-data/case-study-uber-technologies-inc-data-breach-7261484d6471> also <https://www.bankinfosecurity.com/uber-fined-12-million-by-eu-for-breach-disclosure-delay-a-11730> (14.04.2020).

security breach[54] also Federal Trade Commission dealt the case of Uber regarding the breach of privacy and data security[55], the state procedure against Uber data breach was also held in the state of California[56] and Pennsylvania[57] and other states.

Uber was "lucky" as far the 2016 breaches were dealt in the countries under the previous legislation before the GDPR came into force. Otherwise the sanctions might be higher based on the rules of GDPR where the sanctions might be calculated based on the annual global revenue.

4. Discussion and conclusion

Sharing economy is not a new phenomenon. Currently is rising and obtaining a great potential. Legally there is not one common definition of shared economy, while scholars differ between the collaborative economy and the shared economy arguing with different meanings. From the word sharing comes that the main objective of the economy, which is to share. Share services, goods, digital content and data. It is no doubt that data became already a currency in digital word and a consumer can buy digital products based on exchange of its personal data. Personal data not compering to any other data losing its value in case it is used repeatedly. This approach was supported by new directive on certain aspects concerning contracts for the supply of digital content and digital services.

Sharing economy has more than two subjects involved in the transaction. It so called "prosumers" where consumers and providers of services are connected via digital platform. Also, different categories of data are collected by the digital platforms personal and non-personal too. Some data might not have any value at the first sight for consumer but later discovering the data help the platforms to adjust the price for consumers needs (even taking advantage of the discomfort of the consumer such as low battery on mobile phones).

Right to data portability has a special value in the digital world with its main aim to make the position of the platform and the consumer as balanced as possible, mostly when used together with the right to erase data. Practical usage of the "power" of that right is questionable in shared economy, mostly when the

[54] Complaint available at: <https://buckleyfirm.com/sites/default/files/Buckley%20Sandler%20InfoBytes%20Washington%20State%20v.%20Uber%20Technologies%20-%20Complaint%2020 17.11.28.pdf> (14.04.2020).

[55] Case documents available at: <https://medium.com/golden-data/case-study-uber-technologies-inc-data-breach-7261484d6471> (14.04.2020).

[56] Documents to the case available at: <https://oag.ca.gov/system/files/attachments/press-docs/uber-final-judgmentscanned_0.pdf> (14.04.2020).

[57] Documents available at: <https://news.justia.com/wp-content/uploads/2018/03/2018-03-05-Uber.pdf> (14.04.2020).

references and reputation of the consumer (user of the data platform) is valuable even more than data added or created by him. With the extensive interpretation of the right that includes also the data controllers have collected upon consent or according to a contract. In case those data would not be transferable practically (being able to proceed also be the new platform) the effect and the power of the right to data portability would be in question.

Uber as a giant game player in the field of shared economy was put into a question whether the platform is considered as an information society service or a transport service, where the Court of Justice provided clear reply in the famous case Elite taxi discussed in this article. Both elements of the platform shall be considered, and the legal requirements shall be met by the digital platform too. A chain reaction on the data protection breach in more countries was discusses in the article where Uber faced legal actions in different stated for a one chain of data breaches.

It might be predicted that the shared economy will raise more due to its popularity among consumers, service providers, platforms. The role of the legislators is to focus and think about this type of economy which shall not be left behind any new legislative measures taken. The position of digital platforms as players in the shared economy might be misused in case if not regulated and supervised properly.

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Notion of Anticompetitive Agreement Challenged in Digital Environment*

Mária T. Patakyová**

Summary: Prohibition of anti-competitive agreements pursuant to Article 101 TFEU and its counterparties in competition law of the EU member states is divided into three forms: agreements, concerted practices, decisions of association of undertakings. Each of them covers a different type of colluding and as such should cover a wide range, ideally all anticompetitive colluding. However, it has been recognised that certain potentially anti-competitive dealings are not covered by any of these forms. The very much discussed example is tacit collusion. This article explores these issues and it sets them into the digital environment. The question to be discussed here is whether the issues are deteriorating in digital environment. A supposed scenario is used to present problems of determination whether a dealing is an anticompetitive agreement.

Keywords: Article 101 TFEU, Anticompetitive agreements, Collusions, Concerted practices, Decisions of associations of undertakings, Pricing algorithms, Competition in digital environment

1. Introduction

Competition law has always been full of ambiguous terms. These terms are put into life by decisions of competition authorities and judgements of courts. Such approach is beneficial due to the fact that competition law is aiming on covering an economic reality[1]. Thus, very clear and strict legal restrictions would be easily circumvented by innovative business approaches.

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[1] However, the assessment depends on which school of economics one follows. Much has been written on behavioural economics which question neoclassical's assumption of rationality. BELLOVÁ, J. Behavioural Economics and its Implications on Regulatory Law. *International and Comparative Law Review*, 2015, vol. 15, no. 2, pp. 89–102, p. 91.

Prohibition of anticompetitive agreements follows this logic. Article 101 TFEU, which is at the centre of this article's discussion, uses several terms which might be interpreted in multiple ways. The question is whether the terms are flexible enough to cover situations brought by modern, digital age.

In order to discuss this issue, the article is divided into two parts. The first one focuses on the notion of agreement with all its three forms stated in Article 101 TFEU: agreements in narrow sense; decisions of associations of undertakings; concerted practices. It analyses chosen cases of the Court of Justice of the EU in order to establish what is at the centre of each of these terms. The second part moves on to digital environment where competition law must operate nowadays. It is not the aim of this article to assess all the issues brought by digital era. The second part rather introduces the digital environment and it asks whether the notion of agreement in its broader sense (consisting of all three forms) covers dealings which might occur in digital word. A supposed scenario is discussed in this regard. The conclusion sums up the matters and it presents one of the possible ways forward.

2. Notion of agreement

Competition law in EU covers various questions.[2] One of the most significant is the prohibition of anti-competitive agreements. Article 101 TFEU states: "[t]*he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market* [...]".

We may identify several important elements which shall hold a dealing anticompetitive:

- dealing shall have an effect on trade between member states;
- dealing shall have as its object or effect the prevention, restriction or distortion of competition within the internal market;
- dealing shall be done by undertakings or association of undertakings;
- dealing shall have a form of an agreement, a decision by association of undertakings or a concerted practice.

The main concern for this article is the last point. Before moving into that one in more details, let us spend a word on the third point, i.e. let us briefly discuss the notion of undertakings.

[2] POVAŽANOVÁ, K., KOVÁČIKOVÁ, H. Multinational Tax Avoidance vs. European Commission. *Bratislava Law Review*, 2017, vol. 1, no. 1, pp. 133–141; p. 133.

It is one of the crucial notions of EU competition law, though it is not defined in the Treaties[3]. Number of CJEU judgement has dealt with the matter.[4] As stated in *Klaus Höfner* case, "[…] *the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed* [...]."[5]

Three important issues may be derived from this quotation. First, undertaking shall be engaged in an economic activity. In the *Klaus Höfner* case, employment procurement was considered to be an economic activity[6]; therefore, a public employment agency engaged in the business of employment procurement may be classified as an undertaking. Even an official authority may be engaged in economic activity. Here, however, it must be distinguished between exercise of official authority on the one hand, and economic activities of an industrial or commercial nature on the other.[7]

Second, the legal nature of the undertaking is not decisive. Therefore, a public entity may be an undertaking, regardless of whether it is a separate entity conferred with special rights or whether it is part of state administration.[8] Similarly, it is not important whether the entity is a legal person at all. It may consist of formally more legal persons, such as parent company and its subsidiaries, provided that subsidiaries may not genuinely decide on their own. In order words, if they operate as a single economic unit.[9]

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3 By the Treaties we understand Treaty on European Union (TEU) and Treaty on Functioning of the European Union (TFEU).

4 Naturally, the notion of undertakings is also discussed by scholars. See, for instance, BLAŽO, O. Can be EU Competition-law Concept of Undertaking Lesson for Bankruptcy Law? *European Studies – The Review of European Law, Economics and Politics*, 2016, vol. 3, no. 2, pp. 204–215; KALESNÁ, K., PATAKYOVÁ, M. T. Subjects of Legal Regulation – Different Approaches of Comeptition, Public Procurement and Corporate Law. In MILKOVIC, M., KECEK, D., HAMMES, K. (eds.): *Economic and Social Development ,46th International Scientific Conference on Economic and Social Development – „Sustainable Tourist Destinations", Book of Proceedings*. Varazdin: Varazdin Development and Entrepreneurship Agency, 2019 , pp. 210–219.

5 Case C-41/90 *Klaus Höfner a Fritz Elser vs Macrotron GmbH* [1991] ECLI:EU:C:1991:161, para 21.

6 *Ibidem*, paras 21–23.

7 Case C-343/95, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECLI:EU:C:1997:160, para. 16; Case 118/85 *Commission of the European Communities v Italian Republic* [1987] ECLI:EU:C:1987:283, para 7. Similarly, this concept applies in state aid sphere. See a recent decision in joined cases C-262/18 P and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s.* [2020] ECLI:EU:C:2020:450, paras. 28 et seq.

8 Case C-343/95, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECLI:EU:C:1997:160, para. 17; Case 118/85 *Commission of the European Communities v Italian Republic* [1987] ECLI:EU:C:1987:283, para. 8.

9 Case C-22/71 *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECLI:EU:C:1971:113; CRAIG, P., DE BÚRCA, G. *EU Law – Text, Cases and Materials. Sixth Edition*. Oxford: Oxford University Press, 2015, p. 1004.

Third, the way in which an entity is financed is not of importance here either. This point is interconnected with the first one. Furthermore, the entity does not have to be a profit organisation.[10]

2.1. Agreements

At the very beginning, it shall be stressed that "agreement" may be understood in two ways. The agreement in a broader sense of the word covers all three forms of dealing mentioned in Article 101 TFEU, i.e. agreements, decisions of associations, concerted practices. The agreement in its narrower sense is addressing the first form only. This part of the article will be dedicated to agreements in the narrow sense.[11]

The notion of agreement has a specific meaning within EU competition law. It is not related to the notion of contract, as it may be defined in various EU member states. The definition of an agreement is a Union one and it flows from the case law.

The first element which must be fulfilled in order to conclude an agreement is that at least two parties must be part of the agreement. The two parties may not fall within one undertaking. Thus, agreements between two legally separated companies which are parts of the same undertaking may not infringe Article 101(1) TFEU.

The requirement of at least two parties also means that unilateral conduct of an undertaking is not an agreement. Such unilateral conduct escapes the prohibition in Article 101(1) TFEU.[12] It may, however, be prohibited based on Article 102 TFEU[13].

To distinguish between what is and what is not a unilateral conduct proved to be onerous.[14] The Court acknowledged in Bayer that "*the existence of an agree-*

[10] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999], ECLI:EU:C:1999:430, paras. 74 et seq.

[11] Naturally, it is not possible to capture all nuances of the term "agreement" within a few pages provided for this purpose in this article. Neither it is the aim of this article. Therefore, this part will only describe some fundamental pieces of information which are needed for further discussion, deliberately leaving apart other elements, such as single overall agreement.

[12] Case 107/82 *AEG* v *Commission* [1983] ECLI:EU:C:1983:293, para. 38; joined cases 25/84 and 26/84 *Ford and Ford Europe* v *Commission* [1985] ECLI:EU:C:1985:340, para. 21; case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECLI:EU:T:1994:79, para. 56, Case T-41/96 Bayer AG v Commission of the European Communities, ECLI:EU:T:2000:242, para. 66.

[13] 102(1) TFEU: *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*.

[14] Joined cases 25/84 and 26/84 *Ford and Ford Europe* v *Commission* [1985] ECLI:EU:C:1985:340, case C-2/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG* [2004] ECLI:EU:C:2004:2

ment within the meaning of that provision can be deduced from the conduct of the parties concerned"[15], however, it ruled that "*such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others*."[16]

The second element is related to the formal requirements. As laid down by case law, "[…] *it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way* […]"[17]. This expression does not have to fulfil any formal requirements, it may be expressed or implied.[18] The agreement may be in an oral form.[19] Therefore, it is well possible that a valid contract under national contract law is not concluded.[20] It was established in early case law that a gentlemen's agreement may fall under Article 101(1) TFEU.[21]

The agreement may be evidenced by documents in a written form. For instance, a correspondence between undertakings may serve as evidence that there was a concurrence of wills.[22]

What is required in essence is a concurrence of wills of the undertakings concerned, "[…] *the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention*."[23] This approach is necessary due to the fact that many undertakings would like to hide their agreement, especially if they are aware of the fact that the agreement is prohibited by Article 101(1) TFEU. Thus, what may occur is a situation where a conduct appears to be unilateral, however, it is, in fact, an agreement between two

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15 Case C-2/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG* [2004] ECLI:EU:C:2004:2, para. 100.

16 *Ibidem*, para. 101.

17 Case T-41/96 *Bayer AG v Commission of the European Communities* [2000] ECLI:EU:T:2000:242, para 67. See also Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECLI:EU:C:1970:71, para. 112; joined cases 209/78 to 215/78 and 218/78 *Heintz van Landewyck SARL and Others v Commission of the European Communities* [1980] ECLI:EU:C:1980:248, para. 86; Case T-7/89 *SA Hercules Chemicals NV v Commission of the European Communities* [1991] ECLI:EU:T:1991:75, para. 256.

18 Case T-41/96 *Bayer AG v Commission of the European Communities* [2000] ECLI:EU:T:2000:242, para. 72.

19 Case 28/77 *Tepea BV v Commission of the European Communities* [1978], ECLI:EU:C:1978:133, para. 41.

20 Case T-41/96 *Bayer AG v Commission of the European Communities* [2000], ECLI:EU:T:2000:242, para. 68.

21 Case 41-69 *ACF Chemiefarma NV v Commission of the European Communities* [1970] ECLI:EU:C:1970:71, para. 9.

22 Case C-260/09 P Activision Blizzard Germany GmbH v European Commission [2011] ECLI:EU:C:2011:62; para. 73.

23 Case T-41/96 *Bayer AG v Commission of the European Communities* [2000], ECLI:EU:T:2000:242, para 69.

undertakings. This is the case if one undertaking conducts an apparently unilateral conduct and it receives a tacit acquiescence from the other undertaking.[24]

Following the economic rather than legal view on the notion of agreement, it is not relevant whether the persons who concluded the agreement has the authority to do so. "*It is rarely the case that an undertaking's representative attends a meeting with a mandate to commit an infringement*".[25] Therefore, it is not required that partners or CEOs of the undertaking authorised such agreement. As a matter of fact, they do not have to have a knowledge about it at all. "[…] *action by a person who is authorised to act on behalf of the undertaking suffices*".[26]

The third element of the agreement's definition is related to its implementation. Article 101(1) TFEU prohibits the agreement itself. Even if the agreement was never implemented, undertakings concerned may still be punished for infringement of EU competition law.[27]

2.2. Concerted practices

Before jumping into the discussion related to concerted practices themselves, it is important to note that a concerted practice may be applied together with an agreement in its narrow sense. One of the parties in *LVM* case challenged the double classification of the conduct as an agreement and/or concerted practice.[28] The Luxembourg court ruled that "[…] t*he Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article* [101 TFEU]"[29]

From legal point of view, both agreements and concerted practices may be forbidden by Article 101 TFEU. Thus, it is not crucial to distinguished between an agreement and a concerted practice. These may be only different manifestations

[24] *Ibidem*, para 71.

[25] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* [2013] ECLI:EU:C:2013:71, para. 26.

[26] *Ibidem*, para 25; joined cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECLI:EU:C:1983:158, para. 97.

[27] WHISH, R., BAILEY, D. *Competition Law. Ninth Edition*. Oxford: Oxford University Press, 2018, p. 104.

[28] Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission of the European Communities* [1999] ECLI:EU:T:1999:80, para. 695.

[29] *Ibidem*, para 696.

of the very same infringement of Article 101(1) TFEU.[30] The same applies for decisions of associations of undertakings.[31] In order words, the crucial point is to distinguish between collusive and non-collusive behaviour.

There are several points to make in relation to concerted practices themselves. First, we must bear in mind that undertakings, especially cartelists, are aware of the fact that they are committing an infringement of competition law. Consequently, they will do all in their power to hide the collusion between them, especially they can destroy incriminating evidence based on which an agreement between them may be proved.[32]

Second, there is a thin line between collusive practice and parallel behaviour on the market. The situation on the market and the behaviour of undertakings may be determined by their collusive intention as well as by their economic rationalisation of how to respond to competitors' tactics.

The case which laid down the fundaments of concerted practices theory is *ICI v Commission*. In the given time, there were three general and uniform price increases of dyestuffs.[33] The Court acknowledged that[34]:

- coordination may become apparent from the behaviour of undertakings on the market;
- parallel behaviour may serve as a strong evidence of a concerted practice "if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market"[35];
- a concerted practice possibly occurs if the parallel conduct stabilises the prices on an above-competition level.

In this case, the existence of the concerted practice was substantiated by price developments in particular member states;[36] instructions to raise prices[37] and contacts between undertakings[38].

In *Suiker Unie* case, the Court defined a concerted practice as "*a form of coordination between undertakings, which, without having been taken to the stage*

[30] Case C-49/92 *Commission of the European Communities v Anic Partecipazioni SpA* [1999] ECLI:EU:C:1999:356, para. 113.

[31] Ibidem.

[32] WHISH, R., BAILEY, D. *Competition Law. Ninth Edition*. Oxford: Oxford University Press, 2018, p. 116.

[33] Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECLI:EU:C:1972:70, para. 1.

[34] Ibidem, paras. 65–68.

[35] Ibidem, para. 66.

[36] Ibidem, paras. 69 et seq.

[37] Ibidem, p. 642, para. 88.

[38] Ibidem, para. 96.

where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market"[39]

For an agreement to be conclude, a concurrence of wills must take place. For a concerted practice to occur, undertakings must knowingly substitute competition for cooperation.[40] There is no need for a meeting of minds or existence of a common course of conduct.[41] Hence, an undertaking that want to be out of reach of concerted practices shall independently determine its business strategy.[42] Naturally, the undertaking may react on behaviour of its competitors, however, it may not be in contact with them, especially if such contact would influence their business strategies.[43]

The Court of Justice was engaged with digital aspects of collusion in *Eturas* case.[44] Travel agencies were using an information system to sell travel packages. This system was supposed to uniform booking method. The administrator of the system sent (through a personal e-mailbox) a message that the discounts on products sold through that system would henceforth be capped. Subsequently, the system was technically modified. The travel agencies were presumed that they have participated in a concerted practice, provided that they had been aware of the message. However, if they publicly distanced themselves from the practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, the assumption did not apply.[45]

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[39] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECLI:EU:C:1975:174, para. 26.

[40] Joined cases C89/85, C104/85, C114/85, C116/85, C117/85 and C125/85 to C129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECLI:EU:C:1993:120, para. 63; case C8/08 *TMobile Netherlands and Others* [2009] ECLI:EU:C:2009:343, para. 26.

[41] Case T587/08 *Fresh Del Monte Produce, Inc. v European Commission* [2013] ECLI:EU:T:2013:129, para. 300.

[42] Ibidem, para. 301; Joined cases C89/85, C104/85, C114/85, C116/85, C117/85 and C125/85 to C129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECLI:EU:C:1993:120, para 63; case C7/95 P *John Deere* v *Commission* [1998] ECLI:EU:C:1998:256, para. 86; case C8/08 *TMobile Netherlands and Others* [2009] ECLI:EU:C:2009:343, para. 32

[43] Case T587/08 *Fresh Del Monte Produce, Inc. v European Commission* [2013] ECLI:EU:T:2013:129, para. 302.

[44] Case C-74/14 "Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba [2016] ECLI:EU:C:2016:42.

[45] For comments on this case, see, for instance, LAMADRID, A. *ECJ's Judgment in Case C-74/14, Eturas (on the scope of "concerted practices" and on technological collusion)*. [online]. Available at: < https://chillingcompetition.com/2016/01/22/ecjs-judgment-in-case-c-7414-eturas-on -the-scope-of-concerted-practices-and-on-technological-collusion/>; LAWRANCE, S.,

2.3. Decisions of associations of undertakings

Anti-competitive agreements *stricto sensu* may have various forms. The scope of Article 101(1) TFEU is even broadened by concerted practices, not requiring the concurrence of wills to take place. However, that is not all. The infringement of Article 101(1) TFEU may take a form of a decision of an association of undertakings.

Firstly, it shall be remembered that associations of undertakings do not need to fulfil the definition for undertakings. They do not necessarily need to be involved in an economic activity. However, Article 101(1) TFEU covers decisions of such associations.

It is important that an association associates undertakings and not some other entities. The Court of First Instance stated in FNCBV that farmers are involved in economic activity, i.e. production of goods for remuneration; hence *"the unions which bring them together and represent them, and the federations which bring the unions together, may be described as associations of undertakings"*.[46]

Secondly, associations of undertakings may serve for legitimate purposes. However, they may also be established for anticompetitive purpose. Suppose a group of undertakings intend to commit a price fixing. They may form an association which will issue guidelines or rules on prices. A price cartel would effectively be established. Associations may be especially fruitful if the cartel shall comprise large number of undertakings which would otherwise be difficult to manage and monitor their compliance with cartel rules.[47]

Thirdly, as to the type of restriction, decisions of associations of undertakings may take the form of by object as well as by effect restrictions. For instance, if associations fix minimum prices for certain goods, with the aim of making them binding on all traders, such dealing has the object of restricting competition.[48]

LISNER, M. *Eturas – Any conclusions on platform collusion… ?* [online]. Available at: < http://competitionlawblog.kluwercompetitionlaw.com/2017/01/19/eturas-conclusions-platform-collusion/?doing_wp_cron=1598453604.6673059463500976562500>

[46] Joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v Commission of the European Communities* [2006]. ECLI:EU:T:2006:391, para. 54.

[47] WHISH, R., BAILEY, D. *Competition Law. Ninth Edition*. Oxford: Oxford University Press, 2018, p. 114.

[48] Joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v Commission of the European Communities* [2006]. ECLI:EU:T:2006:391, para. 85; case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECLI:EU:C:1985:33, para. 22.

Fourthly, Article 101(1) prohibits *decisions* of associations of undertakings. The notion of decisions has an EU definition. It was established in case law that decisions cover, for instance, a recommendation, even if it is not binding, if compliance with such recommendation has an appreciable influence on competition.[49] If recommendations determine the conduct of a large number of association's members, they have an appreciable influence on competition.[50] The association does not necessarily have to be in a position to force its members (undertakings) to fulfil the obligations imposed on them.[51]

Apart from that, Whish and Bailey identified that decisions may take form of constitution of a trade association, regulations governing the operation of an association, agreement entered into by an association.[52]

3. Digital environment

The world is inevitable moving towards a digital age. Even before the pandemic of COVID-19, many offline activities were moved into the online world. This was enhanced by the pandemic which may result into aggravation of the legal enforcement.[53]

Digital environment is related to many factors.[54] A lot has been written about big data and their influence on competition policy.[55] However, not all issues are related to data *per se*. The technology that processes data is equally challenging from the regulatory perspective.[56]

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[49] Joined cases 96–102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission of the European Communities* [1983] ECLI:EU:C:1983:310, para. 20.

[50] *Ibidem*, para. 21.

[51] Joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v Commission of the European Communities* [2006]. ECLI:EU:T:2006:391, para. 89; case 71/74 *Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geimporteerd fruit "Frubo" v Commission of the European Communities and Vereniging de Fruitunie* [1975] ECLI:EU:C:1975:61, paras. 29 to 31.

[52] WHISH, R., BAILEY, D. *Competition Law. Ninth Edition*. Oxford: Oxford University Press, 2018, p. 114 and the references therein.

[53] The impact of the pandemic on legal regulation is preview in many fields. See, for instance, PATAKYOVÁ, M., GRAMBLIČKOVÁ, B. Mandatory and Default Regulation in Slovak Commercial Law. *Bratislava Law Review*, 2020, vol. 4, no. 1, pp. 93–111, p. 107.

[54] Naturally, it is not only competition law which must adapt to digital age. See, for instance, CIBUĽKA, T., KAČALJAK, M. Tax Treaty Override in Slovakia – Digital Platform Permanent Establishment. *Bratislava Law Review*, 2018, vol. 2, no. 1, pp. 80–88.

[55] *See*, for instance, STUCKE, M. E., GRUNES, A. P. *Big Data and Competition Policy*. Oxford: Oxford University Press, 2016, pp. 16–28.

[56] How competition law is affected by digital environment is also a subject matter of many conferences. See, for instance, BLAŽO, O. The Challenges of Regulating and Enforcing Competition

AI technologies are characterised by opacity, complexity, unpredictability and partially autonomous behaviour.[57] Under such conditions, the compliance with legal regulations is, in general, complicated. The following part will be dedicated to the issues of pricing algorithms and their assessment under 101(1) TFEU.

3.1. The problem of pricing algorithms

Algorithms may serve for various purposes. They are capable of making the processes more efficient, thus be to the benefit of consumers. As put by Competition & Markets Authority, "*algorithms can reduce transaction costs for firms, reduce frictions in markets, and give consumers greater information on which to base their decisions*"[58] Pricing algorithms may use artificial intelligence, big data techniques, data and analysis of competitors' and consumers' behaviour.[59]

Yet, they may also be used for illegal acts, e.g. cartels. Several authors have claimed that digital environment is able to facilitate collusion.[60] It is not the aim of this paper to assess all aspects related to pricing algorithms. Rather, the paper would like to present one possible scenario and analyse whether it will be covered by any of the forms of agreements recognised by Article 101(1) TFEU.

3.2. Pricing algorithm in a supposed scenario

Suppose a parallel use of the same pricing algorithm by economic operators in public procurement, i.e. tenderers. These tenderers would be undertakings at the same time.[61] The facts of the case would be as follows: there is a pricing

Law (Bucharest 14 –15 November 2019). *Bratislava Law Review*, 2019, vol. 3, no. 2, pp. 100–103.

57 EUROPEAN COMMISSION. *WHITE PAPER On Artificial Intelligence - A European approach to excellence and trust*. [online]. Available at: <https://ec.europa.eu/info/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en>, p. 13.

58 Competition & Markets Authority. *Pricing algorithms*. [online]. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf >, p. 3.

59 GAL, M. S. *Algorithms as Illegal Agreements*. [online]. Available at: < https://ssrn.com/abstract=3171977>, p. 11.

60 *Ibidem*, p. 13.

61 For the clarification of the notion, see 7. KALESNÁ, K., PATAKYOVÁ, M. T. Subjects of Legal Regulation – Different Approaches of Cometition, Public Procurement and Corporate Law. In MILKOVIC, M., KECEK, D., HAMMES, K. (eds.): *Economic and Social Development ,46th International Scientific Conference on Economic and Social Development – „Sustainable Tourist*

algorithm on the market which is used by tenderers/undertakings to calculate the price for their product or services. This pricing algorithm is developed by a third party, a software company. Undertakings purchase the pricing algorithm from the third party and they do not have a written agreement among themselves that they must purchase the price algorithm from the third party. The market is characterised by a relatively small number of undertakings and high barriers to entry.

The use of the same pricing algorithm is likely to be present.[62] The purchase of an off-the-shelf pricing algorithm is not imaginary as such pricing algorithms do exists.[63] A question arises whether and under which circumstances will the use of the same pricing algorithm by undertakings, purchased from the same third party, be considered as an infringement of Article 101(1) TFEU.[64]

In the terminology used by Ezrachi and Stucke[65], this scenario would fall within the second category of collusion, a so-called "*Hub and Spoke*". This category of collusion is characterised by "*the use of a single algorithm to determine the market price charged by numerous users.*"[66] As an example, Exrachi and Stucke present the price algorithm Uber uses to set the price for a taxi drive.[67] The agreement between algorithm developer and algorithm users exists. However, this agreement does not have to comprise an agreement on price fixing. It may be the parallel use of the same algorithm which may lead to the same result as price fixing.[68] Pursuant to the authors, it is necessary to see the internal design

Destinations", Book of Proceedings. Varazdin: Varazdin Development and Entrepreneurship Agency, 2019, pp. 210–219.

62 Competition & Markets Authority. *Pricing algorithms*. [online]. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf >, p. 4.

63 GAL, M. S. *Algorithms as Illegal Agreements*. [online]. Available at: < https://ssrn.com/abstract=3171977>, p. 11.

64 If so, such collusion may have severe consequences. 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, p. 288; PATAKYOVÁ, M. T. Initial Thoughts on Influence of Artificial Intelligence on Bid Rigging. *EU Business Law Working Papers*, 2019, no. 1, pp. 1-9. [online] Available at: < https://ces.sze.hu/images/working_papers/eublaw_wp_1_2019.pdf>, p. 4.

65 EZRACHI, A., STUCKE, M. E. *ARTIFICIAL INTELLIGENCE & COLLUSION: WHEN COMPUTERS INHIBIT COMPETITION* [online]. Available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591874>.

66 Ibidem, p. 1782.

67 Ibidem, p. 1788.

68 As put by the same authors elsewhere, the use of the same algorithm may be an attempt to restrict competition as well as an unintentional alignment and use of the same/similar algorithm to monitor prices. EZRACHI, A., STUCKE, M. E. *Virtual Competition. First Edition*. Cambridge, Massachusetts: Harvard University Press, 2016, p. 48.

of the algorithm to see whether it may lead to exploitation. If so, the anti-competitive character may be established. If not, the nature of the agreement may be established, evidence on parties' intent may be useful.[69]

The distinctive feature between our scenario and the Uber-like Hub and Spoke scenario is a lack of further relations between the third party developing the pricing algorithm and the undertakings that use it.[70] However, the Hub and Scope category appears to cover our scenario nevertheless.[71]

3.3. Does it fall within any form of agreement?

Would such parallel use of the same pricing algorithm be prohibited? There is no clear-cut answer to the question. First, there is no clear horizontal agreement between undertakings. The concurrence of wills might have taken place, but this is not clear from external evidence. The competition authority would need to inspect the internal documents, emails etc. in order to find out whether there was an agreement or not. If no evidence is find, the first form of agreement pursuant to Article 101(1) TFEU cannot be established.

Regarding an agreement, there is clearly a vertical agreement (or rather agreements) between the third party and each of the undertakings. The question is whether these vertical agreements were anticompetitive. If the third party has merely supplied the pricing algorithm to every undertaking that asked for it, vertical agreement is probably not anticompetitive.

Second, even if no evidence on agreement *stricto sensu* is found, undertakings may have adopted a concerted practice. For this to take place, there is no need to meeting of minds or concurrence of wills. What competition authorities would be looking for here is an unnatural behaviour on the market, where undertakings have knowingly substituted a practical cooperation between them for the risks of competition.

However, the undertakings may claim, as in *Austrienne and Rheinzink*,[72] that the concerted practice is not the only explanation of the parallel use of the pricing algorithm. They may claim that the algorithm was working properly, had a good

[69] EZRACHI, A., STUCKE, M. E. *ARTIFICIAL INTELLIGENCE & COLLUSION: WHEN COMPUTERS INHIBIT COMPETITION* [online]. Available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591874>, pp. 1788-1789.

[70] For further discussions regarding Hub and Spoke conspiracies, see EZRACHI, A., STUCKE, M. E. *Virtual Competition. First Edition*. Cambridge, Massachusetts: Harvard University Press, 2016, pp. 46 et seq.

[71] Ibidem, p. 49.

[72] Joined cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECLI:EU:C:1984:130.

price, had a stable support etc. It is questionable how the competition authorities would cope with such situation.

Without a piece of evidence on collusion, such as instructions on price developments or contacts between undertakings, it may be difficult to establish that the undertakings colluded. The pieces of evidence such as current prices and price developments of particular undertakings may not prove the concerted practice itself, as all undertakings use the same pricing algorithm which may explain their similar or even identical pricing behaviour.

Third, collusion may take a form of decision of association of undertakings. If the undertakings are associated in an association which instructed them (even on a non-binding basis) to use the same pricing algorithm, Article 101(1) might be breached. However, if there is no such association, or if the association did not instruct them in any way, this form of collusion did not take place.

4. Conclusion

This article dealt with the notion of agreement within Article 101 TFEU. Three forms of agreements, agreements in their narrow sense, concerted practices and decisions of associations of undertakings were presented. The article briefly introduced the problems which may occur due to the digital environment the competition takes place in and it focused on pricing algorithms. In order to show how the notion of agreement in its broader sense may be insufficient to cover all anticompetitive agreements, the article presented a supposed scenario where undertakings in a particular sector would use the same pricing algorithm provided by the same third party. The paper pointed out that certain types of collusion may not be caught by any of the forms mentioned in Article 101 TFEU.

The most useful of the three forms seem to be a concerted practice. However, in order to establish that such practice takes place on the market, competition authorities might need to have more evidence than only a piece of evidence on prices and their development. This is due to the fact that undertakings may claim that the use of the same pricing algorithm is substantiated by other reasons than collusion. For instance, that particular algorithm might be the best on the market.

Naturally, the borderline between the parallel behaviour and tacit collusion has always been a thin one. The question is whether it is not getting thinner in digital environment. If this is so, one may wonder whether stricter liability for undertakings is not necessary. For instance, undertakings might be asked to intentionally avoid the creation of possible concerted practices. This might be a similar obligation as the one which is imposed on dominant undertakings by Article 102 TFEU. It may, of course, be justifiable only in certain sectors,

such as the undertakings which are participating in tendering procedures. Apart from the sector approach, the sticker liability may be applicable if a red flag is present.

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Is the Case Law of ECtHR Ready to Prevent the Expansion of Mass Surveillance in the Post-Covid Europe?

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Summary: The COVID-19 may become a new opportunity for expanding mass surveillance by states. It is already called a security threat, and states are taking appropriate measures to prevent it, including restricting human rights. Abandoning surveillance technology will not be easy after a pandemic and mass surveillance can become the standard for preventing threats. To prevent such a scenario, the approach of the European Court of Human Rights (ECtHR) may be a turning point in the expansion of mass surveillance. The research examines the current case-law of the ECtHR in order to analyse the attitude of ECtHR to mass surveillance. The research is focused on the question whether it can help to prevent the mass surveillance to be the norm for the post-pandemic world. The research reveals an increasing bias in case law of the ECtHR towards legalizing mass surveillance and the lack of updating the new criteria for the legality of mass surveillance. The ECtHR is likely to agree with most of the measures that states have introduced to prevent the COVID-19. Authors note that a due attention should be paid to human rights as potentially an effective tool to prevent widespread legalization of mass surveillance. The issue of using invasive tools to regulate mass surveillance, which are now used to resolve the COVID-19 situation, may become even more significant in the future.

Keywords: European Court of Human Rights, COVID-19, privacy, mass surveillance

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1. Introduction

The term "mass surveillance" is used to describe the scope of data collection measures and can be applied within both the criminal legal paradigm and the paradigm related to the extraction of intelligence data in the protection of state security. However, digital surveillance has also become a "new type" of disease prevention. The pandemic made it possible to legalize mass surveillance as a method to fight against COVID-19. The World Health Organization (hereafter-WHO) mentions "tracing and quarantine of contacts" as one of core public health measures that breaks the chains of transmission[1] and as one of basic components it should be central to every national COVID-19 response.[2]

More and more countries (such as Spain, France, the United Kingdom, Italy, Germany, Switzerland, Israel, Estonia, Armenia or Latvia) have started using technologies to track the movement of citizens in order to monitor quarantine measures and establish contacts of patients. The impact of the pandemic on the level of human rights protection is undeniable. Ten of the forty-seven member countries of the Council of Europe have already notified about derogations from their obligations in emergency situations under article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) in connection with coronavirus infection. A more accurate assessment of this impact of COVID-19 in human rights will be seen when measures taken by the Governments will be analysed in judgments of the European Court of Human Rights (hereafter ECtHR). But at present the question arises: what is the attitude to mass surveillance in case-law of ECtHR and can it helps to prevent the mass surveillance to be the norm for the post-pandemic world?

2. Possible issues that COVID-19 may raise with ECtHR

The privacy or security debate has been going on for many years. With the development of digital technologies it has become one of the main moral, ethical and legal dilemmas. Yuval Noah Harari warns that humanity can lose freedom at a time when many are willing to sacrifice everything for the sake of a sense

[1] Considerations for quarantine of contacts of COVID-19 cases Interim guidance World Health Organization; 2020. 19 August 2020, p. 1.

[2] Critical preparedness, readiness and response actions for COVID-19. Geneva: World Health Organization, 2020. [online]. Available at: https://apps.who.int/iris/bitstream/handle/10665/332665/WHO-COVID-19-Community_Actions-2020.4-eng.pdf

of security in the uncertain future.[3] So the main question that always comes up in terms of choosing between these categories sounds like this: how much freedom are we willing to give up for keeping our security? COVID-19 re-actualizes this question. It has caused a new wave of increasing control over everyone. Against the background of the pandemic geo-location tracking, face recognition system deployment, software pre-installation obligations, and phone tracking are taking place. For example, mobile operators in Italy, Germany, Belgium and Austria provide officials with generalized data for monitoring compliance with the quarantine. This information is officially collected in the general databases, created in the context of panic over the COVID-19.

However, it would be naive to believe that these technologies have only just begun to be developed. Technologies that allow tracking persons and collecting data from them have long existed and are used by many states. Nick Srnicek in "Platform Capitalism"[4] shows, that for some of the modern digital platforms, the main business model is the collection of user data and their capitalization.

The legality of the use of these technologies has already been the subject of consideration by the ECtHR and it already has developed some criteria for evaluating the protection of digital rights. But the pandemic has opened new horizons for mass surveillance, made it easier and expanded the possibilities of collection of information about a person. Mass surveillance is evaluated as a means of ensuring security and even approved by the data subject itself, which no longer grabs its privacy, even if it transmits a larger volume of personal data.

Nevertheless, such technological measures introduced to prevent the spread of the coronavirus can be used as methods of mass surveillance. The human rights organization Amnesty International's Security Lab have released a report mentioning the contact tracing applications to track infections developed by several countries and have found some of them as most dangerous for privacy.[5] Therefore, the emergence of new tools for digital surveillance raises questions about the protection of digital rights, especially in unequal conditions of the state, business and users. The ECHR, as a guarantor of human rights, may prevent to some extent the use of the contract tracking apps as mass surveillance methods. This implies the need to adapt case law of the ECtHR to these kinds of modern challenges to privacy.

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[3] HARARI, Yuval, Noah. *The world after coronavirus 20 March 2020*. "The Financial Times". [online]. Available at: https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75

[4] See more: SRNICEK, N. Platform Capitalism. **Cambridge**: Polity, 2016.

[5] *Bahrain, Kuwait and Norway contact tracing apps among most dangerous for privacy*. 16 June 2020. [online]. Available at: https://www.amnesty.org/en/latest/news/2020/06/bahrain-kuwait-norway-contact-tracing-apps-danger-for-privacy/

Contact tracking apps are used in about twenty eight countries, fourteen of them in Europe. Apps in Russia and Armenia were compulsory to download. In Germany, Austria, Italy mobile operators are sharing location data with health ministries. Another issue that will be considered in the near future is the possible revision of the limits of the right to privacy, which may change after the pandemic. It is difficult to say what these changes will be. But there is no doubt that issues of privacy can become even more significant and cause more controversy, and the processes of its contestation and approval are even more visible. In the context of a broad focus on privacy and digital surveillance, it is important to remember that privacy is the result of a challenge process involving different groups: business, the state, and many civic associations. There is no unambiguous concept of privacy taken abstractly and regardless of the society in which it exists. Helen Nissenbaum expresses the idea of contextual integrity,[6] according to which the concept of privacy varies depending on the context, the potential threats we perceive, and ethical considerations.

In this regard, it may be necessary for the ECtHR to re-examine the scope of article 8 of the ECHR, especially the right to informational self-determination in the context of the definitely new role of technologies in society, to outline new contours of other human rights, to consider the relationship between them and technologies, and to find new balances between individual and collective interests. Digital surveillance and special programs will be very difficult to stop when the pandemic ends, because it is a unique tool for censoring and monitoring the mood of ordinary citizens. Therefore, the fight for privacy gets a new impetus and quarantine restrictions can become a new additional reason for appeals to the ECtHR. According to the report of the Council of Europe a number of measures taken by the authorities in the context of coronavirus "*will inevitably encroach on rights and freedoms which are an integral and necessary part of a democratic society governed by the rule of law*".[7]

The ECtHR may once again face a wave of complaints from public organizations that will challenge the use of mass surveillance technologies by authorities not only during the pandemic, but also after it, with the "screwing in" of the surveillance mechanism through a facial recognition system or software. That measure brought in to protect citizens, when most people accept that they are needed, could outlast the current crisis. Joseph Cannataci, the UN special rapporteur on the right to privacy, warns against that threat to privacy when using

[6] NISSENBAUM, Helen. *Privacy in Context: Technology, Policy and the Integrity of Social Life*. Standford: Stanford University Press, 2009.

[7] Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. SG/Inf(2020)11, 7 April 2020, p. 2.

surveillance to track people who have survived the epidemic.[8] It is a global pandemic that can become a cover for future invasive electronic spies. Without a proper, especially supranational monitoring, there is a risk that these tough new measures will become the norm around the world. The practice of the ECtHR can both facilitate and hinder their legitimization. Therefore, in the near future, it may not face the question of defining the fine line between data collection and total control. Modern reality can become the test for the Europe and for the ECtHR readiness to protect human rights in the digital age.

3. The mass surveillance in the case law of the ECtHR before the case Big Brother Watch v. UK

Before 2016 the ECtHR formed fairly rigid criteria for ”strict necessity” of surveillance, which were applied not only within the framework of the criminal legal paradigm, but also in the framework of protecting national security. The approach to assessing mass data interception in the ECtHR began to take shape with the case of Weber and Saravia v. Germany.[9] There the ECtHR checked the compatibility of the German legislation with the ECHR, which allowed interception of telecommunications for the purpose of detecting and preventing such dangers as an armed attack on Germany or a terrorist act.[10] The ECtHR summarized the criteria that should be applied to assess the predictability of the legal framework governing surveillance, which were later confirmed in Liberty and others v. United Kingdom.[11] The Court developed six safeguards (called the Weber criteria) that must be introduced into national legislation to avoid abuse of power, namely: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed.[12]

[8] BACCHI, Umberto. *Coronavirus surveillance poses long-term privacy threat, U.N. expert warns* [online]. Available at: https://www.reuters.com/article/us-health-coronavirus-privacy/coronavirus-surveillance-poses-long-term-privacy-threat-un-expert-warns-idUSKBN21I1XG

[9] ECtHR. Weber and Saravia v. Germany (Application no. 54934/00). Judgement of 29 June 2006.

[10] Ibid., p. 4.

[11] ECtHR. Liberty and Others v. the United Kingdom (Application no. 58243/00). Judgment of 1 July 2008.

[12] Ibid., p. 95.

The ECtHR took an even stricter approach to privacy violations in Zakharov v. Russia.[13] To Weber's criteria listed above, the Court added the standard of "reasonable suspicion" when considering surveillance cases. Moreover, this standard is beginning to be considered in relation to a broader scope of law, and not only in the field of criminal investigation and search for missing persons, as was done, for example, in Iordachi and Others v. Moldova.[14] In Zakharov v. Russia the Court tried to apply this standard to the sphere related to the collection of intelligence data in the framework of protecting state security. The ECtHR considered the legality of the provision of the Federal Law of the Russian Federation on operational-search activities, which made possible to use surveillance and to obtain information about events or actions (inaction) that pose a threat to the state, military, economic, information or ecological security.[15] Due to uncertainty and vastness of the "*events or actions (inaction) that pose a threat to the state, military, economic, information or ecological security"* the Court concluded that such a law *"does not give any indication of the circumstances under which an individual's communications may be intercepted on account of events or activities endangering Russia's national, military, economic or ecological security*".[16]

The ECtHR found that without access to relevant materials Russian courts were unable to verify whether there was a "substantial factual basis" to suspect the person being monitored.[17] The ECtHR recognized that, although signatory states have a certain margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security, judges must ensure adequate and effective guarantees against abuse.[18] The fact that these measures were ordered by a judge is an important guarantee against arbitrariness. At the same time, the Court pointed out that the issue of permits for surveillance by a non-judicial service may be compatible with the ECHR. The Court emphasized the need for an authorization procedure independent from the executive, while accepting that non-judicial authorities may be competent to authorize interception if they are capable of verifying the existence of a reasonable suspicion.[19]

Besides, according to this judgment, the ECtHR will assess the accessibility of the domestic law, the scope and duration of the secret surveillance measures,

[13] ECtHR. Roman Zakharov v. Russia. (Application no. 47143/06 [GC]). Judgment of 4 December 2015, p. 10.

[14] See also ECtHR. Iordachi and Others v. Moldova. (Application no. 25198/02). Judgment of 10 February 2009, p. 51.

[15] Пункт 2 статьи 7 ФЗ «Об оперативно-розыскной деятельности» от 12 августа 1995 года N 144-ФЗ с посл. изм. и доп. // Собрание законодательства РФ. 1995. N 33. Ст. 3349.

[16] Ibid., p. 248.

[17] Ibid., p. 261–262.

[18] Ibid., p. 232.

[19] Ibid., p. 260.

the procedures to be followed for storing, accessing, examining, using, communicating and destroying the intercepted data, the authorisation procedures, the arrangements for supervising the implementation of secret surveillance measures, and, any notification mechanisms and the remedies provided for by national law.[20]

Afterwards in Szabó and Vissy v. Hungary the ECtHR tested Hungarian legislation for compliance with the ECHR to the extent that it allows this measure to be used to collect information in order to prevent terrorist acts or preserve national security.[21] The ECtHR stated that "*it is a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies in pre-empting such attacks, including the massive monitoring of communications susceptible to containing indications of impending incidents*"[22] and that the priority now is to establish effective control over these laws.

The ECtHR interpreted the category of "necessary in a democratic society" as requiring "strict necessity," in the light of the particular character of the interference and the potential for mass surveillance. Surveillance must be strictly necessary in two senses: as a general consideration for the safeguarding of democratic institutions[23] and as a particular consideration for the obtaining of vital intelligence in an individual operation.[24]

The ECtHR also highlighted the need for authorization by the national courts (only in exceptional circumstances it is permissible to do so by the executive authorities, but only subject to subsequent judicial control).[25] The Court referring to Zakharov v. Russia held that "*in this field, control by an independent body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny*".[26] Thus, we can see a tightening of the requirement of judicial control in comparison with Zakharov v. Russia. Hungarian legislation was strongly criticized by the ECtHR as not conforming to the principle of strict necessity. The ECtHR referring to the Zakharov case indicated that "*a sufficient factual basis for the application of secret intelligence gathering measures which would enable the evaluation of necessity of the proposed measure – and this on the basis of an individual suspicion regarding the target*

[20] Roman Zakharov v. Russia. p. 238.

[21] Comp. ECtHR. Szabó and Vissy v. Hungary (Application no. 37138/14). Judgment of 12 January 2016, p. 7, 10 - 11. For an analysis of the judgment see also CARPENTER, Christine. *Privacy and Proportionality: Examining Mass Electronic Surveillance under Article 8 and the Fourth Amendment*. International and Comparative Law Review, 2020, vol. 20, no. 1, p. 37.

[22] Ibid., p. 68.

[23] Ibid., p. 54.

[24] Ibid., p. 73.

[25] Ibid., p. 77, 80, 81.

[26] Ibid., p. 77.

person".[27] The use of the "individual suspicion" standard instead of "reasonable suspicion" was criticized in concurring opinion of Judge Pinto de Albuquerque according to whom the ECtHR in the judgment chose the lower standard of an unqualified "individual suspicion". This "*diminishes significantly the degree of protection set out in Zakharov and previously in Iordachi and Others*".[28] Such an approach required national authorities to check whether there are sufficient grounds to intercept certain communications in each case.

The imposition of quite a strict framework on surveillance which was formed in the practice of the ECtHR until 2016 complicated the use of mass surveillance by states. The ECtHR welcomed only targeted surveillance and only if a set of Weber criteria against possible abuse were met.

4. The judgment of the ECtHR in Big Brother Watch v. UK and in Breyer v Germany: shift of approach

Judgment in Big Brother Watch v. UK

Following Snowden's revelations about the USA-UK surveillance and information exchange program, three applicants sued the UK.[29] They considered that several articles of ECHR were violated and tried to persuade the ECtHR to take into account the qualitative leap in the technical capabilities of state to intercept, store and process big data. In this case, the ECtHR considered the compliance of three main aspects of UK law governing mass electronic surveillance with the ECHR: the interception of communications, the exchange of intelligence, and the collection of metadata by telecommunications service providers.[30] Immediately after the trial Snowden announced: "*today we won*".[31] However, can this decision be considered as a victory of privacy?

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[27] Ibid., p. 71.

[28] Concurring opinion of Judge Pinto de Albuquerque. p.18.

[29] ECtHR. Big Brother Watch and Others v. United Kingdom (Applications nos. 58170/12, 62322/14 and 24960/15). Judgement of 13 September 2018 (referral to Grand Chamber, 4 February 2019). For an evaluation of the judgement see also CARPENTER, Christine. *Privacy and Proportionality: Examining Mass Electronic Surveillance under Article 8 and the Fourth Amendment.* p. 41.

[30] Ibid., p. 269.

[31] Bulk Data Collection By NSA and GCHQ Violated Human Rights Charter, European Court Rules. 14 September, 2018. [online]. Available at: //https://massive.news/2018/09/14/bulk-data-collection-by-nsa-and-gchq-violated-human-rights-charter-european-court-rules/.

In Big Brother Watch v. UK the ECtHR concluded that mass surveillance per se does not violate the ECHR and confirmed that it is subject to the broad discretion that States have when choosing how best to achieve a legitimate goal of protecting national security.[32]

This approach was a repetition of the position expressed in Centrum för Rättvisa v. Sweden,[33] in which the ECtHR held that Sweden's bulk interception regime was not *per se* out of step with Article 8 of the ECHR and its operation was within the state's margin of appreciation in light of "*current threats facing many Contracting States (including the scourge of global terrorism and other serious crime, such as drug trafficking, human trafficking, sexual exploitation of children and cybercrime), advancements in technology which have made it easier for terrorists and criminals to evade detection on the internet, and the unpredictability of the routes via which electronic communications are transmitted*."[34] This re-approval delineates the position of the ECtHR, which it will adhere to when further developing its case law.

The ECtHR's recognition of mass data interception as permissible per se removes a number of key parameters of verification for "legality", "necessity in a democratic society" and "proportionality". The ECtHR identifies four stages of mass surveillance technology: data interception, filtering, selection by search criteria and verification by analysts and promises that the broad discretion of States to decide whether to use this regime will be combined with strict control in subsequent stages.[35] What exactly does the ECtHR exclude from verification?

Firstly, the ECtHR in Big Brother Watch[36] points out that the very idea of ex post facto notification of the operation of the person about his/her being under the surveillance is logically incompatible with a mass surveillance system and should, therefore, be discarded. Before that, the ECtHR held a different position, which was formed in cases Weber and Saravia v. Germany and Szabó and Vissy v. Hungary.[37] According to the Court's previous position, "*subsequent notification is inextricably linked to the effectiveness of judicial protection measures and, consequently, to the existence of effective safeguards against abuse of monitoring power, since, in principle, the individual concerned will have little recourse to the courts unless they are notified of measures taken without their consent*"; and

[32] Ibid., p. 314.

[33] ECtHR. Centrum För Rättvisa v. Sweden (Application no. 35252/08). Judgment of 19 June 2018, p. 112.

[34] Ibid., p. 112.

[35] ECtHR. Big Brother Watch and Others v. United Kingdom (Applications nos. 58170/12, 62322/14 and 24960/15). Judgement of 13 September 2018, p. 315, 329.

[36] Ibid., p. 317.

[37] Weber and Saravia p. 135, Szabó and Vissy v. Hungary, p. 86.

that notification should be sent as soon as possible after the end of surveillance when it would not undermine the purpose of the measure.[38]

Secondly, the ECtHR refused to consider it necessary to obtain prior judicial permission to conduct such operations. In Roman Zakharov v. Russia the ECtHR stated that if the competence to authorize surveillance is not vested in a judicial authority, this may be compatible with the ECHR if that authority is sufficiently independent from the executive.[39] In Szabó and Vissy v. Hungary the ECtHR specified authorization by the judicial authorities as a necessary guarantee and only in exceptional circumstances allowed authorization by the executive authorities, and then only subject to subsequent judicial review.[40] The ruling in the Big Brother Watch states that although in the United Kingdom permission to conduct mass surveillance was not issued by either a judge or an independent administrative authority, there are no problems because several indications show that there is no abuse of executive power.[41] In this part, the ECtHR agrees with the report of the Venice Commission that independent supervision may be able to compensate for the lack of a court-issued permit.[42] The removal of this procedural requirement indicates the creation of a different approach depending on states: what was criticized for Hungary, Russia, Croatia, and Bulgaria is acceptable for Sweden and the UK.

Thirdly, regarding the nature of the offences that give rise to mass surveillance, the ECtHR pointed out that the focus should shift to the stage of selecting the information received for verification.[43] At the same time, the ECtHR recognizes that the general mention of threats to national security in the applicable legal acts is already sufficient to meet this requirement for verification. Using such a broad concept to define the reason for mass surveillance makes it possible for states to justify it broadly. As an argument for the correctness of its judgment, the Court indicates that national security constituted one of the legitimate aims to which national law referred.[44]

Fourthly, the ECtHR did not impose strict requirements for the formulation of a range of offences in acts on specific operations, although it noted that the use of clear expressions would be highly desirable.[45] For example the Big Brother

[38] Ibid. p. 86.
[39] Ibid., p. 258.
[40] Ibid., p. 77, 80, 81.
[41] See ibid., p. 381.
[42] Ibid., p. 318.
[43] ECtHR. Big Brother Watch and Others v. United Kingdom.(Applications nos. 58170/12, 62322/14 and 24960/15) Judgement of 13 September 2018 (referral to Grand Chamber, 4 February 2019).
[44] Ibid., p. 333.
[45] Ibid., p. 342.

Watch concerned phrases such as "*material providing intelligence on terrorism (...) including, but not limited to, terrorist organizations, terrorists, active sympathizers, attack planning, fund-raising*".[46] Recognizing such uncertainty as acceptable can also be interpreted as a sign of agreement for the broadest possible discretion of states to use mass surveillance.

There is also no requirement to determine the individuals whose data can be intercepted by the state. What is surprising is quite a naive claim that "*it is clear that the intelligence services are (not) exercising an unfettered discretion to intercept whatever communications they wish*".[47] In terms of the limits of this discretion, the ECtHR points to the need to comply with national legislation, as well as the proportionality of mass interception of data for the purpose being pursued.[48]

Rather unlimited nature of the mass surveillance regime is also reflected in the fact that the ECtHR refuses to apply the rule previously deduced in the decision of the case Weber and Saravia,[49] that the search criteria applied to intercepted data must be specified in the operation order. As the Court mentioned it would "*unnecessarily undermine and limit the operation of the warrant and be in any event entirely unrealistic*".[50] The guarantee of protection from arbitrariness, according to the ECtHR, should be that these search words and so-called "selectors" should be subject to independent supervision.[51] Thus, by recognizing mass surveillance as permissible per se, the ECtHR further restricts the right to respect for privacy.

The ECtHR did not create new criteria for the mass surveillance regime, but relied on a list of criteria stated in case Weber and Saravia v. Germany. For some reason, the Court did not pay attention to the fact that technological and information development has undergone both quantitative and qualitative changes since 2006, and the criteria already developed by the Court's practice are insufficient for an adequate assessment of modern surveillance regimes. The problem is the comprehensive coverage of modern digital surveillance without any restriction or exception for individuals who have no connection to terrorism or serious crime.

Criticism of this approach was expressed by Judge Koskelo. In a partly concurring, partly dissenting separate opinion in Big Brother Watch, ECtHR Judge Koskelo, joined by Judge Turković, suggested that the ECtHR's case law assessing the minimum safeguards that should apply to bulk interception regimes in the context of national security was insufficient and in need of clarification: "*It*

[46] Ibid., p. 342, 156.
[47] Ibid., p. 337.
[48] Ibid.
[49] ECtHR. Weber and Saravia, p. 32.
[50] ECtHR. Big Brother Watch and Others v. United Kingdom, p. 340.
[51] Ibid., p. 340.

is obvious that such an activity – an untargeted surveillance of external communications with a view to discovering and exploring a wide range of threats – by its very nature takes on a potentially vast scope, and involves enormous risks of abuse. The safeguards against those risks, and the standards which under the Convention should apply in this regard, therefore raise questions of the highest importance. I am not convinced, in the light of present-day circumstances, that reliance on the Court's existing case-law provides an adequate approach to the kind of surveillance regimes like the one we are dealing with here."[52]

As for the advantages of this decision, however, it is worth mentioning the expansion of the range of information that could be intercepted in violation of article 8 ECHR: from the content of messages to related communications data (metadata). The Regulation of Investigatory Powers Act allowed the UK's intelligence services to search and examine, without restriction, "linked communications data" of all intercepted communications on the grounds that metadata is less intrusive than content data, and it was necessary to determine whether a person was or was not in the British Isles. The Court took a slightly different approach to this issue, considering that shared access to the content of messages violates the essence of the right to privacy, although this does not apply to metadata, hence revealing the difference between them. This approach explicitly ignores that this distinction between access to message content or metadata is very problematic: metadata can often reveal more confidential information about the data subject and mass surveillance of metadata is much more effective than accessing content.[53] For example, the content of message may not reveal anything remarkable about the sender/recipient. But metadata could reveal for example the identity of the sender/recipient or his geographic position.

The Court recognizes that metadata is one of main tools for the intelligence services, but does not believe that the authorities did the right thing by completely exempting them from the safeguards applicable to the search and study of content. The ECtHR held that national law concerned did not provide real guarantees for the selection of metadata for verification and, thus, violated article 8 ECtHR, since it did not meet the quality requirements of the law and was unable to deter interference in what is necessary in a democratic society.

Refusal to recognize the acquisition of related communications data "*necessarily less intrusive than the acquisition of content*"[54] does not mean that the Court's

[52] Big Brother Watch partly concurring, partly dissenting separate opinion of Judge Koskelo, joined by Judge Turković, p. 3.

[53] For more see for example Bernal, Paul. Data gathering, surveillance and human rights: recasting the debate. *Journal of Cyber Policy*, 2016, vol. 1, no. 2, pp. 243–264.

[54] Big Brother Watch partly concurring, partly dissenting separate opinion of Judge Koskelo, joined by Judge Turković, p. 3, ibid., p. 356.

approach to the equality of these categories of information is already established. The ECtHR will be forced to formulate a clearer position in the near future and it is possible that a number of cases will challenge the legality of collecting or sufficient guarantees for collecting and storing information (especially metadata) through applications that were designed to prevent the spread of COVID-19. Yet the ECtHR has not equalized the modes of verification of interception of the content of messages and their metadata, did not reach the applicability of Weber's criteria to metadata and did not recognize metadata interception as the same as gaining access to the content of messages. But even this "rudimentary" position of the Court regarding the protection of metadata should definitely be considered a significant step towards ensuring comprehensive protection of privacy.

Follow-up of Big Brother Watch: case Breyer v. Germany

The decision in Big Brother Watch can be considered as one of the significant decisions that will determine the approach for further case law of the ECtHR for a long time to come. And this is far from an assumption: already on 30 January 2020 in Breyer v. Germany[55] the ECtHR held that the indiscriminate storage of subscriber information by telecommunications service providers did not violate article 8 of the ECHR. The applicants claimed that the obligation to keep their data under article 111 of the Telecommunications Act (hereinafter – TA) violated their right to privacy, "*as it forced them to disclose their personal data, which was subsequently stored*".[56] In their opinion, the violations were very serious because the storage of subscriber information by telecommunications service providers is possible without providing preliminary requirements. The article 111 of the TA did not contain any preliminary requirements for storage. Moreover, the law allows the storage of information not for a targeted subscriber, but for all mobile-telephone users. This regulation practically makes it possible to store information about those subscribers, which do not pose any danger or risk for public safety or national security.[57]

The ECtHR first held that "*Article 8 of the Convention (...) provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such form or manner that their Article 8 rights may be engaged*".[58] After that it pointed out that the mere storage

[55] ECtHR Breyer v. Germany (Application no. 50001/12). Judgement of 30 January 2020.
[56] Ibid., p. 66.
[57] Comp. ibid., p. 67.
[58] Ibid., p. 75.

of data relating to a person's private life, and therefore section 111 of the TA, constituted interference within the meaning of article 8 of the Convention.[59] As for its justification, it repeated that " [*I]n the context of, inter alia, storage of personal information it is essential to have clear, detailed rules governing minimum safeguards concerning amongst other things duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction*".[60]

ECtHR found that the intervention is pursuing the legitimate aims of public safety, prevention of disorder or crime and the protection of the rights and freedoms of others.[61] For this measure to be necessary in a democratic society, it must meet urgent social needs and be proportionate.[62] According to the Court, fighting crime, ensuring public safety and protecting citizens were indeed urgent social needs. In order to assess the proportionality of the measure, the Court subsequently determined the level of interference with the applicants' right to privacy. Agreeing with the German Constitutional Court, it stated that this data does not include any personal information, does not allow creating personal profiles or tracking the movements of mobile phone subscribers, and also relates to individual communication events.[63]

The ECtHR also came to the conclusion that the interference was, while not trivial, of a rather limited nature.[64] With regard to the rules for future access and use of collected data, the Court found that sections 112 and 113 of the TA contained sufficient limiting factors to make the interference proportionate. It was also noted that the collected data was "*further protected against excessive or abusive information requests by the fact that the requesting authority requires an additional legal* basis to retrieve the data".[65] The exemptions were limited to the requirement of necessity, which in the context of prosecution for offences meant "*that there must be at least an initial suspicion*".[66]

The ECtHR concluded that the retention of subscriber data for government purposes, without discrimination and regardless of whether there is a reasonable suspicion of the concerned person does not violate the ECHR. This is an extension of the already selected trend of the ECtHR, which was already in the case of Big Brother Watch. The permissibility of mass surveillance per se is not

[59] Ibid., p. 81.
[60] Ibid., p. 83.
[61] Ibid., p. 86.
[62] Ibid., p. 88.
[63] Ibid., p. 92.
[64] Ibid., p. 95.
[65] Ibid., p. 100.
[66] Ibid., p. 100.

inconsistent with the ECHR and does not exceed the broad discretion that governments have when choosing the means to achieve the legitimate goal of protecting national security. If inappropriate collection of such information can be allowed, then the storage of subscriber data is not extraordinary. In his dissenting opinion, Judge Ranzoni criticized the decision in Breyer. According to him, the ECtHR, as well as the German Constitutional Court, overlooked the fact that the data in question, admittedly, is not sensitive in itself, "*It ... facilitates the identification of the parties to every telephone call or message exchange and (consequently) the attribution of possibly sensitive information to an identifiable person*".[67]

Judge Ranzoni also disagreed with the majority regarding the assessment of safeguards and whether the existing ones are sufficient in order to effectively prevent the misuse and abuse of personal data.[68] In particular, he argued that, in the circumstances, the concept of a "double lock" could not be considered an effective protection from the moment the data was received, although it was based on broad and general provisions that might be sufficient as legitimate door keys that do not require an order from a judicial or other independent authority. In addition, since individuals are not notified after their data has been received, "*the victim of the interference has no knowledge and cannot seek a review of the information retrieval*".[69] The observation that compensation may nevertheless be required together with judicial proceedings for damages in respect of final decisions of the authorities, moreover "*only applies to information requests that have led to further telecommunication surveillance or other investigative measures*".[70]

Based on the above, we can conclude that the modern approach of the ECtHR to mass surveillance gives broad discretionary powers to states, opening the possibility for extensive use of mass surveillance technologies by states.

5. Why did the ECtHR choose this approach?

It may be argued that the acceptable recognition of mass surveillance per se is in fact a legalisation of current European national policies in this area. The same approach is more likely to be followed by the ECtHR in its case law in the near future. The ECtHR stated that "*the decision to operate a bulk interception regime in order to identify hitherto unknown threats to national security is one which continues to fall within states' margin of appreciation*", adding that such regimes

[67] Dissenting Opinion of Judge Ranzoni (Breyer v. Germany), p. 5.
[68] Ibid., p. 18.
[69] Ibid., p. 23.
[70] Ibid., p. 24.

are "*valuable means to achieve the legitimate aims pursued, particularly given the current threat level from both global terrorism and serious crime*".[71] But the real reason for this legitimization still lies in another plane: states always seek to get and use the data of their citizens and any change that can be adjusted to national security will most probably be used to get this data.

After the terrorist attacks that have occurred in Europe since 2015, Germany,[72] France,[73] United Kingdom,[74] Austria,[75] Italy,[76] Sweden[77] and many other states passed almost identical laws that give their national surveillance agencies very broad ability to conduct mass surveillance. Detailed consideration of these laws is beyond the scope of this study. But even a superficial analysis of these legal acts shows their inconsistency with the case law of the ECtHR already developed at the time of their adoption.

First, in Zacharov the ECtHR was sceptical of broad definitions in the context of "*national, military, economic or ecological security*" that provide "*an almost unlimited degree of discretion*."[78] In case Kennedy v. the UK the ECtHR noted that "*the condition of foreseeability does not require states to set out exhaustively by name the specific offences which may give rise to interception*",[79] "*it obliges them to provide sufficient details about the nature of the offences in question*".[80] This suggests that surveillance laws should be precise enough to give citizens an

[71] Ibid., p. 386.

[72] Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes Vom 23 Dezember 2016. [online]. Available at: https://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/18_wp/BND-Gesetz/bgbl.pdf;jsessionid=03D24BF37F441A72BF4E5FB3E0F5AC73.2_cid294?__blob=publicationFile&v=1

[73] LOI n. 2015-1556 du 30 novembre 2015 relative aux mesures de surveillance des communications électroniques internationales (1) NOR: DEFX1521757L. [online]. Available at: https://www.legifrance.gouv.fr/eli/loi/2015/11/30/DEFX1521757L/jo/texte.

[74] The UK Investigatory Powers Act 2016. [online]. Available at: http://www.legislation.gov.uk/ukpga/2016/25/contents/enacted

[75] Sicherheitspolizeigesetz, BGBl Nr. 662/1992, last amended by BGBl I Nr. 44/2014. [online]. Available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005792.

[76] *D.L. 18 febbraio 2015, n. 7 1 2, Misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione (15G00019) (GU Serie Generale n.41 del 19-02-2015).*

[77] Lag (2008:717) om signalspaning i försvarsunderrättelseverksamhet. SFS 2018:1918. [online]. Available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008717-om-signalspaning-i_sfs-2008-717.

[78] Ibid., p. 248.

[79] Ibid., p. 159.

[80] Ibid.

indication of the circumstances that may warrant surveillance. But the national legal acts may tend to allow mass surveillance on broad grounds.

Second, almost all the laws have a lack of adequate legal guarantees for data subjects. For example in the UK the Investigatory Powers Act 2016[81] introduced the double-lock mechanism requiring judicial approval.[82] But the law limits the scope of review by the Judicial Commissioners and they do not have full authority to assess the merits of surveillance measures. In France the Intelligence Act 2015 on the basis of article L. 811-3, expanded the number of purposes that can justify extra-judicial surveillance, at the same time does not establish any mandatory judicial pre-authorization process. Marc Trévidic mentions this situation as "*a total absence of control in this law*" with regard to the interception of calls, text messages and emails by the security services, "*extra-judicial surveillance with the approval of the Prime Minister, which also provides for the creation of 'black boxes' that track data on the connection of all Internet users*".[83] But as we mentioned before, these criteria were of importance for the ECtHR: in Roman Zakharov v. Russia the Court accepts that the requirement of prior judicial authorization constitutes an important safeguard against arbitrariness.[84]

Third, most of laws do not restrict protection from the collection and analysis of privileged communications, including foreign public officials, parliamentarians both inside and outside the borders of Europe. In Kennedy v. the United Kingdom, which concerns the Swiss government's use of the telephone lines of a lawyer, the ECtHR explicitly noted the need to establish clear rules and guarantees under the law for such privileged communications.[85]

Against the background of this situation, having changed its attitude to mass surveillance in cases such as Centrum för Rättvisa and Big Brother Watch, the ECtHR expresses the general approach of European states after 2015. To strengthen its position in the Big Brother Watch case, the ECtHR regularly refers to the report of the Venice Commission.[86] The report recognizes that "*the main*

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[81] See article 140 of the Investigatory Powers Act 2016. [online]. Available at: https://www.legislation.gov.uk/ukpga/2016/25/pdfs/ukpga_20160025_en.pdf.

[82] A dual executive-judicial pre-authorization process for its foreign bulk warrants.

[83] *Loi renseignement: "Une arme redoutable entre de mauvaises mains", s'inquiète Marc Trévidic*. [online]. Available at: https://www.rtl.fr/actu/debats-societe/la-loi-sur-le-renseignement-entre-de-mauvaises-mains-est-une-arme-redoutable-estime-le-juge-marc-trevidic-7777296541

[84] Ibid., p. 249.

[85] ECtHR. Kopp v. Switzerland (Application - 23224/94). Judgment of 25 March 1998, p. 71–75.

[86] *Report on the Democratic Oversight of Signals Intelligence Agencies*. Strasbourg, 15 December 2015 Study No. 719/2013 CDL-AD(2015) 011 Or. Engl. European Commission for Democracy through Law (Venice Commission) Adopted by the Venice Commission At Its 102nd Plenary Session (Venice, 20-21 March 2015). [online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)011-e.

interference with privacy occurred when stored personal data was accessed and/or processed by the agencies."[87] As we can see, the data collection stage is not mentioned here, which means that the data collection can be considered per se consistent with the ECHR.

6. Conclusions

The ECtHR has already formulated an approach to the legal acts regulating mass surveillance for compliance with the ECHR. Most probably the situation will further strengthen the position formed after Big Brothers Watch and Centrum för Rättvisa cases. Despite the fact that Big Brother Watch case is currently being considered by the Grand Chamber of the ECtHR, it seems improbable to have a change in the approach of the ECtHR especially with the emergence of COVID-19, which becomes the turning point in the issue of expanding mass surveillance.

In the situation when COVID-19 is already considered a threat to security, the states take appropriate measures, including restricting human rights. To abandon surveillance technology will not be easy after a pandemic, and mass surveillance can become the standard for preventing and managing threats. By rejecting to review the list of minimum requirements in the Big Brother Watch the ECtHR missed a chance to make its case law more adaptable to challenges in post-pandemic world.

The ECtHR new approach to mass surveillance may serve as a guide for the development of national legislation and may provoke the adoption of such legislation in states where it is not yet available. Due to the COVID-19 mass surveillance by governments is becoming the new norm and may be expected to expand even further in the future justified by insurance of the security of people. If ECtHR delays updating the new criteria for the legality of mass surveillance in the near future, states may try to interpret such a provision as a carte blanche at the European level the expansion of the mass surveillance.

At the end, we would like to emphasise that a due attention should be paid to the potential of human rights as an effective tool to prevent widespread legalization of mass surveillance. The issue of using invasive tools to regulate mass surveillance, which are now increasingly used by governments to resolve the pandemic situation, may become even more significant in the future. Even without derogations under article 15 of the ECHR, the ECtHR might agree with most of the measures that states have introduced to combat the pandemic. Therefore,

[87] ECtHR. Centrum För Rättvisa v. Sweden (Application no. 35252/08). Judgment of 19 June 2018, p. 69.

the answer of the main question of the research is that the modern attitude to mass surveillance in case law of ECtHR does not help much to prevent the mass surveillance to be the norm for the Post-pandemic world.

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Breastfeeding as a (Non)Exclusive Right of Women in Labor Relations – the European Approach

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Summary: The authors of presented article deal with the issue of breastfeeding in labor relations. The current Slovak legislation allows only women to take a breastfeeding break. The authors wonder whether the regulation in question is still efficient in the 21st century and does not cause problems rather than benefits in practice. In foreign legislation, it is standard that a man, the child's father, can under certain conditions take a breastfeeding break. The article analyzes Slovak legal norms and compares them with Spanish, Italian and Portuguese legal regulations as well as the chosen decision of the Court of Justice of the European Union regarding breastfeeding break. Methods of analysis, comparison and synthesis were used, which enabled the authors to form comprehensive conclusions as well as suggestions *de lege ferenda*. The authors' opinion is, that the legal regulation of breastfeeding break in Slovakia needs to be amended in order to provide a father with the breastfeeding break under certain circumstances.

Keywords: Breastfeeding, Labor Relations, Employee, Equal Treatment, Working Time

1. Introduction

In the Slovak Republic, only a minimum of professionals deal with the issue of the women's position in labor relations. Even fewer authors focus on those labor law issues, that are closely related to the principle of equal treatment between men and women. With regard to the adopted Directive of the European

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Parliament and of the Council no. 2019/1158 on the work-life balance of parents and caretakers (hereinafter also referred to as the "Work-Life Balance Directive"), which the Slovak Republic must transpose during summer 2022, we are convinced that gender issues and equality in the workplace should be increasingly reflected in professional discussions.

In the 21st century, we no longer consider it right for legal norms to be seen as male and female. We believe that we shall have only one set of universal rights. However, we must state that Act no. 311/2001 Coll. the Labor Code (hereinafter also referred to as the "Slovak Labor Code") is far from being such a universal legal regulation. A legal definition of the term "breastfeeding female worker" can be found in the introductory provisions. It is therefore clear that in Slovakia, from a labor point of view, a man cannot perform activities related to breastfeeding. The same applies in the case of a breastfeeding break, which, in accordance with Section 170 of the Labor Code, belongs only to the working mother. We consider the Slovak legal norms regarding breastfeeding break to be obsolete. We will try to justify our opinion by comparing Slovak regulations to those of Spain, Portugal and Italy and consequently propose our own adjustments to legal norms.

2. Breastfeeding in Labor Relations in Slovakia and in selected Countries of the European Union

In the conditions of the Slovak Republic, the employer is obliged to provide a breastfeeding break exclusively to the mother of the child. The Slovak Republic is a member of the European Union, and we therefore consider it important to analyze the provision of breastfeeding in a broader context[1], in accordance with the case law of the Court of Justice of the European Union and selected legislation[2] of the Member States.

2.1. Breastfeeding Break in the Slovak republic

Pursuant to the Section 40 of the Slovak Labor Code, an employee who has informed her employer in writing of her breastfeeding is considered to be a breastfeeding employee. According to Council Directive no. 92/85 / EEC on

[1] HAMUĽÁK, O. La carta de los derechos fundamentales de la Union Europea y los derechos sociales. *Estudios constitucionales,* 2018, vol.16, no.1, pp. 167–186.

[2] KUSTRA-ROGATKA, A. The Kelsenian Model of Constitutional Review in Times of European Integration – Reconsidering the Basic Features. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 7–37.

the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (hereinafter referred to as "Directive on the Protection of Female Workers") it is enough to inform an employer about the condition to be considered as a breastfeeding employee. Within the meaning of the foregoing a stricter legal regulation of the Slovak Republic can be observed in comparison with the directive of the European Union. In Slovakia, only an employee who informs the employer in writing about her condition is considered a breastfeeding employee. According to the Directive on the Protection of Female Workers, it is sufficient for an employee to inform the employer about breastfeeding orally or implicitly, it does not have to be a written notice.[3] In addition, we can state from Slovak practice that employers are not inclined to receive written notifications in electronic form (especially because the Slovak Labor Code does not deal with the issue of electronic delivery) and require primarily a written (printed) document. It can therefore be stated that the very process of transferring information about breastfeeding to the employer in Slovakia is more complicated than would be necessary. The mere information that an employee is breastfeeding is important for the employer because breastfeeding employee is provided with higher protection as well as with a breastfeeding break. It is an institute regulated in the Section 170 of the Slovak Labor Code, according to which the employer is obliged to provide the mother who breastfeeds her child with special breaks at work. Breastfeeding breaks are paid, included in working time, and can be provided at the beginning or at the end of the working time. The mother of a child who performs work during the prescribed weekly working hours is entitled to two half-hour breaks for a child under the age of 6 months and one half-hour break for a child under the age of 12 months.[4]

We consider it necessary to emphasize that the child's father has no entitlement to special breaks in connection with the care of a newborn child and cannot even take a breastfeeding break. The only type of obstacle at work that a child's father is entitled to is an obstacle at work to transport the mother to and from the hospital after birth. In the Slovak Republic, the work-life balance directive has not yet been transposed and paternity leave of 10 days has not yet been introduced.[5] Likewise, the second parent of a child is not a legal term in the Slovak Republic and therefore we use the terms father of the child and mother of the child in the analysis.

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[3] BARANCOVÁ, H. a kol. *Zákonník práce*. *Komentár*. Bratislava: C. H. Beck, 2019, pp. 1273–1275.

[4] FREEL, L., LIGASOVÁ, Z. Práca na úkor rodiny: nevyhnutnosť alebo možnosť? In *Naděje právní vědy.* Plzeň : Západočeská univerzita, 2017, pp. 98–108.

[5] KRIPPEL, M. Podmienky nároku na materské otca. In *Míľniky práva v stredoeurópskom priestore*. Bratislava: Právnická fakulta UK, 2019, pp. 323–334.

In terms of international law, the right to breastfeed is not clearly defined.[6] In the professional literature, however, breastfeeding is considered to be primarily breastfeeding directly by the mother of the child, breastfeeding with breast milk from a bottle or breastfeeding with artificial substitutes for breast milk from a bottle.[7] Based on the analysis of the Slovak Labor Code, it is clear that a breastfeeding break is provided in the Slovak Republic to every mother who informs her employer of her condition. Every mother, also meaning the mother who adopts the child and therefore cannot breastfeed the child herself biologically but must provide him/her with nutrition through artificial substitutes for breast milk. In addition to mothers who adopt a child, a breastfeeding break can be used by a mother who, for health or other reasons, breastfeeds the baby from a bottle. Statistics from the National Center for Health Information[8] from 2018 show that approximately 52% of children are breastfed until the age of 6 months by breastfeeding.[9] This means that about 48% are fed differently, which cannot be considered a negligible number. As indicated, the breastfeeding break is already used in practice by mothers who do not breastfeed the baby directly from the breast. The question therefore arises as to why the child's father cannot take a breastfeeding break if the child is nourished in other way than with breast milk directly from the mother's breast.

2.2. The Judgement in the Case C-104/09 Pedro Manuel Roca Alvarez v Sesa Start Espana ETT SA

The Court of Justice of the European Union in Case C-104/09 Pedro Manuel Roca Alvarez v Sesa Start Espana ETT SA (hereinafter referred to as "Alvarez v Espana") also addressed the issue of the father's right to a breastfeeding break. Mr. Alvarez, who worked for Sesa Start Espana ETT SA, applied for a breastfeeding break under the Spanish Labor Code. According to the Spanish Labor Code, mothers were entitled to a breastfeeding break until the end of the 9th month after the birth. Only those fathers of the children whose mothers were employed, were entitled to the breastfeeding break.[10] The employer refused to

[6] ŠIMÁČKOVÁ, K., HAVELKOVÁ, B., ŠPONDROVÁ, P. (eds.) *Mužské právo. Jsou právní pravidla neutrální?* Praha: Wolters Kluwer, 2020, pp.829–850.

[7] PALMER, G. *Politics of Breastfeeding: when breast are bad for bussines*. London: Pinter & Martin Ltd, 2009, pp. 30–35.

[8] MESARČÍK, M. Právne aspekty spoločného zdroja údajov v kontexte zefektívnenia správy zdravotníctva. In *Justičná revue*, 2018, pp. 733–743.

[9] Národné centrum zdravotníckych informácii SR. [online]. Available at: http://www.nczisk.sk/Statisticke_vystupy/Tematicke_statisticke_vystupy/Pages/default.aspx.

[10] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 11–13.

grant Mr. Alvarez a breastfeeding break, arguing that his child's mother was not employed but was a self-employed person. The Supreme Court of Galicia has therefore referred a question to the Court of Justice of the European Union for a preliminary ruling on whether the provision in question in the Spanish Labor Code complies with the principle of equal treatment.[11] The Court of Justice of the European Union has ruled that there is a difference in treatment between the mother and the father of the child under the Spanish Labor Code. It can be considered problematic that while the fact that the child's mother is employed is sufficient to provide her with a breastfeeding break, the employed father of the child will not be provided with the same, unless the mother of the child is also employed. The status of the child's parent was therefore assessed differently for the child's mother and for the child's father within the meaning of the Spanish Labor Code.[12] The Court of Justice of the European Union emphasizes that both parents have a comparable right to request a reduction in working hours in connection with caring for a newborn. In the decision, the court further stated that breastfeeding is increasingly moving away from its purely biological significance and that a child can breastfeed equally well with both the mother and the father, by breastfeeding from a bottle. Thus, a breastfeeding break cannot serve solely to create a bond between mother and child but should also serve the child's father to provide care for the child. It is not a question of protecting the specific relationship between the mother and the newborn child, if it is possible to provide the child's nutrition in a comparable quality by the child's father.[13] Furthermore, in the decision, the court also addressed the issue of differences in treatment between employees and self-employed persons. The court stated that the child's mother could not be penalized for choosing to be self-employed. If the breastfeeding break were not provided to the fathers of children whose mothers are not employed, this would mean a disproportionate burden on self-employed mothers, which is an undesirable phenomenon.[14]

This decision had a significant impact on the formation of legislation in Spain. It also influenced the decision-making activity of national courts in the public sector and ensured more equal conditions in the care of the newborn child. We consider not only Spain, but also Italy and Portugal to be countries whose legislation, with regard to breastfeeding breaks, make a significant contribution to equality in the care of the newborn child by both parents and thus enable mothers to participate in working life.

[11] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 14–18.
[12] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 2127.
[13] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 28–34.
[14] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 35–37.

2.3. The Legal Regulation of Breastfeeding Break in Spain, Portugal and Italy

According to a survey by the European Institute for Gender Equality, Spain has achieved 72.9 points in equality in employment relations. The European average is at the level of 72.0 points, while the Slovak Republic reached only 66.5 points. In Spain, the possibility for men and women to take an hour or two off work while performing family care responsibilities is relatively balanced. Of the respondents, 35% of men and about 33% of women use this option.[15] The decision in case Alvarez v Espana had a significant impact on the legislation on breastfeeding in Spain, which can now be taken by working fathers of children, regardless of whether the child's mother is working or not. Both parents can use the breastfeeding break up to the child's 9th month for a maximum of one hour a day or they can decide to shorten their working day by 30 minutes.[16] In addition to the private sector, the right to a father's breastfeeding break was confirmed by the Spanish Central Court for Disputes for the public sector as well, by a decision granting a breastfeeding break pursuant to Section 48 of the Spanish Public Service Statute to a police employee to the same extent as the mother of his child.[17] Spain has thus become one of the most liberal countries in the provision of a paid breastfeeding break, which is intended to ensure, in addition to the child's nutrition, also the relief of the mother in the performance of parental duties.

In addition to Spain, neighboring Portugal also provides a relatively generous right to both parents in caring for a newborn child. Pursuant to the Section 47 of Act no. 7/09 the Labor Code, the child's mother is entitled to a paid one-hour break at work twice a day. If the mother does not breastfeed the baby directly from the breast but breastfeeds from the bottle, both the mother and the baby's father are entitled to a breastfeeding break until the child is one year old. This applies provided that the employer has not set up a crèche or other facility for newborns directly at the workplace. The right to a breastfeeding break may be exercised by one of the parents or they may share the right to a breastfeeding break by mutual agreement.[18] Portugal, like Spain, ranked high in the gender

[15] European Institute for Gender Equality. [online]. Available at: https://eige.europa.eu/publications/gender-equality-index-2019-spain.

[16] International Labor Organization. [online]. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf

[17] The Local. [online]. Available at: https://www.thelocal.es/20130410/spanish-fathers-score-breastfeeding-leave

[18] International Labor Organization. [online]. Available at: https://www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_structure=3&p_year=2009&p_start=1&p_increment=10&p_sc_id=2000&p_countries=PT&p_countries=KI&p_print=Y

equality index, reaching 72.5 points in the equality of labor relations. An interesting statistic is that part-time work in Portugal is not the domain of women and is performed by both men (8%) and women (13%). 23% of women and 28% of men surveyed use the opportunity to take a break from work to provide care for family matters.[19]

Unlike Spain and Portugal, Italy did not achieve an above-average score in the gender equality index. Gender equality in labor relations is only at the level of 63.1 points. As many as 33% of women work shorter working hours, compared to 9% of men, and only 19% of women and 22% of men use the opportunity to take a break during work to care for a child.[20] The practice therefore reflects completely different numbers than could be expected from the legislation. Pursuant to the Section 39 of Decree no. 151/2001, a woman has the right to take two hours of paid breaks at work during the first year of a child's age for the purpose of breastfeeding. During these breaks, she may leave the company's headquarters. Pursuant to Section 40 of the said Decree, the father of the child may also take a breastfeeding break to the same extent, provided that:
(a) the child is entrusted to the sole care of the father;
(b) the mother decides not to take breast-feeding breaks;
(c) the mother of the child is unemployed;
(d) (d) the mother of the child is seriously ill or deceased.[21]

The father's right to take a breastfeeding break in Italy thus derives from the mother's decision to take or not to take a breastfeeding break. The law does not directly allow the mother and father of the child to agree on the division of the breastfeeding break at their own discretion.

2.4. Comparison and Reflections de lege ferenda

Based on the analysis of the chosen legal regulations, it can be clearly stated that, apart from the Slovak Republic, all selected countries of the European Union provide the father of the child with the opportunity to use a breastfeeding break in some form. We believe that the ruling of the Court of Justice of the European Union in the case Alvarez v Espana has had a significant impact on the legislation

[19] European Institute for Gender Equality. [online]. Available at: https://eige.europa.eu/gender-equality-index/2019/domain/work/PT.

[20] European Institute for Gender Equality. [online]. Available at: https://eige.europa.eu/gender-equality-index/2019/domain/work/IT

[21] International Labor Organization. [online]. Available at: https://www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_structure=3&p_year=2011&p_start=1&p_increment=10&p_sc_id=2000&p_countries=IT&p_print=Y#:~:text=In%20the%20Legislative%20Decree%20No,part%2Dtime%20contract%20after%20maternity

of the southern states of the European Union and should also influence the development of the right to breastfeeding break in other countries.

Based on medical research[22], the authors are convinced that breastfeeding a baby is the most appropriate way to feed a baby, but it is necessary to state that not all mothers can feed their baby in this way. As we have already mentioned, almost 48% of children under the age of 6 months in the Slovak Republic are nourished differently than with breast milk directly from the mother's breast. Medical experts report that a mother's inability to breastfeed her baby can contribute to deepening or maintaining depressive symptoms.[23] Therefore, we believe that mothers who cannot breastfeed their babies in the natural way should not be subjected to sanctions by labor law. The World Health Organization has adopted the Code of Marketing of Breast-milk Substitutes, which has also been transposed into Commission Directive No. 2006/141 / EC on infant formulas and follow – on formulas. Those standards specify exactly what a formula must meet in order to be presented as infant formula and to be administered as a substitute for breast milk. Labor law standards should therefore not determine what is the most appropriate way to feed a child, but should reflect the different conditions and needs of parents – employees and adjust the right to a breastfeeding break in such a way, as to take into account different life situations.[24] At the same time, we are of the opinion that the child's father, like the child's mother, should be able to take a breastfeeding break if the child is nourished differently than from the mother's breast. Otherwise, in our opinion, it would be a difference in treatment without a legal reason.

De lege ferenda, we consider it necessary to amend the legislation on breastfeeding in the Slovak Republic. Based on the analysis of selected legal regulations and their comparison, we cannot state that any of the analyzed legal regulations would be an ideal model. We do not consider the Italian model to be suitable, as it does not distinguish between breastfeeding and bottle breastfeeding and at the same time deduces father's right to a breastfeeding break from the mother's.[25] We consider legislation in Spain and Portugal to be the more appropriate. Spain allows both parents to take the breastfeeding break regardless of the method of breastfeeding to the same extent, therefore we do not consider this to be an ideal

[22] CESAR, G. V. Breastfeeding in the 21st century: epidemiology, mechanisms, and lifelong effect. In *The Lancet. Series: Breastfeeding*. 2016, pp. 475-490.

[23] IZÁKOVÁ, Ľ. Duševné zdravie počas tehotenstva a po pôrode. In *Psychiatrická prax*, 2015, p. 20.

[24] NOVÁKOVÁ, M. Pracovné podmienky vysokoškolských učiteliek. In *Bratislava Legal Forum: Equality and inequality before the law in relation to weaker subjects of law*. Bratislava: Právnická fakulta UK, 2015, pp. 204–208.

[25] HAMUĽÁK, J., NEVICKÁ, D. Švédsky model rodičovskej dovolenky – cesta k rovnoprávnosti? In *Právny štát – medzi vedou a umením*. Bratislava: Wolters Kluwer, 2018, pp. 124–127.

model. The Portuguese legislation distinguishes between breastfeeding and bottle breastfeeding, which we consider to be the right way of classifying breastfeeding. However, leaving the division of the breastfeeding break to the parents' agreement is not the fair solution from our point of view, as it can benefit one parent over another. Based on the performed analysis and comparison, we therefore consider best solution to distinguish between breastfeeding by the mother and breastfeeding from a bottle. Assuming that the baby is breastfed directly by the mother from the breast, it is in our opinion legally correct that only the mother should be able to take a breastfeeding break. In this case, the breastfeeding break should not serve as a substitute institute for insufficient legal regulation of other breaks at work or personal leave of the child's father.

However, if it is not possible for the mother (whether for health or other reasons) to breastfeed the child, we consider it necessary to regulate the possibility of drawing a breastfeeding break for the child's father. We are of the opinion that if the child's mother or father informs the employer that the child is being breastfed in another way, they should be entitled to a certain paid period of time, which the mother and father can use independently to breastfeed the baby from the bottle. If the legislature were to make the drawing of the father's breastfeeding break entitlement to the mother's right, we are of the opinion that at least part of it should be non-transferable and intended exclusively for the child's father. Such a tool would also help to establish mothers in the labor market and reduce the difference in treatment in the selection of jobseekers. An employer could not automatically assume that only a woman-mother would take breastfeeding breaks but would have to assume that a similar situation could occur with a man-father. Equal treatment in the granting of the right to a breastfeeding break while bottle breastfeeding would ultimately contribute to improving the position of mothers in the labor market, which is a long-term goal of the European Union translated into the Work-Life Balance Directive.[26]

3. Conclusion

Biologically, the right to breastfeed is considered to be the exclusive right of women. However, the law should reflect various standards of living. On the basis of an analysis of selected legal regulations, their mutual comparison as well as an analysis of the decision of the Court of Justice of the European Union, we must state that in the 21st century labor law should reflect the real and current

[26] FREEL, L., LIGASOVÁ, Z. Práca na úkor rodiny: nevyhnutnosť alebo možnosť? In *Naděje právní vědy.* Plzeň: Západočeská univerzita, 2017, pp. 98–108.

needs of the labor market. Based on statistical data as well as an analysis of the legislation of Spain, Portugal and Italy, we are convinced that it is necessary to amend the Labor Code of the Slovak Republic and introduce the possibility of taking a breastfeeding break for the father of the child, provided that the child is breastfed from a bottle. In addition, the introduction of this break in the form of a certain non-transferable period of time can contribute to the equality of women and men as subjects of employment relationships. It would help to destigmatize women as those who exclusively care for children which subsequently makes them an undesirable burden for employers. If this does not happen, mothers' access to the labor market will continue to be disproportionally difficult, and at the same time, the legal entitlements of employed fathers to equal care will be (mostly) absent.

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PALMER, G. *Politics of Breastfeeding: when breast are bad for bussines*. London: Pinter & Martin Ltd, 2009, pp. 3035.

ŠIMÁČKOVÁ, K., HAVELKOVÁ, B., ŠPONDROVÁ, P. (eds.) *Mužské právo. Jsou právní pravidla neutrální?* Praha: Wolters Kluwer, 2020, 1076 p.

Is the Number of Established Societas Europaea in the Czech Republic Still Puzzling?

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Summary: The number of European companies founded in the Czech Republic can be described as the Czech puzzle, according to the paper "The Czech Societas Europaea Puzzle" by Horst Eidenmüller and Jan Lasák. They are concerned with the question why two thirds of all European companies from all countries of the European Economic Area (EEA) are established in the Czech Republic. At the same time, there is a presumption that this phenomenon of ready-made European companies will pass away. Though, the aim of this paper was to analyse the development of newly registered European companies in the Czech Republic after 2014 and compare it with the period until the end of 2013. The authors conclude that the growth rate of European companies registered in the Czech Republic is approximately the same. By contrast, annual growth rates are rising in Germany and Slovakia which also have had a considerable number of SEs.

Keywords: European Company, Czech corporation law, shelf/ ready made companies, Czech Societas Europea Puzzle, UFO companies

JEL: K220

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Data statement: We confirm that the used data of European Companies are freely available at http://ecdb.worker-participation.eu/ provided by ETUI (European Trade Union Institute)

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1. Introduction

A European company (hereinafter referred to as 'SE') can be understood as a multinational company which acts as a legal person and is governed primarily by the European law. It can also be found under the name European joint stock company or Societas Europaea. Each European company has the abbreviation SE in its name. The European Company is regulated by Council Regulation No. 2157/2001 on the Statute for a European Company and subsequently by Council Directive 2001/86 supplementing the Statute for a European Company with regard to the involvement of employees. Both regulations entered into force on 8 October 2004 and also apply to the countries of the European Economic Area (EEA). In the Czech Republic, the European company is regulated by the Implementing Act No. 627/2004 Coll., on the European Company, as amended. Council Regulation (EC) No 2157/2001 describes four basic ways of establishing a European company: merger, transformation of a public limited company, holding and the establishment of a subsidiary. At the same time, the transnational principle must be met. However, if a European company is set up by a parent European company, there is no longer a European dimension required, in other words, the involvement of companies from at least two EEA countries is not necessary. The company is established by a memorandum of association. Each European company acquires its legal personality on the day of its incorporation. Under Article 12 of Regulation No 2157/2001, any European company is to be entered in the commercial register in which it has its registered office.

The European company should have been more interesting for the founders from the perspective of transnational business than individual national company law. Otherwise, there would be no need to introduce these companies into European law at all. In 2010, a European Commission report[1] on European companies was issued. This was also required by the Council Regulation[2], which asked for a report to be issued within five years of the entry into force of this Regulation. The report contains a list of the most important positive and negative aspects and factors that influence the establishment of European companies in the European Union. The positive aspects for the establishment of a European company are mainly the following: the European image of the European company, the transnational nature of the company, the possibility of relocation, the

[1] The application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE): REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. In: *ec.europa.eu* [online]. 17.11.2010 [cit. 2020-01-20]. Available at: https://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-676-EN-F1-1.Pdf

[2] Council Regulation No. 2157/2001 on the Statute for a European Company, Article 69.

possibility of cross-border mergers, the potential for reorganization and the possibility of group simplification. Easier financing could also be seen as an advantage, since the legal form of a European company ensures a better position in dealing with banks and in requests for EU support. The disadvantages of a European company include the costs of setting up, time-consuming and complex procedures and legal uncertainty. The total establishment costs range from approximately EUR 100 000 up to EUR 2 to 4 million. One of the most expensive foundations in history was Allianz SE and BASF SE (EUR 95 million and EUR 5 million).[3]

According to this report, as of October 10, 2010, 657 European companies were registered in all EEA commercial registers. At first glance this seems to be good news, but unfortunately, on closer examination, the analysts found that most of these companies do not do any business. More than four fifths of these companies were empty. These are the so-called shelf / ready-made companies or companies without employees. Thus, only less than one fifth of the companies fulfilled their purpose for which they were set up, namely to carry on business within the EEA. The authors of the report state that the setting up of ready-made SEs by professional service providers in these countries can be explained by the fact that the system of ready-made companies available for sale is common here (in the Czech Republic and Germany). According to respondents in the public consultation, companies buy ready-made SEs mainly to save time and costs and avoid complex and uncertain start-up procedures. A number of respondents stated that ready-made SEs also enable SEs to be set up without having to meet a demanding cross-border element or having to negotiate employee involvement. The ability to avoid difficult requirements is particularly important for smaller companies. On the other hand, workers' organizations are concerned that ready-made SEs could be used to circumvent the provisions of the SE Directive concerning the involvement of workers. In this context, it is necessary to mention the lack of information on many ready-made SEs after their activation. This is partly explained by the fact that annual accounts are published retrospectively. Another explanation may be that due to their small size, some companies are required to disclose only the abridged balance sheet and the notes on the financial statements. In some cases, the accounts are not available at all without any justification"[4].

The phenomenon of the large number of SEs in the Czech Republic was also dealt with by Czech and European experts, including academics. For example,

[3] The application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE): REPORT cit. quot., pp. 4–5.

[4] The application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE): REPORT cit. quot., p. 7.

the aforementioned authors of the article "The Czech Societas Europaea Puzzle" Horst Eidenmüeller and Jan Lasák in 2011 believed that the reason for this fact is the simpler possibility of effective corporate governance, where the choice between monistic and dualistic management is important, moreover, it can bring considerable economic benefits. The Czech implementing law for a European company regulates the model of a dualistic European company[5], where there can be only one member on the management and one member on the supervisory board, whereas the board of monistic society must have at least three members[6]. Though surprisingly, the choice of dualistic (and not monistic) management with fewer members is being chosen in the Czech Republic to simplify the management of a company[7]. The authors conclude that according to their survey among 88 Czech SEs, there are strong reasons why Czech companies chose this form of society, such as simplifying the internal governance structure and a positive European image of SE. At the same time, however, they report that overall demand is lower than the number of SEs and they consider the numbers of shelf SEs to be too optimistic[8].

However, according to later work from 2013 by Jan Cremens and Anders Carlson[9], that monitors the functioning of the SEs, new European subsidiaries in the Czech Republic are being steadily created further. Moreover, compared to the numbers of national companies, they are considerable and their turnover is constant. The analysis is complicated by the fact that registrations require minimal information. The authors of 15-page study on this topic further describe the typical creation process of a SE in the Czech Republic that takes place gradually. "*After registration, nothing happens for a while. This period can sometimes be from 6 months to a year. Then the changes start, share capital is paid up, companies move to a new address and new board members are coming and going. New or anonymous shareholders enter, there is often a new company name, there are changes in the share structure, in the trade register and in the VAT register and sometimes some employees can be found in the statistical register* ".[10]

[5] Implementing Act No. 627/2004 Coll., On the European Company, as amended, § 23–26.

[6] Act No. 513/1991 Coll., Commercial Code, as amended (the "Czech Commercial Code"), section 194 (3).

[7] Eidenmüller, H. G. M., Lasak J., *The Czech Societas Europaea Puzzle* (December 7, 2011). ECGI – Law Working Paper No. 183/2011. Available at SSRN: https://ssrn.com/abstract=1969215 or http://dx.doi.org/10.2139/ssrn.1969215, p.10–14.

[8] Eidenmüller at al., cit. quot., pp. 10–14, 16.

[9] CREMENS, J., CARLSON. A. *The SE in the Czech company law landscape - an introduction*. Brussels: ETUI aisbl, 2013, ISBN 978-2-87452-283-3.

[10] CREMENS at al., cit. quot., p. 110.

They also state that it seems that European company is in fact the first and, above all, domestic solution for small companies that do not want to fulfil the obligations of Czech corporate law. The fact that it is possible to create a company with a very simple internal structure, according to which a legal entity has only one member of the Board of Directors, seems to be the key explanation for the high incidence of SE in the Czech Republic. SE is therefore an alternative to a domestic limited liability company. The legal form is very similar to a Czech joint-stock company with dual management but substantially simplified in its management, as confirmed by several other authors [Štrauch (2008), Glück (2009), Eidenmüller and Lasák (2011)][11]. Most Czech European companies are set up by their mother company. These SEs no longer need a European dimension, in other words, the involvement of businesses from at least two EEA countries is not necessary. In the Czech Republic, they are offered for sale as ready-made companies that can do business according as other Czech companies without the European dimension. The permanent establishment of new SEs is due to the popularity of this solution, and although overall demand is not overwhelming, these companies are still being sold. The minimum capital requirement is officially higher than for the Czech limited liability company but there is neither capital control nor a statutory audit of actual transactions after the creation of an SE. Thus, SEs registered by one person may be several in the chain, without high capital requirements. In addition, the minimum required capital is guaranteed by the parent SE, which acts as the sole shareholder. This is probably the reason why the same person (s) related to the business provider also appear in the records. The vast majority of SEs are therefore established / purchased in the Czech Republic by small and medium-sized enterprises or individuals and perceive it as a business tool with few employees and low corporate costs, and the prescribed minimum capital does not seem discouraging. In conclusion, the study states that a limited number of Czech SEs are cross-border or transnational in nature and the authors have (to date) no evidence that they would function differently than European companies established elsewhere. Their owners are interested in transfers of seats, legal restructuring or European image. However, their creation can simply be the result of contact with a (Czech) consulting company that recommends this form of business.[12]

Both of the above studies work with the legal status of company establishment under the Czech Commercial Code valid until the end of 2013 and mentioned that the situation could change with a more appropriate setting of domestic business

[11] CREMENS at al., cit. quot., p. 120.
[12] CREMENS at al., cit. quot., pp. 109–110, 119–122.

corporation management, which happened with the new Business Corporations Act from January 1, 2014.

Ambruz & Dark Deloitte Legal dealt with experience with the practical functioning of a European company in the Czech Republic in 2017. First of all, it pointed out that since 2014, when the Business Corporations Act came into force, the board of directors of a joint stock company with monistic structure can have only one member. On the other hand, the European Company Act requires at least three members of the corporate governance structure. It further states that the transfer of the registered office can now be achieved even for the classic forms of capital companies and in practice this "advantage" of SE did not work. Their article also deals with the influence of employees' rights, which according to the authors in the Czech Republic do not enjoy much popularity. Therefore, SEs in the Czech Republic do not carry out traditional business and perform more like a classic holding company with minimum or no employees. The authors conclude that it will be interesting in the future to see whether shareholders, with regard to Czech alternatives to a European company, decide to abandon this legal form and replace it with, for example, a joint-stock company.[13]

As described in introduction, many experts believed that this phenomenon of ready-made European companies in the Czech Republic will pass away over the years, because there is not so much demand for this type of transnational form of business. Part of the "hope" was also put into 2014 and the adoption of the Czech Business Corporations Act. Though, the aim of this paper was to evaluate the development of newly registered European companies in the Czech Republic after 2014 and compare it with the period until the end of 2013. All this against the background of the number of SEs in other countries of the European Economic Area.

2. Material and methods

This paper works with data from 2004 to 2019, precisely from October 10, 2004 (date of entry into force of the Regulation) to December 31, 2019. The database and overview of established European companies (ECDB – European Company (SE) Database) is provided by ETUI (European Trade Union Institute). Aggregated information is based on data obtained from national commercial registers or the Official Journal of the EC. It is updated regularly, but there may

[13] Zkušenost praktickým fungováním evropské společnosti v českém právu. In: *www.epravo.cz* [online]. [cit. 2019-06-13]. Dostupné z: https://www.epravo.cz/top/clanky/zkusenost-praktickym-fungovanim-evropske-spolecnosti-v-ceskem-pravnim-radu-106050.html

be slight distortions due to data being taken from different sources that might be differently structured.

Methods of description, analysis, synthesis and comparison were used.

3. Results

According to the ECDB database, 3,223 European companies are registered in the European Economic Area until the end of 2019. 2,177 of those, which is approximately 66 %, are registered in Czechia. Germany and Slovakia follow. The remaining 25 EEA countries, where at least one European company was established, account for only 10 % of all registered SEs.

The ECDB divides European companies into normal European companies, micro / empty European companies and UFOs of European companies. Companies with more than 5 employees are called "normal SEs". The ECDB representatives also state that the number of 'normal' SEs' is likely to be greater, only the ECDB is unable to identify them. Most SE companies are established as branches and therefore have no employees at the time of incorporation. After the activation process is likely to increase the number of employees. Empty/ micro SEs have fewer than 5 employees and may, for example, do business in property management. As for UFO European companies there is no categorization information available in their case. This group also includes ready-made companies, which are established without the subject of activity and employees.

The table 1 shows that the Czech Republic, Germany and partly also Slovakia account for a large part of the number of European companies. There are significantly less companies with more than 5 employees than the total registered companies.

Table 1: Number of established SE in EEA countries 2004–2019

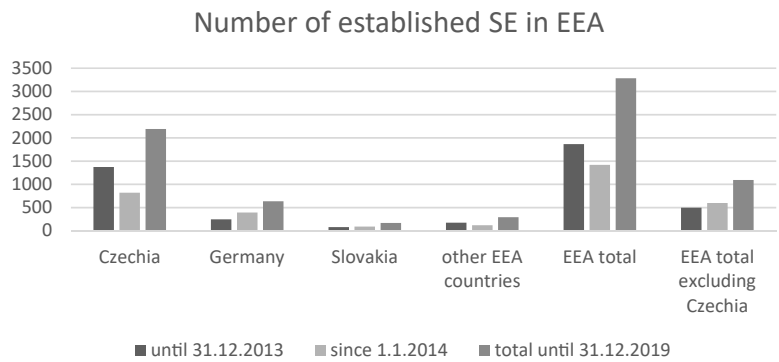
Country	Number of established SE	SE with >5 employees
Belgium	7	6
Czechia	2177	137
Denmark	1	0
Estonia	10	7
Finland	1	1
France	36	33
Ireland	12	5
Italy	3	1
Cyprus	27	10
Liechtenstein	13	4
Lithuania	1	1
Latvia	7	6
Luxembourg	33	16
Hungary	5	5
Malta	9	0
Germany	567	401
Netherlands	37	23
Norway	4	3
Poland	9	2
Portugal	1	0
Austria	20	9
Slovakia	159	25
Spain	2	0
Sweden	5	2
United Kingdom	35	7
Greece	2	1
Bulgaria	5	4
Romania	35	0
TOTAL	**3223**	**709**

Source: http://ecdb.worker-participation.eu/

When analysing the following graphs it is crucial to understand that by the end 2013 it was possible to set up a company for about ten years (exactly 3,371 days, which is about 63% of the entire possibility of SE existence) and since 2014 it is 6 years (exactly 2,006 days) , which is 37% of all days in the reporting period.

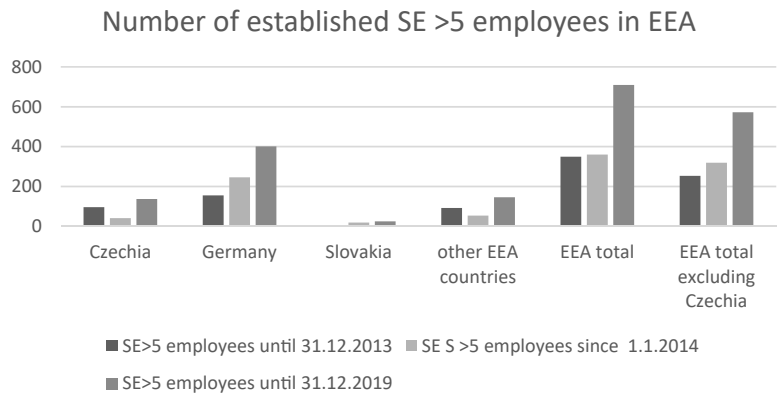
From the two graphs below it is obvious that while the Czech Republic is clearly leading in the total number of registered European companies, the situation will change in favour of Germany as soon as we focus only on companies with more than 5 employees.

Chart 1: Number of established SE in EEA 2004 – 2019



Source: http://ecdb.worker-participation.eu/

Chart 2: Number of established SE >5 employees in EEA 2004–2019



Source: http://ecdb.worker-participation.eu/

The chart 3 shows that growth rate of established SEs in the Czech Republic is slowing compared to Germany. There were 391 companies registered by our neighbours, which is 61.6 % of all European companies registered in Germany in 6 years. In the previous nearly 10 years, this was 38.4 %. Thus, the growth rate of registered companies in Germany is rising. The same applies to Slovakia. The situation in the Czech Republic is the opposite. There have been 819 companies registered out of a total of 2,190 SEs in the Czech Republic since 2014. By the end of 2013, 62.6 % had been registered and since 2014 it has been 37.4 %.

Thus, the average growth rate per year remains approximately the same. The number of companies registered in the Czech Republic is still high, however, unlike Germany and Slovakia, its growth does not increase over time.

Chart 3: Percentage of SE established until 2013 and since 2014

Source: http://ecdb.worker-participation.eu/

The positive development of the number of European companies with more than 5 employees in Germany has already been mentioned above. Chart 4 shows interesting development in the Czech Republic and Slovakia, where out of 25 European companies with more than 5 employees registered in Slovakia, 19 (i.e. 76 %) were established after January 1, 2014. As for the Czech Republic, 41 companies out of 137 (30 %) have had more than 5 employees in the same time period.

Chart 4: Percentage of SE >5 employees established until 2013 and since 2014

Source: http://ecdb.worker-participation.eu/

Comparing the absolute number of companies with more than 5 employees in the Czech Republic and Slovakia (41 versus 19) since 2014, the results are close to the expected reality if we want to fulfil the purpose and meaning of the European company.

4. Conclusions

The Czech Republic, as outlined in this paper, has taken the lead in the number of established European companies. In doing so, it has also largely contributed to a certain negative perception of European companies. Since 2007, European companies have been massively established in the Czech Republic with an effort to sell them. Thus, most of the listed companies are still waiting for their owners. The fact that many established companies that have not yet been sold has long led many analysts to question whether this approach is meaningful at all and has a future.

European society should have brought many benefits. Transnational mergers, the choice between a monistic and dualistic management system, the ability to move headquarters abroad, a new image and greater prestige. Over time, most of these benefits have been incorporated into national legal systems for domestic forms of business. In 2014, Act No. 90/2012 Coll., On Business Companies and Cooperatives (Business Corporations Act) came into force, where Czech entrepreneurs are allowed a monistic organizational structure that was supposed to

compensate for the advantages of a European company in the area of corporate governance. A part of academics and professionals expected a decrease in the number of registered European companies in the Czech Republic.

The aim of this paper was to evaluate the development of newly registered European companies in the Czech Republic after 2014 and compare it with the period until the end of 2013. All this in comparison with registered European companies in other countries of the European Economic Area.

From the analysis of data processed from the ECDB database, the authors conclude that the growth rate of registered European companies in the Czech Republic is approximately the same. 63% of European companies in the Czech Republic were registered in roughly the first ten years and 37% of SEs since 2014, i.e. in the last 6 years. Expectations of professionals were therefore not fulfilled and the adoption of the Business Corporations Act, effective from 2014, did not affect the number of established SEs. This also applies to companies that have more than 5 employees. By contrast, growth rates are rising in Germany and Slovakia which also have had a considerable number of SEs.

The number of European companies registered in the Czech Republic (with 10 million inhabitants) still constitutes more than 66 % of all SEs in the entire European Economic Area, which has more than half a billion inhabitants. On the other hand, data from the Czech Statistical Office show that SE accounts for less than half a percent of the roughly half a million capital companies operating in the Czech Republic. Therefore, this is not an important legal form of business in the Czech Republic, and even more so in other EEA countries.

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EU Enlargement Policy Towards the Western Balkans: State Actors, Interests and Strategies

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Summary: While the current EU Commission has shown a clear commitment to Western Balkans Enlargement, member states are divided. Germany and France, the two biggest EU member states have opposite views, whereas Germany is clearly in favour, France has its cpncerns. Throughout this article we assess the advantages (to enhance the geopolitical power of the EU) but also the challenges that this enlargement process entails (EU internal instability due to lack of rule of law). We conclude that differentiated integration could be the best option in finding a common agreement between the ones that support and the ones that oppose further EU enlargement by ensuring the EU influence in the region at the same time that it reduces the possible risks of internally weakening the EU.

Keywords: enlargement, differentiated integration, Western Balkans, Germany, France.

1. Introduction

On July 1st 2020, same day as Germany took over the Council of the EU six-months rotating presidency, the EU Commission launched the framework (guidelines and principles) of the negotiations with candidate states, Albania and North Macedonia, as a requested by the General Affairs Council. Besides specificities, this clarifies the EU willingness of continuing its enlargement towards a specific region: the Western Balkans.

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After the great enlargement of 2004-07 – that leaded to the accession of 12 new member states – the EU entered into a kind of enlargement hibernation phase – with the exception of Croatia in July 2013. Different experts stress that the above mentioned great enlargement lead to "enlargement fatigue". This phenomenon would have started even before the first group of candidate countries joined the EU in 2004, when a negative perception about enlargement was spread at the popular level among old member states[1] – getting worse after Bulgaria and Rumania joined the EU in 2007. This fatigue idea continued being part of the EU political discourse. During the nineties enlargement was understood as an asset, particularly from the geopolitical point o view. However, this enthusiasm gave way, first, to certain discouragement and apathy and, nowadays, to hesitation and even fear. Today there is the suspicion that enlargement might introduce further destabilisation inside the EU, which might explain the slowdown in the enlargement process to the Western Balkans. Even the EU seems to question the usefulness of its enlargement policy.

There are several elements that have intervened in the appearance of this sense of fatigue. One the one hand, the experience from the 2004-07 great enlargement. Overall the increase in the EU heterogeneity (political, social, economic and cultural) had impacted the decision making process. In addition, it has been found that the process of assimilation (adoption and fulfilment of membership criteria) of new member states is more difficult despite the efforts (including pre-accession programs) made in political (fundamental rights, democratic institutions, corruption) and economic (development and cohesion) matters.

On the other hand, the EU in 2020 is completely different from the one of 2004[2]. The institutional innovations brought about by the Lisbon Treaty (generally speaking, an expansion of the powers of the main supra-state institutions or the creation of the EEAS)[3], in addition to the different steps taken to deal with the 2008 economic crisis (banking union, MEDE...), the refugee crisis (2015) (FRONTEX strengthening), Brexit (2016-20) and, currently, the steps taken to deal with the COVID-19 pandemic. Under this scenario, the EU gives preference to its internal strengthening and stability rather than to enlargement. The EU has greatly evolved during the last decade to the point that, as stressed by the historian Kershaw "after the financial bankruptcy [2008], Europe is another continent"[4].

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1 DINAN, D. *Europe recast. A history of European Union*. Palgrave, 2014, p. 317.

2 BONOMI, M. Off Track. The EU′s Re-engagement with the Western Balkans. *Istituto Affari Internazionali Papers*, 2019, p. 10.

3 LAMOSO, P. Una voz (común) para una UE fuerte en un escenario global incierto. *Revista Aranzadi Unión Europea*, 2020. Nº 4, Año XLVI, Abril, pp. 65–86.

4 KERSHAW, I. Ascenso y crisis. Europa 1950-2017: un camino incierto. *Crítica*, 2019, p. 515.

As we have already pointed out, the EU internal migrations, protected by the EU citizens' right of freedom movement, leaded to the development of negative folk tales, fictitious or real, regarding enlargement – remember the popular case of the polish plumber – that worked as the perfect fuel for the right or populist parties in old member states. In part, Brexit referendum in June 2016 fuelled that hostility toward immigration. Furthermore, enlargement towards Centre and Eastern European countries increased the complexity of the EU's political agenda. The EU had to deal with, for instance, energy safety (many of these countries are highly dependent form Russian gas and fuel) which required designing a common energy policy with serious geopolitical implications and closely linked to other policies such as foreign policy, neighbourhood, investment and innovation or environment. This without forgetting the impact that enlargement has over PAC or structural policies.

The 2004 enlargement was unique due to the reasons that candidate countries had to join the EU. In Lewis's opinion, the main motivation for candidate counties was "the willingness of "security" in material, political and military terms [...]. The primary objective was to anchor into the western structures as firmly and as soon as possible" (NATO included). This can be considered as a particular negative motivation due to, even though they did not want to be left behind, they lacked the positive willingness of following the EU approach (not necessarily federal) characteristic from old member states[5]. In the background, there were also reasons of a historical-cultural or symbolic-political nature (referred to by expressions such as "return to Europe") that conceived accession as a factor of modernization in a broad sense (economic, political, social, cultural)[6].

The EU adjustment to enlargement has not been easy. In addition to the above mentioned "fatigue", the so called (*absorption capacity*) of the EU has also been mentioned as a factor for stopping new adhesions. It is mainly based on the impact that the integration of new member states could have on different issues such as budget, the ability to implement common policies or the effectiveness and responsibility of decision-making[7].

On the other hand, the consequences derived from the 2004-07 enlargement also impacted the individual position of the EU member states. For instance, member states that benefit from cohesion funds like Spain or Portugal were

[5] LEWIS, P. The enlargement of the European Union. In BROMLEY, S. (ed.) *Governing the European Union*. Sage Publications, 2001, p. 230.

[6] CLOSA, C. La ampliación de la Unión Europa y sus efectos sobre el proceso de integración. *Revista de Estudios Políticos (Nueva Época)*, 1995, nº. 90, octubre-noviembre, 1995, p. 152.

[7] SEDELMEIER, U. Enlargement. From rules for accession to a policy towards Europe. In WALLACE, H., POLLACK, M. and YOUNG, A., (eds.) *Policy-Making in the European Union*, OUP, 2010, pp. 426–427.

affected by the cut or even disappearance of those resources. At the same time France perceived it as a loss of political weight, due to it favoured the shift of the gravity centre to the East, in favour of Germany[8].

Currently, as a consequence, among other factors, of the enlargement itself, the EU is more politicised and fragmented.[9] Conflicts or divisions are increasingly noticeable between groups of member states (north-south, west-east, creditor-debtor, the Visegrad group or the Hanseatic group). In this sense, we can stress the measures adopted by the EU institutions for the preservation of the rule of law and fundamental rights in countries such as Poland or Hungary or the proliferation of extreme right-wing and populist forces (authoritarian, xenophobic and Eurosceptic or even anti-EU) in the Centre and Eastern member states[10].

The Western Balkan enlargement adds other risks, such as: the presence of minority groups and ethnic hatreds in the region that can be easily exploitable,[11] or even geopolitical, derived from the meddling of global superpowers such as China, Turkey, Iran or Russia.

While during the last decade the EU has focused the attention on internal issues (managing the economic-financial crisis, the refugee crisis, or Brexit) these global superpowers have got influence in the region. This justifies the reticence' expressed by some member states (Holland, Austria, France or Spain ...) regarding this future enlargement as well as the uncertainty and low enthusiasm generated[12]. In short, this enlargement follows a geopolitical dimension: to reinforce the stability and security of both EU member states and candidate countries.

Western Balkan candidates present, among other obstacles[13], low economic indexes and a high dependence on the commercial relationship with the EU. However, although to a varying degree, they seem to have reached certain

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8 DINAN, D. *Europe recast. A history of European Union*. Palgrave, 2014, p. 319.

9 CANCELA-OUTEDA, C. (2020) The Post-crisis European Union Before the Political Union: Coordinates and Keys of the Future Institutional Architecture. In RAMIRO TROITIÑO, D., KERIKMÄE, T., DE LA GUARDIA, R. M. & PÉREZ, G. A (Eds) *The EU in the 21st Century Challenges and Opportunities for the European Integration Process Architecture*, Springer, pp. 117–133, pp. 120–122.

10 MARTÍN DE LA GUARDIA, R. (2020). Nationalist Populism: New Political Parties in Europe. Their Ideas, Governments and Support for a Less-Integrated Europe. In RAMIRO TROITIÑO, D., KERIKMÄE, T., DE LA GUARDIA, R. M. & PÉREZ, G. A (Eds) *The EU in the 21st Century Challenges and Opportunities for the European Integration Process Architecture*, Springer, pp. 29–41.

11 JUDT, T. ¿Una gran ilusión? Un ensayo sobre Europa. Taurus, 2013, pp. 79–81.

12 DINAN, D. The European Council in 2018. Overview of decisions and discussions. *European Parliamentary Research Service*, PE 621.824 – June 2018, pp. 39–40.

13 "Nevertheless their membership prospects seemed remote, partly because of 'enlargement fatigue' in the EU, and partly because of difficulties that were both common to the region and specific to each country, ranging from weak governance, to economic underdevelopment, to high

stability at the same time that they have manifested their political willingness of being part of the EU. In addition, we can stress that its "Europeanness" is not questioned, different from what has been the case with Turkey.

In the different enlargement processes the political motivations are decisive, although at first sight the fulfilment of political and economic criteria, plus the monitoring of the negotiating procedure conducted by the European Commission seem central. In this regard, we can stress as examples: the De Gaulle veto to the UK[14] adhesion, the Greek support in favour of the adhesion of Cyprus – even though this meant adding a politically divided state since 1974- or the Slovenian blockade due to a border conflict on the occasion of the Croatian EU adhesion, which allowed sending encouraging signals to the Western Balkans.

Enlargement to the Western Balkans is not an exception. After the EU leaders remarked, in March 2007, their "unequivocal support for the European perspective for the Western Balkans', the Bulgarian Council of the EU six-months rotating Presidency – first half of 2018 – established the future enlargement of the Western Balkans as one of its priorities. As underlined in an EU Parliament report, "the purpose of EU enlargement policy is to promote economic development and strengthen security and stability in the Western Balkans, as preconditions for those countries eventually to become Member States. Enlargement policy allows the EU to leverage the prospect of membership in order to push badly needed reforms in the region. But conditionality can only work if there is a credible possibility of membership. The remoteness of that possibility had reduced the EU's influence in the Western Balkans, where ethnic tension and national rivalries were again on the rise by 2018. A main goal of the Bulgarian Presidency was to focus EU attention on the region, and breathe new life into enlargement policy"[15].

The experience of episodic enlargements suggests, indeed, that, in general, reluctant Member States ended up accepting it through a rational calculation (cost-benefits, compensations ...). By the end of the Cold War, the EU had to design an enlargement policy that occupies a remarkable place in its agenda[16], although with variable intensity. Following Sedelmeier, according to Lowi's typology, this policy is, on one side, a constituency policy that affects the

crime and corruption." See, DINAN, D. The European Council in 2018. Overview of decisions and discussions. *European Parliamentary Research Service*, PE 621.824 – June 2018, p. 37.

[14] RAMIRO TROITIÑO, D., POLESE, A., BRAGHIROLI, S. De Gaulle y Europa. Nacionalismo frente a integración en la construcción europea. *Revista de Occidente*, 2018, Nº 443, pp. 87–101.

[15] DINAN, D. The European Council in 2018. Overview of decisions and discussions. *European Parliamentary Research Service*, PE 621.824 – June 2018, p. 38.

[16] SEDELMEIER, U. Enlargement. From rules for accession to a policy towards Europe. In WALLACE, H., POLLACK, M., YOUNG, A., (eds.) *Policy-Making in the European Union*, OUP, 2010, p. 406.

institutional structure, rules and decision making. On the other hand, at the same time it also presents elements characteristic of a redistributive policy, particularly, regarding those areas that receive budget funds[17]. Consequently, it is a complex and controversial policy where both member states and EU Commission are the centre actors.

Therefore, we can talk about an enlargement policy. This is, according to some academics, the most effective tool of EU Foreign Policy (Peterson y Gottwald, 2015)[18] due to its influence is significantly higher over the countries that are part of an enlargement process rather than over those member states that are already part of the EU or over third countries. Since 2003, the EU is involved into what could be the last EU enlargement process, the Western Balkans. Enlargement towards the Western Balkans presents two fundamental problems: One the one hand they have not reached a sufficient and adequate development of the rule of law and, on the other hand, the serious yet asymmetrically effects that the multiannual debt crisis have provoked in the EU since 2008; which currently is expected to worsen due to the health emergency resulting from COVID-19 pandemic.

The Juncker Commission (2014-2019) decided that no more countries will join the EU during its mandate. However, at the end of its period as President of the Commission, he recognized the strategic importance of keeping the Western Balkans under the influence of the EU. Following this logic, and as part of its strategy of a Geopolitical Commission, the current President of the EU Commission, Úrsula Von der Leyen (2014-2019), emphasized her commitment to enlargement by asking her Neighbourhood and Enlargement Commissioner, Olivér Várhelyi, to work for a credible perspective towards the Western Balkan enlargement[19]. Currently, the Balkan countries that are part of the enlargement process are four: Montenegro (2012), Serbia (2014), North Macedonia (2020) and Albania (2020). Kosovo and Bosnia remain as potential candidates as they still do not meet the entry requirements.

As we have already highlighted, even though the EU enlargement to the Western Balkans entails great threats and risks, particularly linked to the protection of the rule of law, the option of non-enlargement could lead to destabilization in

[17] SEDELMEIER, U. Enlargement. From rules for accession to a policy towards Europe. In WALLACE, H., POLLACK, M., YOUNG, A., (eds.) *Policy-Making in the European Union*, OUP, 2010, p. 402.

[18] PETERSON, J. & GOTTWALD, M. The EU as a Global Actor. In KENEALY, D., PETERSON, J. & CORBETT, R. (eds). *The European Union. How does it work?* Oxford University Press, 2015, pp. 208–228.

[19] European Commission. Ursula Von der Leyen. Mission Letter. Commissioner-designate for Neighbourhood and Enlargement. Brussels, 10 September 2019.

the EU neighbourhood, which is a primary objective within the current Global Strategy of the EU Commission. At the same time that it could weaken the EU power in the world at the expense of other global actors which are interested and already have a direct influence on the region such as: China, Russia, Turkey or the Gulf Countries. Even though the great geopolitical relevance that the Western Balkans have for the EU, there is the risk that this enlargement process would not be completed. This because France and Germany, the two member states that are at the driving seat of the EU integration process, have opposite views about it. Whereas Germany is one of the main benefited, France, thinking in purely domestic terms, considers it as little strategic relevance. Besides, we cannot forget that the UK, traditionally the member state that has supported enlargement the most, is no longer part of the EU, complicating the options for the candidate countries.

The main aim of this piece is precisely to examine, from the lenses of policy analysis, the position that the two biggest EU member states, Germany and France, have towards the Western Balkan enlargement. Specifically, we aim to introduce the complexity (interests-strategies) that the Western Balkan enlargement involves. In so doing, we will assess the advantages and disadvantages of the EU enlargement to the Western Balkans, in short: Who wins and who loses with the Western Balkans enlargement? Is it a matter of interests or strategy? This article concludes by stressing that differentiated integration could be the perfect option in order to find a common agreement between the most favourable and the most reticent member states. At the same time that it ensures a high influence of the EU in the region.

2. Enlargement Through Rational Lenses

Enlargement is one of the EU foreign policy instruments and, therefore, it follows an intergovernmental decision making process. Member states pursue their domestic interest in intergovernmental conferences where they hold on veto power and where asymmetries of power condition the results of the negotiation (Moravcsik, 1998). Taking into account that the final decision reflects the biggest member states preferences, it is essential to analyze what are their priorities and strategies. Following logic of consequences or cost benefit, Member states will favour enlargement as long as it provides long term economic or geopolitical benefits[20] (greater stability in the neighbourhood, greater geopolitical impact or

[20] MORAVCSIK, A. & VACHUDOVA, M. National Interests, State Power, and EU Enlargement. *East European Politics and Societies*, 2003, Vol. 17, Nº. 1, pp. 42–57; p. 43.

better immigration control ...). This would imply that those member states that a priori do not obtain any benefit from enlargement would support it as long as they think they have the enough negotiating power in order to make those member states that will win the most with enlargement compensate them through other means[21].

Currently, the major obstacle that Western Balkan enlargement faces is the weakness of their democracies. Therefore, we understand that, in order to strengthen their relationship with the Western Balkans, member states would contemplate different possibilities: full membership or even differentiated integration. Schimmelfenning underlines that EU integration can only be understood through the logic of differentiation (Curtin, D.: 2020, 3)[22]. Following a rational logic, the degree of differentiation in the integration of the new members will be determined by the differences regarding the preferences and power of member states (Moravcsik, 1998). Finally, last decision would be based on the major benefits that going for one of those options would mean before any other possible alternative (Hall & Taylor, 1996). Schimmelfening stresses that when taking decisions, Member States seek to reduce the costs that a non-decision entails such as transaction costs, policy costs and autonomy costs[23]. Following Schneider, enlargement processes always create tensions between member states where the most economically developed are, usually, the ones that are more in favour of adding new member states, contrary to the ones that are institutionally weaker or, as it is the case of France, have a large agricultural sector. Finally, he remarks that enlargement would only be possible in case the redistribution of gains compensate the relative costs[24].

This article main hypothesis is, therefore, that member states would favour future enlargements (Western Balkans) in case they think it will bring economic or geopolitical benefits. Notwithstanding, our second hypothesis is that member states would try to minimize the enlargement costs as much as possible by likely opting for differentiated integration formulas.

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[21] SCHIMMELFENNIG, F. & SEDELMEIER, U. Theorizing EU enlargement: research focus, hypotheses, and the state of research. *Journal of European Public Policy*, 2002, Vol.9, Nº4, pp. 500–528, pp. 512–513.

[22] CURTIN, D. From a Europe of Bits and Pieces to a Union of Variegated Differentiation. *EUI Working Papers*; *RSCAS* 2020, Nº 37. [online]. Available at: < https://cutt.ly/LuPR3kT>

[23] SCHIMMELFENNIG, F. & SEDELMEIER, U. Theorizing EU enlargement: research focus, hypotheses, and the state of research. *Journal of European Public Policy*, 2002, Vol.9, Nº4, pp. 500–528, pp. 510–511.

[24] SCHNEIDER, C. J. Enlargement processes and distributional conflicts: The politics of discriminatory membership in the European Union. *Public Choice*, 2007, Nº 132; pp. 85–102, p. 86.

3. EU – Western Balkans: What Has the EU Done so Far?

Eurostat[25] data shows that Western Balkans is an underdeveloped area: Albania's GDP represents 31% of the EU average, North Macedonian's 38%, Serbian's 40% and Montenegro's 48%; In addition to highly conflictive. The Balkan wars took place less than 30 years ago and there still are tensions to resolve regarding borders. Because of this, the EU is strongly interested in maintaining a close relationship with this area in the aim of promoting cross-border regional cooperation and ensuring stability in its neighbourhood.

Official Candidates	Territorial Extension Km2	Population	GDP growth 2019 (%)	Inflation 2019 (average %)	Public Debt (% GDP)	Life expectancy	Youth Unemployment rate (15-24) (%)	Major Religions
Montenegro	13.812	622.182	3.0	1.0	89	73 (M) / 77 (F)	30,7	Christianity / Islam
Serbia	88.499	7M	3.3	2.0	52	72 (M) / 77 (F)	30	Christianity
Turkey	783.562	82 M	0,2	15,7	30,8	73.3 (M) / 79.8 (F)	23,7	Islam
Albania	28.748	2,9 M	3.0	1,7	66	74 (M) / 80 (F)	28,1	Islam / Christianity
R. North Macedonia	25.713	2,1 M	3,1	1,5	51	73 (M) / 77 (F)	39,1	Christianity / Islam
Potencial Candidates	**Territorial Extension Km2**	**Population**	**GDP growth 2019 (%)**	**Inflation 2019 (average %)**	**Public Debt (% GDP)**	**Life expectancy**	**Youth Unemployment rate (15-24) (%)**	**Major Religions**
Bosnia & Herzegovina	51.129	3,5M	2,8	0,8	33	74,8 (M) / 79,8 (F)	39,7	Christianity / Islam
Kosovo	10.887	1,8 M	4,2	2,68	17,5	70 (M) / 74,5 (F)	Above 50	Islam / Orthodox

Source: own elaboration with data from: Coface for trade, BBC countries profile, World Bank, UN, Spanish Ministry of Foreign Affairs and global security.

[25] Eurostat. GDP per capita in PPS. [online]. Available at: <https://cutt.ly/tuPYW19>

In the aim of ensuring a more secure neighbourhood the EU has put in place various instruments or strategies to build a closer relationship with Western Balkans. In this sense, the first step towards a possible Western Balkans enlargement was the Stabilization and Association Process (SAP) launched in 1999 and reinforced during the Thessaloniki Summit in 2003. The main purpose behind this initiative was to build an ever closer relationship regarding different areas in order to ensure more stability through common political and economic goals, which have leaded to the establishment o a free trade area. It is based on contractual, commercial, financial assistance and regional cooperation relationships[26]. Regional cooperation regarding numerous and various social and economic areas has also been enhanced. Finally, an accession process has been launched. However, since member states stressed its interests in adding Western Balkan countries to the EU during the Thessaloniki Summit (2003), Slovenia (2004) and Croatia (2013) have been the only ones that have joined the EU to date; whereas Montenegro (2012), Serbia (2014), North Macedonia and Albania (May 2020) are, currently, part of the adhesion process.

As part of the accession process, the EU provides financial assistance to help candidate countries carry out the reforms that are necessary to implement and comply with EU law. This through the Instrument for Pre-Accession Assistance, whose program runs until 2020, including performance indicators in order to assess whether the objectives have been achieved (European Commission, 2015)[27]; but also technical assistance tailored to the needs of the candidate country. The latter is provided through the Technical Assistance and Information Exchange Instrument, which is aimed at sharing good practice experiences and knowledge[28]. The EU also provides aid for counter-terrorism, security, rule of law, migration and humanitarian aid programs[29], in addition to contributing to the protection of press freedom as an essential element of a democratic and legal state (European Parliament 2017)[30]. Besides, Economic relations between the Western Balkans and the EU are very close. EU companies make large investments in the region, being its first trading partner in

[26] European Commission. Stabilisation and Association Agreement. 2016 [online]. Available at: <https://cutt.ly/Ca0qAja>

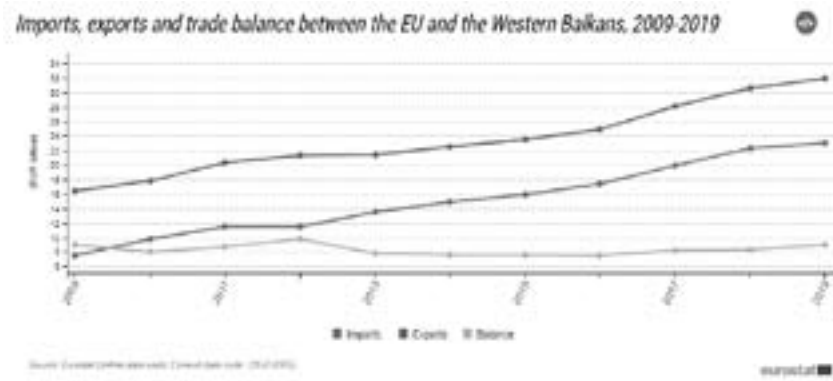
[27] European Commission. Overview – Instrument for Pre-accession Assistance. 2015. [online]. Available at: <https://cutt.ly/4uPYSG6>

[28] European Commission. TAIEX. 2020. [online]. Available at: <https://cutt.ly/muPY22g>

[29] RRUSTEMI, A., WIJK, R., DUNLOP, C., PEROVSKA, J. & PALUSHI, L. Geopolitical Influences of External Powers in the Western Balkans; *The Hague Centre for Strategic Studies*. 2019. [online]. Available at: <https://cutt.ly/CuPUlex>; p. 13.

[30] European Parliament. Media freedom trends 2017: Western Balkans. At a glance. 2017. [online]. Available at: < https://cutt.ly/0uPUm6V>

both imports and exports 72.8%, followed by China, 5% and Russia, 4.8% (Council of the EU 2018)[31].



Source: Eurostat

These countries have also a high participation in various EU programmes such as Erasmus +, Horizon 2020, Creative Europe or COSM. In addition, two security and defence missions are present in the region (EEAS 2017)[32]. Finally, the EU Commission launched a digital agenda for the Western Balkcans aimed at providing assistance to transform the economy of the region into digital (European Commission 2018)[33].

4. New Enlargement Policy Towards the Western Balkans

Following Schimmelfennig and Sedelmeier (2004, p. 664), the effectiveness of EU conditionality regarding third countries accession negotiations depends on the credibility of its threats and rewards. In this sense, the EU Commission has proposed a new accession process characterized for being more predictable and credible, as well as more dynamic and subject to greater political

[31] Council of the EU. Infographic - EU and Western Balkans intertwined. 2018. [online]. Available at:< https://cutt.ly/FuPUIRb>

[32] EEAS. EU Engagement in the Western Balkans. Factsheet. 2019. [online]. Available at: <https://cutt.ly/kuPUVnu>

[33] European Commission. European Commission launches Digital Agenda for the Western Balkans - EU monitor. 2018. [online]. Available at: <https://cutt.ly/QuPIk0Y>

control[34]. In order to make the enlargement process more credible, the European Commission has proposed it to be based on mutual trust and clear commitments between the EU Member States and the Western Balkans. The EU Commission has also emphasized the necessity of "a stronger political steer and engagement at the highest levels". In order to achieve this objective the EU Commission has proposed to increase the frequency of high level summits between the EU and the Western Balkans, at the same time that ministerial contacts are also intensified. The EU Commission has also proposed Member states to be much more systematically involved in monitoring and reviewing the process[35].

In order to make this accession process more dynamic, the EU Commission has proposed to group the negotiating chapters in six thematic clusters: fundamental rights, internal market, competitiveness and inclusive growth, green agenda and sustainable connectivity; resources, agriculture and cohesion; external relations. Each cluster negotiations' will be opened as a whole, after the open criteria are fulfilled, instead of an individual chapter basis. Fundamental rights negotiations will be open first and closed last. The progress being made in this area will condition the negotiations path. The period of time between opening a cluster and closing the individual chapters will be limited, preferably within one year. Besides, to make this process more predictable the EU Commission compromises to make more clear what it expects from the candidate countries along the different stages of the process. In particular, the EU Commission compromises to clarify what are the rewards that reforms can bring and what the negative consequences if there is not progress. Among the benefits we can find accelerated integration or access to internal market or to EU programmes, in addition to an increase in funding and investments. Negotiations could be stopped regarding specific areas or, in most complicated cases, stop the whole process. Besides, the EU Commission stresses the possibility of reopen individual chapters that had already been closed.[36].

In particular, EU institutions demand progress regarding three priority areas: first of all they want to ensure Rule of Law based on a strict division of powers and an independent judicial system that fights against public corruption and organized crime, progress towards free market without state intervention or power structures

[34] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enhancing the accession process – A credible EU perspective for the Western Balkans. 2020. [online]. Available at <https://cutt.ly/FuPJX0U>

[35] European Commission. A more credible, dynamic, predictable and political EU accession process – Commission lays out its proposals. 2020. [online]. Available at <https://cutt.ly/RuPKaXD>

[36] European Commission. A more credible, dynamic, predictable and political EU accession process – Commission lays out its proposals. Press Release. 2020. [online]. Available at https://cutt.ly/2uPX2VY

that allow accumulation of power and limit the development of private initiative, as well as the solution of territorial disputes that affect some neighbour countries[37].

5. A matter of national interest.

Enlargement to the Western Balkans is the perfect test for the EU capacity to influence global governance[38]. EU member states favourable to enlargement stress that the EU enlargement to the Western Balkans is in the EU interest. As we have already highlighted, the EU is the largest trading partner of the Western Balkans (72.8%) in terms of both imports and exports (Council of the EU 2018).[39] However, trade ties with the region are very different between member states and regarding each Western Balkans country.

Even though *Eurobarometer* (2019) shows that, for the first time since 2009 EU citizens are largely in favour of enlargement, more people are in favour rather than against[40], whereas German and French citizens are largely contrary of keep enlarging the EU. Besides, Germany and France have diverging positions regarding enlargement to the Western Balkans. Germany is the leader of the negotiating accession process, supported by countries such as Austria, Italy or Poland; while France has positioned itself against it, like Denmark and the Netherlands, mainly due to the weakness of their rule of law[41]. Countries favourable to enlargement are the ones who enjoy the closest ties with the region, whether because of high presence of diaspora, economic relationship or due to geopolitical or security reasons. Therefore, we can confirm that Member States preferences are in directly connected with their national interests.

5.1. Germany, in Favour

In most member states, enlargement process is a "high policy" issue that is essentially limited to the government, although it depends on the national constituency

[37] GINÉ DAVÍ, J. El dilema de la UE en los Balcanes. 2019. [online]. Available at: <https://cutt.ly/luPLuN1>

[38] BRUDZIŃSKA, K., GUBALOVA, V., KUDZKO, A. & MUZERGUES, A. Making Flexible Europe Work? European Governance and the potential of differentiated integration. *GLOBSEC Policy Institute*. (2020) [online]. Available at: <https://cutt.ly/DuPZoAx>; p. 36.

[39] RRUSTEMI, A., WIJK, R., DUNLOP, C., PEROVSKA, J. & PALUSHI, L. Geopolitical Influences of External Powers in the Western Balkans; *The Hague Centre for Strategic Studies*, 2019. [online]. Available at: <https://cutt.ly/CuPUlex>

[40] Standard Eurobarometer 91. Spring 2019. [online]. Available at: <https://cutt.ly/auPZM8Y>

[41] SZPALA, M. & FORMUSZEWICZ, R. EU split over enlargement policy. Centre for Eastern Studies. 2019. [online]. Available at: <https://cutt.ly/muPXH9q>

of each member state. In the case of Germany, the procedure is a bit more complicated. The National Parliament has big powers in shaping the process, which makes it a truly political debate. Germany and Western Balkans are closely tied. Almost 1,5 million of German inhabitants come from the Western Balkans. Germany is also one of the EU biggest inverstors in the region[42]. Germany is the first trading partner in imports and exports with Serbia; first commercial partner in imports and second in exports with North Macedonia; second trading partner in imports and third in exports with Albania and second trading partner in imports with Montenegro. This makes Berlin its greatest ally within the EU[43].

At the same time, Germany is one of the largest contributors of development aid in the region. In addition, it has participated in peacekeeping operations in its conflicts, which made it to play a more relevant political role. However, although Germany supports enlargement, based on the large number of benefits that this would bring, its maximum objective is not undermining the EU integrity[44].

The Western Balkan countries are located in a privileged geographical enclave and Germany is particularly interested in the EU controlling it[45]. Evidence of Germany's great support for the Western Balkans enlargement was the holding of the Western Balkans Summit in August 2014 and the launch of the Berlin Process[46]. Through the Berlin Process Germany stressed that Serbia was the most important country in the region due to its geostrategic location. Furthermore, Germany has made particular efforts to facilitate relations between Serbia and the EU, but also to facilitate dialogue between Serbia and Kosovo[47], key for the possible accession of Serbia to the EU.

In the case of Germany, enlargement to the Western Balkans is also a domestic issue due to the main migratory route towards Germany goes through the Western Balkans. The two most important refugee flow routes to the EU from Turkey and Greece go through the Western Balkans. Specifically, one goes through North

42 KER-LINDSAY, J., ARMAKOLAS, I., BALFOUR, R. & STRATULAT, C. The national politics of EU enlargement in the Western Balkans. *Southeast European and Black Sea Studies*, 2017. Vol. 17, Nº. 4; pp. 511–522, pp. 515–516.

43 COLIBASANU, A. Germany: Keeping an Eye on the Balkans. *Geopolitical Futures*, 2017. [online]. Available at: <https://cutt.ly/5uPVPzM>

44 KER-LINDSAY, J., ARMAKOLAS, I., BALFOUR, R. & STRATULAT, C. The national politics of EU enlargement in the Western Balkans. *Southeast European and Black Sea Studies*. 2017. Vol. 17, Nº. 4; pp. 511–522, pp. 515–516.

45 VON DER BURCHARD, H. M. Albania, North Macedonia should get green light for EU talks in March. *Politico.com/Europe*. 2020. [online]. Available at: <https://cutt.ly/VuPBlgi>

46 TÖGLHOFER, T. & ADEBAHR, C. Firm supporter and severe critic – Germany's two-pronged approach to EU enlargement in the Western Balkans. *Southeast European and Black Sea Studies*, 2017. Vol. 17, Nº 4, pp. 523–539.

47 COLIBASANU, A. Germany: Keeping an Eye on the Balkans. *Geopolitical Futures*. 2017. [online]. Available at: <https://cutt.ly/5uPVPzM>

Macedonia and Serbia, and the other through Albania and Montenegro; merging in Bosnia and Herzegovina with the aim of reaching Croatia[48] and from there travel to the north of the EU. This is the main reason for Germany in considering Western Balkans as sensitive topic for its internal security and, consequently, it is one of the major supporters of Western Balkan enlargement. Enlargement to the Western Balkans is an essential piece of Angela Merkel's government to control migration[49]. In this regard, at the European Council of June 5th 2020, the EU called for closer collaboration with the Western Balkans in order to achieve a more efficient migration policy and border management, at the same time that it remarks the necessity to continue improving their asylum systems and cooperation on readmission and return[50].

However, the Western Balkan enlargement support of other German political parties, elite and general public is decreasing. Following *Eurostat* 57% of German citizens is contrary to add more countries to the EU[51]. At the same time, that they consider that immigration is the most severe challenge that the EU currently has[52]. In short, German opposition is questioning both the Western Balkan enlargement to reach European standards and the expected benefits from its accession[53].

5.2. France, suspicious

French opposition to the enlargement process is also directly linked to its domestic interests, in addition to their understanding of the EU integration project. France understands the EU enlargement process as the best way of expanding its power and influence. However, despite the historical ties that bind France to the region, the Western Balkans enlargement is currently of little interest. Evidence about the French lack of interest in keep adding more countries to the EU project is the introduction, after the Croatia accession to the EU in 2013, of the referendum requisite for accepting new members[54]. As regards the specific case of Western

[48] DÉRENS, J-A. Dans les Balkans, la situation désespérée des migrants et réfugiés. *Rfi.fr.* 2019. [online]. Available at: <https://cutt.ly/EuPMps6>

[49] COLIBASANU, A. Germany: Keeping an Eye on the Balkans. *Geopolitical Futures*. 2017. [online]. Available at: <https://cutt.ly/5uPVPzM>

[50] European Council. Western Balkans: Council calls for enhanced cooperation in migration and security. 2020. [online]. Available at: <https://cutt.ly/qa0abfs>

[51] Standard Eurobarometer 91. Spring 2019. Factsheets, Germany. [online]. Available at: <https://cutt.ly/CuP1vGo>

[52] Standard Eurobarometer 91. Spring 2019. Factsheets, Germany. [online]. Available at: <https://cutt.ly/CuP1vGo>

[53] SZPALA, M. & FORMUSZEWICZ, R. EU split over enlargement policy. Centre for Eastern Studies. 2019. [online]. Available at: <https://cutt.ly/muPXH9q>

[54] WUNSCH, N. Between indifference and hesitation: France and EU enlargement towards the Balkans. *Southeast European and Black Sea Studies*, 2017, Vol. 17, Nº 4, pp. 541–554.

Balkans, political and economic ties are not significant, except for Serbia, country with which trade has increased over the last years and it is expected to continue doing so. France is the twelfth largest supplier and tenth largest buyer of Serbia, while at the same time more than 100 French companies are present in this country, including: Michelin, Société Générale o Crédit Agricole[55]. On the other hand, the presence of diaspora from the Western Balkans in France is not very large.

Historically, France's main interest in relation to enlargement policy is for the EU to become bigger and more powerful because it would result in a bigger and more powerful France[56]. However, support for enlargement is declining sharply in the French domestic political debate[57]. Following last *Eurostat* (2019) 58% of French citizens are contrary to adding more countries to the EU[58]. This scepticism about enlargement is fundamentally based on the fear that the admission of less developed countries to the EU could lead to economic disadvantages[59]. French political parties are neither interested in continue enlarging the EU. This is not only the case of the Front National, but also the Republicans[60]or even Enmanuel Macron who stresses that, while France proposes a strategic discussion on the future of the EU, Germany puts economic interests first[61]. The French main purpose is to keep the EU as a political project, which would be hampered by the entry of new member states. In this sense, its Ministry of Foreign Affairs stresses that France will work for a "controlled enlargement"[62].

Another reason that France uses to be sceptical of future enlargement processes is the experience derived from the great enlargement to the East in 2004. Paris understands that Berlin was one of the big winners, as it has expanded its area of influence and, therefore, increased its power. France considers the Western Balkans as part of Germany's area of influence[63] and, as a consequence, they

[55] France Diplomatie. Serbia. [online]. Available at: <https://cutt.ly/psaxNGP>

[56] KER-LINDSAY, J., ARMAKOLAS, I., BALFOUR, R. & STRATULAT, C. The national politics of EU enlargement in the Western Balkans. *Southeast European and Black Sea Studies*, 2017, Vol. 17, Nº. 4; pp. 511–522, p. 519

[57] WUNSCH, N. Between indifference and hesitation: France and EU enlargement towards the Balkans. *Southeast European and Black Sea Studies*, 2017. Vol. 17, Nº 4, pp. 541–554.

[58] Standard Eurobarometer 91. Spring 2019. Factsheets, France. [online]. Available at: <https://cutt.ly/CuP1vGo>

[59] WUNSCH, N. Between indifference and hesitation: France and EU enlargement towards the Balkans. *Southeast European and Black Sea Studies*, 2017. Vol. 17, Nº 4, pp. 541–554.

[60] SULZER, A. & LAURENT, Q. (Le 28 mars 2019) Élargissement de l'Europe: Wauquiez assume ses variations. Leparisien.fr. [online]. Available at: <https://cutt.ly/fuP21hz>

[61] DEMPSEY, J. Europe's Enlargement Problem. *Carnegie Europe*, 2019. [online]. Available at: <https://cutt.ly/9uP9bla>

[62] WUNSCH, N. Between indifference and hesitation: France and EU enlargement towards the Balkans. *Southeast European and Black Sea Studies*, 2017. Vol. 17, Nº 4, pp. 541–554.

[63] TREGOURES, L. By blocking enlargement decision, Macron undercuts France's Balkan goals. *Atlantic Council*. 2019. [online]. Available at: <https://cutt.ly/YuP8d3Z>

possible accession to the EU would benefit the hegemonic power of Germany and weaken France'. In summary, from a purely rational point of view aimed at maximizing domestic interest, for France, unlike Germany, the political and economic relevance of the Western Balkans enlargement is low. France, from a domestic point of view, lacks a vital interest in the region and, therefore, understands that this enlargement will not bring it any direct benefit. Contrary, it fears that the reinforcement of German hegemony in the EU club, particularly after Brexit. UK has been the main German ally regarding EU enlargement, contrary to the France resistance. Without any doubt, Brexit will make more difficult the entry of new countries into the EU[64]. That being said, further EU enlargement would send a message of strength, influence and democratizing capacity of the EU to the rest of the world[65]. The German and French approach towards Western Balkans accession is still contradictory since both countries are aware about the problems of enlargement but also about the risks of not doing so.

6. With Clear Positive, but Also Negative Consequences.

Enlargement to the Western Balkans constitutes a great dilemma for the EU. First, these countries are still far from meeting the minimum standards of rule of law protection[66], fight against corruption, organized crime, etc. that are necessary to be able to belong to the community club. In the second place, adding six new members to the EU would weaken the EU capacity to take decisions in an effective and efficient way. Notwithstanding, an eventual EU abandonment or disengagement of the enlargement process could seriously jeopardize the stability of the EU's neighbourhood and, at the same time, weaken its geopolitical power. It would mean leaving the Western Balkans in the hands of other powers such as Russia, China or Turkey that would clearly benefit from the EU vacuum in the region[67]. This is precisely the dichotomy that divides EU member states in advancing the accession process.

[64] JANO, D. Brexit implications on EU enlargement is it make or break time? *EU Policy Hub. Policy Brief*, 2016. [online]. Available at: <https://cutt.ly/ruP81SI>

[65] IVKOVIĆ, A. (February 2nd 2020) [EWB Interview] Wunsch: There is a good chance France will consent to opening of talks with the new methodology. *European Western Balkans*. [online]. Available at: <https://cutt.ly/uuP4RIW>

[66] CSAKY, Z. Nations in Transit 2020 Dropping the Democratic Facade. Freedomhouse.com. 2020. [online]. Available at: <https://cutt.ly/TsyH9Ww>

[67] ABELLÁN, L. (18 de mayo de 2018) La cumbre de la UE en Sofía evita dar perspectiva de adhesión a los Balcanes. *Elpaís.com*. [online]. Available at: <https://cutt.ly/fuP7wpW>

6.1. Geopolitics

In an increasingly geopolitical world in which the future of citizens depends on great power struggles and where the objective is to create ever greater spheres of influence through the instruments of political power, the EU cannot stay behind[68]. Commission Juncker (2014-2019) highlighted that there would be no further enlargements during his mandate while stressing that first the EU needs to be internally strengthened. However, by the end of his mandate, Juncker underlined its awareness about stability in the EU neighbourhood would necessarily mean a Western Balkans credible accession process[69].

Ursula Von der Leyen has defined its Commission Presidency term as geopolitical[70] with the utmost purpose of increasing the EU power in the world – which necessarily mean to ensure the stability in the EU neighbourhood. The current EU Commission understands that enlargement to the Western Balkans is in the EU political, economic and security interest; in addition to a geostrategic move in order to make the EU more stable, strong and united[71]. During her first speech as President of the EU Commission, Von der Leyen made particular emphasis on a strategic enlargement to the Western Balkans[72]. Nevertheless, the most important challenge that the EU Commission faces in making the EU a relevant geopolitical actor remains to be the lack of unity among member states towards its immediate neighbourhood. The fact that France refuses to make any progress towards Western Balkans enlargement allows external competitors to exert greater influence in the region[73].

The EU Commission has emphasized that promoting enlargement policy towards the Western Balkans would be essential to ensure the credibility, success and influence of the EU in the region, especially taking into account the current global scenario characterized by great geopolitical rivalry[74]. Over the past few years, favoured by the

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68 STEINICKE, S. Geopolitics is back — and the EU needs to get ready. *International Politics and Society*, 2020. <https://cutt.ly/KuP5yIP>

69 European Commission. President Jean-Claude Juncker's State of the Union Address 2017. Speech. 2017. [online]. Available at: <https://cutt.ly/OuP5SmH>

70 European Commission (November 27th 2019) Speech by President-elect von der Leyen in the European Parliament Plenary on the occasion of the presentation of her College of Commissioners and their programme. 2019. [online]. Available at: <https://cutt.ly/LsyLScu>

71 DABROWSKI, M. Can the EU overcome its enlargement impasse? *Bruegel.org.* 2020. [online]. Available at: <https://cutt.ly/JuP6uBE>

72 European Commission (November 27th 2019) Speech by President-elect von der Leyen in the European Parliament Plenary on the occasion of the presentation of her College of Commissioners and their programme. 2019. [online]. Available at: <https://cutt.ly/LsyLScu>

73 TEEVAN, C. Geopolitics for dummies: Big challenges await the new European Commission. *ECDPM blog*. 2020. [online]. Available at: <https://cutt.ly/ouP6DCP>

74 MEĐAK, V. New methodology will put political will to the test. *European Western Balkans. com*. 2020. [online]. Available at: <https://cutt.ly/duAqkR8>

vacuum left by the EU and the US, there has been an increase in the presence and influence of other world powers such as Russia, China, Turkey or the Gulf countries in the Western Balkans, mainly through soft power or investment strategies[75].

Therefore, even if member states reluctances about enlargement would discourage to continue the accession process, doing so would have severe consequences for the EU mainly because Western Balkans could end up under the influence of China, Russia or Turkey. China, as part of its One Belt One Road initiative is making large investments in the region. Furthermore, the governments of the Western Balkans are particularly attracted to Chinese investments because, unlike those from the EU, they are not conditional on any kind of reform nor do they require extensive bureaucratic procedures for which their public administration is not adequately prepared[76].

Serbia is the Western Balkan country with the closest relations with the EU. However it also enjoys a tight relationship with Russia, mainly focused on political and religious aspects, that has led to an agreement on a Eurasian economic union[77]. Similarly, China's largest investments in the region are concentrated in Serbia[78]. Furthermore, as part of a soft power strategy, both China and Russia have provided military equipment and made investments in the region to promote their culture among Western Balkans citizens, at the same time that they have also strengthen its ties with the political elites of these countries. On the other hand, Iran and Turkey have focused their influence in the religious sphere through Muslim communities[79].

6.2. Rule of law

Rule of law is the key problem in the Western Balkans accession to the EU[80]. While region's elites have been successful in creating a false appearance of democracy through, for example, the periodic holding of elections, enacting laws

[75] VUKSANOVIC, V. Serbia's deal with the Eurasian Economic Union: A triumph of foreign policy over economics. *LSE Blog*. 2019. [online]. Available at: <https://cutt.ly/huAwPg9>

[76] MARCIACQ, F. & REICHARDT, I. (May 24th 2019) Failure in the Western Balkans means a failure of the European project. *NewEasternEurope.com*. [online]. Available at: <https://cutt.ly/WuAepNM>

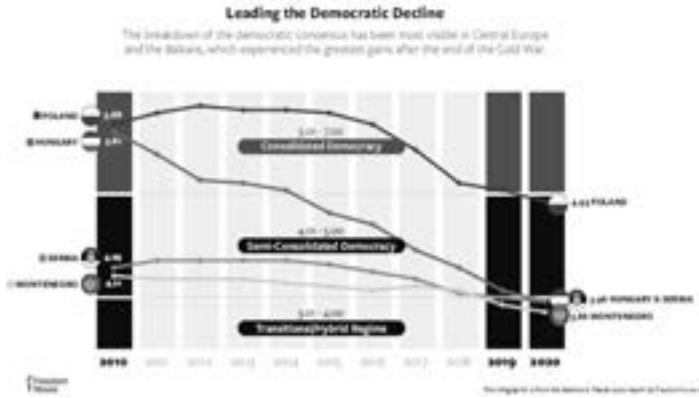
[77] CADÈNE, B. (Le 6 Mai 2020) Les Balkans occidentaux sont-ils les bienvenus dans l'Union européenne? *Franceculture.fr*. [online]. Available at: <https://cutt.ly/4uAeJ6Y>

[78] MARDELL, J. China's Economic Footprint in the Western Balkans. *Bertelsmann-stiftung.de.* 2020. [online]. Available at: <https://cutt.ly/UuArf3O>

[79] RRUSTEMI, A., WIJK, R., DUNLOP, C., PEROVSKA, J. & PALUSHI, L. Geopolitical Influences of External Powers in the Western Balkans; *The Hague Centre for Strategic Studies*. 2019. [online]. Available at: <https://cutt.ly/CuPUlex>

[80] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

that guarantee freedom of expression or constitutionally guaranteeing a system of counterweights; The reality is that these Balkan elites impede the effective enjoyment of individual rights, calling into question rule of law[81]. Western Balkans socio-political context is characterized by low levels of respect for the rule of law and high levels of corruption. To which we must add security risks derived from social unrest, political instability and ethnic-nationalist or extreme right and religious extremisms. In addition to a weak economic context that means that, taking into account the geographical proximity of the Western Balkans to the EU if its presence is not reinforced, it will suffer from the external negative consequences (Bonomi and Reljic 2017)[82]. One of the *sine qua non* requirements for a candidate state to finally join the European project is its firm respect for the rule of law. In this regard, EU Commission stresses that Western Balkans have to carry out major reforms regarding respect for the rule of law, the fight against corruption and organized crime, economic and competitiveness as well as regional cooperation and reconciliation[83]. According to *Freedomhouse.org*, none Western Balkan countries is currently considered as full democracy[84].



Source: Freedom House

A credible enlargement perspective for and enhanced EU engagement with the Western Balkans. COM(2018) 65 final. 2018. [online]. Available at: <https://cutt.ly/ZsyB20j>

81 KMEZIĆ, M. Rule of law and democracy in the Western Balkans: addressing the gap between policies and practice. *Southeast European and Black Sea Studies,* 2020, Vol. 20, Nº1; pp. 183–198, p. 186.

82 RRUSTEMI, A., WIJK, R., DUNLOP, C., PEROVSKA, J. & PALUSHI, L. Geopolitical Influences of External Powers in the Western Balkans; *The Hague Centre for Strategic Studies*. 2019. [online]. Available at: <https://cutt.ly/CuPUlex>

83 European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2019) 260 final. 2019. [online]. Available at: <https://cutt.ly/nuAy9V5>

84 *FreedomHouse.org* Countries and Territories. 2020. [online]. Available at: <https://cutt.ly/NuAuc4X>

Political parties have captured the state through corrupt and patronage networks ranging from the political to the judicial sphere through control of the media. Generally speaking, political forces with strong representation support the accession to its country to the EU. In particular, with regards to Montenegro, the political party with the strongest representation in the EU Parliament is pro-EU. However, the alliance of right-wing populist and conservative parties "Democratic Front", the main opposition party, with 17 seats out of 81 in Parliament (2016), consider itself eurosceptic while defending anti-NATO and pro- Russian positions[85]. In the case of the Serbian President, even though it is in favour of the accession to the EU, he is committed to Russia, keeping it as its traditional geopolitical partner. In 2019 Serbia and Russia signed a Eurasian economic agreement. Another fundamental actor in Serbia is the "Serbian Radical Party", a eurosceptic radical party that seeks to unite all Serbs under a single State[86]. In Albania, all political forces defend integration into the EU and strengthening relations with the United States[87] and NATO. Finally, North Macedonia's party system is divided around the representation of different ethnic groups, which favours nationalist tendencies. However, they all share their commitment to European integration and NATO[88].

Once the EU and the Western Balkans begin a closer relationship through the accession process, the EU will have to make considerable efforts to establish the necessary guidance, check the reforms and condition the funds particularly to the advances in this matter[89]. As the EU Council stresses: "Increased EU assistance will be linked to tangible progress in the rule of law and in socio-economic reforms, as well as on the Western Balkans partners' adherence to EU values, rules and standards"[90]. However, several academics stress that it might take several years before Western Balkans are able to are able to endorse EU law requiring even more time for them to guarantee compliance with EU norms and values[91].

[85] Balkaninsight.com (October 11th 2016) Montenegro: Key Political Parties. 2016. [online]. Available at: <https://cutt.ly/HuAt7Dn>

[86] Party Passport. Serbia. European Party Monitor.*KU Leuven. Konrad Adenauer Stiftung*. 2020. [online]. Available at: <https://cutt.ly/WuAyieZ>

[87] Party Passport. Albania. European Party Monitor.*KU Leuven. Konrad Adenauer Stiftung*. 2020. [online]. Available at: <https://cutt.ly/uuAyhGn>

[88] Party Passport. North Macedonia. European Party Monitor.*KU Leuven. Konrad Adenauer Stiftung*. 2020. [online]. Available at: <https://cutt.ly/FuAyvN2>

[89] TOCCI, N. (May 6th 2020) Los Balcanes Occidentales pertenecen a Europa. *POLITICO. HEAVEN32.com.* [online]. Available at: <https://cutt.ly/QuAu5Ud>

[90] EU Council. Zagreb Declaration, 6 May 2020. Press report. 2020. [online]. Available at: <https://cutt.ly/Ysy2aUj>

[91] MARCIACQ, F. & REICHARDT, I. (May 24th 2019) Failure in the Western Balkans means a failure of the European project. *NewEasternEurope.com*. [online]. Available at: <https://cutt.ly/WuAepNM>

Therefore, Western Balkan accession to the EU will depend, to a large extent; on the reforms they are capable of implementing.

7. Differentiated Integration Towards the Western Balkans?

Holzinger & Schimmelfennig (2012) share the Grabitz (1984) conception about Multi-speed Europe underlying that it implies "the introduction of a federal political union in several steps, whereby some states co-operate closer at an earlier point in time while others follow suit later"[92]. Differentiated integration is part of the EU project since the Maastricht Treaty. At this point, the concept used was flexibility. During the Amsterdam Treaty the concept used was closer cooperation, reformulated by the Treaty of Nice into enhanced cooperation. Finally, the Lisbon Treaty introduced, particularly regarding defence, permanent structured cooperation. Furthermore, with the aim of making unanimity in decision-making more flexible, Amsterdam Treaty introduced the possibility of constructive abstention[93]; in addition to the popular *opt-outs* with regards to Schengen.

The main objective of enlargement policy is that candidate countries become full member states. This means that they have to add to their domestic law the entire *acquis communautaire*. Nevertheless, since the EU already applies differentiated integration within the EU, it could also be very advantageous to do so regarding candidate countries in order to strengthen relations with those that aspire to have a closer relationship with the EU but either do not want, or are not prepared to be full members. However, we should also have into account that differentiated integration could foster inequalities between member states, leading to first and second class member states[94].

Enlargement process towards the Western Balkans, unlike previous enlargement processes, is particularly linked to cross compliance. There are major questions surrounding this process regarding security, migration and freedom

[92] HOLZINGER, K. & SCHIMMELFENNIG, F. Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data. *Journal of European Public Policy*, 2012, Vol. 19, Nº 2, pp. 292–305, p. 294.

[93] JOKELA, J. Introduction. In JOKELA, J. (Ed). Multi-speed Europe Differentiated integration in the external relations of the European Union. *Finish Institute of International Affairs*. 2014. REPORT 38; pp. 9–16, p. 11. [online]. Available at: <https://cutt.ly/0uAandG>

[94] RAIK, K. & TAMMINEN, T. Inclusive and exclusive differentiation: Enlargement and the European Neighbourhood Policy. JOKELA, J. (Ed). Multi-speed Europe Differentiated integration in the external relations of the European Union. *Finish Institute of International Affairs,* 2014. REPORT 38; pp. 45–63; p. 46. [online]. Available at: <https://cutt.ly/0uAandG>

of movement (Grabbe 2014; Ker-Lindsay 2017)[95]. Germany is a strong supporter of the Western Balkans enlargement, not only as a way of democratically transforming these countries but also as a way to convince and engage both domestic political actors and citizens as a whole[96].

Given that Western Balkans must undergo major reforms before they can become full Member States, it would be appropriate to consider as an option the establishment of intermediate steps prior to full integration. As we have indicated, their accession is subject to the fact that these countries manage to reform their institutions and the development of rule of law, so it is likely that, if this is not achieved, certain economic sectors would opt for establishing an association with the internal market instead of full integration[97].

Both Germany and France are among the member states more favourable to the introduction of closer collaboration mechanisms between Member States that further EU integration,[98] which means differentiated integration or Multi-speed EU. Germany remarks the idea that multi-speed EU does not mean a divided EU, and understands that introducing flexibility mechanisms will allow the EU to effectively respond to the different challenges that will arise. France maintains that the only way for the EU to function is through the introduction of flexibility in its policies. Furthermore, France hopes that a Multi-speed EU will consolidate France power as part of the EU's hard core as it considers that it has been weakened as a result of successive enlargements[99].

Despite its reluctances, France understands that the strategic relevance of the Western Balkans to the EU is inevitable. However, it is also necessary to consider several member states concern about the problems that this enlargement would bring. As Stefan Lehne (Carnegie Europe) highlights, resorting to differentiated integration formulas that would lead to a multilevel system of European governance could undoubtedly facilitate the integration of the Western

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95 KER-LINDSAY, J., ARMAKOLAS, I., BALFOUR, R. & STRATULAT, C. The national politics of EU enlargement in the Western Balkans. *Southeast European and Black Sea Studies*, 2017. Vol. 17, Nº. 4; pp. 511–522, p. 519.

96 TÖGLHOFER, T. & ADEBAHR, C. Firm supporter and severe critic – Germany's two-pronged approach to EU enlargement in the Western Balkans. *Southeast European and Black Sea Studies*, 2017. Vol. 17, Nº 4, pp. 523–539.

97 TCHERNEVA, V. Europe's new agenda in the Western Balkans. *European Council on Foreign Relations* 2019. [online]. Available at: <https://cutt.ly/fuAd8i0>

98 BRUDZIŃSKA, K., GUBALOVA, V., KUDZKO, A. & MUZERGUES, A. Making Flexible Europe Work? European Governance and the potential of differentiated integration. *GLOBSEC Policy Institute*. 2020; p. 12. [online]. Available at: <https://cutt.ly/DuPZoAx>

99 BRUDZIŃSKA, K., GUBALOVA, V., KUDZKO, A. & MUZERGUES, A. Making Flexible Europe Work? European Governance and the potential of differentiated integration. *GLOBSEC Policy Institute*. 2020; pp. 47–48. [online]. Available at: <https://cutt.ly/DuPZoAx>

Balkans[100]. Furthermore, opting for differentiated integration formulas, in line with the proposal of French President Enmanuel Macron, would allow the EU to ensure stability in its neighbourhood without directly linking it to a promise of enlargement[101]. Nevertheless, it is important to note that the offer that the Commission has made to the Western Balkans entails full Membership, so changing the rules the game could affect the credibility of the EU in the region.

8. Conclusion

Throughout this article, we have focused on the different understanding that Germany and France have towards the Western Balkan enlargement, stressing that they follow a rational approach based on the pursuit of their domestic interests. In terms of who wins and who loses with the Western Balkans enlargement it is clear that Germany enjoys a closer relationship in both economic and political terms than what France does. France feels the enlargement to the Western Balkans could harm its influence in the EU, in favour of Germany, particularly after Brexit. In addition to the economic disadvantages, that adding less developed countries to the EU could bring in terms of distribution of its funds. Not to mention the danger that these weak democracies could cause to the heart of the EU project. Nevertheless, France could very much benefit from the geopolitical power and influence in the global arena that the EU could obtain because of this enlargement.

Western Balkans' enlargement is a crossroads between the problems that it could bring into the EU in terms of democracy and respect of rule of law and the risk of losing geopolitical influence if not strengthening the relationship among these two political areas. This article concludes that differentiated integration seems to be the best answer in order to strengthen the links with third countries that either do not want to be part of the EU (Brexit) or that do not fulfil the necessary criteria to join the EU project (Western Balkans). Moreover, as we have already stressed both France and Germany are among the member states more favourable about introducing formulas of differentiated integration. Therefore this article emphasizes it could be the best strategy to find a common agreement among the EU member states. In short, differentiated integration could allow the EU to take advantage of a closer relationship with the Western Balkans in

[100] PIACENTINI, S. The Western Balkans in the European Union: Enlargement to What, Accession to What? POLI, E. (ed) *Instituto Affari Internazionali*. 2017. Nº 17. [online]. Available at: <https://cutt.ly/LuAhwpQ>

[101] CENTRE FOR EUROPEAN REFORM. Can France and Germany steer Europe to success? Annual Report. 2019, pp. 3–4. [online]. Available at: <https://cutt.ly/zuAhXCJ>

increasing its influence in the region, at the same time that reduces the risk of the down sides that adding these countries to the EU could cause in the future strengthening of the integration project.

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Correlation of the International and National Institutional and Legal Regulations of Applying Some Aspects of Technical Barriers in Practices of Ukraine and the European Union

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Summary: This study contains the attempt of the comprehensive approach to issues of the correlation of concepts, provisions and obligations of States and their associations with respect to technical barriers to trade (in particular, technical regulations, standardization, certification, and accreditation, conformity assessment procedures and market surveillance systems) enshrined in international world treaties (in particular, the Agreement on Technical Barriers to Trade (TBT), which is binding for Member-States in the system of the WTO treaties) and regional multilateral and bilateral treaties (for example, the Association Agreement between Ukraine, from one part, and the European Union, European Atomic Energy Community, and their Member-States, from the other part, dd. June 27, 2014). The particular attention is paid to the national, including unified (or that being in the process of unification/adaptation), institutional and legal provision in this area, most notably in Ukraine and the European Union (first of all, the Regulation of the European Parliament and of the Council No. 765/2008/EC and Decision of the European Parliament and of the Council No. 768/2008/EC of 9 July 2008). The performance by Ukraine at the domestic/national level of its international obligations in accordance with the Association Agreement 2014 has been separately considered in terms of technical regulations and standardization, accreditation, conformity assessment procedures and market surveillance systems and their implementation (adaptation, entrenchment) in relevant regulatory legal, and organizational and institutional forms.

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1. Introduction

Goods and technologies (methods for their cultivation, extraction, and production) can be potentially dangerous (including harmful) for human life and health, and the environment. On the one hand, as a result of the aforementioned, States apply the non-tariff measures in the form of technical requirements (means, barriers) for the protection, in the first place, of national commodity consumers against potential risks. And on the other hand, technical norms and standards can be introduced by countries to restrict the undesirable competition in the domestic market, and to protect national commodity producers against it, and thus, such measures become additional obstacles in foreign economic activity and contradict the principles of freedom and liberalization of international trade. That is, the application by States or regional economic integrations of technical barriers as means of the non-tariff regulation of foreign trade depends on the purpose, for which they are introduced, and therefore, a comprehensive and all-encompassing approach to their study and settlement is required. The complexity and self-sufficiency of the system are based on the correlation and interdependence of the international (world and regional) and national (domestic) entrenchments of concepts, provisions and obligations of States and their associations regarding technical barriers to trade (in particular, technical regulations, standardization, certification, accreditation, conformity assessment procedures and market surveillance systems). However, it is worth specially focusing on the fact that "technical harmonization" is important not by itself, but as an element of the sophisticated system/mechanism of intermal and external markets functioning (movement and exchange of goods and services), their instruments and their institutional and legal support.

Undoubtedly, the main special multilateral international treaty in the said area is the WTO Agreement on Technical Barriers to Trade (hereinafter – the TBT Agreement), which contains three mechanisms for reducing trade barriers related to the product requirements, namely (Preamble[1]): – restrictions on the establishment of such requirements as a specific purpose and a necessary measure

[1] *Uhoda pro tekhnichni bariery u torhivli* vid 15.04.1994 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/981_008. (in Ukrainian).

for its achievement; – inducement to harmonization of the requirements based on international standards, etc.; – encouragement to support developing countries. Accordingly, the WTO Member-States must perform the assumed obligations at both international and national levels, in particular to coordinate their actions with existing international commitments (for example, the content of bilateral agreements, national regulatory legal acts, etc.).

The determinative bilateral international treaty for modern Ukraine is the Association Agreement between Ukraine, from one part, and the European Union, European Atomic Energy Community, and their Member-States, from the other part, dd. June 27, 2014 (hereinafter – the Association Agreement). The Association Agreement is an international treaty of the complex nature, because the cooperation envisaged therein covers a wide range of interstate relations and all spheres of the economy; it lays the legal foundations for the mutual cooperation and proclaims its principles. A particular component of the Association Agreement, in view of the subject matter of the study, is a comprehensive program of adaptation/harmonization of legal rules/fundamentals (including the regulatory environment) in trade-related areas to the relevant EU requirements/standards. In particular, the free trade area between the European Union and Ukraine provides for the abolition of import duties, reduction in non-tariff barriers to trade, liberalization of services markets, ensuring transparency and predictability of regulations of the Ukrainian domestic market in accordance with the European and international standards, approximation of internal policies of Ukraine, including in the field of protection of the consumer's rights, to the generally accepted rules of international and European practices, ensuring the bilateral customs cooperation, etc.

We should particularly emphasize that one of the association agreement conclusion principles ("mixed external competence") is based on the EU Court of Justice's judgment on the case of *Demirel*[2], namely related to the formation of special relationship and participation commitments, within certain limits, of non-EU countries within the system of the Union[3] (for example, in the customs sphere[4], or common procedures, namely regarding technical barriers (technical regulations, standardization systems, conformity assessment accreditation, etc.).

[2] C-12/86, *Demirel v Stadt Schwäbisch Gmünd* case, [1987] ECR 3719, para. 7 and 28.

[3] See: HOLDGAARD, R. *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*. Kluwer Law International, 2008, p. 206 (para. 12.3.1.1.); LOCK, T. The European Court of Justice and International Courts. Oxford University Press, 2015, pp. 100–113 (Chapter 3.IV.B); MENDEZ, M. *The legal effects of EU agreements: maximalist treaty enforcement and judicial avoidance techniques.* Oxford Studies in European Law: OUP Oxford, 2013, 374 p.

[4] SCHRÖMBGES, U., WENZLAFF, O. Doubts regarding the origin of goods based on OLAF mission reports vs protection of confidence. *World Customs Journal,* 2011, vol. 5, No. 1, p. 92.

Due to the performance of international obligations by States and their associations, coordination and harmonization among them of actions in certain spheres of the socio-economic life, in particular regarding the technical regulation (technical barriers) system, the special attention should be paid to relevant national regulatory legal acts and institutions, as a manifestation of the immediate state of affairs in one or another area[5]. That is, the study of the practice and status of the national institutional and legal regulation of technical barriers in Ukraine and the EU is important, both in terms of the correlation, interdependence and performance of their own international obligations under the TBT Agreement, and mutual ones in accordance with the Association Agreement, and for the identification of problems and next steps of collaboration.

2. Correlation of the provisions of the WTO Agreement on Technical Barriers to Trade and Association Agreement between Ukraine and the EU

Technical barriers to trade are any state control and restriction measures related to the technical requirements for imported goods, when they are used as a means of restricting access of goods of a foreign production/origin to the domestic market of a country[6]. In order to prevent the restrictive effect of technical barriers to international trade, while maintaining their protective function for security of States, their population, flora, fauna and the environment, the Agreement on Technical Barriers to Trade, also referred to as "Standards Code"[7], was elabo-

[5] It is interesting for Ukraine to study the experience of approximation (harmonization, adaptation) of laws in different spheres, in particular related to technical barriers, both within the EU itself, and of the countries which a while ago worked their way to the EU and now are its members. See, for example: BRENTON P., SHEEHY J., VANCAUTEREN M. *Technical Barriers to Trade in the European Union: Importance for Accession Countries.* CEPS: Working Document No. 144. April 2000, 27 p.; ŠIŠKOVÁ, N. *Základní otázky sbližování českého práva s právem ES.* Codex Bohemia, 1998, 336 p. (in Czech); CHEVASSUS-LOZZA, E., MAJKOVIČ, D., PERSILLET, V., UNGURU, M. *Technical barriers to Trade in the European Union: Importance for the new EU members. An assessment for agricultural and food products.* Paper prepared for presentation at the 11th congress of the EAAE (European Association of Agricultural Economists), The Future of Rural Europe in the Global Agri-Food System Copenhagen, Denmark, August pp. 24–27, 2005 etc.

[6] DANYLTSEV, A. V., DANYLOVA, E. V., ZAKHAROV A. V. *Osnovu torhovoi polytyky y pravyla VTO.* M.: Mezhdunar. otnoshenyia, 2005, p.. 127. (in Russian).

[7] OSYKA, S. H., PIATNYTSKYI, V. T. *Svitova orhanizatsiia torhivli*. K.: «K.I.S.», 2004, p. 283. (in Ukrainian).

rated within the framework of GATT during the Tokyo Round (1973-1979) of multilateral trade negotiations.

The issue of technical barriers to international trade, in addition to the regulation at the global (universal) level within the WTO, is also reflected in regional agreements, for example in the Association Agreement between Ukraine, from one part, and the European Union, European Atomic Energy Community, and their Member-States, from the other part, dd. June 27, 2014[8].

In accordance with Article XI of the Marrakesh Agreement establishing the WTO[9], the EU as a customs territory and Ukraine as a State (Article XII)[10] are members of the WTO[11], and therefore, parties to the Agreement on Technical Barriers to Trade[12]. As a result, having signed the Association Agreement, its parties (Ukraine and the EU) must abide by international obligations arising from the participation both in this Agreement and in those related to the WTO membership[13], including the TBT Agreement. The question arises as to the correlation between the TBT Agreement and Association Agreement themselves.

In analyzing the provisions of the TBT Agreement[14] and Association Agreement (Chapter 3, Articles 53-58)[15], it should be noted that:

- The TBT Agreement consists of a preamble, 15 articles and three annexes; in the Association Agreement, Chapter 3 consisting of six articles (Articles

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[8] *Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony* vid 27.06.2014 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/984_a11. (in Ukrainian).

[9] *Uhoda pro zasnuvannia Svitovoi orhanizatsii torhivli* vid 15.04.1994 r., m. Marrakesh. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/995_342. (in Ukrainian).

[10] *Protokol pro vstup Ukrainy do Svitovoi orhanizatsii torhivli* vid 05.02.2008, m. Zheneva. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/981_049. (in Ukrainian).

[11] *World Trade Organization, WTO.* [online]. Available at: https://www.wto.org/.

[12] *Uhoda pro tekhnichni bariery u torhivli* vid 15.04.1994 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/981_008. (in Ukrainian).

[13] See: HOLDGAARD, R. *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*. Kluwer Law International, 2008, pp. 276–287 (para. 15.2.1.1.); MENDEZ, M. *The legal effects of EU agreements: maximalist treaty enforcement and judicial avoidance techniques.* Oxford Studies in European Law: OUP Oxford, 2013, 374 p. (Chapter IV); SCHILDBERG, B. *How are Technical Barriers to Trade treated in EU Trade Agreements? Recommendations for the Development Friendly Design of EPA Negotiations related to Technical Barriers to Trade.* Braunschweig, 2007, 21 p.

[14] *Uhoda pro tekhnichni bariery u torhivli* vid 15.04.1994 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/981_008. (in Ukrainian).

[15] *Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony* vid 27.06.2014 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/984_a11. (in Ukrainian).

53-58) and Annex III to Chapter 3 are devoted to the issue of technical barriers.

- The EU and Ukraine in Article 54 of the Association Agreement confirmed their existing rights and obligations under the TBT Agreement.
- Although, both agreements do not explicitly define the concept "technical barriers to trade", they use the same terminology: technical regulations and standards (including packaging, marking and labeling requirements), and conformity assessment with the reference in the Association Agreement (paragraph 1 of Article 53) to the TBT Agreement (Annexes 1-3).
- The provisions of the Association Agreement (paragraph 2 of Article 53), as well as paragraph 1.5 of Article 1 of the TBT Agreement, do not apply to sanitary and phytosanitary measures, nor to purchasing goods by public authorities for needs of their own production or consumption (paragraph 1.4 of Article 1 of the TBT Agreement).
- Paragraph 1 of Article 55 of the Association Agreement defines the technical cooperation on technical barriers somehow broader and in more details: "The Parties shall strengthen their cooperation in the field of technical regulations, standardization, market surveillance, accreditation and conformity assessment procedures with a view of increasing mutual understanding of their respective systems and facilitating access to their respective markets". That is, the said provision is in line with the Preamble of the TBT Agreement, in particular: "Recognizing the important contribution of international standards and conformity assessment systems for production efficiency and facilitating the conduct of international trade; non-creation of unnecessary obstacles to international trade and taking measures necessary for the protection of security interests of countries, human, animal or plant life and health, and of the environment, or for the prevention of fraud and discrimination"[16].
- The particular attention should be paid to the fact that Article 55 of the Association Agreement entrenches a non-exhaustive list of areas and subjects of harmonization and unification in the field being studied, namely "the initiation of a dialogue on regulatory legal issues at both horizontal and sectoral levels", and also paragraph 2b): "by respective organizations, public or private, responsible for metrology, standardization, testing, market surveillance, certification and accreditation", including within the framework of "European organizations" (paragraph 2d), the WTO and the United Nations Economic Commission for Europe (UNECE)[17] (paragraph 2f), and in Ukraine (para-

[16] See: C-100/96, *The Queen v MAFF, ex parte British Agrochemicals Association Ltd* case, [1999] ECR I-1499.

[17] *The United Nations Economic Commission for Europe, UNECE.* [online]. Available at: http://www.unece.org/oes/nutshell/ member_States_ representatives.html

graph 2c) of Article 55). And the TBT Agreement operates with the following terminology: "preparation, adoption, and application of technical regulations, standards, and conformity assessment by central government bodies (Article 2), local government and non-government bodies (Article 3), international and regional systems (Article 9)".

- This is the TBT Agreement, which calls all the WTO Members, including both the EU and Ukraine, to actively participate in the work of international standardization organizations, in particular: – the International Organization for Standardization (ISO)[18], which, for example, has the Product Conformity Assessment Committee (CASCO), the Committee for the Protection of Consumer Rights (COPOLCO), and the EuropeAid Development and Cooperation Committee (DEVCO)[19] in its structure; – the International Standardized Testing Organization (ISTO)[20]; – the International Electrotechnical Commission (IEC)[21]; – the International Telecommunication Union[22] (ITU)[23], the structure of which has the ITU Telecommunication Standardization Sector (ITU-T)[24]; – the Codex Alimentarius Commission[25]; and the International Organization of Legal Metrology (OIML)[26]. In addition, Ukraine fully en-

[18] *International Organization for Standardization, ISO.* [online]. Available at: https://www.iso.org

[19] Ukraine, as a full-fledged member of ISO since 1993 (represented by the National Standardization Body SE "UkrNDNC" (Ukrainian Research and Training Center of Standardization, Certification and Quality), is a member-country of CASCO, and DEVCO Committees, and an observer-state of REMCO, and COPOLCO Committees. Ukraine also performs functions as a secretariat in ISO/TC218, is a member of 119 technical committees, and an observer in 217 technical committees.

For more details, see [online]. Available at: http://uas.org.ua/ua/zagalni-vidomosti-pro-dp-ukrndnts/kerivnitstvo/generalniy-direktor-dp-ukrndnts/pershiy-zastupnik-generalnogo-direktora-direktor-institutu-standartizatsiyi/viddil-mizhnarodnogo-regionalnogo-mizhderzhavnogo-spivrobutnytstva/spivrobitnitstvo-z-mizhnarodnimi-organizatsiyami/. (in Ukrainian); https://www.iso.org/member/2172.html

[20] *International Standardized Testing Organization, ISTO.* [online]. Available at: http://www.isto.ch/.

[21] *International Electrotechnical Commission, IEC.* [online]. Available at: https://www.iec.ch/dyn/www/f?p=103:5.

For more details, see [online]. Available at: http://uas.org.ua/ua/zagalni-vidomosti-pro-dp-ukrndnts/kerivnitstvo/generalniy-direktor-dp-ukrndnts/pershiy-zastupnik-generalnogo-direktora-direktor-institutu-standartizatsiyi/viddil-mizhnarodnogo-regionalnogo-mizhderzhavnogo-spivrobutnytstva/spivrobitnitstvo-z-mizhnarodnimi-organizatsiyami./. (in Ukrainian); https://www.iec.ch/dyn/www/f?p=103:16:0::::FSP_ORG_ID:1030

[22] The International Electric Communication Union (International Telecommunication Union, ITU), is sometimes called the International Telecommunication Union.

[23] *International Telecommunication Union, ITU.* [online]. Available at: https://www.itu.int

[24] *The ITU Telecommunication Standardization Sector, ITU-T.* [online]. Available at: https://www.itu.int/ru/ITU-T/Pages/default.aspx

[25] *Uhoda pro tekhnichni bariery u torhivli* vid 15.04.1994 r. Annexes 1, 3. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/981_008. (in Ukrainian).

[26] *International Organization of Legal Metrology, OIML.* [online]. Available at: https://www.oiml.org/en

sures the participation of respective national bodies not only in international organizations, but also in European ones (paragraph 7 of Article 56 of the Association Agreement).

- Article 56 of the Association Agreement provides for the gradual achievement by Ukraine of conformity with EU technical regulations, standardization, metrology, accreditation, conformity assessment procedures and market surveillance systems (with the relevant list and schedule (Annex III)). Ukraine is also progressively introducing the corpus of European standards (EN) as national standards (paragraph 8 of Article 56).
- Just as in Articles 10-11 of the TBT Agreement, so in paragraphs 3-6 of Article 56 of the Association Agreement, reporting information about the status and changes in the field of technical regulations, standards and conformity assessment procedures is envisaged; it should be noted that the provisions of the TBT Agreement clearly state this procedure.
- Paragraph 5 of Article 57 of the Association Agreement provides for the direct link of the TBT with the potential Agreement on Conformity Assessment and Acceptance of Industrial Products (the ACAA Agreement), before signing of which Ukraine and the EU must take into account the provisions of the TBT Agreement in their relationship.
- The Association Agreement (Article 58), as well as some provisions of the TBT Agreement (for example, Annex I), also pays attention to the technical requirements for marking and labeling.

Thus, the EU-Ukraine Deep and Comprehensive Free Trade Area involves, inter alia, the cooperation at the international regional level with regard to technical barriers, their unification and harmonization. This cooperation should be conducted in order not to create additional non-tariff barriers, on the one hand, to international trade in the performance by States of their protective/security functions in respect of their own (national) interests, and on the other hand, to national commodity producers and consumers. By comparing the TBT Agreement and Association Agreement, one can argue about their interrelation and interdependence, due to the impact of the TBT Agreement provisions on the content of the Association Agreement and its participants, as well as about the relevance of their core provisions. The EU and Ukraine, while drafting the Association Agreement, adhered to their own international commitments as a result of their WTO membership, and in general, without repeating, supplemented and specified the provisions of the TBT Agreement in the international regional agreement.

3. Some aspects of technical regulations, standardization, accreditation, conformity assessment procedures and market surveillance systems of products/goods in the EU

The introduction/application of technical barriers (including technical regulations, standardization, certification, conformity assessment, etc.) in the EU was regulated and is being regulated by specific statutory acts: – directives and decisions of the European Parliament and of the EU Council (formerly the EEC), in particular: by the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, and of rules on Information Society services[27], and the Decision 1673/2006/EC of the European Parliament and of the Council of 24 October 2006 on the financing of European standardization[28], and the Council Decision No. 87/95/EEC of 22 December 1986 on the standardization in the field of information technology and telecommunications[29]. However, the Regulation of the European Parliament and of the Council 1025/2012 of 25 October 2012 recognized the inconsistency of the above-mentioned legal framework with changes in EU standardization over the last decades. Accordingly, the Regulation makes amendments in the Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council, and repeals the Council Decision 87/95/EEC, and the Decision of the European Parliament and of the Council 1673/2006/EC[30].

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[27] *Laying down a procedure for the provision of information in the field of technical standards and regulations: Directive of the European Parliament and of the Council* of 22 June 1998 № 98/34/EC. No longer in force. Date of end of validity: 06.10.2015. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31998L0034

[28] On the financing of European standardisation: Decision of the European Parliament and of the Council of 24 October 2006 № 1673/2006/EC. No longer in force. Date of end of validity: 31.12.2012. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006D1673

[29] On standardization in the field of information technology and telecommunications*: Council Decision* of 22 December 1986 № 87/95/EEC. No longer in force. Date of end of validity: 31.12.2012. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31987D0095

[30] On European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the

The technical regulation system established in the European Union is recognized as the most effective model for international cooperation in the world[31]. The large number of the agreements concluded on the mutual recognition of conformity assessment results with many countries attests to the high efficiency of the European approach in the field of technical regulations[32]. One has to agree that the free movement of products/goods in the EU is based on a new approach to technical harmonization and standardization, and on a global approach in the area of conformity assessment[33].

Thus, by the Decision of 7 May 1985 on a new approach to technical harmonization and standards (85/C 136/01), the EEC Council[34]:

– emphasized the need to resolve the situation as regards technical barriers to trade;
– stated its importance and necessity for reference, primarily, to European standards in order to define the technical characteristics of products;
– determined the principles of European standardization policies (for example, revising applicable technical regulations to eliminate obsolete or unnecessary ones; ensuring the mutual recognition of test results and creating the agreed rules for functioning of certification bodies; expanding practices to define the technical characteristics of products in accordance with European standards).

Council: Regulation (EU) of the European Parliament and of the Council of 25 October 2012 № 1025/2012. In force. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1025

[31] See: BRENTON P., SHEEHY J., VANCAUTEREN M. *Technical Barriers to Trade in the European Union: Importance for Accession Countries.* CEPS: Working Document No. 144. April 2000, 27 p.; CHEVASSUS-LOZZA E., MAJKOVIČ D., PERSILLET V., UNGURU M. *Technical barriers to Trade in the European Union: Importance for the new EU members. An assessment for agricultural and food products.* Paper prepared for presentation at the 11th congress of the EAAE (European Association of Agricultural Economists), The Future of Rural Europe in the Global Agri-Food System Copenhagen, Denmark, August 24–27, 2005 etc.

[32] To study an example of the practical use of provisions of the WTO's Agreement on Technical Barriers to Trade (TBT) and various EU's regulations in this sphere we may attend to: C-147/96, *Netherlands v Commission* case, [2000] ECR I-4723; C-27/00 & 122/00, *Omega Air* case, [2002] ECR I-2569; C-377/98, *Netherlands v Parliament and Council (Biotech)* case, [2001] ECR I-7079; C-100/96, *The Queen v MAFF, ex parte British Agrochemicals Association Ltd* case, [1999] ECR I-1499; C-149/96, *Portugal v Council (Portuguese Textiles)* case, [1999] ECR I-8395 etc.

[33] KRYVOSHEIA, S. O., DIADIURA, K. O. Obgruntuvannia natsionalnoi systemy tekhnichnoho rehuliuvannia ta yii transformatsiia do zahalnoievropeiskoi. *Tekhnolohycheskyi audyt y rezervы proyzvodstva*, 2015, vol. 2/3 (22), p. 58. (in Ukrainian).

[34] *On a new approach to technical harmonization and standards: Council Resolution* of 7 May 1985 № 85/C 136/01. In force. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31985Y0604%2801%29

The guidelines for a new approach to technical harmonization and standards (Annex II[35]) include the following principles among basic ones:

– legislative harmonization is limited to the adoption of directives;
– the task of drawing up the technical specifications is entrusted to bodies competent in the standardization area;
– technical characteristics are not mandatory and maintain their status of voluntary standards;
– the producer has the choice of not manufacturing in conformity with the standards, but in this event he has an obligation to prove that his products conform to the essential regulatory requirements.

In 1989-1990s, the EEC Council adopted the Resolution on a global approach and Decision 90/683/EEC, which determined the general guidelines and detailed conformity assessment procedures[36]. As of today, "the relevant EU decisions and regulations", on "technical regulations and standardization, metrology, accreditation, conformity assessment procedures and market surveillance systems" (paragraph 1 of Article 56[37]) are the Regulation of the European Parliament and of the Council No. 765/2008/EC of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing the Regulation (EEC) No. 339/93[38] (hereinafter – the Regulation No. 765/2008/EC), and the Decision of the European Parliament and of the Council No. 768/2008/EC of 9 July 2008 on a common framework for the marketing of products, and repealing the Council Decision 93/465/EEC[39] (hereinafter – Decision No. 768/2008/EC) and its Annexes (Annex I. Reference Provisions For Community Harmonization Legislation For Products; Annex II. Conformity

[35] *On a new approach to technical harmonization and standards: Council Resolution* of 7 May 1985 № 85/C 136/01. In force. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31985Y0604%2801%29

[36] Concerning the modules for the various phases of the conformity assessment procedures which are intended to be used in the technical harmonization directives: Council Decision of 13 December 1990 № 90/683/EEC. No longer in force. Date of end of validity: 22.07.1993. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1533063499296&uri=CELEX:31990D0683

[37] *Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony* vid 27.06.2014 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/984_a11. (in Ukrainian).

[38] *Pro vstanovlennia vymoh do akredytatsii ta rynkovoho nahliadu, poviazanykh z realizatsiieiu produktiv, ta pro skasuvannia Rehlamentu (IeES) № 339/93: Rehlament Yevropeiskoho Parlamentu i Rady (IeS)* vid 09.07.2008 r. № 765/2008. [online]. Available at: http://zakon5.rada.gov.ua/laws/show/994_938. (in Ukrainian).

[39] *Pro spilni ramky dlia realizatsii produktiv ta pro skasuvannia Rishennia Rady 93/465/IeES:* Rishennia Yevropeiskoho Parlamentu i Rady vid 09.07.2008 r. № 768/2008/IeS. [online]. Available at: https://zakon.rada.gov.ua/laws/show/994_b42. (in Ukrainian).

Assessment Procedures). Let us consider some of the provisions of these regulatory legal acts.

The Regulation No. 765/2008/EC provides for the recognition of a single accreditation organization at the regional level (the European Accreditation Organization (EA)), whose task is to promote a transparent, quality-led system for the evaluation of the competence of conformity assessment bodies throughout Europe (paragraph 23 of the Preamble of the Regulation No. 765/2008/EC).

Paragraph 2 of the Preamble and Article 2 of the Decision No. 768/2008/EC lay down common principles and definitions required for the adoption of sectoral regulatory acts; and define the structure of a future unified legislation on procedures for trade in products/goods. These are principles and rules for the organization and accreditation of conformity assessment bodies, according to which a Member-State shall appoint only a single national accreditation body operating on a non-for-profit basis, having financial and personnel resources for the performance of tasks, not providing consultancy services, not owning shares nor otherwise having a financial or managerial interest in a conformity assessment body (Article 4), i.e. is independent, objective and impartial, and upon that, it shall publish audited annual accounts and ensure confidentiality of information (Article 8 of the Regulation No. 765/2008/EC, Article R17 of Annex II to the Decision No. 768/2008/EC).

Paragraph 17 of the Preamble and Article 1 of the Decision No. 768/2008/EC declare the position that the quality of products placed on the EU market shall comply with the requirements of the European legislation. The general principles of the CE marking and the obligation of Member-States to ensure the correct implementation of the regime governing in this field and to take appropriate measures (sanctions) for the improper use of the marking are contained in Article 30 of the Regulation No. 765/2008/EC, and upon that the following has been entrenched: – the CE marking right belongs to the manufacturer or his authorized representative, who thereby assumes responsibility for the conformity of a product with all applicable requirements; – the CE marking shall be affixed only to products, to which its affixing is provided for by the specific harmonized legislation; – the affixing to a product of markings, symbols, or inscriptions, which are likely to mislead third parties regarding their meaning or form shall be prohibited. The Decision No. 768/2008/EC, however, contains the provision on the CE marking, which indicates the conformity of a product quality with the requirements established (paragraph 29), and is applied only for that purpose (paragraph 30). Article R12 of Annex I to the Decision No. 768/2008/EC substantially supplements the general principles of the CE marking set out in Article 30 of the Regulation 765/2008/EC[40], with the

[40] *Pro vstanovlennia vymoh do akredytatsii ta rynkovoho nahliadu, poviazanykh z realizatsiieiu produktiv, ta pro skasuvannia Rehlamentu (IeES) № 339/93: Rehlament Yevropeiskoho*

rules for its affixing. Thus, the CE marking applied to products or their label shall be legible and visible; it shall be affixed to products before they are placed on the market; it may contain the identification number of the conformity assessment body, where that body has carried out the conformity assessment at the manufacturing stage. The EU Member-States are under the obligation to develop a legal mechanism to regulate public relations in the field of marking, as well as to bring business entities to responsibility, up to criminal one, for committing infringements in the field of marking products[41].

Paragraphs 20-27 of the Decision No. 768/2008/EC identify the participants in the process of distributing goods on the market, namely: – the manufacturer's sole responsibility is to carry out the conformity assessment procedure (paragraph 21); – importers must guarantee that conformity assessment procedures of products supplied by them have been fully implemented, products have been labeled, and documentation drawn up by manufacturers is suitable for inspection by the supervisory public authorities (paragraph 22); – the distributor of products must monitor that during their sale or other handling of them, their quality characteristics are not adversely affected (paragraph 23), as well as should be involved in control and supervisory measures, and provide the specially authorized state authorities with all necessary information about products/goods (paragraph 27).

Article R2 of Annex I to the Decision No. 768/2008/EC contains the obligations of the manufacturer, who shall: – ensure that products are manufactured in accordance with the requirements of a specific regulatory act; – draw up the technical documentation, carry out the conformity assessment procedure of products/goods, and deliver goods already assessed for the conformity; – draw up the EU declaration of conformity, and affix the marking of products/goods, etc. The requirements for products are: – availability of a serial number, indications on belonging to the series of goods, other designations and elements allowing them to be identified; – providing each product with instructions and safety information on precautionary measures when using it (set out in a language, which can be easily understood by consumers of a country, on whose market it is sold). The manufacturer is also obliged, further to a reasoned request from government authorities, to provide with information and documentation regarding the conformity of the product in a language they understand. According to Article R10 of Annex I, it is the obligation of the manufacturer to draw up and regularly update

Parlamentu i Rady (IeS) vid 09.07.2008 r. № 765/2008. [online]. Available at: http://zakon5.rada.gov.ua/laws/show/994_938. (in Ukrainian).

[41] *Pro spilni ramky dlia realizatsii produktiv ta pro skasuvannia Rishennia Rady 93/465/IeES:* Rishennia Yevropeiskoho Parlamentu i Rady vid 09.07.2008 r. № 768/2008/IeS. [online]. Available at: https://zakon.rada.gov.ua/laws/show/994_b42. (in Ukrainian).

the EU Declaration of conformity (of a standard form (Annex III), with modular elements (Annex II)), indicating the conformity in the manufacture of products with all the requirements established by regulatory legal acts[42].

The obligations of the importer according to Article R4 of Annex I to the Decision No. 768/2008/EC include placing only compliant products on the EU market of goods. The importer shall ensure that the manufacturer of products has carried out the conformity assessment procedures, drawn up the technical documentation, and affixed the marking; the necessary documents are attached to products/goods; goods are provided with instructions and documents containing the information about its safe use in a language, which can be easily understood for the consumer. The importer shall indicate their name and trademark, as well as contact information. Further to a request from public authorities, the importer shall provide with the information and documentation regarding the conformity of products/goods. When placing goods on the market, in accordance with the provisions of Article R5 of Annex I to the Decision No. 768/2008/EC, the distributor shall take into account all the requirements established by law: shall verify the marking available on goods, and be convinced that goods are accompanied by the required documentation, instructions and safety information in a language, which can be easily understood. In the event of uncertainty as to the fact that a product is in conformity, it shall not make products available on the market until they have been brought into conformity with the requirements established. If products/goods pose a threat, the distributor is obliged to provide the manufacturer or importer with all necessary information, as well as to report this fact to the market surveillance authorities. Further to a request from public authorities, the distributor shall provide with the information and documentation regarding the conformity of products/goods. Article 4 of the Decision No. 768/2008/EC establishes the conformity assessment procedures to be applied when the EU legislation imposes the specific conformity requirements for certain products. The procedures shall be chosen from among the determined modules (Annex II to the Decision No. 768/2008/EC), taking into account a number of the following criteria: – the module shall be appropriate to the category of goods in terms of its characteristics; – the conformity assessment shall be determined by the degree of risk and the type of threat inherent in it; – there is a need to avoid imposing modules that may lead to appearance of artificial obstacles to the conformity assessment of products/goods. Annex II to the Decision 768/2008/EC contains the description of the conformity assessment procedure of products/goods by modules: Module A "Internal Production Control "; Module B

[42] See: C-149/96, *Portugal v Council (Portuguese Textiles)* case, [1999] ECR I-8395; C-147/96, *Netherlands v Commission* case, [2000] ECR I-4723.

"EC-type Examination"; Module C "Conformity to Type Based on Internal Production Control"; Module D "Conformity to Type Based on Quality Assurance of the Production Process"; Module E "Conformity to Type Based on Product Quality Assurance"; Module F "Conformity to Type Based on Product Verification"; Module G "Conformity Based on Unit Verification"; and Module H "Conformity Based on Full Quality Assurance".

The market surveillance mechanisms for goods (including products originating from third countries) are a guarantee of their compliance with the safety requirements (including protection of the consumers' rights, and the environment). The Member-States are obliged to set up market surveillance authorities with the relevant competence, powers, and resources, as well as communication and coordination between them (Articles 17, and 18 of the Regulation No. 765/2008/EC). The important aspect of activities in this matter is the procedures for tracking complaints, and reports on risks that arise in relation to products/goods subject to the harmonized EU legislation; monitoring accidents and health damages caused by such products. The market surveillance measures determined by the Regulation include the checks of product characteristics according to the appropriate scale (document verification, physical and laboratory checks of samples). According to Article 19 of the Regulation No. 765/2008/EC, market surveillance authorities shall be empowered not only to require business entities to provide with the necessary documentation, but also, if needed, to enter premises of such entities, take samples of products, destroy or otherwise dispose of products that present a serious risk. Other duties of market surveillance authorities include the prevention and reduction of risks identified for any product; independence, impartiality and objectivity of activities. The concept of "products presenting a serious risk" is enshrined in Article 20 and stipulates the duty of the Member-State to guarantee that such products will be promptly withdrawn or removed, or their placement on the market will be prohibited. In this case, the clear criteria are set for decisions on qualifying products as those presenting a serious risk: they must be based on a risk assessment that takes into account the nature of the hazard and the likelihood of its occurrence.

As defined by the 'Blue Guide'[43] on the implementation of EU products rules, the Decision No. 768/2008/EC updated, harmonized and consolidated the various technical tools: terms, criteria for the designation and notification of conformity assessment bodies, rules for the notification procedure, conformity assessment procedures (modules) and rules for their use, mechanisms of interim measures,

[43] The 'Blue Guide' on the implementation of EU products rules 2016: Commission Notice, C/2016/1958. [online]. Available at: https://op.europa.eu/en/publication-detail/-/publication/ca3224fa-5303-11e6-89bd-01aa75ed71a1

business entities' duties and traceability requirements. Therefore, the Regulation (EC) No. 765/2008 and the Decision No. 768/2008/EC contain all the necessary elements of the comprehensive regulatory framework for the effective work on safety and conformity of products/goods with the requirements adopted for the protection of different public interests and proper functioning of the single market, which is particularly important for Ukraine in view of paragraph 1 of Article 56 of the Association Agreement.

4. Current state and prospects of the performance by Ukraine of its commitments on national technical barriers to trade in the context of the EU-Ukraine Association Agreement

The EU-Ukraine Association Agreement[44] has been already in force for five years, including its full effect since September 1, 2017[45];[46]. The Provisions of the Agreement envisage the freedom for the movement of goods (Article 26 and certain provisions of Chapter 2), with the exception of agricultural ones (Article 40, Chapter 17 "Agriculture and Rural Development" (Articles 403-406). The signing of the Association Agreement, as well as creation within this Agreement of the deep and comprehensive free trade area between Ukraine and the European Union have a serious impact on the development of foreign trade, because: – Ukrainian commodity producers have acquired certain improved opportunities to enter the EU market, which envisages the connection with improving the level of quality, safety and the environmental profile of Ukrainian goods; – the increase of competition on the domestic market; – more opportunities to share experience and technology; – implementation of more modern tools for the non-tariff regulation (including technical regulations, standardization, metrology, accreditation, conformity assessment procedures systems, sanitary and phytosanitary measures,

[44] *Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony* vid 27.06.2014 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/984_a11. (in Ukrainian).

[45] *Pro ratyfikatsiiu Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony: Zakon Ukrainy* vid 16.09.2014 r. №1678-VII. [online]. Available at: https://zakon.rada.gov.ua/laws/show/1678-18. (in Ukrainian).

[46] *Shchodo nabrannia chynnosti Uhodoiu: Lyst Ministerstva zakordonnykh sprav Ukrainy* vid 20.07.2017 r. № 72/14-612/1-1713. [online]. Available at: http://zakon5.rada.gov.ua/rada/show/v1713321-17. (in Ukrainian).

etc.) on the one hand, and ways of combating them, or unification/minimization of their impact on international trade, etc., on the other hand.

The abolition of the non-tariff restrictions in the EU for goods from Ukraine is provided for in Articles 34-35 of Part 3 "Non-Tariff Measures" of Title IV of the Association Agreement. It should be noted separately that there is a significant number of individual provisions in the Agreement and its annexes/supplements regarding different groups/types (quantitative, hidden and financial) of non-tariff restrictions, in particular as for technical barriers (Article 53-58). However, the parties have not waived their right to apply the trade protective measures in some cases.

In the framework of the Association Agreement (Article 54), Ukraine and the EU countries have undertaken to strengthen their cooperation in the field of technical regulations, standardization, market surveillance, accreditation and conformity assessment procedures with a view to increasing mutual understanding of their respective systems and facilitating access to their respective markets. Accordingly, to this end, the Parties to the Association Agreement may initiate a dialogue on regulatory legal issues at both horizontal and sectoral (vertical) levels (paragraph 1 of Article 55). At the same time, this cooperation involves: – reinforcing regulatory cooperation through the exchange of information, experience and data; – scientific and technical cooperation with a view to improving the quality of their technical regulations, standards, testing, market surveillance and accreditation; – encouraging cooperation between their respective organizations responsible for metrology, standardization, certification and accreditation; – fostering the development of the quality infrastructure for standardization, accreditation, and conformity assessment systems in Ukraine; – promoting the participation of Ukraine in the work of European organizations; – seeking solutions to overcome barriers to trade; – coordinating their positions in international trade and regulatory organizations (the WTO, and UN-ECE (in particular, for example, UN-ECE on the use of ISO standards[47])) (paragraph 2 of Article 55)[48].

The Cabinet of Ministers of Ukraine, by the Resolution No. 1106 of 25 October 2017, approved the Action Plan, the implementation of which is intended to demonstrate the performance by Ukraine of the obligations assumed, availability of the information about the performance of its obligations, clarity of response mechanisms and taking appropriate measures[49]. The fulfillment of

[47] Note: ISO published 22969 international standards. [online]. Available at: https://www.iso.org/standards.html

[48] *Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony* vid 27.06.2014 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/984_a11. (in Ukrainian).

[49] *Pro vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi*

the Action Plan envisages, inter alia, making amendments to regulatory legal acts, and developing new documents in order to approximate the Ukrainian legislation to the EU law in accordance with the obligations under the Association Agreement. The analysis of the provisions of the Action Plan makes it possible to distinguish those that relate primarily to the investigated issue: – mechanisms and actions on the part of Ukraine in terms of achieving the compliance with EU technical regulations, and EU standardization, metrology, accreditation, conformity assessment procedures and market surveillance systems. The Ministry of Economic Development, Trade and Agriculture (former – the Ministry of Economic Development and Trade)[50], which quarterly publishes reports on the performance by Ukraine of its obligations under the Association Agreement[51], shall be responsible for implementing the action.

The performance of obligations to implement the EU acquis provisions in the national legislation of Ukraine, to carry out the necessary administrative and institutional reforms, and to introduce the effective and transparent administrative system (paragraph 2 of Article 56) takes place in accordance with the schedule set out in Annex III to the Association Agreement (paragraph 3 of Article 56). In addition, Ukraine must inform the EU once a year about the implementation of measures, and in cases where the actions listed in the timetable have not been implemented within the applicable time frame, a new timetable for their completion should be defined (paragraph 4 of Article 56)[52].

Ukraine has undertaken the obligations, in paragraph 1 of Article 56 of the Association Agreement, to follow the principles and practices laid down in the EU Decisions and Regulations on technical barriers, in particular with regard to

storony: Postanova Kabinetu Ministriv Ukrainy vid 25.10.2017 r. № 1106. [online]. Available at: https://zakon.rada.gov.ua/laws/show/1106-2017-%D0%BF. (in Ukrainian).

[50] *Ministerstvo rozvytku ekonomiky, torhivli ta silskoho hospodarstva Ukrainy.* [online]. Available at: http://www.me.gov.ua/?lang=uk-UA. (in Ukrainian).

For research topics ("Cooperation between Ukraine and the European Union", "Technical Regulation") see [online]. Available at: http://www.me.gov.ua/Tags/DocumentsByTag?lang=uk-UA&id=10ca8da3-169d-419b-a6f2-d42635f92b8b&tag=SpivrobitnitstvoMizhUkrainoiuTaYevropeiskimSoiuzom; http://www.me.gov.ua/Tags/DocumentsByTag?lang=uk-UA&tag=TekhnichneReguliuvannia. (in Ukrainian).

[51] See the Quarterly Monitoring of Fulfillment in the Ministry of Economic Development and Trade for 2018/2019 of the Action Plan for Implementation of the Association Agreement between Ukraine and the EU [online]. Available at: http://www.me.gov.ua/Documents/List?lang=uk-UA&id=f1bdcc6c-abc8-46dc-9648-ed56b2fcea1c&tag=ImplementatsiiaUgodiProAsotsiatsiiuMizhUkrainoiuTas. (in Ukrainian).

[52] *Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony* vid 27.06.2014 r. [online]. Available at: http://zakon2.rada.gov.ua/laws/show/984_a11. (in Ukrainian).

the Regulation of the European Parliament and of the Council No. 765/2008/EC of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing the Regulation (EEC) No. 339/93[53] and the Decision of the European Parliament and of the Council No. 768/2008/EC of 9 July 2008 on a common framework for the marketing of products, and repealing the Council Decision 93/465/EEC[54].

Of great importance for the development of trade between Ukraine and the EU is the signing of the Agreement on Conformity Assessment and Acceptance of Industrial Products (hereinafter – the ACAA Agreement, (ACAA)), as a Protocol to the Association Agreement (paragraph 3 of Article 57), which will simplify access of Ukrainian industrial products to the European market, but only after the full harmonization of sectoral and horizontal legislations, institutions and standards of Ukraine with European counterparts. We note that the ACAA Agreement may initially cover one or more industrial sectors, with a gradual extension to all 27 sectors/categories of industrial (non-food) products/goods (Annex III) envisaged in the Association Agreement; after this, Ukraine and the EU have undertaken to consider the possibility of its extension to other categories of industrial products. The ACAA Agreement is called the "industrial visa-waiver", underlining its potential for the development of foreign trade relations between Ukraine and the European Union, and modernization of the Ukrainian economy, as well as its validity as a factor in the path of the European integration. It should be noted that the issue of concluding the ACAA Agreement between the EU and Ukraine has already had a continuous history, since December 2005, long before the beginning of negotiations on the future Association Agreement.

In accordance with the provisions of the Association Agreement, in order to conclude the ACAA Agreement, Ukraine shall[55]:

- Make its own national legislation, both horizontal (framework) and vertical (sectoral) full compliant with the European one – paragraph 1 of Article 57;
- Adopt the European harmonized standards for relevant types of products as national ones;

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[53] *Pro vstanovlennia vymoh do akredytatsii ta rynkovoho nahliadu, poviazanykh z realizatsiieiu produktiv, ta pro skasuvannia Rehlamentu (IeES) № 339/93: Rehlament Yevropeiskoho Parlamentu i Rady (IeS)* vid 09.07.2008 r. № 765/2008. [online]. Available at: http://zakon5.rada.gov.ua/laws/show/994_938. (in Ukrainian).

[54] *Pro spilni ramky dlia realizatsii produktiv ta pro skasuvannia Rishennia Rady 93/465/IeES:* Rishennia Yevropeiskoho Parlamentu i Rady vid 09.07.2008 r. № 768/2008/IeS. [online]. Available at: https://zakon.rada.gov.ua/laws/show/994_b42. (in Ukrainian).

[55] LUTSENKO D. *Uhoda ASAA: intehratsiia Ukrainy do rynku promyslovykh tovariv YeS.* V ramkakh proektu "Hromadska synerhiia". Sichen 2019, S. 3. [online]. Available at: https://www.civic-synergy.org.ua/analytics/ugoda-asaa-integratsiya-ukrayiny-do-rynku-promyslovyh-tovariv-yes/. (in Ukrainian).

- Bring all its own national conformity assessment infrastructure (the national standardization body, the national accreditation body, metrological institutions, conformity assessment bodies) as well as state market surveillance infrastructure (market surveillance bodies and procedures) in line with the European requirements;
- Abolish all regulatory regimes (the major part of which exists since the Soviet and post-Soviet times), which contradict, duplicate and/or are complementary to the European requirements for relevant types of products (first of all, sanitary norms and rules and regulatory legal acts in the field of labor protection).

The obligations to adapt the horizontal (framework) legislation have been implemented in Ukraine in the form of regulatory legal acts, in particular these are the Laws of Ukraine "On General Safety of Non-Food Products"[56], "On Accreditation of Conformity Assessment Bodies"[57], "On State Market Surveillance and Control of Non-Food Products"[58], "On Technical Regulations and Conformity Assessment"[59], "On Metrology and Metrological Activity"[60], "On Liability for Damage Caused by a Defect in Products"[61], etc. In addition, in order to align the infrastructure with the European requirements, the Law of Ukraine "On Standardization" has also been adopted in Ukraine[62]. As all of these legislative acts have been drafted in accordance with the relevant EU regulatory legal requirements and some of them were previously analyzed by European experts, they are generally in line with the European requirements, but this does not exclude the need to amend them (for example, the Laws of Ukraine "On Standardization" and "On State Market Surveillance and Control of Non-Food Products").

Article 56 of the Association Agreement provides for the gradual achievement by Ukraine of the compliance with EU technical regulations, standardization, metrology, accreditation, conformity assessment and market surveillance systems (Annex III), as well as gradual implementation of European standards (EN) as

[56] *Pro zahalnu bezpechnist nekharchovoi produktsii: Zakon Ukrainy* vid 02.12.2010 r. № 2736-VI. [online]. Available at: https://zakon.rada.gov.ua/laws/show/2736-17. (in Ukrainian).

[57] *Pro akredytatsiiu orhaniv z otsinky vidpovidnosti: Zakon Ukrainy* vid 17.05.2001 r. № 2407-III. [online]. Available at: https://zakon.rada.gov.ua/laws/show/2407-14. (in Ukrainian).

[58] *Pro derzhavnyi rynkovyi nahliad i kontrol nekharchovoi produktsii: Zakon Ukrainy* vid 02.12.2010 r. № 2735-VI. [online]. Available at: https://zakon.rada.gov.ua/laws/show/2735-17. (in Ukrainian).

[59] *Pro tekhnichni rehlamenty ta otsinku vidpovidnosti: Zakon Ukrainy* vid 15.01.2015 r. № 124-VIII. [online]. Available at: https://zakon.rada.gov.ua/laws/show/124-19. (in Ukrainian).

[60] *Pro metrolohiiu ta metrolohichnu diialnist: Zakon Ukrainy* vid 05.06.2014 r. № 1314-VII. [online]. Available at: https://zakon.rada.gov.ua/laws/show/1314-18. (in Ukrainian).

[61] *Pro vidpovidalnist za shkodu, zavdanu vnaslidok defektu v produktsii: Zakon Ukrainy* vid 19.05.2011 r. [online]. Available at: https://zakon.rada.gov.ua/laws/show/3390-17. (in Ukrainian).

[62] *Pro standartyzatsiiu: Zakon Ukrainy* vid 05.06.2014 r. № 1315-VII. [online]. Available at: https://zakon.rada.gov.ua/laws/card/1315-18. (in Ukrainian).

a national standard, including technical requirements to the marking and labeling, which should be met by products/goods imported to the EU (Article 58). In accordance with paragraph 8 of Article 56 of the Association Agreement, Ukraine shall progressively transpose the corpus of European standards (EN) as national standards and, at the same time, abolish the "conflicting national standards, in particular the application of interstate standards (GOST/ГОСТ) developed before 1992", according to Annex III. The responsibility for implementing this action is borne by the National Standardization Body, SE "UkrNDNC"[63]. The program of the national standardization works in Ukraine for 2019 has been approved by the Order of SE "UkrNDNC" of 25 February 2018 No. 33[64]. At the end of 2019, the National Standard Fund amounted to 22682 standards, of which: 7110 – those harmonized with international standards; 7790 – those harmonized with European standards, and the level of harmonization was 65,7%. The Program 2019 includes 288 topics for drafting national standards to replace GOST developed before 1992; also it envisages 1964 topics for drafting national standards identical to relevant harmonized European standards, for the purposes of acts of the European law (paragraph 213[65]).

Therefore, despite some difficulties in the implementation of certain tasks in the field of standardization, we conclude that Ukraine is performing its obligations to harmonize the standardization system with the EU norms. The prospects of the sectoral (vertical) development of the Ukrainian standardization law include, first of all, continuing the process of reforming and harmonizing the technical regulation system. The objective need to unify and harmonize national state standards with international and European ones is particularly urgent. We agree with the opinion of scientists that the norm for the implementation at the national level of 80% of standards in force in the EU requires to accelerate the pace of harmonizing the national regulatory framework of Ukraine with EU standards[66]. However, as Yu.Y. Harasym specifies, the question of the existence

[63] *Derzhavne pidpryiemstvo «Ukrainskyi naukovo-doslidnyi i navchalnyi tsentr problem standartyzatsii, sertyfikatsii ta yakosti», DP «UkrNDNTs».* [online]. Available at: http://uas.org.ua/ua/. (in Ukrainian).

[64] *Prohrama robit z natsionalnoi standartyzatsii v Ukraini na 2019 rik: Nakaz DP "UkrNDNTs"* vid 25.02.2018 r. № 33. [online]. Available at: http://uas.org.ua/ua/services/standartizatsiya/programa-robit/. (in Ukrainian).

[65] *Zvit shchodo vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony za IV kvartaly 2019 roku.* Monitorynh vykonannia v Minekonomiky v IV kvartali 2019 roku planu zakhodiv z vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu ta YeS. [online]. Available at: http://www.me.gov.ua/Documents/List?lang=uk-UA&id=f1bdcc6c-abc8-46dc-9648-ed56b2fcea1c&tag=ImplementatsiiaUgodiProAsotsiatsiiuMizhUkrainoiuTas. (in Ukrainian).

[66] LYTVYNSKA, S. Harmonizatsiia ukrainskykh natsionalnykh standartiv serii «Informatsiia ta dokumentatsiia» z mizhnarodnymy i yevropeiskymy: zdobutky i perspektyvy. *Ukrainian Scientific*

of duplicate regimes in terminology remains unresolved: technical regulations (as a regulatory legal act) and technical regulation (as a process)[67], as opposed to English, in which there is a single term "technical regulation" as a process, etc.

For the purpose of signing the ACAA Agreement, in order to determine the priority sectors of industrial products (Article 57, Annex III of the Association Agreement), the term has been set: -- until September 1, 2022[68], and the work in this area is ongoing and consists of: ensuring that the legislation, standards and infrastructure are reviewed in terms of the compliance with the EU requirements, which will allow increasing the competitiveness of domestic products and expanding the export capabilities of Ukraine[69]. It can be argued that Ukraine is moving ahead in the matter of performing the "homework" in the preparation for concluding the ACAA Agreement[70], but the near-term perspective of its signing

Journal of Information Security, 2012, vol. 2, s. 44. (in Ukrainian).

[67] *Pro vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony: Postanova Kabinetu Ministriv Ukrainy* vid 25.10.2017 r. № 1106. [online]. Available at: https://zakon.rada.gov.ua/laws/show/1106-2017-%D0%BF. (in Ukrainian).

[68] *Pro vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony: Postanova Kabinetu Ministriv Ukrainy* vid 25.10.2017 r. № 1106. [online]. Available at: https://zakon.rada.gov.ua/laws/show/1106-2017-%D0%BF. (in Ukrainian).

[69] See: *Zvit pro diialnist natsionalnoho orhanu standartyzatsii za 2017 rik.* [online]. Available at: http://uas.org.ua/wp-content/uploads/2018/02/Zvit-na-KR-NOS.pdf. (in Ukrainian); *Zvit pro vykonannia Prohramy robit z natsionalnoi standartyzatsii na 2019 rik.* Hruden, 27.12.2019 r. [online]. Available at: http://uas.org.ua/ua/services/standartizatsiya/programa-robit/. (in Ukrainian); *Zvity shchodo vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony za I-IV kvartaly 2018 roku.* Monitorynh vykonannia v Minekonomrozvytku v I-IV kvartalakh 2018 roku planu zakhodiv z vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu ta YeS. [online]. Available at: http://www.me.gov.ua/Documents/List?lang=uk-UA&id=f1bdcc6c-abc8-46dc-9648-ed56b2fcea1c&tag=ImplementatsiiaUgodiProAsotsiatsiiuMizhUkrainoiuTas. (in Ukrainian); *Zvit shchodo vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony za IV kvartaly 2019 roku.* Monitorynh vykonannia v Minekonomiky v IV kvartali 2019 roku planu zakhodiv z vykonannia Uhody pro asotsiatsiiu mizh Ukrainoiu ta YeS. [online]. Available at: http://www.me.gov.ua/Documents/List?lang=uk-UA&id=f1bdcc6c-abc8-46dc-9648-ed56b2fcea1c&tag=ImplementatsiiaUgodiProAsotsiatsiiuMizhUkrainoiuTas. (in Ukrainian).

[70] See: *Zvit pro diialnist natsionalnoho orhanu standartyzatsii za 2017 rik.* [online]. Available at: http://uas.org.ua/wp-content/uploads/2018/02/Zvit-na-KR-NOS.pdf. (in Ukrainian); *Prohrama robit z natsionalnoi standartyzatsii v Ukraini na 2019 rik: Nakaz DP "UkrNDNTs"* vid 25.02.2018 r. № 33. [online]. Available at: http://uas.org.ua/ua/services/standartizatsiya/programa-robit/. (in Ukrainian); *Zvit pro vykonannia Prohramy robit z natsionalnoi standartyzatsii na 2019 rik.* Hruden, 27.12.2019 r. [online]. Available at: http://uas.org.ua/ua/services/standartizatsiya/programa-robit/. (in Ukrainian); *Proekt Chastyny 1 «Novi temy» do proektu Prohramy robit*

is not foreseen; it would be appropriate to consider the possibility to temporarily simplify procedures or mitigate requirements for the assessment and documentary certification of conformity and acceptability of certain industrial products of the Ukrainian origin for the EU requirements.

The Ministry of Economic Development, Trade and Agriculture of Ukraine is the institutional center for reforming the technical regulation system and preparing for the conclusion of the ACAA Agreement. It is responsible for the formation of state policies in this area, performs regulatory and/or coordinating functions in the field of the horizontal legislation (technical regulations and conformity assessment, standardization, metrology, market surveillance), and with regard to the vertical (sectoral) legislation, it is also the regulator that develops technical regulations in the defined sectors. Other central executive authorities perform functions of the regulator, or inspection (supervisory) functions in the defined sectors[71].

One of the components of the institutional reforming and harmonization of standardization, according to Article 11 of the Law "On Standardization", is the establishment of the National Standardization Body (NSB)[72], whose functions are entrusted to the State Enterprise "Ukrainian Research and Training Center for Problems of Standardization, Certification, and Quality" (SE "UkrNDNC")[73], in accordance with the Decree of the Cabinet of Ministers of Ukraine of 26 November 2014 No. 1163-2014-p "On Definition of a State-Owned Enterprise that Performs Functions of the National Standardization Body"[74]. Therefore, the significant step on the transfer of functions of the National Standardization Body from the State (represented, for example, by the State Consumer Standard) to the enterprise (even if it is the state-owned one) has been made.

At the same time, we should agree with the statement that the State is not able to promptly respond to changes and developments in new technologies[75]. That

z natsionalnoi standartyzatsii na 2020 rik. [online]. Available at: http://uas.org.ua/ua/services/standartizatsiya/programa-robit/. (in Ukrainian).

71 LUTSENKO, D. *Uhoda ASAA: intehratsiia Ukrainy do rynku promyslovykh tovariv YeS.* V ramkakh proektu "Hromadska synerhiia". Sichen 2019, S. 4. [online]. Available at: https://www.civic-synergy.org.ua/analytics/ugoda-asaa-integratsiya-ukrayiny-do-rynku-promyslovyh-tovariv-yes/. (in Ukrainian).

72 *Pro standartyzatsiiu: Zakon Ukrainy* vid 05.06.2014 r. № 1315-VII. [online]. Available at: https://zakon.rada.gov.ua/laws/card/1315-18. (in Ukrainian).

73 *State Enterprise "Ukrainian Research and Training Center for Problems of Standardization, Certification, and Quality", SE "UkrNDNC".* [online]. Available at: http://uas.org.ua/ua/. (in Ukrainian).

74 *Pro vyznachennia derzhavnoho pidpryiemstva, yake vykonuie funktsii natsionalnoho orhanu standartyzatsii: Rozporiadzhennia Kabinetu Ministriv Ukrainy* vid 26.11.2014 r.№ 1163-2014-r. [online]. Available at: https://zakon.rada.gov.ua/laws/show/1163-2014-%D1%80. (in Ukrainian).

75 KOVALOVA, M. L. Osoblyvosti systemy standartyzatsii ta sertyfikatsii v Ukraini. *Biznes ta intelektualnyi kapital*. Intelekt XXI, 2016, vol. 4, s. 69. (in Ukrainian).

is why in the European countries, private entities are engaged in the elaboration of standards, in particular the indicative example is the German Institute for Standardization DIN – a non-profit association, whose members are enterprises, unions, state organizations, trade firms, scientific institutes, etc. Thus, the Terminology DIN Standards Committee consists of 47% of the industry representatives, 44% of scientists and researchers, and only 8% of participants from the public sector. Such a committee structure is an effective mechanism for creating market standards that, first of all, have credibility as well as undoubtedly promote global trade, encourage rationalization, and contribute to ensuring quality and improving security and communications[76].

In addition, according to paragraph 7 of Article 56 of the Association Agreement, Ukraine fully ensures the participation (or cooperation) of relevant national bodies not only in international world organizations[77], but also in European ones, in particular in: – the European Committee for Standardization (CEN), which brings together national standardization bodies of 34 European countries[78]; – the European Committee for Electrotechnical Standardization (CENELEC)[79]; – the European Telecommunications Standards Institute[80] (the European Telecommunications Standards Institute, ETSI)[81], etc.

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[76] *The German Institute for Standardization, DIN.* [online]. Available at: https://www.din.de/en

[77] Which have already been discussed.

[78] *The European Committee for Standardization, CEN.* [online]. Available at: https://www.cen.eu/about/Pages/default.aspx.

For more details, see [online]. Available at: http://uas.org.ua/ua/zagalni-vidomosti-pro-dp-ukrndnts/kerivnitstvo/generalniy-direktor-dp-ukrndnts/pershiy-zastupnik-generalnogo-direktora-direktor-institutu-standartizatsiyi/viddil-mizhnarodnogo-regionalnogo-mizhderzhavnogo-spivrobutnytstva/spivrobitnitstvo-z-mizhnarodnimi-organizatsiyami/. (in Ukrainian); https://standards.cen.eu/

[79] *European Committee for Electrotechnical Standardization, CENELEC.* [online]. Available at: https://www.cenelec.eu/aboutcenelec/whoweare/index.html

For more details, see [online]. Available at: http://uas.org.ua/ua/zagalni-vidomosti-pro-dp-ukrndnts/kerivnitstvo/generalniy-direktor-dp-ukrndnts/pershiy-zastupnik-generalnogo-direktora-direktor-institutu-standartizatsiyi/viddil-mizhnarodnogo-regionalnogo-mizhderzhavnogo-spivrobutnytstva/spivrobitnitstvo-z-mizhnarodnimi-organizatsiyami/. (in Ukrainian); https://www.cenelec.eu/dyn/www/f?p=104:11:1958283374840701::::FSP_ORG_ID:5777

[80] Also called the European Telecommunications Standards Institute

[81] *European Telecommunications Standards Institute, ETSI* [online]. Available at: https://www.etsi.org/.

For more details, see [online]. Available at: http://uas.org.ua/ua/zagalni-vidomosti-pro-dp-ukrndnts/kerivnitstvo/generalniy-direktor-dp-ukrndnts/pershiy-zastupnik-generalnogo-direktora-direktor-institutu-standartizatsiyi/viddil-mizhnarodnogo-regionalnogo-mizhderzhavnogo-spivrobutnytstva/spivrobitnitstvo-z-mizhnarodnimi-organizatsiyami/. (in Ukrainian); https://www.etsi.org/; https://www.etsi.org/newsroom/news/394-news-release-25-may-2012?highlight=WyJ1a3JhaW5lIl0=

The institutional legal changes may also include the measures for possible gaining by Ukraine, before the end of 2020, of the membership in the International Organization of Legal Metrology (OIML), which are still ongoing, and signing of the Metre Convention in order to participate to the full extent in the Mutual Recognition Arrangement for national standards and calibration and measurement certificates issued by national institutes of metrology (CIPM MRA) (Article 56 of the Association Agreement).

On August 7, 2018, Ukraine became a full-fledged member of the International Bureau of Weights and Measures (BIPM, Fr.: Bureau International des Poids et Mesures)[82] (before that, since 2002, it was an associate member of the General Conference of Weights and Measures), following the adoption of the Law of Ukraine of 23 May 2018 No. 2445 "On Accession of Ukraine to the Metre Convention"[83]. The said events open for Ukraine the possibility to ensure comparison of benchmarks and to strengthen its national infrastructure/quality institution, the basis of which is exactly metrology; accordingly, this gives the right to the future full membership in the International Organization of Legal Metrology (OIML).

Within the framework of implementing the Association Agreement, the Trade and Sustainable Development Council was established[84], which consists of representatives of public authorities, business, employers, trade union organizations, environmental NGOs, etc. The Council has the status of an advisory and consultative body, and its activities are primarily aimed at resolving the issue to prepare recommendations and proposals for the establishment of an institutional component within the framework of implementing the provisions of Chapter 13 "Trade and Sustainable Development" of the Association Agreement between Ukraine and the EU, namely regarding: the organization of work of the Consultative Group on sustainable development issues; and the selection of candidates for the Expert Group. The first meeting of the Trade and Sustainable Development Council was held on September 10, 2018.

Another priority element of the institutional legal reforming/adaptation of the technical regulation system is to bring the accreditation system of Ukraine in line

[82] Bureau International des Poids et Mesures, BIPM. [online]. Available at: https://www.bipm.org/en/about-us/

For more details, see [online]. Available at: https://www.bipm.org/en/about-us/member-states/ua/

[83] *Pro pryiednannia Ukrainy do Metrychnoi konventsii: Zakon Ukrainy* vid 23.05.2018 r. № 2445-VIII. [online]. Available at: https://zakon.rada.gov.ua/laws/show/2445-19. (in Ukrainian); *Metrychna konventsiia vid 20.05.1875 r., m. Paryzh.* [online]. Available at: https://zakon.rada.gov.ua/laws/show/250_001-75#n2. (in Ukrainian).

[84] *Pro utvorennia Rady z pytan torhivli ta staloho rozvytku: Postanova Kabinetu Ministriv Ukrainy* vid 13.06.2018 r. № 478. [online]. Available at: http://zakon5.rada.gov.ua/laws/show/478-2018-p. (in Ukrainian).

with the requirements of the European Accreditation of Certification[85] (European Accreditation of Certification, EA)[86] and to sign relevant bilateral recognition agreements with EA. In this regard, the Law of Ukraine "On Accreditation of Conformity Assessment Bodies"[87] is of the exceptional importance, with the adoption of which the conformity assessment (certification) and accreditation functions have been separated. The result of these actions was the formation of the National Accreditation Agency of Ukraine (hereinafter – NAAU)[88] in 2002.

The NAAU's activities are recognized in the European Union and across the globe; it is a member of a number of international and regional accreditation organizations: an associate member of the European Accreditation of Certification (EA)[89], which ensures the mutual recognition of accreditation results of conformity assessment bodies on the basis of the Bilateral Recognition Agreement, (EA BLA) in the areas of accreditation of testing and calibration laboratories, product certification bodies, management system certification bodies, personal certification bodies and inspection bodies.

The EA acknowledged that the areas of the NAAU's activities are in line with the European accreditation regulatory requirements. The NAAU is a full-fledged member of the International Laboratory Accreditation Cooperation[90] (International Laboratory Accreditation Cooperation, ILAC)[91] and a signatory to the Mutual Recognition Arrangement (ILAC Mutual Recognition Arrangement, ILAC MRA) in the areas of accreditation of testing and calibration laboratories and inspection bodies[92].

In August 2016, the NAAU applied for the membership in the International Accreditation Forum (IAF)[93], as a result of which in June 2017, the NAAU joined

[85] Sometimes called the European Accreditation of Certification. See [online]. Available at: http://www.ukrcsm.kiev.ua/index.php/en/services-ua/standard-ua/inter-org-standard-ua. (in Ukrainian).

[86] *European Accreditation of Certification, EA.* [online]. Available at: https://european-accreditation.org/.

[87] *Pro akredytatsiiu orhaniv z otsinky vidpovidnosti: Zakon Ukrainy* vid 17.05.2001 r. № 2407-III. [online]. Available at: https://zakon.rada.gov.ua/laws/show/2407-14. (in Ukrainian).

[88] *National Accreditation Agency of Ukraine.NAAU.* [online]. Available at: https://naau.org.ua/?lang=en *Natsionalne ahentstvo z akredytatsii Ukrainy*. [online]. Available at: https://naau.org.ua/. (in Ukrainian).

[89] For more details, see [online]. Available at: https://european-accreditation.org/ea-members/directory-of-ea-members-and-mla-signatories/

[90] Sometimes called the International Laboratory Accreditation Cooperation, See [online]. Available at: http://www.ukrcsm.kiev.ua/index.php/en/services-ua/standard-ua/inter-org-standard-ua. (in Ukrainian)

[91] *International Laboratory Accreditation Cooperation, ILAC.* [online]. Available at: https://ilac.org/

[92] *ILAC MRA Annual Report 2018.* [online]. Available at: https://ilac.org/ilac-mra-and-signatories/

[93] *International Accreditation Forum, IAF.* [online]. Available at: https://www.iaf.nu/

the IAF[94]. In August 2017, the NAAU received the status of a signatory to the Multilateral Recognition Arrangement in the areas of accreditation of product certification bodies, personnel certification bodies, and certification bodies of quality management systems, the environment, information security, food safety, as well as quality management systems for medical products and energy management systems (IAF MLA (Multilateral Recognition Arrangements)[95]. In September 2017, the NAAU and IAF signed the agreement on the use of a mark, which provides the accredited product, personnel and management system certification bodies with the opportunity to use the combined mark of IAF MLA on their own documents, subject to signing of a separate agreement with the NAAU.

Therefore, the accreditation provided by the NAAU in the above areas is equivalent to the accreditation provided by national accreditation bodies – parties to ILAC MRA and IAF MLA in more than 80 countries of the world[96]. The perspective tasks concerning the NAAU's activities, first of all, include developing and deepening the international cooperation within the framework of EA, ILAC and IAF, as well as the further cooperation with national accreditation bodies of different countries for the mutual recognition of accreditation.

By determining overall prospects for the development in the field of technical regulations and standardization, metrology, accreditation, conformity assessment procedures and market surveillance systems, the priority remains to work on the further and full performance by Ukraine of its obligations under the Association Agreement not only in regard to institutional and legal (framework, organizational) aspects, but also their strict observance, implementation/application, as well as monitoring.

5. Conclusions

It's worth approaching the technical barriers subject in an integrated, prudent and responsible manner as it covers various spheres of socio-economic and public life, in particular, for example, foreign economic (foreign trade and customs) aspects; the equality of the goods made by national producers with the goods originated in other countries on states' internal markets, states' social responsibility for the current and prospective health of their population, national economic (including food) security; as well as legal confirmation/legalization (including

[94] See: [online]. Available at: https://www.iaf.nu/articles/IAF_MEM_Ukraine/502

[95] *IAF MLA Committee Members.* IAF Secretariat. 13 November 2019. P. 31. [online]. Available at: https://www.iaf.nu/upFiles/MLA%20Member%20List.pdf

[96] See: https://naau.org.ua/mizhnarodna-diyalnist/. (in Ukrainian); https://european-accreditation.org/ea-members/directory-of-ea-members-and-mla-signatories/#UKRAINE

harmonization, adaptation and coordination) of all the above mentioned matters both on the national and the international level.

Technical barriers to international trade (the institutional and legal (regulatory) manifestation of which is technical regulations, standardization, metrology, accreditation, conformity assessment procedures and market surveillance systems) can be used by States both to improve the quality and safety of goods/products and to fight against unwanted competitors. Thus, on the one hand, there is a need to align (including to unify, to adapt) technical barriers to trade and regulate their application within the framework of international cooperation (world and regional, multilateral and bilateral), and on the other hand, the countries themselves (at national and domestic levels) must protect their own economic and security interests, their commodity producers, consumers and the environment. Due to the socio-economic importance and ambiguity of the application of technical barriers to trade, States actively cooperate on issues of either their limitation, or transparent regulation/application, without ignoring also the unification and adaptation processes of regulatory legal, organizational, documentary and procedural aspects with regard to technical regulations, and standardization, metrology, accreditation, conformity assessment procedures and market surveillance systems, etc.

Firstly, the need to regulate technical barriers is addressed in the WTO system multilateral international agreement: – the Agreement on Technical Barriers to Trade (TBT), the references to the provisions of which are also contained in regional international agreements, in particular in the Association Agreement between Ukraine and the EU 2014. Certainly, any international treaties with the same participants should not contradict one another with regard to provisions enshrined in them and, accordingly, obligations arising from them. Having compared the content of the TBT Agreement and the Association Agreement, one can argue about their interdependence, interrelation, consistency with each other, influence (first of all, the TBT Agreement), and in some cases, interchangeability, as well as relevance and correlation of their basic provisions. As a rule, international treaties with fewer participants (regional or bilateral) are more specific by reason of their sense in terms of entrenching their parties' special/sectoral obligations, as well as more effective and stricter in their performance, as it is observed in the context of Chapter 3 "Technical Barriers to Trade" (Articles 53-58, Annex III) of the Association Agreement.

The European Union and its Member-States have a long-standing practice of international and national institutional and legal support and regulation of technical barriers as non-tariff means of international trade; thus, the use of their experience and achievements in this field is reasonable and appropriate, both in theoretical and practical terms, especially for countries with the European

integration vector. For example, the Regulation (EC) No. 765/2008 and Decision No. 768/2008/EC contain the essential elements of the modern integrated regulatory framework for the effective work on safety and compliance of products/goods with the requirements adopted to protect different public interests, and for the proper functioning of the single market within the EU Member-States and deep and comprehensive free trade area between Ukraine and the European Union.

Within the framework of the Association Agreement, the focus is predominantly put on harmonization (adaptation) of the regulatory environment of Ukraine with relevant EU standards. In the field of technical barriers, Ukraine has undertaken a number of institutional and legal obligations (namely: to take necessary steps in order to achieve the conformity with the EU technical regulations, and EU standardization, metrology, accreditation, conformity assessment procedures and market surveillance systems; to adhere to the principles and practices outlined in the EU decisions and regulations), the performance of which can be now observed at both domestic and international levels. The national regulatory legal activity in the investigated area may primarily include adopting or updating of legislative and non-legislative acts of Ukraine (in particular, the Laws of Ukraine "On Accreditation of Conformity Assessment Bodies", "On State Market Surveillance and Control of Non-Food Products", "On Technical Regulations and Conformity Assessment", "On Metrology and Metrology Activities", "On Standardization", etc.), as well as the large-scale work on the gradual implementation of European standards (EN) in relevant harmonized/adapted national technical regulations and standards. As concerns the domestic institutional and organizational activity of Ukraine in performing its obligations regarding technical barriers of the Association Agreement, it is necessary to point out the formation of the National Standardization Body represented by the State Enterprise "Ukrainian Research and Training Center for Problems of Standardization, Certification, and Quality" (SE "UkrNDNC") and the National Accreditation Agency of Ukraine (NAAU). Within the framework of international (world and regional) cooperation of Ukraine in various formats, the attention is paid to the cooperation (or its attempts) with the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC), the European Telecommunications Standards Institute (ETSI), the European Accreditation of Certification (EA), the International Bureau of Weights and Measures (BIPM, Bureau International des Poids et Mesures), the International Organization of Legal Metrology (OIML), the International Organization for Standardization (ISO), the International Standardized Testing Organization (ISTO), the International Electrotechnical Commission (IEC), the International Telecommunication Union (ITU), and the International Laboratory Accreditation Cooperation (ILAC), etc.

Stability and predictability in international trade relations can be ensured, to no small degree, through a system of rules/norms recognized by most countries of the world, which enters into force by its implementation and application, first of all, at the national (domestic) level. (Although, in the modern world predominantly, this is driven by external and international factors). Despite the certain progress of Ukraine in the adaptation and institutional and regulatory provision, at domestic and international levels, of some aspects related to technical barriers to international trade, a whole lot of things remain to be done on the way of reforming and harmonizing the national technical regulation system. In summary, the attention should be paid to the need for a more active integration of Ukraine into the world economy, including through: the implementation of commitments resulting from the WTO membership and participation in the Association Agreement with the EU; the further liberalization of foreign trade and domestic economic policies; the simplification of export-import procedures and optimization of regulating the non-tariff barriers to trade, etc.

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JUNIOR RESEARCHERS PAPERS

An Outline on the Right to Water in the EU System

Francesco Anastasi*

Summary: Water is a fundamental resource for the birth, development of human civilization. The right to water is one of those rights that transcends and embraces the whole history of man and society. However, in our contemporary society the right to water seems something new, almost a post-modern innovation. Research at European level has taken up the challenge and the scientific water community is committed to rapidly developing and transferring management solutions that make our cities more liveable and the negative pressures on the availability of good quality water for uses increasingly irrelevant potable and civil. In this context it is important to develop a regulatory and legislative approach that does not settle for damage-repair dynamics but an approach aimed at prevention and planning directed towards two contexts: procurement and recycling-reuse.

Keywords: Water, Resource, Water Rights, Right to Water, European Legislation, EU

1. Introduction

Water is a fundamental resource for the birth and development of human civilization[1].

Nowadays the distribution of water is unbalanced: the resource is in continuous contraction and the indiscriminate use of the resource combined with climate change will increase the imbalances.

According to the 2015 edition of the World Water Development of the United Nations, by 2030 is expected a 40% drop in water availability, unless the management and use of this resource will improve[2].

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1 Cfr. KAPP, E., (Edited by KIRKWOOD, J. W. and WEATHERBY, L.). *Elements of a Philosophy of Technology On the Evolutionary History of Culture*, University of Minnesota Press, 2018; SCHMITT, C. *Land und Meer. Eine weltgeschichtliche Betrachtung*, Stuttgart, Klett-Cotta, 1954, trasl. it. Milano, Adelphi, 2002.

2 *The UN World Water Development Report 2015, Water for a Sustainable World*, available at: http://www.unesco.org/; sul punto cfr. anche *2017 UN World Water Development Report,*

The idea of a *right to water*, as a constitutionally protected value and as a guaranteed essential common good, is one of the fundamental problems of the 21st century. In the European law system, there are many problems concerning the use of water: for example, the various forms of pollution that threaten rivers, lakes and underground waterways or the various uses of water resources[3].

In European law there are several problems concerning the use of water: for example the various forms of pollution that threaten rivers, lakes and underground waterways or the various uses of water resources[4].

On this point also Pope Francis in the Encyclical *Laudato si*, dated 24.05.2015, has made many considerations on the theme of "care of the common home" and on the link, today increasingly evident among the concerns for nature and justice towards the poorest.

The Pope addresses in his text an invitation to act to the States to ensure the right of everyone to access water: "*to face the fundamental problems that cannot be solved by the actions of individual countries, a global consensus is essential. for example, (...) to ensure access to drinking water for all*"[5].

Most of the rules on water are addressed to states, which often deal mainly with affirming their territorial sovereignty over water resources present in their territory rather than guaranteeing the right to water of their citizens.

Furthermore, under the international law, the right to water is subject to a series of normative acts of different legal value, from the declarations of the General Assembly of the United Nations to acts of greater effectiveness from the point of view of the obligation, which, moreover, are not addressed in the same direction.

This contributes greatly to making the overall regulatory framework even more uncertain and contradictory.

For instance, in the Chart of Nice, there is no precise reference to right to water, whilst some constitutions of African countries have recognized this right.

It should be noted that the effects of privatization policies are more aggressive when they are aimed at territories in which there is not a strong welfare tradition, as in the EU, capable of balancing the most radical thrusts of privatization and liberalization.

Wastewater: The Untapped Resource, disponibile su http://www.unesco.org/; also https://www.un.org/sustainabledevelopment/water-and-sanitation/

[3] BRANS, E., DE HAAN, E. J. (edited by). *The Scarcity of Water, Emerging Legal and Policy Responses*, Kluver Law International, 1997.

[4] Cfr. GIUFFRIDA, R., AMABILI, F. *La tutela dell'ambiente nel diritto internazionale ed europeo,* Giappichelli, Torino.

[5] Cfr. BISCOTTI, B., LAMARQUE, E. *Cibo e acqua. Sfide per il diritto contemporaneo: Verso e oltre Expo 2015*, Giappichelli, Torino.

It is not a coincidence, therefore, that the most violent popular reactions against the processes of privatization of the water resource took place in Cochabamba in Bolivia and that the constitutionalization of the right to water is affecting the whole South America.

In particular, among the constitutions in which a right to water was expressly stated, those of Bolivia (article 20.III) of 2009, Ecuador (article 3) of 2008 and Uruguay (article 47) of 2004[6].

As has been pointed out[7], the change to the Bolivian constitution is a direct consequence of the revolt of 2000, which was known as *water* revolt[8].

These events explain both the forecast of access to water and sanitation as a human right, and the prohibition of forms of privatization of the water service.

Also worthy of note are other provisions of the Bolivian constitution: for example the §373 defines the fundamental right to water for life, and attributes to the State the task of guaranteeing and promoting access to water resources, implementing a series of principles including those of solidarity, equity and sustainability[9].

The proclamation of the right to water as fundamental has consequently determined, a centralization of the competences: in Bolivia was established the Ministry of Water.

2. The human right to water in international treaties

For instance, the right to water is expressly mentioned, for example, in the Convention on the Elimination of All Forms of Discrimination against Women (New York, 1979), in the Convention on the Rights of the Child (New York, 1989) and in the Convention on the Rights of Persons with Disabilities (New York, 2007)[10].

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6 Cfr. HILDERING, A. *International Law, Sustainable Development and Water Management*, Eburon, 2006; also IANNELLO, C. *Il diritto all'acqua. L'appartenenza collettiva alla risorsa idrica*, La scuola di Pitagora.

7 Ibidem.

8 BERTI SUMAN, A. *The Human Right to Water in Latin America: Challenges to Implementation and Contribution to the Concept*, BRP, 2018.

9 "*El agua constituye un derecho fundamentalísimo para la vida, en el marco de la soberanía del pueblo. El Estado promoverá el uso y acceso al agua sobre la base de principios de solidaridad, complementariedad, reciprocidad, equidad, diversidad y sustentabilidad. II. Los recursos hídricos en todos sus estados, superficiales y subterráneos, constituyen recursos finitos, vulnerables, estratégicos y cumplen una función social, cultural y ambiental. Estos recursos no podrán ser objeto de apropiaciones privadas y tanto ellos como sus servicios no serán concesionados*". Available at https://bolivia.justia.com/nacionales/nueva-constitucion-politica-del-estado/cuarta-parte/titulo-ii/capitulo-quinto/

10 «*States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate*

It also seems appropriate to refer to the Convention on the Use of International Watercourses other than Navigation (New York, 1997)[11] which recognize and provides the needs of the vital needs of the individuals in case of a conflict due to the use of an international waterway.

The human right to water and hygiene is also regularly regulated in the Protocol on Water and Health (London, 1999) to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992). In this context, it has been positively promoted with a view to protecting health through the management of water resources[12].

The right to water and hygiene is already considered implicit in several human rights affirmed in other human rights treaties (the right to life, food, housing and health).

The right to water is therefore included in the right to life (Article 6) of the Covenant on Economic, Social and Cultural Rights (New York, 1966), the right to food and housing (Article 11) and law to health (Article 12).

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in and benefit from rural development and, in particular, shall ensure to such women the right:

- *(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply. transport and communication*» (art. 14, par. 2).

«1. *States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and the rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

2. States Parties shall pursue hill implementation of this right and. in particular, shall take appropriate measures:

- *(c) To combat disease and malnutrition, including within the Framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious food and clean drinking-water, taking into consideration the dangers and risks of environmental pollution*» (art. 24, par. 2).

«*States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:*

- *(a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance br disability-related needs; (...)*» (par. 28, par. 2).

[11] Cfr. MCCAFFREY, S. C., SINJELA, M. *The 1997 United Nations Conventions on International Watercourses*, in American Journal of international Law, 1998; cfr also TANZI, A., ARCARI, M., *The united nations convention on the law of international watercourses*, London, Kuver law international, 2001.

[12] «*Equitable access to water, adequate in terms both of quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion» art. 5, l*

«Special consideration should be given to the protection of people who are particularly vulnerable to water-related disease» (art. 5, k).

The Committee on Economic, Social and Cultural Rights, in the general comment n. 1 (2002) on the right to water found that the same should be understood as a condition to benefit from other human rights[13].

The content of the human right to water and hygiene is understood by these international treaties as "*the obligation of the State to assure the individual the availability, quality, accessibility of water, as well as the related information*". Water is a social and cultural asset, not a commercial asset and the cost of supply must be sustainable at an accessible cost for everyone.

At the international level, was elaborated a sort of hydrological naturalism which, in Vandana Shiva, assumes the connotations of a *global ethics* almost with a religious accents[14].

There are those who have tried to clarify the scope of this natural right on a normative level.

In fact, although it is a public service there are those who have understood it as a right to be guaranteed to everyone free of charge up to a certain amount, in an amount exceeding rising costs up to a certain quota beyond which they will suffer strong economic penalizations disincentivate waste.

2.1. International agreements on regional water resources – Outline

The protection of marine waters in Europe is governed by four international cooperation structures, the so-called regional maritime conventions between Member States and neighboring countries that share common water resources: the 1992 OSPAR convention (based on the previous Oslo and Paris conventions) for the north-east Atlantic; the 1992 Helsinki Convention for the Baltic Sea area; the Barcelona Convention (UNEP-MAP) of 1995 for the Mediterranean; the 1992 Bucharest Convention for the Black Sea. EU river waters are protected by the 1996 Danube Protection Convention and the 2009 Rhine Protection Convention.

[13] «*Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite [or the realization of other human rights» «The human right to water entitles everyone to sufficient. safe, acceptable, physically accessible and affordable water [or personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements*» cfr. United Nations Document E/C.12/2002/11 20 January 2003 par. 1.

[14] Cfr. SHIVA, V. *Water Wars: Privatisation, Pollution and Profit*, Cambridge (Mass.), South End Press, 2002.

Interregional environmental cooperation focused on marine waters or river basins has led to the development of different macro-regional strategies in the EU: the strategy for the Baltic Sea region in 2009 (the first global EU strategy designed for a macro-region); the strategy for the Danube region (2011) and the strategy for the Adriatic-Ionian region (2014).

3. Briefly on the principle of the European Environmental law

The Union environmental policy is based on the principles of precaution, preventive action and correction of pollution at source, as well as on the "polluter pays" principle. The precautionary principle[15] is a risk management tool that can be used in case of scientific uncertainty about an alleged risk to human health or the environment deriving from a specific action or policy[16].

For example, if there are doubts about the potentially dangerous effect of a product and if, following an objective scientific evaluation, uncertainty remains, an instruction can be given to block the distribution of this product or to withdraw it from the market.

These measures must be non-discriminatory and proportionate and should be reviewed as soon as more scientific information becomes available[17].

The polluter pays principle[18] is implemented by the Environmental Liability Directive[19], which aims to prevent or otherwise repair environmental damage to

[15] About the precautionary principle and its development In the European Union see among others, FREESTONE, D., HEY, E. *The Precautionary Principle and International Law,* 1996, Kluver Law International; O'RIORDAN, T., *Interpreting the Precautionary Principle*, 2009; PEEL, J., *The Precautionary Principle in Practice: Environmental Decision-making*, Federation Press, 2005; COONEY, R, DICKSON, B., *Biodiversity and the Precautionary Principle*, Earthscan, 2005.

[16] Cfr. JANS, J. H., VEDDER, H. *European Environmental Law*, Europa Law Pub., 2008.

[17] Cfr. KINGSTON, S., HEYVAERT, V., ČAVOŠKI, A. *European Environmental Law*, Cambridge University Press, 2019.

[18] SANDS, P. *Principles of International Environmental Law*, 3° ed., Cambridge, 2012; SCOTT, J., *The Geographical Scope of the EU's Climate Responsibilities,* in *Cambridge Yearbook of European Legal Studies,* Centre for European Legal Studies, Faculty of Law, University of Cambridge, 2015, p. 92 ss.; SIRONI A. *La tutela della persona in conseguenza di danni all'ambiente nella giurisprudenza della Corte europea dei diritti umani,* in *Diritti umani e diritto internazionale,* 2011, fasc. 1, p. 5 ss.; TRIGGIANI, E., *Spunti e riflessioni sull'Europa*, Bari, 2015, p. 203 ss.; VEDDER, H. *The Treaty of Lisbon and European Environmental Law and Policy*, in *Journal of Environmental Law*, 2010, p. 285 ss.

[19] Available at; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al28120; About the issue see BERGKAMP L., GOLDSMITH B. *The EU Environmental Liability Directive: A Commentary*, Oxford University press, 2005.

protected species and natural habitats, water and soil. Operators who carry out certain professional activities such as the transport of dangerous substances, or activities that involve discharging into the water, are required to take preventive measures in the event of an imminent threat to the environment[20]. If the damage has already occurred, they are obliged to take the appropriate measures to remedy it and to bear the costs. The scope of the directive has been expanded three times to include extraction waste management, operation of geological storage sites and the safety of offshore oil and gas operations respectively[21].

Furthermore, the integration of environmental concerns into other areas of EU policy has today been an important concept in European policy, since it first emerged from an initiative from the 1998 Cardiff European Council[22]. In recent years, the integration of environmental policies has made significant progress, for example, in the field of energy policy, as evidenced by the parallel development of the EU climate and energy package or the roadmap towards a competitive low-emission economy of carbon by 2050.

The implementation of the environmental policy of the European Union is today ensured by Title XX of the Treaty on the Functioning of the European Union, adopted in Lisbon on 13.12.2007 (in force since 01.12.2009) and, in particular, by Articles 191, 192 and 193, which attribute competency of a concurrent nature to the Union[23].

The importance that environmental protection has assumed over the years in the context of the European Union, which has become a leading player on the international scene, is evident today and can be deduced both from the truly large number of binding secondary legislation (over 450 directives, regulations and decisions), both from the circumstance that, alongside the central nucleus of dedicated rules dedicated to the environment, within the Treaties there are other conditions that place protection from pollution, also due to the principle of integration pursuant to art. 11 TFEU (which takes over Article 6 of the EC Treaty), as central to the activity of the Union institutions with reference to the implementation of other policies.

[20] Cfr. VAN CALSTER, G., REINS, L. *Environmental Law*, Edward Elgar Pub, 2017.

[21] Cfr. MUNARI, SCHIANO DI PEPE. *Tutela transnazionale dell'ambiente*, Bologna, 2012.

[22] Cfr. KINGSTON, S., HEYVAERT, V., ČAVOŠKI, A. *European Environmental Law*, Cambridge University Press, 2019.

[23] JANKUV J. *Legal Mechanisms of Protection of the Human Environmental Rights in international public law*, *Law of the European Union and legal order of the Slovak republic.* Leges, Prague, 2018; JANKUV, J. Protection of Right to Environment in International Public Law. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 146–171.

4. The right to water in the European Union

4.1. Briefly, on the history of EU Water Law

The European Union has always been very sensitive to the planning of water resources and has promoted water resources planning instruments to guarantee essential water quality levels[24].

The regulation of water is a central pillar of the European Environmental policy.

It has been introduced in the first Environmental Action Programme in 1973 and has been consistent strand of the EU activity since that moment[25].

The European water law has developed in an overlapping fashion, consistently aiming at the higher environmental and health based standards.

It has begun by regulating potable water and bathing water (the first programmatic Directive is 1976) and the regulation focused on the emission of dangerous substances into water, before returning to a more focused approach regulating freshwater fish and shellfish waters.

The first Council Directive, n. 75/440/EEC on the quality of surface water was intended for the production of drinking water in the Member States, emphasized in the preamble «*the need to protect human health and to exert control over surface water intended for the production of drinking water and on the treatment of such water purification*»[26].

In 1980 the Council adopted a directive on the quality of water intended for human consumption, which was then repealed by Council Directive 98/83 with the aim of protecting "*human health from the adverse effects of contamination of water intended for human consumption, ensuring its healthiness and cleanliness*"[27]. EU water law had therefore initially developed in a fragmented way, focusing on the different forms of water use and pollution, on issues of implementation and subsidiarity[28].

The breakthrough in EU policy on this matter was achieved by the Directive of the European Parliament and of the Council known as the *Water Framework*

[24] Cfr. also URBANI, P. *Il recepimento della direttiva comunitaria sulle acque: profili istituzionali di un nuovo governo delle acque*, in *Riv. giur. amb.*, 2004, pp. 209 ss. e CORDINI, G., *La tutela dell'ambiente idrico in Italia e nell'Unione europea*, *ivi*, 2005; also GAROFALO, L., *Osservazioni sul diritto all'acqua nell'ordinamento internazionale*, in "Analisi Giuridica dell'Economia" 1/2010, pp. 15–28; cfr. JOACHIM C., MAZEAU, L. *Between risk and complexity: European water protection law issues,* in Journal international de bioéthique et d'éthique des sciences, ESKA, Paris, 2017.

[25] EU Environment Action Programme, available on https://eng.mst.dk/about-us/international/environmental-action-programme/

[26] Directive of the council, n. 75/440/CEE

[27] Directive of the council n. 91/676, to avoid nitrates pollution.

[28] MORGERA, E. *Environment*, in *European Union Law* (PEERS, S., BARNARD, C. edited by), OUP, 2014.

Directive in 2000. This was, and still is, the most important and programmatic intervention[29].

At the present the main problems concerning the management of water resources are due to the lack of public investments for the efficiency of the water network, as well as to consumption and dispersion by private individuals both in the performance of economic activities and for domestic use.

The Directive is innovative from many points of view. It conceives the water management referring to the "river basin" (art. 2, 13) according to an integrated approach. It also proposes to regulate the management of fresh water combining quantitative and qualitative aspects including both surface and underground waters[30].

However, the Directive merely states, in a general way, in the first paragraph of the preamble that «*water is not a commercial product on a par with others, but a heritage that it must be protected, defended and treated as such*».

Related to the Framework Directive are also the Council and European Parliament Directives adopted in 2006 and 2008 respectively on the protection of groundwater against pollution and deterioration and on the environmental quality standard in the water policy field[31].

More recently, was adopted the Directive 2014/23/EU of the European Parliament and of the Council on the awarding of concession contracts: it explicitly excludes concessions in the water sector from its scope[32].

In the preamble, in paragraph 40, we find an important reference to water as a "good", «*the importance of water as a public good of fundamental value for all citizens of the Union*»[33].

Not even the interpretation of the aforementioned directives provided by the Court of Justice of the European Union has contributed to the affirmation of the

[29] Cfr. KINGSTON, S., HEYVAERT, V., ČAVOŠKI, A. European Environmental Law, Cambridge University Press, 2019.

[30] Cfr. HENDRY, S. *Frameworks for Water Law Reform*, Cambridge University Press, 2015; cfr. DE VIDO, S., *Il diritto all'acqua nella prospettiva europea*, in *Il diritto all'acqua, atti del seminario di studio svoltosi a Milano il 26 novembre 2015* (VIOLINI, L. E RANDAZZO, B. edited by), Giuffrè Editore, 2017.

[31] Directive 2008/105/CE of the EU Parliament and the Council of 16 December 2008, GU L 348, 24,12.2008 p. 84, also, Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, in O L 288/28, 6,11,2007, pp. 27–34

[32] Cfr. HENDRY, S. *Frameworks for Water Law Reform*, Cambridge University Press, 2015; also DE VIDO, S. *Il diritto all'acqua nella prospettiva europea*, in *Il diritto all'acqua, atti del seminario di studio svoltosi a Milano il 26 novembre 2015* (VIOLINI, L. E RANDAZZO, B. edited by), Giuffrè Editore, 2017.

[33] Directive 2014/23/CE of the EU Parliament and the Council, del 26 February 2014 GU L 94, 28.3.2014.

human right to water[34]. And indeed there were a lot of infringement proceedings issued by the European Commission against one of the EU member states for failure or incorrect transposition of one of the aforementioned directives[35].

4.2. The right to water in EU doctrine

The right to water has been configured as a "new right" to be traced back to the widest scope of the right to life[36].

As noted by Luigi Ferrajoli, the paradigm of the right to life as it was theorized at the origins of modern juridical civilization is profoundly changed and includes also the "right to subsistence"[37].

The central problem was how to guarantee the access to the water for billions of people who for political, economic and ecological reasons are not able to dispose of them.

Precisely for these reasons, it has been proposed that the right to water should be conceived as a *sociality right* and collective right at the same time[38].

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[34] In this context, it is interesting that the CJEU held, in the *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others C-43/10* that "*the conditions governing the project cannot be more rigorous than thosepertaining if it had been adopted subsequent to Article 4 of Directive 2000/60. Having become applicable to it. In the case of such a project, the criteria and conditions laid down in articole 47(7) of Directive 2000/60 may, in essence, be applied by analogy and, where necessary, mutatis mutandis, as setting the upper limit for restriction on the project*". On the issue see VAN CALSTER, G., REINS, L. *Environmental Law*, Edward Elgar Pub, 2017.

[35] Economic Social Cultural Rights Committee, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic. Social and Cultural Rights, 20 gennaio2003. E/C.12/2002/11. According to some authors the Court has contributed to «*strengthening of the legal basis for the human right to water*». Cfr. SALMAN, M. A. AND MCINERNEY-LANKFORD, S. *The Human Right To Water*, Washington 2004.

[36] It is important to underline, in this context, the so called *Water Manifesto*, written in 1998 by an international commitee and led by the former president of Portugal Mario Soares.

There are four key ideas:

- water is an irreplaceable source of life and a "vital good" that belong to all the inhabitants of the land in common;
- water is a patrimony of humanity and for this reason it is a resource that, unlike any other, can not be the object of private property;
- Human society is conducted, at different levels of its organization, must also guarantee in economic terms the right of access to all without any discrimination;
- water management and democratic institutions, participatory and representative democracy. For this reason, it is urgent to organize, on a global level, a "Water Parliaments Network", launch international information campaigns and establish a "World Observatory for Water Rights".

[37] Cfr. FERRAJOLI, L. *L'acqua come bene comune e il diritto all'acqua come diritto fondamentale*, Relazione al Convegno internazionale sul diritto all'acqua, Gorizia, 8 febbraio 2003.

[38] MARSHALL, T. H. *Citizenship and Social Class*, in MARSHALL T.H., *Class, Citizenship and Social Development*, Chicago, The University of Chicago Press, 1964.

As a "sociality right", the right to water can be claimed by citizens of a given community towards their political authorities and must therefore be socially guaranteed by these authorities. As a collective right, the right to water can be claimed within the international legal system by political authorities legitimately representing a people settled in a specific territory[39].

In this regard, more specifically, it has been configured as a "new" right, because the underlying need is new, generated by the growing scarcity of the necessary good, by the inequality with which it is distributed or is accessible, by the disputes provoked by competition for its hoarding[40].

All the previous consideration consent to consider the right to water is a "solidarity right" or "third generation right"[41] that refers to human solidarity issues, or to general or collective interests[42].

Furthermore, the right to water must be conceived and claimed not as a sort of negative freedom, the undisturbed use of a good that nature has made available to all men, but as a right to survival, a right to social solidarity[43].

The idea of water as a right, and specifically of a solidarity right spread from some systematic consideration of the collective primary needs of this resource for the whole collectivity[44].

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[39] Cfr. SHIVA, V. *Water Wars: Privatisation, Pollution and Profit*, Cambridge (Mas.), South End Press, 2002.

[40] MARSHALL, T. H. *Citizenship and Social Class*, in MARSHALL T. H. *Class, Citizenship and Social Development*, Chicago, The University of Chicago Press, 1964.

[41] In this regard, Norberto Bobbio - who operated a chronological classification of rights, distinguishing first of all among first generation rights, which pertain to classic fundamental rights (such as political rights, freedom, private property), and rights of second generation or social rights (inclusive rights to work, education, health, in addition to the various public welfare and social security services guaranteed by the welfare state). He was the first to highlight the category of new rights by defining them, the third generation rights; it is still a very heterogeneous category (e.g. the right to live in an unpolluted environment can be mentioned) in which the right to water can also be included. Cfr. BOBBIO, N., *L'età dei diritti*, Torino, 1997, pp. 263 e ss; cfr. also, STAIANO, S. *Note sul diritto fondamentale all'acqua. Proprietà del bene, gestione del servizio, ideologie della privatizzazione*, in *federalismi.it*, 5, 2011, 6; also for some details on the italian development of the right to water cfr. CRISMANI, A. *La protezione costituzionale del diritto all'acqua pubblica tra crisi finanziaria e diritti umani. L'art. 70.a della Costituzione slovena sul "Diritto all'acqua potabile*", in Amministrazione in Cammino, 2016.

[42] Cfr. BALDINI, V., *Che cosa è un diritto fondamentale". La classificazione dei diritti fondamentali. Profili storico-teoricopositivi*, in Gruppo di Pisa, available at: https://www.gruppodipisa.it /images/rivista/pdf/Vincenzo_Baldini_-_Che_cosa_e_un_diritto_fondamentale.pdf.,

[43] NICOTRA, F., *Un "diritto nuovo: il diritto all'acqua*, in Federalismi, 2016.

[44] Cfr. LANGFORD, M., RUSSELL, A. F. S. *The Human Right to Water*, Cambridge, 2017; in the same sense Cfr. SULTANA, F., LOFTUS, A. *The Right to Water: Politics, Governance and Social Struggles*, EarthScan, 2012; for a more deepen study on this matter it is suggested by ZOLO D., *Il diritto all'acqua come diritto sociale e come diritto collettivo. Il caso palestinese*, Diritto pubblico, Fascicolo 1, gennaio-aprile 2005. It is important to underlying that some interpreters

The collective dimension of the right to water focuses on the right to access to this precious resource for all affiliates (as a right to social solidarity), as well as living in a healthy and unpolluted environment[45].

The principal problem is to start up a widespread reform of the national legal systems in order to guarantee the social and constitutional right of access to water in favor of all the members of the social group, starting from the most disadvantaged and marginalized[46].

In particular, at present, there are some international treaties in which is affirmed the existence of a right to water and hygiene, as an indispensable element to face the fundamental needs of a human being.

4.3. The right to water in the Treaties

The European Union seems to be very oriented towards accentuating the individual dimension of the right to water, to the detriment of the collective or communitarian right. Observing environmental litigation, it is noted that there is no room for popular actions other than those related to compensation for damages.

Therefore, the European legal system does not offer new ideas in the conception of common goods[47].

In more detail, the right to water is assumed to be linked to the human fundamental rights on which the Union is founded (Article 2 TEU) and indirectly linked to the environmental protection referred to in art. 37 of the Charter of fundamental rights of the European Union and also in art. 191 TFEU, dedicated specifically to the European Union's environmental policy[48].

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does not share the idea that a right could be conceived as a collective right. In this sense KIMLICKA, W. *Liberalism, Community and Culture*, Oxford, Oxford University Press, 1989. See also, FACCHI, A. *I diritti nell'Europa multiculturale*, Roma-Bari, Laterza, 2001, pp. 21 ss., HABERMAS, J. *Kampf um Anerkennung in der demokratischen Rechtsstaat*, Frankfurt am Mein, Suhrkamp, 1996, ita. trasl. *Multiculturalismo. Lotte per il riconoscimento*, Milano, Feltrinelli, 1998, p. 87 ss.

45 Cfr. DE MARTINO, F. R. *L'acqua come diritto fondamentale e la sua gestione pubblica*, Munus, 1, 2017, p.163; STAIANO, S. *Note sul diritto fondamentale all'acqua. Proprietà del bene, gestione del servizio, ideologie della privatizzazione*, in Federalismi.it, 5, 2011.

46 HILDERING, A. *International Law, Sustainable Development and Water Management*, Eburon, 2006.

47 Cfr. PRECHAL, S., VAN ROERMUND, B., VAN ROERMUND, G. *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, Oxford University Press, 2008; RIORDAN P. *Global Ethics and Global Common Goods*, Bloomsbury, 2015.

48 Cfr. HENDRY, S. *Frameworks for Water Law Reform*, Cambridge University Press, 201; also DE VIDO, S., *Il diritto all'acqua nella prospettiva europea*, in *Il diritto all'acqua, atti del seminario di studio svoltosi a Milano il 26 novembre 2015* (VIOLINI, L. E RANDAZZO, B. edited by), Giuffrè Editore, Torino, 2017.

More specifically, referring to the primary sources of the European *acquis*, it is useful to recall some more specifications.

First of all, it should be recalled article 37 of the Charter of Fundamental Rights of the European Union, which summarizes the contents of the Union's environmental policy with an emphasis on the importance of integration between the various policies[49].

Still, it should be recalled the full text of the article according to whom "*a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*"[50].

It should be noticed that this disposition has not a complete strict legal binding character[51].

The provisions of the Charter could be divided into two categories: right and principles. In particular, article 37 expresses a principle that should inspire the policy of the European Institutions: it contains the definitions "*of the objectives to be respected by EU legislature and which can be invoked only in the case they have been implemented through legislation*"[52].

In its own terms, it is not possible to consider article 37 as *legal* right[53]. Some scholars maintained that it should be consider a "Charter" principle, even though this make article 37 less important as a tool or legal basis of environmental protection. In any case, some others consider very unlikely that a "right" to environmental protection would equate to a simple guarantee of beneficial environmental protection outcomes[54].

Shortly, we can say that article 37 is not a legal reference to a new right of environmental protection in the European Union, but it could have the potential

[49] The full text of the article: *"high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development"*.

[50] Official Journal of the European Union C 303/17–14.12.2007, available on https://fra.europa.eu/en/eu-charter/article/37-environmental-protection

[51] Cfr. ŠIŠKOVÁ, N. *New Challenges for the EU in the field of human rights -focusing on the mechanism of the Charter*, *in European Studies. The Review of European Law*, Economics and Politics, 2014, volume 1, pp.12–24.

[52] Cfr. ŠIŠKOVÁ, N. *New Challenges for the EU in the field of human rights -focusing on the mechanism of the Charter*, *in European Studies. The Review of European Law*, Economics and Politics, 2014, volume 1, p.17.

[53] Cfr. in this sense, BOGOJEVIC, S., RAYFUSE, R. *Environmental Rights in Europe and Beyond*, Bloomsbury, 2018.

[54] Cfr. BOGOJEVIC, S., RAYFUSE, R. *Environmental Rights in Europe and Beyond*, Bloomsbury, 2018; QUIRICO, O., BOUMGHAR, M. *Climate Change and Human Rights: An International and Comparative Law*, Routledge, 2016.

to create some reasoning in the very next future, according to the European Courts interpretations[55].

The principles set out in this article 37 have been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by article 3 of the Treaty on European Union and Articles 11[56] and 191 of the Treaty on the Functioning of the European Union.

It is important to underline that Article 11 of the Treaty of the Functioning of the European Union (TFEU) sets out an all-encompassing legal duty to integrate environmental protection requirements in the policies and activities of the European Union (EU)[57].

It must be recalled also article 3, par. 3[58], and article 21, par. 2, lett. f[59], of the TEU, with whom the Union is committed to ensuring a high level of environmental protection, in order to ensure sustainable growth and improve resource management natural world.

With this regulation, finally, the human right to water has found its expression in the EU law. From a more widen point of view, in fact, the six environmental human rights have found their protection.

4.4. The role of the Commission

In 2012, the Commission launched the European Water Resources Safeguard Plan, a long-term strategy aimed at ensuring a qualitatively adequate water

[55] Cfr. BUNGER, D. *Deficits in EU and US Mandatory Environmental Information Disclosure*, Springer, 2012.

[56] The full text of the article says "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development"*, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E011&from=EN

[57] CFr. SJÅFJELL, B., *The Legal Significance of Article 11 TFEU for EU Institutions and Member States,* Nordic & European Company Law Working Paper No. 14-08. Available at: https://ssrn.com/abstract=2530006

[58] The text of the article: *"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."*

[59] The text of the paragraph: *"help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development"*.

supply for all legitimate uses, improving the implementation of current European water policy, integrating the objectives of water policy into other sectoral policies and filling the gaps in the existing framework[60]. This plan provides for the development, by the Member States, of an accounting of water resources and water efficiency objectives, as well as the definition of European standards for water reuse.

Union policy has established two main legal frameworks for the protection and management of freshwater and seawater resources through a holistic ecosystem-based approach, namely the European Water Framework Directive and the Environmental Strategy Framework Directive marine.

4.5. The European Parliament role

The "Right2Water" (infra 3.3.) European citizens' initiative urged the EU institutions and Member States to ensure that all citizens enjoy the right to water and sanitation, which is the supply and the management of water resources are not subject to internal market rules and water services are excluded from liberalization measures.

In response to this citizens' initiative, the Parliament, by a large majority, asked the Commission to propose legislation that enshrines the universal human right to drinking water and sanitation, as recognized by the United Nations and, where appropriate, a revision of the water framework directive to recognize universal access and the human right to water.

The Parliament, underlining the need for a transition to a circular economy, supported plans to promote the re-use of water for agricultural irrigation. In this same spirit, he approved plans to improve the quality of tap water in order to reduce the use of plastic bottles.

In its resolution on the international governance of the oceans, the Parliament "*emphasises that creating a sustainable maritime economy and reducing pressures on the marine environment require action on climate change, land-based pollution reaching the seas and oceans, marine pollution and eutrophication, on the preservation, conservation and restoration of marine ecosystems and biodiversity, and on the sustainable use of marine resources*".

In this context *" urges the Commission to support international efforts to protect marine biodiversity, in particular in the framework of the ongoing negotiations for a new legally binding instrument for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction' and 'calls on*

[60] On the issue, see AA.VV. *The Regulation of Water Services in the EU*, *The Regulation of Water Services in the EU*, in *Review of European Economic Policy*, 2013, No 3.

the Commission to propose more stringent legislation in order to preserve and ensure sustainable uses of marine biodiversity in areas under the jurisdiction of the Member States".

4.6. Right2water initiative

A support for the progressive recognition of the right to water in the EU, and consequently also international, actually, came from civil society, thanks to a new instrument of participatory democracy made available by the Treaty of Lisbon: the initiative of European citizens (ICE)[61].

As noted by the doctrine, the ECI is set up as a form of initiative (of citizens) for an initiative (the legislative one of the European Commission) therefore an absolutely unique and innovative tool in the legal system of the Union[62]. In other words, the ICE would operate as a law initiative, which is also transnational given the participation of citizens of different Member States[63].

Three initiatives reached the required number of statements of support and were presented to the Commission. The first to reach one million signatures was "Right2water" (1,659,543 signatures).

In the proposal, the citizens' committee urged the Commission to propose legislation aimed at establishing the universal human right of drinking water and sanitation[64].

The Commission responded to the European Citizens' Initiative with the Communication of 19 March 2014, stating that the right to safe drinking water and sanitation as internationally established must always be linked to the right to life and human dignity as if it is a "derived right"[65] rather than an autonomous right.

In the communication, the Commission emphasizes EU action to guarantee access to drinking water and sanitation for the population[66].

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61 Cfr, *interalia*, FEATCNO, F. *Il diritto di iniziativa dei cittadini europei: uno strumento efficace di democrazia partecipativa?*, in Rivista italiana di diritto pubblico comparato, 2011, p. 727 ss.; In *,il nuovo istituto di democrazia partecipativa le sue prime applicazioni*, in Studi sull'integrazione europea, 2012, p. 523 ss.; ALLEGR, I G. *Il diritto di iniziativa cittadini europei: verso quale democrazia partecipativa in Europa?* in CIVITARESE MATTEUCCI, S., GUARRIELLO, F., PUOTI, P. (edited by), *Diritti fondamentali e politiche della UE di Lisbona*, Santarcangelo, Maggioli, 2013.

62 Cfr. also HENNEN, L. *European E-democracy in Practice*, Springer, 2020.

63 Cfr. DE VIDO, S. *Il diritto all'acqua nella prospettiva europea*, in Il diritto all'acqua, atti del seminario di studio svoltosi a Milano il 26 novembre 2015 (VIOLINI, L. E, RANDAZZO, B. edited by), Giuffrè Editore, Torino, 2017.

64 Cfr. SCHIFFLER, M. *Water, Politics and Money: A Reality Check on Privatization*, Springer, 2015.

65 Comunication of the Commission, Bruxelles, 19.3.2014 COM(2014) 177 final.

66 Ibidem.

Recently, with the Communication of January 31, 2012, the European Commission presented a proposal for a Directive of the European Parliament and of the Council in order to amend the Directives n. 2000/60 / EC and 2008/105 / EC. The amendments were limited to the management of the substances in the water sector: it was "technical" proposal, evidently not aimed at the recognition of the human right to water[67].

The European Parliament, vice versa in its resolution of 8 September 2015, invited the Commission (paragraph 10) to present legislative proposals, «*including, where appropriate, a revision of the Water Framework Directive which recognizes universal access and law human water»* calling for an universal access to safe drinking water and sanitation to be recognized in the EU Chart of Fundamental Rights.

This would imply the possibility for individuals to claim the rights deriving from the directive before the national courts.

Among the aims of the Directive, in addition to the quality of the water, it should be provided that every State must guarantee access to a minimum amount of water necessary to satisfy the essential needs of all individuals.

However, the essential level could be defined internally at national level, based on indications from the World Health Organization and / or the European Commission.

This would ensure on the one hand the opportunity for individuals to own rights that can be exercised before internal jurisdictions, and on the other hand the opportunity for the Court of Justice to interpret the provisions of the Directive.

The Court of Justice in this way could assess whether the minimum quantity, set by the State, of water necessary for the essential needs of individuals, meets the parameters detected at the international level.

This would ensure that the elements of the right to water (availability, accessibility, acceptability, affordability and quality) would be subject to a minimal harmonization.

This proposal is only one on the long route of the affirmation of the right to water as a norm of international law.

One of the important indications that could derive from the Directive could be the identification of the "right price" of the water, to be defined at a national level according to the indications of the Directive itself.

In this context, however, it is noted that the European Parliament in this regard stressed that the Commission should not – under any circumstances – promote the privatization of water in the context of an economic adjustment or in any other procedure on coordination. of the EU's economic strategy (paragraph 22).

[67] SEC(20l1) 1546 final, SEC(2011) 1547 final. Bruxelles, 31.1.2012 COM(2011) 876 final 2011/0429 (COD).

5. The implementation of the Directive

The implementation of the Directive on the treatment of urban wastewater, launched in 1991, has certainly led to the reduction of the emission of pollutants into the receiving water bodies but still 22% of European water bodies is polluted by point sources and new problems have emerged recent due to the discovery in water bodies of substances not previously considered, such as pharmaceutical product residues, including medicines for human use[68].

Compared to the previous EU legislation, the Water Framework Directive has contributed to overcoming the concept of water management limited to their distribution and treatment[69].

The basin management plan envisaged by the Water Framework Directive is seen as "*the plan of plans"*, or as a reference tool for sectoral plans including urban planning, which must therefore necessarily be compared with the layout of the territory and the availability of water resources in the hydrographic basin or district, to which the planning refers[70].

The development of management plans and therefore the drafting and implementation of the programs of measures must take into account climate change, which must also be taken into consideration in the implementation of the "Floods" Directive[71].

A guideline document of the European Commission, published in 2009 (CIS Guidance n. 24 – River Basin Management in a changing climate), intended to provide useful indications for the identification of adaptation measures to climate change to be included in the planned management plan by the Water Framework Directive, in the drought management and water scarcity Directive, which refers to the strategy on these issues covered by the specific communication issued in 2007, and again in the flood risk management plans provided for by the "Floods" Directive[72].

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[68] Directive on the treatment of urban wastewater available on https://ec.europa.eu/environment/water/water-urbanwaste/implementation/implementationreports_en.htm

[69] KINGSTON, S., HEYVAERT, V., ČAVOŠKI, A. *European Environmental Law*, Cambridge University Press, 2017.

[70] Directive on the treatment of urban wastewater available on https://ec.europa.eu/environment/water/water-urbanwaste/implementation/implementationreports_en.htm

[71] Ibidem.

[72] WFD Guidance Documents, available on https://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm; The challenge of climate change to the European coastal areas, available on https://ec.europa.eu/environment/iczm/state_coast.htm; AA.VV., *Climate change, impacts and vulnerability in Europe 2012° an indicator-based report EEA Report No 12/2012*, Luxembourg: Office for Official Publications of the European Union, 2012;

AA.VV. Climate change, impacts and vulnerability in Europe 2016An indicator-based report, Luxembourg: Office for Official Publications of the European Union, 2016.

The cyclical nature of the aforementioned plans will allow the gradual implementation of innovative measures and instruments, proving over time the effectiveness of the response to the changes taking place.

The European Environment Agency has more specifically dealt with the impacts of climate change in urban areas in a 2009 report (Urban adaptation to climate change in Europe) in which ample space was devoted to analysing the challenges posed by the new climate trends and particular attention was paid to floods and recurrent droughts and water scarcity, which are increasingly impacting[73].

The possible solutions must be supported by the overall improvement of the adaptive capacity of urban areas. To be effective, these adaptation measures must be adopted following a systematic planning process in which the priorities for implementing the actions are clearly identified.

The improved adaptability certainly leads to a reduction in the vulnerability of cities to the risks related to climate change but this objective is achievable through a plurality of factors that include knowledge, the right to water as a public good, access to technologies and infrastructure, economic resources and the efficiency of institutions. Fundamental to the success of the adaptation strategy at city level is the connection of local institutions with the regional, national and European levels, also and above all in times of "spending review" for the activation of economic instruments consisting mainly of structural funds and from research ones, both national and community[74].

The operational plans of the territorial cooperation programs and the programming of European research activities up to 2020 take into consideration the need for coordination of national policies through a comparison between the various national programs, and also regional ones if relevant, in order to share the results and optimize the resources allocated to address the issues addressed[75].

While taking into account the variability of impacts and different degrees of vulnerability among the 27 Member States and associated countries, this stronger collaboration and coordination action aims to create a strengthening of the common European space and to create a single area of research and technological innovation shared by all countries belonging to the European Union.

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[73] AA.VV. *EEA SIGNALS KEY ENVIRONMENTAL ISSUES FACING EUROPE 2009*, Luxembourg: Office for Official Publications of the European Communities, 2009.

[74] MACRORY, R., HAVERCROFT, I. *Principles of European Environmental law,* International Specialized book service incorporated, 2004; JANS, J. H., VEDDER, H., *European Environmental Law*, Europa Law Pub, 2008.

[75] Cfr. i.e. AA.VV. *Territorial Cooperation in Europe, A Historical Perspective*, Publications Office of the European Union, Luxembourg, 2015.

A greater attention that in the past is also turned to the interaction between all the sectors involved and therefore between policies and strategies that must be adopted by the so-called "political decision makers", first of all by those who sit at community tables.

It is now widely accepted that the priority role of water management in environmental protection policies must find the appropriate confirmation in energy, industrial, agricultural, as well as in tourism and of course in urban planning and demographic policies.

The analysis of the results of the management plans has revealed a series of critical issues that have forced us to reconsider the goal of achieving good water status by 2015, as the data so far established suggest that only a little more than half of the water bodies will have such environmental quality characteristics.

To provide greater clarity on EU water strategies and to meet the need to more effectively integrate qualitative and quantitative aspects, the European Commission Communication "*Blueprint to safeguard Europe's water resources*" was published in the autumn of 2012 will guide Member States in the process of revising the first water management plan[76].

6. Conclusions

As clearly stated in the Plan for the protection of European water resources, the European Commission considers it urgent that EU Member States focus on eco-compatible growth and make the resources used, including water resources, more efficient in order to overcome sustainably the current economic and environmental crisis, adapt to climate change and increase the possibility of strengthening the competitiveness and growth of the European water sector.

In fact, the water sector (in Italy) includes 9.000 small and medium-sized active companies and counts, in the sector of water supply companies alone, 600.000 direct jobs[77]. The eco-compatible growth has good prospects for development and employment growth also in other sectors connected to the water

[76] A Blueprint to Safeguard Europe's Water Resources, available on https://www.eea.europa.eu/policy-documents/a-blueprint-to-safeguard-europes.

[77] MURARO, G. *La gestione del servizio idrico integrato in Italia, tra vincoli europei e scelte nazionali,* in "Mercato Concorrenza Regole", 2/2003; AA.VV., *Infrastrutture e servizi a rete tra regolazione e concorrenza. Le infrastrutture idriche*, Astrid, 2008; ARNAUDO, L. *Gestione giuridica delle acque e concorrenza nei servizi idrici,* Mercato Concorrenza Regole, 2003.

sector (industries that use 39 water, development of technologies in the water sector, etc.), in which innovation can increase operational efficiency[78].

Research at European level has taken up the challenge and the scientific water community is committed to rapidly developing and transferring management solutions that make our cities more liveable and the negative pressures on the availability of good quality water for uses increasingly irrelevant potable and civil.

In this context it is important to develop a regulatory and legislative approach that does not settle for damage-repair dynamics but an approach aimed at prevention and planning directed towards two contexts: procurement and recycling-reuse.

This approach is aimed at reducing consumption, especially in procurement.

More specifically, it has been shown that the legal instruments for the protection of water resources were already settled but it is important that the institutions would change their approach. It seems necessary, first of all, a change of approach by the Court of Justice of the European Union, in relation to the application of actions for annulment of an act of the institution and bodies of the Union, that could really protect all the environmental rights[79].

The challenge is to create an integrated city/countryside model that does not impoverish the environment.

In this context the most emblematic cases are those of the management of the Aral Sea and the case of the rivers in China, in particular the Beijing Guanting, and the Yangtze[80].

In this context, we need to rethink our environment and our way of use of water resource as an opportunity to rethink the relationship between man and natural space.

In this framework it is necessary to try to carve out a living and living space for the human being that is not antithetical to nature, but that integrates it and protects it.

We need also to rethink our cities also trying to find a space that can create a green / blue belt that guarantees water supply on the one hand and pollution prevention on the other hand.

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[78] MASSARUTTO, A. *La riforma della regolazione dei servizi idrici in Italia L'impatto della riforma: 1994–2011*, Research Report n. 9 January 2012, IEFE – The Center for Research on Energy and Environmental Economics and Policy at Bocconi University.

[79] JANKUV, J. *Legal Mechanisms of Protection of the Human Environmental Rights in international public law, law of the European union and legal order of the Slovak republic*, Leges, 2018.

[80] DIAMOND, J. *Collapse*, Penguin Group USA, 2014.

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Collective Actions for Infringement of Competition Law

Ondřej Dostal*

Summary: This article deals with the legal instrument of collective actions for competition law infringements. The text touches upon the pros but also cons of this concept interpreted usually as the boost needed for private enforcement of competition law, yet bringing also risks of selective protection of competition and even bullying competitors. The article provides illustration of the struggle between the effort to make collective actions and thus the private enforcement of competition law in general more attractive in the light of the blooming U.S. model and the concurrent legislators´ will to refrain from the most negative features of the model mentioned. An insight into the hitherto soft and hard law initiatives in the area of collective actions in the EU and the Czech Republic and their interplay with competition law is offered.

Keywords: competition law, damages, class action, collective action, representative action, court, European Commission, cartel, private enforcement, abuse of dominant position, Directive on representative actions for the protection of the collective interests of consumers, Commission's Recommendation on common principles for collective redress mechanisms, Directive on actions for damages for infringements of the competition law, opt-in, opt-out

1. Introduction to collective actions for infringement of competition law in the European Union

Private enforcement of competition law by means of civil claims and the unsatisfactory conditions for it throughout the European Union have been an evergreen of the EU competition law discourse since at least the beginning of the

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millennium. So far, the private enforcement of competition law in the EU has been associated especially with individual claims by individual companies that suffered damage resulting from competition law infringements. No overhaul in this respect came with the milestone 2014 EU Directive facilitating the conditions for civil actions for damages resulting from competition law infringement[1], which has brought about improvement of position of individual claimants but left out the possibility of collective claims[2][3]. Thus still nowadays, with the Directive having been implemented into the EU countries´ legal orders, the damages typically need to be large enough in order to be worth pursuing at a court and the individual claimant – typically a corporate company – needs to possess sufficient evidence usually demanding also a costly economic analysis – now under the Directive rules arguably available also from competition authorities – and significant resources for conducting a multiple-year dispute. Accordingly, possible smaller yet non-negligible claims by especially indirect purchasers, usually consumers, of the goods affected in terms of price or quality by competition law infringement, may remain non-effectuated.[4]

A completely different story of collective redress has been narrated in the United States of America[5], however, for a price unacceptable to the EU representatives. As a Joint Note on Collective Redress[6] puts it: *"[The U.S.] form of collective redress contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties) the possibility*

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1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

2 See recital 13 of the Directive: *"This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU".*

3 For overview of the topic of collective actions see WRBKA, S., VAN UYTSEL, S., SIEMS, M. *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* Cambridge University Press, 2012.

4 For analysis of obstacles to effective compensation of victims of competition infringements, types of victims and losses, and need for enhanced private competition law enforcement in the EU see ŞAHIN, E. Collective Redress and EU Competition Law Routledge, 2018.

5 For more details on the U.S. system and the procedural aspects of collective actions as a whole see WINTEROVÁ, A. Hromadné žaloby (procesualistický pohled). *Bulletin advokacie*, 2008, č. 10, p. 21.

6 Towards a Coherent European Approach to Collective Redress: Next Steps, Joint information note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli, SEC(2010) 1192.

of contingency fees for attorneys and the wide-ranging discovery procedure for procuring evidence. Because of the increased risk of abusive litigation resulting from these combined incentives, we believe that these features are not compatible with the European legal tradition. We therefore firmly oppose introducing "class actions" along the US model into the EU legal order."

Along these lines, several EU initiatives have been undertaken in the area of collective or representative actions (i.e. actions brought by a member of a group of claimants on their behalf or actions brought on behalf of the group of claimants by a specialised entity different from the claimants) in attempt to boost private enforcement of competition law in the European Union by attracting groups of claimants to the court in pursuit of damages resulting from an identical mass infringement of law, which has so far seemed unworthy of claimants´ time, money and effort required.[7] No individual EU legal regulation has been exclusively dedicated to collective actions for the breach of competition law area so far, with consumer protection rules being the most usual source of collective claims´ rules in the EU member countries.[8] However, competition law has been regularly mentioned among the areas suitable for this solution. A brief overview of the Commission´s initiatives in the area of collective claims for breach of competition law follows, including main elements suggested and safeguards against their abuse crucial from the business point of view.

2. EU Commission´s initiatives on collective actions for competition law infringements

2.1. White Paper on damages actions for breaches of the EC antitrust rules[9]

Following a 2004 study on the conditions for antitrust damage claims in the member states commissioned[10] by DG Competition and its reflection in DG Competition´s 2005 Green paper on damages actions for breach of the EC antitrust

[7] For analysis of the „European model" of collective actions see NAGY, C. I. Collective actions in Europe.Springer Bruefs in Law, 2019.

[8] For comprehensive overview of EU member states´initiatives in the area of collective actions see ASHTON, D. *Competition Damages Actions in the EU: Law and Practice*. Edward Elgar Publishing, 2018, 11.115-11.223; RODGER, B. J. *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*. Kluwer Law International, 2014.

[9] COM(2008) 165 final.

[10] https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

rules[11], the Commission in its White Paper *suggested a combination of two complementary mechanisms of collective redress to address effectively [the absence of a mechanisms allowing aggregation of the individual claims of victims of antitrust infringements]:*

- Representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims[...]; and
- Opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action (as opposed to the opt-out actions[12] dominant in the U.S. system where the alleged victims must take active steps to leave the group represented with no need for their permission by a collective action)[13].

Commission added among others that *safeguards should be put in place to avoid that the same harm is compensated more than once.*

2.2. Joint Information Note on Collective Redress

As a follow-up to several documents by individual EU Commission´s Directorates General touching upon collective redress especially from the protection of consumer perspective, the 2010 Joint Note points out that the enlargement of the EU brings about a need for support to the system of public enforcement of EU competition law, namely for introduction of its private enforcement. The Note interprets the notion of collective redress as "*a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress: by way of injunctive relief [and] compensatory relief[...]".* The Note summarized the then up-to-date position of key stakeholders towards collective claims which does seem to have changed over time: "*[M]ost consumer organisations are in favour of EU-wide judicial compensatory collective redress schemes, whereas many representatives of industry fear the risks of abusive litigation. Stakeholders also warned against an inconsistency between the different Commission initiatives on collective redress, which pleads for the development of a more coherent*

[11] COM(2005) 672.

[12] Opt-out systems in collective redress: EU perspectives and present situation in the Czech Republic are dealt with in the Article of the same name by HAMUĽÁKOVÁ, K. *Hungarian Journal of Legal Studies*, 2018, vol. 59, No.1, p. 95–117.

[13] Possibilities of joining the persons concerned to the group proceedings are comprehensively described in HAMUĽÁKOVÁ, K. Možnosti zapojení dotčených osob do skupinového soudního řízení. *Acta Iuridica Olomucensia*, 2017, Vol. 12, No. 2, p. 9–21.

approach." The Note also warned against abusive claims: "*A European collective redress scheme should not give any economic incentives to bring abusive claims. In addition, effective safeguards to avoid abusive collective actions should be defined. This should be inspired by the existing national judicial redress systems[,…for instance the 'loser pays' principle. The judge*[14] *could also be given a prominent role in the process[,…]assessing the admissibility of the collective actions or verifying if a representative entity bringing the action respects a number of strict criteria."*

2.3. Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms[15]

The 2013 Recommendation remains until these days the most complex Commission´s attempt to regulate collective actions for infringement of competition law. It is a complement to the below mentioned Directive on actions for damages for infringements of competition law[16] and enumerates competition law among the areas „*where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value"* together with consumer protection, environment protection, protection of personal data, financial services legislation and investor protection*, „but also any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant"*[17].

The Recommendation introduced among others definition of *'mass harm situation'* appropriate for cartel agreement or abuse of dominance scenarios, meaning *"a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons".*

Recommendation refused the pillars of the U.S. system such as punitive damages, intrusive pre-trial discovery procedures and jury awards, declaring them foreign to the legal traditions of most EU Member States. It also proposed elementary prevention of abusing the collective actions in competitive

[14] Role of the judge in collective redress is comprehensively dealt with in the Article of the same name by PETROV KŘIVÁČKOVÁ, J. *Acta Iuridica Olomucensia*, 2017, Vol. 12, No. 2, p. 22–37.

[15] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU.

[16] See https://ec.europa.eu/commission/presscorner/detail/en/IP_13_524

[17] See recital (7) of the Recommendation.

struggle by establishing a prohibition to a third party to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant; there should be no incentive in the form of excessive contingency fees for leading legal disputes. Accordingly, the Recommendation supports the principle of "loser pays" and explicitly supports the opt-in principle "*The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice."*

Overall, as regards harmonisation of conditions for collective redress in the EU member states, the Recommendation´s impact has been limited, obviously due to its non-binding nature and perhaps also due to simultaneous focus on a highly sensitive area from the perspective of national states and businesses. However, the principles established have resonated in the later documents on collective claims, including EU and national legislation.

2.4. Directive 2014/104/EU[18]

The Directive itself being rather a minimalistic compromise version of the originally proposed conditions supporting private enforcement of competition law did not go as far as to include yet another possibly controversial instrument, that is the collective actions. Still, the tools of the Directive, e.g. binding effect of decisions by national competition authorities, enabling better access to their documents and presumption of damage caused by cartel, remain available in EU countries with national regulation of collective actions in the area of competition law[19]. Essential conditions for collective actions potentially using the framework of the Directive have been embodied in the second part of the package, the above-mentioned Recommendation.

[18] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[19] Relationship between individual court proceedings and collective court proceedings is analysed in the article HAMUĽÁKOVÁ, K. Vztah individuálního soudního řízení a kolektivního soudního řízení. In IVANČO, M. (ed.). *Mechanizmus uplatňovania kolektívnych nárokov v podmienkach SR*. Univerzita Komenského v Bratislave, Právnická fakulta, 2018.

3. Draft Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC[20]

The most developed, complex, and prospectively binding EU legislative proposal to date dealing with collective actions leaves competition law out of its scope without prejudice to existing national systems for collective redress in the area of competition law. In the framework of its "New deal for consumers" package seeking among others to improve equilibrium in protection of consumer rights resulting from the EU internal market vis-a-vis the rights of undertakings, the European Commission had introduced in 2018 the above-mentioned draft, which as of July 2020 reached the stage of agreed compromise text to be approved by the EU Council and Parliament. The final draft, establishing so far the closest (yet still explicitly distinguished) parallel to U.S. class actions includes e.g. the following instruments aimed, among others, at contributing to fairer competition on the EU internal market[21]:

- At least one representative action procedure for injunction and redress measures should be available to consumers in every member state, allowing representative action at national and EU level;
- Qualified entities (organisations or a public bodies) will be empowered and financially supported to launch actions for injunction and redress on behalf of groups of consumers and will guarantee consumers' access to justice;
- The rules strike a balance between access to justice and protecting businesses from abusive lawsuits through the Parliament's introduction of the ***"loser pays principle"***, which ensures that the defeated party pays the costs of the proceedings of the successful party;
- In order to ensure sound administration of justice and to avoid irreconcilable judgments, an opt-in mechanism should be required regarding a representative action for redress when the consumers affected by an infringement do not habitually reside in the Member State of the court or administrative authority before which the representative action is brought[22].

[20] COM(2018) 184 final.

[21] See e.g. https://www.europarl.europa.eu/news/en/press-room/20200619IPR81613/new-rules-allow-eu-consumers-to-defend-their-rights-collectively

[22] https://www.consilium.europa.eu/media/44766/st09223-en20.pdf

4. Draft Czech Act on Collective Proceedings[23]

In situation when one third of EU member states does not operate any form of legal remedy available to victims of mass harm[24]the Czech Government went on further to improve existing national legislation[25] by means of a draft Act on collective proceedings reflecting many of the instruments discussed above. Heading to reading in the Czech Parliament as of July 2020, the draft aims at consolidating the shattered regulation of collective claims in several areas of Czech legislation[26] and creating an effective tool for resolving smaller claims, both from the perspective of the courts and the claimants. The negotiation on the draft coincides with the EU institutions 'negotiation on the Representative Actions Directive with possible substantial overlap in scope. At the same time, and unlike the draft Directive, the Explanatory Memorandum (hereinafter "the Memorandum")[27] to the draft Act explicitly refers to utilisation of the Act also in the area of competition law infringement claims. Therefore, it is still uncertain what impact the Directive may have on the final version of the Act. With prospect of the Directive being adopted before the end of 2020, it may seem advisable to wait until the approval in the EU Council and Parliament in order to avoid possible discrepancies in implementation of the Directive.

As regards relation of the draft Act to competition law, the Memorandum claims that "*the representative actions could contribute to levelling of competition, reducing anticompetitive behaviour and contributing to improvement of business climate in favour of fair entrepreneurs and ultimately final consumers. Especially relevant should be the claims resulting from the CZ Act on damages in the area of competition law."* Among the conditions for explicitly preferred opt-in representative proceeding pursuant to the Draft Act there is *one stipulating that a representative action shall not be filed with manifestly abusive intent, especially with the aim of causing harm to a group or illegally cause harm to the defendant or an entity taking part in economic competition.* It is furthermore explicitly acknowledged by the Memorandum that the representative actions do

[23] For more details see HAMUĽÁKOVÁ, K., PETROV KŘIVÁČKOVÁ, J. Kolektivní ochrana práv v nově navrhované úpravě. *Bulletin advokacie*, 2018, Vol. 2008, No.12, p. 17–22.

[24] See e.g. https://www.europarl.europa.eu/news/de/press-room/20190321IPR32135/new-rules-to-help-consumers-join-forces-to-seek-compensation

[25] A comprehensive overview of current regulation of representative actions in the Czech Republic is provided by PETROV KŘIVÁČKOVÁ, J., HAMUĽÁKOVÁ, K. Reprezentativní žaloba v českém civilním procesu. *Acta Iuridica Olomucensia*, 2016, Vol. 11, No. 1, p. 51–60.

[26] For complex overview see HAMUĽÁKOVÁ, K. Kolektivní ochrana práv v České republice: současnost a perspektivy. In *Pocta Aleně Winterové k 80. Narozeninám*, Všehrd, spolek českých právníků, 2018, p.130–142.

[27] https://apps.odok.cz/veklep-detail?pid=KORNBA9EXSST

have increased bullying and abusive potential and that it is appropriate for the court before issuing a certificate decision to deal with the question whether the action has not been filed solely for the purpose of defamation of third persons, harming a competitor or even for the purpose of competitors economic liquidation. Prevention of abusing representative actions is secured by regulation of the entities entitled to file a motion to commence a proceeding. For this purpose the right to initiate an opt-in representative proceeding is limited to persons directly harmed by the relevant infringement, i.e. to members of the represented group, while these members must acquire agreement of 10 other members of the group, or 100 members of the group in case of opt-out scenario where a higher tendency to submitting not completely founded claims due to limited material responsibility may occur, and also limited to non-profit entities, i.e. established and trustworthy non-governmental non-profit organisations. The draft Act distinguishes two phases of the proceeding on representative actions in order to exclude abusive attempts to file such actions.

In the first phase the court shall consider admissibility and reasonableness of the claim and decide on it by individual ruling allowing the proceeding to enter the second phase. An essential aspect of the assessment is also verification of the source of finance to be used by the entity financing the dispute[28], or in other words whether the financing entity has interest conflicting with the interests of the defendant or with the interest of the represented group, especially whether it is a competitor of the defendant on the relevant market. At the same time, if the defendant holds the opinion that the representative action is abusive or manifestly unfounded, she should lead the court to this conclusion.

For the sake of preventing the risk of abuse, the draft Act also limits the competences of courts exclusively to disputes concerning rights of consumers, who typically cannot be in position of competitors of defendants. Abusive filing of representative actions in general should be prevented by adequate fees in amount disincentivising abusive claims filings especially in connection with the condition of proving solvency correlating with the claimed performance.

Last, but not least, the draft Act deals with abusive publication of information on representative action, as the very publication of existence of representative proceeding and related negative publicity may act as deterrence of defendant who may be willing to back away and agree with an off-court settlement. In order to prevent this the burden of informing the entities concerned is primarily up to the plaintiff; information on conduct of a representative proceeding will

[28] Issues of Funding of Collective Actions are comprehensively dealt with in the Article of the same name by HAMUĽÁKOVÁ, K. *International and Comparative Law Review*, 2016, Vol. 16, No. 2, p. 127–144.

be published in a registry of collective proceedings only following certifications preventing publication of information on proceedings conducted on the basis of abusive actions; the information on proceedings in the relevant registry shall be limited to the minimum necessary.

5. Conclusion

Collective actions for infringements of competition law remain unregulated in a binding manner on the EU level, and the numerous safeguards against abuse outlined in the above-mentioned documents may be suggesting why it is so in the area where undertakings, and especially corporate companies, may attract attention of speculative claimants. Lengthy proceedings in antitrust cases not always easily embraced by national judges still bring a risk of protracted reputational damage, high costs and uncertain result. This may lead the defendants to seek settlement[29] also in non-self-evident cases and incentivize attempts to probe the preparedness of especially big companies, which may be victimized by selective enforcement of competition law and justice in general. It is therefore imperative to implement solutions enabling responsible and informed behaviour of claimants and not allowing use of persons that have allegedly suffered from possible infringement of competition law as a shield or an excuse for extortion of hypothetical wrongdoers or deterioration of their position on the market. At the same time, defendants in collective or any other proceedings should not become hostages of a pursuit of a general enforcement enhancement. For these reasons it seems appropriate that a possible future EU regulation of conditions for collective claims embodies all the safeguards presented above and give strong preference to the opt-in proceeding which supports informed and responsible approach to pursuing a claim and monitoring the activity of the representing entity and avoid malevolent use of collective actions. National regulation may offer some reverse inspiration as illustrated by the CZ draft Act on Collective proceedings incorporating number of principles expressed in the hitherto EU initiatives.

[29] See further HAMUĽÁKOVÁ, K., PETROV KŘIVÁČKOVÁ, J. Alternative Methods of Collective Disputes Resolution in the Czech Republic. *Baltic Journal of European studies,* 2016, Vol. 6, No. 2, pp. 96–116.

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NOTES, INFORMATIONS AND REVIEWS

A Series of Events on Challenges of Modern Society in Olomouc

Report prepared by
Michal Petr*

At the end of 2020, the Jean Monnet Centre of Excellence in EU Law at the Palacky University Olomouc (hereinafter referred to as "JMCE") organised a series of workshops, seminars and lectures, focused on the relevance of modern technologies in legal theory and practice. This formed a part of its research under the Jean Monnet Networks project *European Union and the Challenges of Modern Society: legal issues of digitalization, robotization, cyber security and prevention of hybrid threats* (hereinafter referred to as the "Project"), bringing together, next to the Palacky University in Olomouc (Czech Republic), the researchers from the Heidelberg University (Germany), the Tallinn University of Technology (Estonia), the Comenius University in Bratislava (Slovakia) and the Taras Shevchenko National University of Kyiv (Ukraine), the first project of this kind to be implemented in the Central and Eastern Europe.

Among other activities of the JMCE, the attention should be drawn to a round table on consumer protection, a round table on robotization and cybersecurity and a lecture on the right to be forgotten. All these seemingly different topics were interconnected by the idea, expressed by associate professor Naděžda Šišková, head of the JMC and the lead coordinator of the Project, that in our times, technology brings new challenges that are unfortunately not matched by the regulation, that is either inadequate or missing.

Digital Future for European Consumers

On the 13th November 2020, the JMCE hosted an on-line round table *Digital Future for European Consumers*, which attracted the attention of more than 60 participants. The discussion, chaired by associate professor BlankaVítová (Palacký University, Olomouc) turned around the presentations of professor Matkéta Selucká (Masaryk University, Czech Republic), Dr. Věra Knoblochová (Ministry of Industry and Trade of the Czech Republic), Dr. Mária T. Patakyová

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(Comenius University, Sovakia), Svatava Veverková (Masaryk University, Czech Republic) and Marcel Iványek (NGO, Czech Republic).

After the introductory remarks of Naděžda Šišková, putting the event into the context of the Project, Blanka Vítová introduced the topic, underlying the fact that the year 2020 witnessed a huge increase in digitalization, especially for consumers.

Markéta Selucká discussed the "Lex Voucher", Czech legislation addressing the situation when due to the COVID pandemic, numerous holiday travels booked with travel agencies were cancelled by the consumers. According to the EU Package Travel Directive and its implementation in the Czech Civil Code, the consumers are entitled to full refund in case of unavoidable and extraordinary circumstances, such as the pandemic. However, in addition to this "standard" procedure, the Commission recommended in May 2020 that the consumers may be also allowed to accept vouchers for a future package holiday in order to protect the travel agencies from bankruptcy. The Czech legislation nonetheless only allowed the vouchers to be issued, not the refund. Markéta Selucká persuasively agreed that this legislation is contrary not only to the EU law, but also to basic principles of law, including the prohibition of retroactivity, and as a result, the consumers are entitled to claim damages and ask the courts not to apply the Lex Voucher. In the following discussion, the participants were informed that there already is one such a court proceedings pending.

Věra Knoblochová tackled the issue of consumer protection from the legislator's point of view. She introduced the "Modernization Directive" concerning consumer protection (Directive 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules) and new directives on the supply of digital content and digital services (Directive 2019/770) and contracts (Directive 2019/771), as well as their implementation and topics to be discussed in the following years, including the extension of requirements on product safety to platforms or artificial intelligence, the extent of obligation to inform consumers or new specifically "on-line" unfair practices, including the publishing of fake "consumer" reviews. She discussed also the issue of "personalised pricing" by e-shops, i.e. the practice of setting different prices for individual consumers, and preparations legislation addressing it; even though some of the participant expressed the view that such a practice ought to be outright illegal, the legislator currently only expects the information requirements attached.

Mária Patakyová focused on consumer protection through the means of antitrust law. She remembered the consumer welfare standard, the benchmark for assessing whether certain conduct is anticompetitive, and discussed several abuse of dominance cases in IT, in particular the controversial Facebook case recently decided by the German Competition Authority, which raised the issue

whether the concept of abuse of dominance was not stretched beyond its original meaning.

Svatava Veverková concentrated on a specific topic of unfair practices of agents arranging energy-supply contracts through energy auctions, in particular vis-à-vis elderly persons. As she cooperated with the consumer protection organization dTest, she was able to present numerous concrete examples and statistics, documenting how widespread these practices are. She pointed out to the shortcomings of current regulation, including the unrealistically short terms to cancel the agreement with the agent and the fact that the final contract with the provider of energy, concluded by the agent, is very difficult to cancel. She also introduced the proposed amendment of the Civil Code and in particular the comprehensive regulation of the role of agents in energy auctions, envisaged by the new Energy Act.

Finally, Marcel Ivánek considered the future of e-commerce. He emphasised the surge of e-commerce. In his opinion, the problem is not the legislation itself but the practice, which is very difficult to check given the number of e-shops and their limited capacity to implement all the legal requirements; not only the regulation, but also the advocacy and education towards consumers and an effective oversight is necessary.

This is a common theme for all the issues discussed – new technologies are often difficult to understand and an increased consumer awareness is crucial in order to guarantee their rights.

Robotization, Digitalization and Cyber Security

On the 8th December 2020, the JMCE hosted another round table, this time on the *Future of Robotization, Digitalization and Cyber Security – a View from Inside the European Parliament*. These topics were discussed by Dita Charanzová, the Vice-president of the European Parliament, and Pavel Svoboda, former Chair of the European Parliament's Committee on Legal Affairs (JURI), chaired by Naděžda Šišková, the head of JMCE. The discussion covered several topics, including a separate legal personality of artificial intelligence (hereinafter referred to as "AI"), the impact of robotization on fundamental rights and the cyber security.

The debate started with the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL), hereinafter referred to as "Resolution 2017"). According to Dita Charanzová, it is important to note that the recommendations addressed the three elementary issues connected with AI: the questions of ethics, liability and trustworthiness; still, this document was a little bit "scary", emphasizing the

potential negative effects of robotization, describing a "sci-fi" world of future. Pavel Svoboda lauded the comprehensiveness of the document and its value for future regulation, not only in the EU but worldwide, including the USA.

Next, the question whether the AI should be awarded legal personality was discussed. As noted Naděžda Šišková, the Resolution 2017 worked with such a possibility. Pavel Svoboda replied that even though in principle, such a scenario would be imaginable (similarly to the fact the legal personality is granted to corporations), he would be contrary to it, as after all, the AI is a machine, not a human being. Dita Charanzová concurred, adding that the White Paper on Artificial Intelligence, issued by the Commission in June 2020, does not include any such possibility and this issue should be tackled by the regulation of liability. Similarly, both the speakers refused the introduction of "personal" rights for AI or the necessity to modify the Charter of Fundamental Rights.

Concerning the "new" report with the recommendations to the Commission on a civil liability regime for artificial intelligence of 5 October 2020 (2020/2014(INL), hereinafter referred to as „Resolution 2020"), Dita Charanzová stressed the unlike the Resolution 2017, this document includes concrete requirements, including the strict liability for the actions of AI. This was welcomed by Pavel Svoboda, who also noted that perhaps, this could form a basis for a common regulation of liability throughout the EU.

The issue of cyber security was also discussed, in particular with relation to the Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union. According to Dita Charanzová, this directive is only a first step towards a comprehensive regulation, which shall be discussed in 2021; out of the concrete challenges ahead, she mentioned the security of the new 5G networks. Pavel Svoboda linked the topic of cyber security to AI and its role in the spread of fake news; he also reiterated the need of regulatory cooperation with the USA.

Finally, Dita Charanzová introduced the Programme "Digital Europe", including numerous centres and programmes promoting "digital skills"; however, the primary responsibility for it will stay with the Member States.

As is obvious from the above, new regulation concerning the deployment of AI is to be expected in the near future, as well as a revision of the cyber security directive.

The Right to be Forgotten

Finally, on 15th December 2020, the JMCE presented a lecture by Dr. Jan M. Passer, the judge of the Court of Justice of the European Union (hereinafter

referred to as "CJ EU") on the right to be forgotten in the case-law of the European Court of Justice.

Mr. Passer not only commented on the cases based on the landmark CJ EU judgement *Google Spain*, but also, more widely, on the evolution of approach to protection of privacy in the judiciary practice.

In case of the right to be forgotten, the technology itself does not create new issues, the existing legal framework and jurisprudence should be sufficient to address them.

A Look into the Future

The discussion steered by all of these events showed that even though some of the problems brought about by digitalisation can be solved using the current regulation and case-law, complex new legislation will be needed in many cases, including AI or internet platforms.

As Naděžda Šišková expressed with regard to the Project, academia should be part of these projects and the outcomes of these events should be used by the legislator.

SEHNÁLEK, David. *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky* (Specifics of the Interpretation of EU Law and Its National Implications). Prague: C.H.Beck, 2019, 208 p. ISBN 978-80-7400-741-5

Reviewer: Naděžda Šišková*

The new monograph of the experienced researcher David Sehnálek focuses on the issues and particularities that go hand in hand with European Union law interpretation, comparing it to interpretation of national and international law. The main focus lies in the manner in which EU law is interpreted by the Court of Justice, but attention is also brought to the role of national courts in this respect.

The author's point of departure is that even if there might be differences in the way EU law is interpreted, they are often excessively emphasised, in particular in the Czech Republic. In his analysis, the author poses the following questions: What are the causes of the possible particularities of interpretation of European Union law? Could it be the systemic set up of the judiciary in the European Union and the powers exercised by the Court of Justice? Could the reason be the multilingual nature of written EU law? What implications can the potential particularities of EU law interpretation have for the Member States?

In foreign (especially English-language) academic literature, interpretation of European Union law is a topic that has been given due attention and is fairly well researched. However, the situation is somewhat different in Czech publications. So far, academic literature have only focused on isolated matters, such as the multilingual nature of EU law interpretation and preliminary ruling proceedings. Despite this, the issue is still topical and worth researching. This is evidenced e.g. by the current vehement efforts of the United Kingdom to rid itself of the influence of the Court of Justice. While the United Kingdom is interested in a partnership with the EU even after its withdrawal from the Union,

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it is simultaneously attempting to avoid being bound by the rulings of the Court and its interpretation of European Union law. This attests to the extraordinary position of the Court. It also speaks to the distinct manner in which the Court approaches EU law interpretation.

From the viewpoint of the Czech Republic and Czech jurisprudence, the importance of this publication lies in the way it challenges the dominant view of European Union law as a distinct matter standing apart from other legal systems and following different principles. Czech courts and authorities still, even after 16 years of membership in this supranational organisation, consider European Union law to be something foreign, unfamiliar and distant, sometimes even "suspicious".

The book is divided into six parts. The first part deals with institutional factors to the extent they influence European Union law interpretation. Specifically, the author notes the extraordinary position of the Court of Justice in the interpretation of EU law and the autonomous character of EU law interpretation in relation to international and national law. This, of course, is hardly ground-breaking. However, this chapter manifests the author's conviction that the way the Court of Justice interprets EU law is inevitably intertwined with the way the position of the Court is defined in the founding treaties. This is a consequence of the Member States' express will. The Court of Justice was given room for its creative decision-making by the Member States and has been making full use of it. However, institutional factors say nothing of the way EU law should be interpreted. Therefore, on the contrary, a restrictive or a moderate approach to interpretation of EU law might be conceivable. What is important is the fact that since its inception, the Court of Justice has essentially been acting in concert with the Member States and their courts. The Member States were the ones that gave the Court the opportunity for its creative interpretation of EU law. It was also the Member States that made decisions of the Court of Justice legitimate by accepting those decisions in everyday practice.

The second part follows up on the first, assessing the position of the Court of Justice and comparing it to its "competitors" as the Court's decisions are subject to review by national highest courts (in particular, constitutional courts) as well as international courts (the role of the European Court of Human Rights and the EFTA Court is especially important here). The viewpoints and priorities of these different courts may vary and it is inevitable that disputes may arise. These courts mutually influence and shape each other's positions. It can be seen that the Court of Justice takes these internal and external influences seriously and reflects them in its decisions. However, primarily for political reasons, the Court only makes limited use of comparative interpretation and scarcely declares its sources of inspiration, especially in cases where it comes from national courts.

In the third part, the author focuses on the first of the examined methods of interpretation, namely linguistic interpretation. The publication focuses here primarily on the way the EU law is interpreted given its multilingual written form. Individual options for such interpretation are laid out, also in the context of interpreting public international law. The author also analyses with meticulous precision the procedures that are available for solving problems inevitably occurring in "translations" of EU law and he points out certain significant shortcomings of the current situation. However, this chapter does not deal merely with comparative linguistic interpretation. It also examines the position of the linguistic interpretation method within the host of methods utilised by the Court of Justice. Comparisons are drawn with other courts in positions similar to that of the Court of Justice (constitutional courts) and, in broader context, also with Anglo-American courts and their approaches to the linguistic method of law interpretation.

The fourth part of the publication deals with functional interpretation of EU law. The author analyses the possibilities and the limitations of reflecting the objectives of the legislators (i.e. Member States with respect to primary law and EU bodies for secondary law) and the purpose sought by EU law, describing a significant difference between the legislator's objective in the case of interpretation of primary law in contrast to secondary law. On the other hand, the Court of Justice is largely inclined to widely consider the purpose of legal regulations, even if it is often impossible to determine, based on its decisions, how the individual purposes were balanced and taken into consideration. In this part, attention is also paid to the *effet utile* principle and both its maximalist and minimalist conceptions. It follows from the author's evaluation that he considers purpose-driven interpretation to be rather problematic as it often functions as a tool for enforcing of the European Union's political goals.

The fifth part of the publication focuses on the consequences of the European Union law interpretation for the Member States and European integration. Extensive interpretation may lead to reverse discrimination. However, it is also worth mentioning here that the Court of Justice simultaneously eliminates this possibility through its extensive interpretation, by limiting the space reserved for national law. In its second half, the fifth part focuses on the consequences of extensive interpretation of EU law for the evolution of national law. Here, the author applies the evolutionary theory to law. He concludes that EU law, as interpreted by the Court of Justice, significantly helps shape and improve national law. This is due to the fact that EU law places the laws of various Member States in direct competition in many areas. It is up to individuals to choose and favour through their actions the better suiting legislation.

By way of conclusion, the author summarises his findings stating that the interpretation of the EU law indeed does not materially differ from the interpretation

of national law. This conclusion is undoubtedly true. Further, the author meticulously summarises specific steps national courts should take for achieving correct EU law interpretation.

The book is definitely worth reading and can be strongly recommended especially for its comprehensive take on the issue at hand and for reflecting a number of connections and insights from national and international law. The publication can be valuable not only for legal theorists, but also for attorneys who apply EU law on an everyday basis.

PATAKYOVÁ T. Mária. *Konania pred Súdnym dvorom Európskej únie (*Proceedings before Court of Justice of the European Union). Bratislava: Wolters Kluwer, 2020 208 p., ISBN 978-80-571-0259-5.

Reviewer: Ondrej Hamuľák*

The European Union is intertwined with comprehensive autonomous legal system which does not have any close parallel in any other forms of cooperation between states or other integration setups. EU law is able, independently on national law, to influence legal relations and fill this relations with new rights and obligations. In addition, EU law is able to enrich the national legal "universe" with new meanings and interpretations, and on top of all this supranational law behaves dominantly in the event of a tensions with conflicting national norms as it is endowed by the application primacy. Thanks to this special characteristics of the EU law, the European integration model could be so successful and create a de facto quasi-federal arrangement in the European area. For more than three decades, the understanding of the European model of cooperation has been defined by the doctrine of "Integration Through Law" (Cappelletti et al. 1985). Law is not only a simple product of integration, but also its tool and defining element. And the Court of Justice has become and continues to be the main "agent" of integration through the law. Thanks to creation and activities of this institution, the European Communities and subsequently the European Union received a proto-federal code in their genetic arrangement, as Eric Stein has pointed in many of his works.

It was thanks to the Court of Justice and its interpretive monopoly that EU law could become a real glue of building an ever closer union between the peoples of Europe (as stated in the Preamble to the Treaty on European Union). For these reasons, the Court of Justice should be considered as key and most important body within the institutional structure of the European Union, especially for lawyers (and law students). A good understanding of its role, functioning, competences and applied instruments is, in essence, a precursor to a correct

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understanding of European integration and EU law. I must say that reviewed publication contributes to this goal, and I welcome its creation with gratitude. The Slovak (or Czech and Slovak) market of scholarly publications in the field of EU law contains several titles (Bobek/Komárek/Passer/Gillis, 2005; Stehlík 2006; Karzel, 2006; Mazák/Jánošíková 2008; Siman/Slaštan 2012; Sehnálek 2019), which deal with the issue of EU justice. However, these are either older publications or texts that are specifically addressed to legal practice or analysing only partial specific questions. Slovak and Czech market does not present an up-to-date and comprehensive textbook, which would offer clear and straightforward interpretation of the matters of the functioning of the Court of Justice in its current form. The book by M. T. Patakyova thus fills a gap in the market and has potential to contribute to the improvement of teaching and, consequently, knowledge in the field of EU law. As follows from the frequent requirements of legal practice addressing the scope and content of the EU law tuition at the law faculties in Slovakia and Czech Republic, it is precisely the question of the functioning and role of the Court of Justice (alongside the principles of application) that we should primarily focus on and emphasize.

The reviewed book addresses all of the essential issues related to the Court of Justice. It brings an insight into its structure, internal organization, personnel substrate, tasks and competencies. The majority of the text then analyses and explains the main types of proceedings before the Union courts, thus creating a comprehensive picture of the Court's work. The text does not avoid also the debated and controversial issues associated with the Court of Justice (e.g. the nature and binding force of its decisions, judicial activism etc.), but analyses and explain them in substance, with the obvious aim of providing a readers with comprehensive view on the importance and position of the Court of Justice.

The book – with the subtitle "textbook" – is primarily intended to be a didactic guide for the teaching and study of EU law. Creation of a accurate, materially correct and at the same time didactically effective study text is always a great challenge and a difficult task. The richness of covered information is very important, but even more important is the effect, the capacity of the text to improve the level of understanding of analysed issues, explain ambiguities and deepen knowledge of addresses. I am pleased to say that the reviewed book fulfils these preconditions. It deals with all the essential issues which lead to a correct understanding of the role and activities of the Court of Justice. The text is arranged very dynamically and the information is presented in a matter-of-fact style and understandable language. In a relatively small space, it solves all key issues and this is its added value and competitive advantage. As a basic textbook, it will find its application at all levels of higher education, and not only within the field of EU law (for its straightforwardness and at the same time material complexity,

it can certainly serve as enriching study material for example, for doctoral students in other areas of law). For the same reasons, this text may also attract the interest of representatives of legal practice, to whom it can provide answers to basic questions without the need to examine extensive commentaries or studies. As a dynamic, efficient and complex study text, it is worth to be recommended for all interested in EU law functioning and developments.

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