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FOREWORD

Institute of Comparative Law (Serbia), in cooperation with "Josip Juraj Strossmayer" University of Osijek Faculty of Law (Croatia) and University of Pécs Faculty of Law (Hungary) has initiated a new international conference, Regional Law Review. Our goal was to create an opportunity for lawyers from various European countries to gather in one place and discuss current issues in the field of law. Unfortunately, the well-known events that marked the current year made it impossible for the conference to be held as we had planned.

Nevertheless, a significant number of authors from a number of countries responded to the invitation to publish papers as well as to participate in the abridged version of the Conference. A total of 22 authors from eight countries researched and presented the results of their researches in the form of 18 scientific papers that you will find in this collection. The Conference was held on October 16 in the form of the online meeting. We owe a great deal of gratitude to everyone who participated in it and made it possible to call the first edition of RLR Conference a success.

I would like to thank the members of the Scientific and Organizational Committee, the representatives of all three institutions that jointly organized the conference, as well as all the reviewers (a total of 25 reviewers from 10 countries) who certainly played siginificant role in establishing the academic standard of the quality of published papers. My gratitude is also directed to all those who worked diligently on the organization of technical and essential details of the Conference and proceedings, and above all for the selfless help of my colleagues from the Institute of Comparative Law, who bore significant burden of the organization. We jointly discovered new means of academic and scientific communication in a world trapped by a pandemic – thank you for that.

Due to our liberal policy of using citation methods, two styles have been used in the collection, with several different variations. I think that in a way such freedom of expression contributes to the dynamics of reading the texts and (in a technical manner) corresponds to the diversity of topics covered by researchers.

What I can conclude with great certainty is that in the coming years – and I am sure that we will be able to work and interact in significantly more favorable circumstances – RLR Conference will grow into a traditional and unavoidable gathering of lawyers from all over Europe.

In Belgrade, November 2020

Mario Reljanović
Editor

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*Ágoston Mohay**

THE PUBLIC SECTOR PURCHASE PROGRAMME RULING OF THE GERMAN FEDERAL CONSTITUTIONAL COURT AND THE EUROPEAN UNION LEGAL ORDER**

The ruling of the Federal Constitutional Court (FCC) of Germany regarding the EU's Public Sector Purchase Programme represents a striking new element in the judicial dialogue between the FCC and the Court of Justice of the European Union (CJEU) which not only has consequences for the aforementioned EU programme, but may have serious repercussions in a broader sense as regards the relationship between EU law and national constitutional law – as well as national constitutional courts and the CJEU. This paper looks at the central arguments of the GFCC ruling in this context and attempts to draw some conclusions regarding the future of the aforesaid relationship.

Keywords: Public Sector Purchase Programme, Bundesverfassungsgericht, constitutional identity, ultra vires acts

1. INTRODUCTORY REMARKS

The relationship between national law and EU law is something of an "evergreen" of EU law research. As is known, the relationship between these two legal orders is generally seen as different from the relationship between national law and international law and is famously governed not by written treaty law, but the case law of the CJEU – the *Van Gend en Loos*[1] and Costa[2] judgments are regarded as two fundamental pillars of the EU legal order, without which the autonomy of the EU legal order cannot be effectively maintained. In *Costa*, the principle of the primacy of EU law was established, and even

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[1] Case 26/62 Van Gend en Loos v. Nederlandse administratie der belastingen [EU:C:1963:1].

[2] Case 6/64 Costa v. E.N.E.L. [EU:C:1964:66].

without codification into written EU primary law (i.e. the Treaties)[3] it serves as an accepted concept. The primacy of EU law over national law is generally not questioned by the EU Member States: as "Masters of the Treaties", the Member States would have the possibility to expressly rule out this principle in the text of the Treaties, but no such attempts have been made since the Costa judgment. In the view of the CJEU, EU law has absolute primacy which includes primacy over national constitutions.[4]

However, the relationship between EU law and national constitutions is a more complex issue if viewed from the perspective of national constitutional courts. This more nuanced view is arguably supported by the so-called "identity clause" which in its current form was introduced by the Treaty of Lisbon. According to Article 4 (2) TEU, the Union shall respect Member States' national identities, "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."Judicial dialogue regarding the question of primacy vis-à-vis constitutions nevertheless started much earlier than the Lisbon Treaty: it was the FCC of Germany which first purported to draw a line, in the context of fundamental rights, in its *"Solange I"* judgment and claim a right to review EU law as regards fundamental rights enshrined in the Grundgesetz (the German Federal Constitution) as long as EU law did not accord the same level of protection to fundamental rights as the Grundgesetz itself.[5] Even without analysing in detail the later case law of the FCC (which modified and refined the court's position) or other constitutional courts, *Solange I* can be seen as the starting point of a judicial dialogue concerning constitutionally relevant issues in the EU context focusing among other things of fundamental rights, ultra vires acts of the EU and the question of what the national constitutional identity of an EU member state actually encompasses – and in what way the identity clause would protect this specific identity "against" (?) EU law.[6] It is against this backdrop that the FCC has delivered a controversial ruling at an already very difficult time for Europe.

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[3] The EU member states however did put the principle of primacy into a legally non-binding declaration attached to the Lisbon Treaty in 2007. See Declaration concerning primacy, annexed to the Final Act of the Intergovernmental Conference, Official Journal of the European Union C 115 (2008).

[4] See most notably Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [EU:C:1970:114] (para 3) and Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [EU:C:1978:49] (paras. 21-26.) For analysis of this position see Von Bogdandy, A.& Schill, S. 2011. Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, *Common Market Law Review*,48(5), pp. 1417-1454.

[5] BVerfGE 37, 271 (Solange I Urteil), para 56.

[6] For good insights into various aspects of this complex issue, see for example Saiz Arnaiz, A. &Alcoberro Llivina, C. 2011.*National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013, and Konstadinides, T. 2011. Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement. *Cambridge Yearbook of European Legal Studies,* Vol 13, pp. 195-218.

2. THE PSPP RULING OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY

On 5 May 2020, the Federal Constitutional Court of Germany (BVerfG) ruled that the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) was contrary to the German Federal Constitution.[7] The PSPP is, in simplified terms, a so-called quantitative easing programme involving the purchase of euro-denominated marketable debt securities issued by central governments of Eurozone Member States[8], probably the most significant measure of ECB responses to the European sovereign debt crisis.[9]

What makes this ruling even more noteworthy is that it was passed following a preliminary ruling by the Court of Justice of the EU which was requested by the FCC itself in the course of the same national constitutional complaint procedure. The questions related essentially to whether the relevant decisions of the ECB amounted to *ultra vires* acts and were infringing German constitutional identity. In its *Weiss* preliminary ruling delivered in December 2018, the Court of Justice upheld the validity of the ECB decisions.[10] The Court of Justice *inter alia* conducted a proportionality analysis (in line with its previous findings in *Gauweiler*[11]) and found that Decision 2015/774 did not run counter to the proportionality principle.[12]

However in its 2020 judgment, the FCC found – regardless of what the preliminary ruling stated – that the ECB measures did infringe the principle of conferral and the delimitation of competences between the EU and its Member States, and were thus *ultra vires*. The deciding issue for the FCC was whether the PSPP could be seen as a monetary policy measure or a measure of economic policy – and as the ECB's competences related only to monetary policy, economic policy measures should be seen as falling outside the competence of the EU's central bank in any case.[13] The BVerfG held that if the distinction between monetary policy and economic policy is to be made on the basis of the proportionality principle, then the *effects* of the ECB measures in question, i.e. the PSPP scheme (which may very well have economic effects) should be taken into account when assessing said proportionality.[14] Subsequently, the FCC delivered a rather strong criticism of the preliminary ruling of the

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[7] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15. The paper comments rely on the English translation provided here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (19 August 2020).

[8] Decision 2015/774/EU of the European Central Bank on a secondary markets public sector asset purchase programme (OJ 2015 L 121/20), Art. 3.

[9] M. Frangakis, 2017. The ECB's Non-standard Monetary Policy Measures and the Greek Financial Crisis. In: Marangos, J. (ed.), *The Internal Impact and External Influence of the Greek Financial Crisis,*Cham: sPalgrave Macmillan, 2017, p. 64.

[10] Case C-493/17 Weiss and Others [EU:C:2018:1000].

[11] Case C-62/14 Gauweiler and Others [EU:C:2015:400].

[12] *Ibid.*, paras. 71-100.

[13] Mayer, F. C., 2020. *Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG*, Verfassungsblog, 7 May 2020 https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/ (19. 08. 2020).

[14] 2 BvR 859/15, para. 139.

CJEU and dismissed the proportionality analysis conducted by the EU Court in *Weiss* as unsatisfactory and "meaningless" for the attainment of the purpose (i.e. the abovementioned distinction between economic and monetary policy goals) that it was apparently meant to serve.[15] The FCC stated that the CJEU afforded the ECB way too broad discretion and at the same time did not provide the standard of review that would have been necessary. And, according to the FCC, by not scrutinizing this competence issue sufficiently, the CJEU "largely abandoned the distinction between economic policy and monetary policy" and thus authorised the ECB "to pursue its own economic policy agenda." And this "agenda", by the very fact that it is of an economic policy nature, encroaches upon the same competences of the EU Member States. This lead the German court to the conclusion that the CJEU "acted ultra vires, which is why, in that respect, its Judgment has no binding force in Germany."[16] Concluding this train of thought, the Federal Constitutional Court proclaimed that no German state institution – thus not the Bundesbank either – may participate in the development or implementation of *ultra vires* acts such as the PSPP.[17]

3. COMMENTS

Much has been said in recent years about judicial dialogue and judicial comity (or the lack thereof) between national constitutional or supreme courts and the Court of Justice in the context of constitutional identity and *ultra vires* review. Neither primacy over national constitutions, nor the relationship between the Court of Justice and national constitutional courts are clear cut issues, and this is certainly not the first sign of conflict – one could refer for recent examples to the *Dansk Industri*[18] and *Landtová*[19] sagas.[20]

In *Dansk Industri,* the Danish Supreme Court decided not to set aside Danish law, despite a preliminary ruling by the Court of Justice which required the Supreme Court to either interpret the relevant provisions of national law in a way that they may be applied consistently with the applicable EU directive or, in case such an interpretation was not possible, to disapply national law which ran counter to EU law (in the particular case: the general principle of non-discrimination.[21] The Danish Supreme Court failed to do

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[15] Ibid. paras. 123-124.

[16] Ibid. paras 153-163.

[17] *Nota bene*: the question of the compatibility of the measures with the prohibition of monetary financing as per Article 123 TFEU was also raised but the BVerfG found utlimately that „a manifest circumvention" of that provision could – „despite the concerns" – not be ascertained (para. 216).

[18] See Case 15/2014 DI, acting on behalf of Ajos A/S v Estate of A. Judgment of the Supreme Court, 6 December 2016 and Case C-441/14 Dansk Industri v Rasmussen [EU:C:2016:278].

[19] Case C-399/09 Landtová [EU:C:2011:415].

[20] As pointed out by Kyriazis, D. 2020. *The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*, European Law Blog, 6 May 2020 https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/(19. 08. 2020).

[21] Case C-441/14 Dansk Industri, paras 31-36.

so, thereby presenting a serious challenge to the principle of primacy.[22] In *Landtová,* the Court of Justice found that the case law of the Czech Constitutional Court regarding pension matters was in breach of the non-discrimination principles of EU law.[23] The Czech Constitutional Court however ruled that the judgment of the Court of Justice was ultra vires and proclaimed that it will not change its practice.[24] The PSPP ruling is also not the first time the FCC has *claimed* a right to review ultra vires acts of the EU[25], but it is the first time that it has actually proclaimed the ultra vires nature of such an act.

It is easy to see why the PSPP ruling can be regarded as a turning point, the consequences of which a may turn out to be rather serious.[26] Firstly, in a theoretical sense: together with direct effect, the primacy of EU law over national law is an essential foundational concept of the EU's autonomous legal order, and the same goes for the CJEU's exclusive jurisdiction regarding the validity of EU law. (One could also say that these are core elements of the constitutional identity of the EU itself.)[27] The professional authority of the FCC is also of relevance here: constitutional courts have long since taken note of and on occasion even expressly referred to FCC jurisprudence regarding the relationship between EU law and national constitutions in the identity review context.[28] It is not hard to see why such judgments undermine the autonomy of the EU legal order. Secondly, in a practical and economic sense, the judgment could very well disrupt the PSSP programme[29] – and what is more, it comes at the time of a global Covid-19 pandemic to which the ECB has among other things responded with a rather similar initiative, the Pandemic Emergency Purchase Programme (PEPP).[30] Although here the FCC itself stated in its communiqué that the

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[22] See Gualco, E. 2017. "Clash of Titans 2.0." From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the Dansk Industri Case. *European Papers*2(1), pp. 223-229.

[23] Case C-399/09 Landtová, para 54.

[24] Ruling PL.US 5/12. For commentary in context see Várnay, E.2019. Az Alkotmánybíróság és az Európai Bíróság. Együttműködő Alkotmánybíráskodás? *Állam- és Jogtudomány,* 60(2), pp. 63-91, and particularly at p. 83., whereas specifically regarding the Czech ruling see: Komárek, J. 2012. Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII" *European Constitutional Law Review*,8(2), pp. 323-337.

[25] See for instance the FCC's Maastricht (2 BvR 2134/92 et 2 BvR 2159/92) and OMT (2 BvR 2728/13) judgments.

[26] Chronowski, N. 2020. Fordulópont az európai bírói párbeszédben: a német Szövetségi Alkotmánybíróság PSPP-döntése. *Közjogi Szemle*, 13(2), pp.76-79.

[27] As discussed inter alia by Lenaerts, K. 2014. The Kadi Saga and the Rule of Law within the EU. *SMU Law Review,*67(4), pp. 708-709. and Mohay, Á. 2019. *A nemzetközi jog érvényesülése az uniós jogban.* Pécs: PTE ÁJK Európa Központ / Publikon. 2019. pp. 141-145.

[28] As did for example the Hungarian Constitutional Court. For an analysis of the relevant judgment see Mohay, Á.& Tóth, N. 2017.Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law, *American Journal of International Law*, 111(2), pp. 468-475.

[29] It should nevertheless be noted that the PSPP-ruling has no retroactive effect. Tosato, G. L. 2020.*The Decision of the German Constitutional Court on the Public Sector Purchase Programme of the European Central Bank: Preliminary Observations*. Policy Brief 24/2020, Luiss School of European Political Economy, 6 May (2020), p. 3.

[30] Decision 2020/440/EU of the European Central Bank on a temporary pandemic emergency purchase programme (OJ 2020 L 91/1).

ruling did not pertain to the PEPP[31], it is difficult to imagine that the same challenge will not potentially be brought against that measure.[32] One cannot help but wonder if a more nuanced response can reasonably be expected from the FCC in the context of the PEPP.

There is nevertheless a possible escape route built into the bastion of constitutional identity in the FCC ruling: the German court has determined a provisional period of no more than three months, during which the European Central Bank could adopt 'a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme."[33] This is not uncontroversial either as thereby the FCC intends to lay down rules for a decidedly independent and decidedly EU-level institution, one which operates on the legal basis of EU law – which in turn can only be judicially reviewed by the CJEU, this jurisdictional delimitation is apparent from Article 19 TEU and Article 344 TFEU. In this light, the suggestion that the German Government and the Bundestag are to influence the ECB (granted, only to conduct a thorough proportionality analysis) is also somewhat perplexing[34], even if the FCC for its part reassures all that this does not conflict with said independence. [35]

4. CONCLUDING REMARKS

Following the German decision, the CJEU issued a laconic press release recounting in no uncertain terms the binding nature of its preliminary rulings and the pivotal role that they play in the uniform interpretation and application of EU law, but – understandably – without any further comment or evaluation.[36]Academics have however strongly criticised the FCC judgment, lamenting the intellectual arrogance of the FCC.[37]

The CJEU is traditionally very protective of its own jurisdiction (consider among many others its judgment in the MOX Plant case[38] or its Opinion 2/13 on EU accession to the ECHR[39]) and in the present case one can understand the cause for alarm: without the preliminary ruling procedure, direct effect and primacy would not exist, and the interpretation of EU law would no doubt see significant divergences in different Member

[31] https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html

[32] Kyriazis 2020.

[33] 2 BvR 859/15, para. 235. The Bundesbank should further ensure that the bonds already purchased are sold in a method coordinated within the European System of Central Banks.

[34] Mayer 2020.

[35] 2 BvR 859/15, para. 232.

[36] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (19 August 2020).

[37] Ziller, J. The Unbearable Heaviness of the German Constitutional Judge. On the Judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 Concerning the European Central Bank's PSPP Programme. *CERIDAP* 2020/2, pp. 87-99.

[38] Case C-459/03 Commission v Ireland [EU:C:2006:345].

[39] Opinion 2/13 [EU:C:2014:2454].

States. The *effet utile*[40] of the preliminary ruling procedure and EU law in general would thus be seriously imperilled, and thus the authority of EU law could be called into question: the preliminary ruling mechanism has been rightly called the central legal in the relationship between EU law and national law, so a strain on this mechanism represents a strain on the authority of Union law.[41]

It has been suggested that the constitutional identity clause in Art. 4(2) TEU may be utilized to reconceptualise the relationship between EU law and domestic constitutional law, paving the way towards a more nuanced interpretation of the relationship between EU law and national constitutional law, going beyond the absolute primacy doctrine applied by the CJEU.[42] Perhaps this FCC ruling – which will no doubt become one of the most analysed judgments in the field of European Union law – signals among other things a need for the CJEU to engage in a more elaborate interpretation of the identity clause and its effects and limits. Of course, any judicial dialogue can only have an effect if the participants of said dialogue actually endeavour to engage in a meaningful conversation.

[40] Regardless of the fact that the *effet utile* doctrine itself is sometimes contested. Cf. Urška Šadl: The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-accession Case Law of the Court of Justice of the EU, European Journal of Legal Studies, vol 18, 2015, pp. 19-45.

[41] Weiler, J. H. H. The authority of European law: Do we still believe in it? In: Heusel, W. &Rageade, J.-P. 2019. *The authority of European law: Do we still believe in it*? Springer, 2019, p. 5.

[42] Von Bogdandy & Schill, 2011, pp. 1417-1454.

LIST OF REFERENCES

Chronowski, N. 2020. Fordulópont az európai bírói párbeszédben: a német Szövetségi Alkotmánybíróság PSPP-döntése. *Közjogi Szemle*, 13(2), pp. 76-79.

Gualco, E. 2017. "Clash of Titans 2.0." From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the Dansk Industri Case. *European Papers* 2(1), pp. 223-229.

Komárek, J. 2012. Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII" *European Constitutional Law Review*, 8(2), pp. 323-337.

Konstadinides, T. 2011. Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement. *Cambridge Yearbook of European Legal Studies,* Vol 13, pp. 195-218.

Kyriazis, D. 2020. *The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*, European Law Blog, 6 May 2020 https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/ (19. 08. 2020).

Lenaerts, K. 2014. The Kadi Saga and the Rule of Law within the EU. *SMU Law Review*, 67(4), pp. 708-709.

M. Frangakis, 2017. The ECB's Non-standard Monetary Policy Measures and the Greek Financial Crisis. In: Marangos, J. (ed.), *The Internal Impact and External Influence of the Greek Financial Crisis,* Cham: Palgrave Macmillan, 2017, pp 47-70.

Mayer, F. C., 2020. *Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG*, Verfassungsblog, 7 May 2020 https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/ (19. 08. 2020).

Mohay, Á. 2019. *A nemzetközi jog érvényesülése az uniós jogban.* Pécs: PTE ÁJK Európa Központ / Publikon. 2019.

Mohay, Á. & Tóth, N. 2017. Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law, *American Journal of International Law*, 111(2), pp. 468-475.

Saiz Arnaiz, A. & Alcoberro Llivina, C. 2011. *National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013.

Tosato, G. L. 2020. *The Decision of the German Constitutional Court on the Public Sector Purchase Programme of the European Central Bank: Preliminary Observations*. Policy Brief 24/2020, Luiss School of European Political Economy, 6 May (2020), pp. 1-3.

Várnay, E. 2019. Az Alkotmánybíróság és az Európai Bíróság. Együttműködő Alkotmánybíráskodás? *Állam- és Jogtudomány,* 60(2), pp. 63-91.

Von Bogdandy, A. & Schill, S. 2011. Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, *Common Market Law Review*, 48(5), pp. 1417-1454.

Weiler, J. H. H. The authority of European law: Do we still believe in it? In: Heusel, W. & Rageade, J.-P. 2019. *The authority of European law: Do we still believe in it*? Berlin: Springer, 2019, pp. 3-20.

Ziller, J. The Unbearable Heaviness of the German Constitutional Judge. On the Judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 Concerning the European Central Bank's PSPP Programme. *CERIDAP* 2020/2, pp. 87-99.

LEGAL SOURCES AND CASE-LAW

Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978. CJEU, Judgment of the Court of 9 March 1978. (Case 106/77, EU:C:1978:49) Available at: http://curia.europa.eu/juris/celex.jsf?celex=61977CJ0106&lang1=en&type=TXT&ancre(19. 08. 2020).

Commission v Ireland, 2006. CJEU, Judgment of the Court (Grand Chamber) of 30 May 2006. (Case C-459/03, EU:C:2006:345) Available at: http://curia.europa.eu/juris/celex.jsf?celex=62003CJ0459&lang1=en&type=TXT&ancre (19. 08. 2020).

Dansk Industri v Rasmussen, 2016. CJEU, Judgment of the Court (Grand Chamber) of 19 April 2016. (Case C-441/14, EU:C:2016:278) Available at: http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0441&lang1=en&type=TXT&ancre (19. 08. 2020).

Decision of the German Federal Constitutional Court of October 12, 1993 In Re Maastricht Treaty, 1993. BVerfGe. (2 BvR 2134/92 et 2 BvR 2159/92).

ECB decisions on the Public Sector Purchase Programme exceed EU competences. 2020, BVerfGe, Press Release of the BVerfGe of 05 May 2020. (Press Release No. 32/2020) Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html (19. 08. 2020).

EU Decision 2015. EU, Decision of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme. (2015/774/EU, OJ 2015 L 121/20) Art. 3.

EU Decision 2020. EU, Decision of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme. (2020/440/EU, OJ 2020 L 91/1).

EU Declaration 2008. EU, Declaration concerning primacy, annexed to the Final Act of the Intergovernmental Conference, Official Journal of the European Union 115 of 09 May 2008. (OJ C 115) p. 344.

Flaminio Costa v. E.N.E.L. 1964. CJEU, Judgment of the Court of 15 July 1964. (Case 6/64, EU:C:1964:66) Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006 (19. 08. 2020).

Gauweiler and Others, 2015. CJEU, Judgment of the Court (Grand Chamber) of 16. June 2015. (Case C-62/14, EU:C:2015:400) Available at: http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0062&lang1=en&type=TXT&ancre (19. 08. 2020).

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. 1970, CJEU, Judgment of the Court of 17 December 1970. (EU:C:1970:114) Available at: http://curia.europa.eu/juris/celex.jsf?celex=61970CJ0011&lang1=en&type=TXT&ancre (19. 08. 2020).

Judgment of the Second Senate of 05 May 2020, 2020, BVerfGe, Judgment of the Second Senate of 05 May 2020. (2 BvR 859/15) Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (19. 08. 2020).

Judgment of the Second Senate of 21 June 2016, 2016, BVerfGe, Judgment of the Second Senate of 21 June 2016. (2 BvR 2728/13). Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html (19. 08. 2020).

Marie Landtová v Česká správa socialního zabezpečení, 2011. CJEU, Judgment of the Court (Fourth Chamber) of 22 June 2011. (Case C-399/09, EU:C:2011:415) Available at: http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0399&lang1=en&type=TXT&ancre (19. 08. 2020).

Opinion 2/13, 2014. CJEU, Opinion of the Court (Full Court) of 18 December 2014. (EU:C:2014:2454) Available at: http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002&lang1=en&type=TXT&ancre (19. 08. 2020).

Press release following the judgment of the German Constitutional Court of 5 May 2020, 2020, CJEU, Press release of the Court of Justice of the European Union of 08 May 2020. (Press Release No. 58/20) Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (19. 08. 2020).

Ruling PL.US 5/12, 2012. Czech Republic Constitutional Court, Judgment of the Czech Republic Constitutional Court of 31 January 2012. (Pl. US 5/12).

Solange I Urteil, 1974, BVerfGE, Beschluß des Zweiten Senats vom 29. Mai 1974. (BVerfGE, 37, 271) Available at: https://www.servat.unibe.ch/dfr/bv037271.html (19. 08. 2020).

Van Gend en Loos v. Nederlandse administratie der belastingen, 1963. CJEU, Judgment of the Court of 5 February 1963. (Case 26/62, EU:C:1963:1) Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026 (19. 08. 2020).

Weiss and Others, 2018. CJEU, Judgment of the Court (Grand Chamber) of 11 December 2018. (Case C-493/17, EU:C:2018:1000) Available at: http://curia.europa.eu/juris/celex.jsf?celex=62017CJ0493&lang1=en&type=TXT&ancre (19. 08. 2020).

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THE DOCTRINE OF SUPREMACY OFEUROPEAN UNION LAW: FOUNDATIONS, SCOPE AND FUTURE PERSPECTIVES

The doctrine of supremacy is essential to the uniformity of the EU legal edifice. It had no formal basis in the Treaty Law but was developed by the Court of Justice of the EU by means of its conception of the "new legal order" (Costa v ENEL). Therefore, the corollary of sovereignty of the EU legal order is the supremacy of EU law: any norm of EU law takes precedence over any provision of national law. From the CJEU's perspective, supremacy entails duty for the national courts to 'set aside' any conflicting national norm when an EU rule applies in a given case. Ultimately, the acceptance and application of the supremacy of EU law are dependent on the Member States. Despite its invention, acceptance of the doctrine of supremacy has been the main challenge within the overall integration process. Recent ruling from the German Constitutional Court (the Bundesverfassungsgericht) on the legality of the European Central Bank's Programme marked that the supremacy issue cannot be put 'ad acta' and still continues to be surrounded with ambiguity and controversy against its unconditional acceptance as the CJEU requires. This paper summarizes the most remarkable aspects of the foundations of the supremacy doctrine and the conceptual basis on which the Member States accord supremacy to EU law, as well as its scope and limits. All this is necessary in order to be able to determine the perspectives for ensuring the supremacy of EU law, while highlighting its importance for the future of the European integration.

Key words: EU legal order, doctrine of supremacy, sovereignty, CJEU, national courts.

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1. INTRODUCTORY REMARKS

In the context of the international law, the European Union is a *sui generis* international organization. The *sui generis* term represents a special organizational form with its own specific features (Peročević, 2017, p.114). The main feature that the EU has in common with the traditional international organizations is that it was established as a result of international treaties too. Unlike the case is with other international organizations, accession to the Union for the Member States inevitably entails delegation or transfer of certain competences related to national sovereignty to a higher *supranational* structure and its institutions.

European Court of Justice (ECJ), today formally known as the Court of Justice of the European Union (CJEU)[43], has played a crucial role in determining the legal nature of the EU, whose judgments have changed the nature of the organization and affected the overall process of European integration within the organization. The *Van Gend en Loos* judgment[44] defines Community law as "a new order of international law in which the Member States have limited their sovereign rights, albeit in a restricted area, and whose subjects are not only the Member States but also their citizens". The Community is defined as a 'new order of international law', which is more than a contract exclusively aimed at mutually agreed obligations between the contracting parties (Van Rossem, 2013, p.18). By referring to the new legal order, the CJEU asserted that the Community was not just a 'traditional' or 'ordinary' international law organization and envisaged its more independent status as well as greater impact on the national legal systems of the Member States. The term 'Community of Law'[45] emphasized the role of law in the European unification project which has been described by scholars precisely as 'integration through law' (Vauchez, 2008, p.1).

Hence, the relationship between the EU law and national law had to be defined. Once again, the CJEU, through its creative and extensive interpretation of the Treaties proved to be an important catalyst for the integration process (Svensson, 2008, p.4). On the basis of its conception of the 'new legal order' the CJEU developed the doctrine of supremacy[46] of Community law which had no previous formal basis in the European Community Treaty. Stating that the aim of creating a uniform common market between different states would

[43] Prior to the Lisbon Treaty the Community Courts comprised the European Court of Justice (ECJ), the Court of First Instance (CFI) and judicial panels. Their nomenclature has been changed by the Lisbon Treaty. Pursuant to Article 19 (1), the Court of Justice of the European Union shall consist of the Court of Justice, the General Court and the specialized courts. Given the jurisdiction of these courts established by the Lisbon Treaty, especially in the preliminary ruling process, when it comes to the European Court of Justice or Court of Justice, the General Court is usually included. In order to ensure consistency, this paper uses the Lisbon nomenclature, but one must have in mind that judgments prior to the Lisbon Treaty were delivered by the European Court of Justice, as named at the time.

[44] Case C-26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[45] This term was popularized by Walter Hallstein (1901-1982) as the first President of the European Commission (1958-1967) who referred to the term 'community of law' in a speech delivered in March 1962.

[46] Term 'primacy' is also used to denote the same doctrine but some authors make distinction between the both regarding their content and scope. See more at Avbelj, M. (2011). Supremacy or Primacy of EU Law - (Why) Does It Matter?. *European Law Journal,* Vol. 17, No. 6, pp. 744–763.

be undermined if EU law could be made subordinate to national law of the various states (Craig & De Búrca, 2011, p.256), *Costa v E.N.E.L.* judgment[47] claimed that the corollary of sovereignty of the EU legal order is the supremacy of EU law: any norm of EU law takes precedence over any provision of national law.

From the CJEU's perspective, the absolute supremacy of EU law was vital in order to 'preserve the uniformity and efficacy of Community law in all the Member States' (Weatherill, 1993, p.316). Supremacy entails duty for the national courts to 'set aside' any conflicting national norm when an EU rule applies in a given case. Ultimately, the acceptance and application of the supremacy of EU law are dependent on the Member States. However,, , the acceptance of the doctrine of supremacy has been the main challenge in that regard. It follows that the evolutionary nature of the doctrine of supremacy is necessarily bidimensional – one dimension is the elaboration of the parameters of the doctrine by the CJEU, while the second dimension refers to the reception and affirmation of the supremacy notion by the national courts of the Member States (Weiler, 1981, p.275-276).

A recent ruling of the German Constitutional Court (the Bundesverfassungsgericht or "BVerfG") on the legality of the European Central Bank's Programme regarding the CJEU's judgment in *Weiss* (Case C-493/17), shows that the supremacy issue cannot be put *ad acta* and still continues to be marked with ambiguity and controversy against its unconditional acceptance as required by the CJEU. The Karlsruhe judges dismissed the CJEU ruling in the ECB's favor, thus defying the doctrine of supremacy of EU law and the authority of the Luxembourg- based judiciary to have the final say on this matter, thus opening the door to potential legal challenges against the EU from other countries.

This paper summarizes the most remarkable aspects of the foundations of the supremacy doctrine and the conceptual basis on which the Member States accord supremacy to EU law, as well as its scope and limits. All this is necessary in order to be able to determine the perspectives for ensuring the supremacy of EU law, while highlighting its importance for the future of the *European integration* in the light of the increasingly heated arguments for and against the European Union. Finally, this approach is especially important to be examined in the light of the enlargement process and accession of candidate countries, such as the Republic of North Macedonia.

2. CJEU'S DESIGN OF THE EU LAW SUPREMACY

At the time of its 'invention' – the early years of the Community's existence- the doctrine of supremacy was not prescribed in the European Community Treaty (ECT), but the CJEU consistently held that it was implied in the Treaty (Vincenzi and Fairhurst, 2002, 185), on the basis of its conception of how the 'new legal order' should be developed (Craig & De Burca, 2011, p.256). The CJEU touched upon this issue in *Van Gend en Loos*, emphasizing that EU law was not just a tool of international law, but had direct effect [under certain requirements] (Douglas, 2002, p.55) when it stated that the Community constituted a new legal order of international law for the benefit of which the states had limited their sovereign rights.

[47] Case C-6/64, *Flaminio Costa v ENEL* [1964] ECR 585, 593.

2.1 The Invention of the Doctrine of Supremacy

The issue of supremacy was directly addressed in *Costa v. ENEL* where on the side of the facts Flaminio Costa claimed that a subsequent Italian statute 'lex posterior' breached Articles 37, 93, 95 and 102 of the EC Treaty and the *Giudice Conciliatore* of Milan, referred the issue to the CJEU under Article 234 (ex Article 177). The CJEU responded to the argument that its preliminary ruling would be of no relevance to the case at hand because the Italian courts would be bound to follow national law (Craig, 2004, p.35) and it opposed the doctrines such as *lex posteriori derogat lege priori* and *lex specialis derogat lex generali*. This time the doctrine of EU supremacy was firmly established and CJEU developed profound legal argumentation to justify its position, which can be divided into two categories: a) those regarding the nature of the Community (now the Union); and (b) those regarding the purpose of the Community (now the Union) (Steiner *et al*, 2003, p.67). Regarding the nature of the Community (Union) law, the Court distinguished the Treaty from other international treaties since the EEC (EU) "has created its own legal system which became an integral part of Member States and which their courts are bound to apply" (Costa, 1964, ECR 586). Moreover, it held that:

"by creating a Community of unlimited duration, having… real powers stemming from limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves" (Costa, 1964, ECR 593).

The CJEU's conception of the 'new legal order' was expanded by stating its 'independent nature' which was voluntarily established by the Member States at the cost of 'permanent limitation of their sovereign rights' (Steiner *et al*, 2003, p.67). To sustain this statement, the Court referred to Article 249 (ex Article 189), whereby a regulation 'shall be binding' and 'directly applicable in all Member States' and thus confirmed 'the precedence of Community law'. As the aims of the Community are concerned, the Court's arguments were more functional and pragmatic – "the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2)" (Costa, 1963, ECR 594). The Court stated that the aims of the Treaty were integration and cooperation, and their achievement would be undermined by one Member State refusing to give effect to a Community (Union law) which should uniformly and equally bind all (Craig & De Búrca, 2011, p.258). The rule of supremacy guarantees that the doctrine of direct effect has its intended effect: to make Community law uniform and effective (Svensson, 2008, p.19).

Finally, from all these observations the Court stated that:

"the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question" (Costa, 1963, ECR 594).

It can be concluded that the Court established its conception of the new legal order on the basis of the permanent limitation of the sovereign rights by the Member States in certain

fields of competence, which then had transferred sovereignty to the Union institutions. Therefore, any subsequent unilateral act incompatible with this concept cannot prevail and this provision is 'subject to no reservation'. According to the Court's observations, the doctrine of supremacy is applicable regarding the policy areas that fall within the Union competences and this rule must be respected in the event of any such conflict between national and EU law.

By establishing the doctrine of supremacy, as it was elaborately spelled out, the Court also affirmed the *rule of law* concept, which was later promoted by the Lisbon Treaty as one of the founding values of the EU. The rule-of-law oriented interpretation by the Court is reflected in its aspiration to prevent different rules for resolving the clashes between national and EU law, faced with the fact that Community law could, but should not, be different in the different Member States. CJEU wanted to establish general supremacy of all EU law, as it held that Community law 'cannot be overridden by domestic legal provisions, however framed', but in its argumentation it referred to the application of regulations as a source of EU law. The national courts mainly apply supremacy by virtue of the authority of their national constitutions and consider supremacy and direct effect of EC law as concepts stemming primarily from national constitutions (Witte, 1999, p.199). Having in mind the specific foundations of the doctrine of supremacy, it was intriguing what would be the outcome if a constitutional law of a Member State was in breach of EU law.

2.2 Evolution of the EU Law Supremacy and the Formula for Its Application

The conflict between Member State's constitutional law and EU law was addressed by CJEU in *Internationale Handelsgesellschaft*[48] by stating that not even a fundamental rule of national constitutional law could be invoked to challenge the supremacy of the EU law (then Community law). Under the German Constitution, any ordinary law incompatible with the German Constitution was invalid, since the Constitution is the highest source of law. In this case, the Court responded that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure". This statement was based on the argument that, with reference to the fundamental rights under the German Constitution, protection of the same rights is one of the main aims of the Treaty. The legality of a Community act cannot be judged in the light of national law (Steiner *et al*, 2003, p.67) as it "would have an adverse effect on the uniformity and efficacy of Community law" (Internationale Handelsgesellschaft, 1970, ECR 1125).

Another conclusion that can be drawn from the *Costa* judgment is that application of the doctrine of supremacy is referred to the national courts of the Member States which should recognize the supremacy of EU law, although no 'recipe' was provided. The context in which this doctrine was invented also must be taken into consideration – the early

[48] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfur und Vorratsstelle fur Getreide und Futtermittel,* [1970] ECR 1125.

years of the European unification project when the creation of the common market was the main goal. So the doctrine of supremacy was further developed by the Court as it was given added force in the *Simmenthal* case[49]. This time the CJEU provided such a 'formula' for the application of the doctrine of supremacy stating that "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule" (Simmenthal, 1978, ECR 629). It also stressed that in order to give full effect to the Community provisions, the Court should refuse to apply "any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means". Supremacy entails duty for the national courts to 'set aside' any conflicting national norm when an EU rule applies in a given case. But, as this doctrine was developed, the requirement to 'set aside' conflicting national law did not entail an obligation to nullify national law, which may continue to apply in any situation that is not covered by a conflicting provision of EU law (Craig & De Burca, 2011, p.256). Yet, this 'mere' duty to disapply the conflicting norm of national law is only a minimum requirement – "EU law norms 'not only by their entry into force render automatically inapplicable any conflicting provision of current national law but… also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions" (Simmenthal, 1978, ECR 632). However, it also entails duty for other national authorities such as those on the legislative level, not to adopt laws that are inconsistent with binding rules of Union law and a duty to modify the laws that prove to be inconsistent, especially in cases when the Union law is intended to harmonize national legislation (Witte, 2011, p.340-341). In *Factortame*[50] the Court held that there should be a provision for state liability also where the national legislature was responsible for the breach of EC law and thus required national courts to do more than just 'set aside' national laws.

2.3. Attempts for Codification of the Supremacy Doctrine

The doctrine of supremacy was introduced by the Court of Justice in a consistent line of case law and it 'constitutionalised' the EC Treaty. The Maastricht Treaty also introduced the 'pillar structure' of the EU, by distinguishing the First Pillar from the Second and Third Pillar as parts of the EU Treaty that did not share many of these special supranational characteristics of the EC Treaty. In the context of the evolution of the doctrine of supremacy, it raised a question of its scope as to whether the EU Treaty has created a specific legal order like the EC Treaty. National judgments on the implementation of the European Arrest Warrant, which is a Framework Decision adopted within the Third Pillar, did not recognize supremacy of Third Pillar 'law'. The optimistic approach towards 'The Future of Europe' in 2002/2003 embedded in the Treaty establishing a Constitution for Europe

[49] C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629.

[50] Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd. and Others,* [1990] ECR I-2433.

of 2004, formally incorporated the supremacy doctrine in Article I-6: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have *primacy* over the law of the Member States". This 'codification' of the supremacy doctrine actually reflected the existing case-law of the CJEU and did not bring any changes to the existing relationship between EU law and national law (Witte, 2011, p.345). Having in mind the destiny of the EU Constitution, for which it was decided to be turned into a de-constitutionalized Reform Treaty, this provision was simply dropped from the Lisbon Treaty on order of the European Council in 2007 and replaced by a Declaration concerning primacy. Declaration 17 Concerning Primacy stated that

"Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law".

Opinion of the Council Legal Service of 22 June 2007, , reiterated the supremacy of EC law established by the Court of Justice in *Costa* judgment as a cornerstone of Community law and assured that "the fact that the principle of primacy will not be included in the future treaty [Lisbon Treaty] shall not in any way change the existence of the principle and the existing case-law of the Court of Justice". Giving thought to the legal power of the declaration as an instrument, removal of the supremacy doctrine from the Treaty has not removed the ambiguity regarding the conceptual basis for acceptance of supremacy, its scope and limits. Despite its invention, the acceptance and application of the supremacy of EU law are the main challenges in that regards and remain dependent on the Member States.

3. "JUDICIAL DIALOGUES": RECEPTION OF THE DOCTRINE OF SUPREMACY BY NATIONAL COURTS

The doctrine of supremacy of the EU law founded by the Court of Justice of the EU can have impact on the legal reality only through the attitude of the national courts and other institutions of the Member States. National courts enjoy a key role in the daily application of EU law, as they function as EU courts that apply EU legislation in national contexts (Paunio, 2010, p.2). It is worth to mention in that regard, that the involvement of national courts in the preliminary ruling procedure (Article 267 Treaty on the Functioning of the European Union [TFEU]) has been crucial for the ability of the CJEU to promote legal integration (Weiler 1994; Alter 1996; Mattli and Slaughter 1998; Davies 2012). In this procedure, the CJEU engages in a constant dialogue with national courts to a certain extent (Rosas, 2007, p.4) and it has been established as an instrument to further develop the law. Hence, *Costa v ENEL* was also a result of preliminary ruling procedure that was presented as a challenge to the Court's jurisdiction and seized as an opportunity to formulate the supremacy principle. The justification of the fundamental principle of supremacy is therefore close to the purpose of Article 267 and there is clear mutual dependence between preliminary rulings and supremacy of EU law (Norberg, 2006, p.16). Although, in accordance with the EU law supremacy, the CJEU possesses hierarchical authority over national courts in questions related to EU law, this does not simply imply that the national courts always

fully agree on the given interpretations, especially in cases related to human rights such as *Solange* and *Maastricht* decisions of the German Federal Constitutional Court known as BVerfGE (Norberg, 2006, p.11). Within the preliminary ruling procedure *inter alia* national courts also elaborated their basis for acceptance of the supremacy doctrine and set certain limitations. In continuation, the reception of the doctrine of supremacy of the EU law at national level will be examined.

3.1 Grounds for Acceptance of the Supremacy Doctrine

Accession to the Union for the Member States inevitably entails delegation or transfer of certain competences related to national sovereignty to this *supranational* structure and the Member States accept the supremacy of EU law. However, it cannot be expected that the transposition of the EU law into different legal systems will produce identical or even similar results in all those systems. The conceptual basis on which the Member States accord supremacy to EU law is the first parameter for examination of the reception of the doctrine of supremacy: they may choose to do so because they accept the Court of Justice's *communautaire* reasoning in *Costa v.ENEL*, or because of a provision within their own national legal order (Craig, 2004, p.44).

Regarding the first approach, the principle of supremacy is essential to the uniformity of the EU legal edifice and ensuring its efficacy in all Member States. On the basis of the *communautaire* reasoning, Belgian *Cour de Cassation* accorded such supremacy to EC law in the *Le Ski* case[51]. It held that in the event of a conflict between a norm of international treaty which produces direct effect in the domestic legal order and domestic law, the treaty must prevail. Moreover, the Belgian *Cour* affirmed that the EC treaties have constituted a new legal system since the Member States have restricted the exercise of their sovereign powers in the areas determined by those treaties. On the other side, Belgian Constitutional Court - *Cour d'Arbitrage* granted supremacy to the constitution in regard to the international treaties, but interpreted *Le Ski* case as applicable only when clash between national law provision and EC Treaty occurs.

However, most of the Member States grounded the acceptance of EU law supremacy in national constitutional provisions on the basis of the dualism concept. In the case of France, the supremacy accorded to the EU law was not based on the inherent nature of EU law, but under the authority of their own national legal order – Articles 55 and 88–1 of the French Constitution (Witte, 1991, p.1-22). French *Cour de Cassation* in *Café Jacques Vabres*[52] stated that the Constitution itself admitted priority to a 'properly ratified international act' in case of clash with 'internal law' since its Article 55 provided for the primacy of certain international treaties over domestic law. The *Conseil d'Etat* in *Nicolo*[53] also grounded its decision on the same constitutional provision, motivated by earlier decisions of the

[51] *Fromagerie Franco-Suisse Le Ski v. Etat Belge* [1972] CMLR 330.

[52] Dec of 24 May 1975 in *Administration des Douanes v Société 'Cafés Jacques Vabre' et SARL Weigel et Cie* [1975] 2 CMLR 336.

[53] Dec of 20 Oct 1989 in *Raoul Georges Nicolo* [1990] 1 CMLR 173.

Conseil Constitutionnel, which indicated that it was for the other French courts to ensure that international treaties were applied (Oliver, 1994, p.10). In a similar manner, German Federal Constitutional Court (BVerfG) relied on constitutional provisions as dominant rationale for the acceptance of EU law supremacy, basing its argumentation on some version of the *communautaire* thesis. Starting from the Court of Justice's premise that "the Union could not exist as a legal community if the uniform effectiveness of Union law were not safeguarded in the Member State", BVerfG in *Honeywell*[54] stated that such transfer of sovereign power to the EU by Germany as a Member State was exercised in accordance with Article 23.1 of the Basic Law. Finally, it concluded that 'unlike the primacy of application of federal law, as provided for by Article 31 of the Basic Law for the German legal system, the primacy of application of Union law cannot be *comprehensive*'. Although it accepted the doctrine of supremacy, this reasoning by BVerfG reflected the rich jurisprudence in which the German courts have articulated different limits to its application. Similar reservations regarding unconditional acceptance of the EU law supremacy were also expressed by the Italian *Courte Constituzionale* in *Frontini*[55], while accepting that on the basis of the Article 11 of the Constitution "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations".

Having in mind the significance of the EU law supremacy for the uniformity of EU's legal edifice, another interesting issue is the acceptance of this doctrine by the 'newer Member States' - Central and Eastern European countries that joined the EU on the basis of the conditionality policy. At that time, EU law supremacy was already established as part of the *acquis communauraire* and one would therefore expect the supremacy doctrine to be a part of the accession criteria. However, none of the Accession Treaties contained such provisions and CEE Constitutional Courts themselves have proven to be important interlocutors in the ongoing supremacy discourse. According to the comparative analyses delivered by Claes (2005, p.81-125) constitutional clauses allowing for the attribution of state powers to international organizations or more explicitly to the EU have had the effect of securing supremacy of the Union law. Such provision is contained in Article 90(1) of the Polish Constitution that authorizes delegation of competences of State organs to international organizations in relation to *certain matters*, while Article 91(2) more precisely accords precedence of international agreements over statutes. Similar 'enabling clauses' are contained in Czech Constitution in Articles 10 and 10a, as well as in Hungarian Constitution (Amendment of 12 December 2002) that provides for strict 'EU' clause instead of 'international organization' approach (Albi, 2005, p.126).

The transfer or delegation of powers to the EU by its newest Member State – Croatia is also granted on the basis of the Croatian Constitution whose Article 143(2) states that "Republic of Croatia shall confer upon the institutions of the EU the powers necessary for the enjoyment of rights and fulfillment of obligations ensuing from membership". Pursuant to Article 145 of the said Constitution, EU legal acts have to be applied 'in accordance with

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[54] BVerfG, 2 BvR 2661/06, 6 July 2010.

[55] *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372.

the *acquis communautaire*' and it indirectly lays down the application of the principles of EU law such as supremacy (Goldner Lang *et al*, 2019, 1146).

3.2 Challenges and Limits to Acceptance of EU Law Supremacy

The conceptual basis for acceptance of the supremacy of EU law is still a live issue in all Member States. Most of the Member States were in the belief that the relationship between the EU law and national law was a matter of the constitutional rules of the State concerned. This approach imposed certain reservations that have been made by some national constitutional courts as to whether the national legal order places limits on its acceptance of EU law supremacy derived from its own national constitution and/or national fundamental rights. As it was already mentioned above, the Court of Justice envisaged absolute supremacy of the EU law by virtue of the inherent nature of the new legal order, but the acceptance of the doctrine has not been unconditional and comprehensive.

French *Conseil constitutionnel* and *Conseil d'Etat* both held that it is the Union legal order which is integrated into the national order on the basis of the Constitution that remains the norm determining the relationship between the legal systems (Charpy, 2007, p.459). The duty to implement the Union law together with the principle of its supremacy does not alter the place of the Constitution at the apex of the internal legal order.

But it was the German Constitutional Court (BVerfGE) that has played an eminent role for the constitutional foundations of Germany's participation in the ongoing process of European integration, but also for the development of the jurisprudence in other EU Member States (Grimm *et al*, 2019, p.414). As it was mentioned above, it was the Article 23(1) of the German Basic Law that stipulates a positive obligation for Germany's state institutions to 'participate in the development of the European Union' with the constitutional objective of 'establishing a united Europe' (Grimm *et al*, 2019, p.417). Together with Articles 24 and 25 of the German Constitution, these provisions represent the conceptual basis for acceptance of the EU law supremacy. But the German courts within the well-known canon of relevant cases such as *Solange I*[56], *Solange II*[57], *Mastricht*[58], *Lisbon*[59] and many others, have laid down limits to the acceptance of the supremacy doctrine and to the overall process of European integration in that regard. These limits relate to the fundamental rights, competence and constitutional identity. As a reaction to the CJEU's reasoning in *Internationale Handelsgesellschaft* mentioned above, BVerfG in *Solange I* held that Article 24 of the German Constitution (Article 24) nullifies any treaty amendment which would destroy the identity of the valid constitutional structure like the protection of the fundamental rights as an' inalienable essential feature' of it. The Court concluded that the Community at that time did not have a 'codified catalogue of fundamental rights'. Therefore, in the event of conflict, the protection of fundamental rights in the German Constitution would prevail over EU law.t. But given the

[56] BVerfG, case 2 BvL 52/71, Solange I, order of 29 May 1974, BVerfGE 37, 271.

[57] BVerfG, case 2 BvR 197/83, Solange II, order of 22 Oct. 1986, BVerfGE 73, 339.

[58] BVerfG, case 2 BvR 2134, 2159/92, Treaty of Maastricht, judgment of 12 Oct. 1993, BVerfGE 89, 155.

[59] BVerfG, case 2 BvE 2/08 et al., Treaty of Lisbon, judgment of 30 June 2009, BVerfGE 123, 267.

development by the CJEU of the fundamental rights doctrine, *Solange II* decision stated that *so long as* (in German *solange*) EC had a level of protection of fundamental rights that is substantially in concurrence with the protections afforded by the German constitution, it would no longer review specific Community acts in light of that constitution. On the occasion of reviewing the constitutionality of the Maastricht Treaty ratification, the BVerfG articulated a competence-based limit to its acceptance of EU supremacy and regarded itself as possessing the jurisdiction to review the actions of European 'institutions and agencies' in order to ensure that the EU did not stray beyond the powers expressly conferred upon it in the Treaties. This issue of who has the ultimate authority to define the allocation of competence as between the EU and the Member States is known as *Kompetenz-Kompetenz*. In *Lisbon* decision the BVerfG had reaffirmed its authority to engage in *ultra vires* review in relation with the constitutional identity known as the *identity lock* (Craig & De Burca, 2011, p.279). The judicial dialogue between the BVerfG and the CJEU revolving around questions of constitutional identity culminated as the BVerfG in its judgment from May 2020 ruled that the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) was contrary to the German Federal Constitution, the *Grundgesetz*[60]. This decision was passed following a CJEU's preliminary ruling requested by the BVerfG on questions related to whether the relevant decisions of the ECB amounted to *ultra vires* acts and were infringing German constitutional identity (Mohay, 2020). German Federal Constitutional Court proclaimed that the CJEU did not scrutinize the ECB's competences sufficiently and authorised the ECB "to pursue its own economic policy agenda". Moreover, it found that it was also" the CJEU who acted *ultra vires*, which is why, in that respect, its Judgment has no binding force in Germany".

So if the constitution is seen as a basis for recognizing the supremacy of Union law, then the absolute supremacy postulated by CJEU is only possible by way of an 'auto-limitation' constitutional clause (Witte, 2011, p.355). Such provision is contained in Article 120 of the Dutch Constitution that prohibits national courts from reviewing the constitutionality of Treaty provisions and of decisions of international organizations, and thereby ensures the absolute supremacy of Treaties once they have been properly ratified.

Italian constitutional case law also represents a similar point of view. *Fragd*[61] decision is a further development of the doctrine implicitly contained in *Frontini* (Cartabia, 1990, p.183) but unlike *Frontini*, the latter shows that the Constitutional Court is willing to test the consistency of individual rules of Community (*Union*) law with the fundamental principles for the protection of human rights that are contained in the Italian Constitution (Gaja, 1990, p.93-34). More recently, the tension between the supremacy and effectiveness of EU law, on the one hand, and the (higher) protection of fundamental rights guaranteed by the national constitutions and respect for the national identity of the Member States, on the other hand, was challenged in *Taricco I*[62] and *Taricco II*[63] judgments. In *Taricco*

[60] BverfG, Judgment of the Second Senate of 05 May 2020 – 2BvR 859/15.

[61] *Spa Fragd v Amministrazione delle Finanze*, Dec 232 of 21 Apr 1989 (1989) 72 RDI.

[62] Case C-105/14, *Ivo Taricco and Others,* ECJ (Grand Chamber) 8 September 2015.

[63] Case C-42/17, *M.A.S. and M.B.*, ECJ (Grand Chamber) 5 December 2017, also known as *Taricco II.*

II, however, the CJEU decided to approach this tension in a constructive way and settle the longstanding dispute with Italian courts - transforming what could have been a war between courts into a dialogue between them (Maesa, 2018, p.50), as it allowed the Italian authorities to apply their national standard of protection of the legality principle, even if it results in "a national situation incompatible with EU law". This decision also tackled the *Komptenz-Komptenz* issue in a certain way.

The 'Supremacy saga' is especially interesting in the case of Central and Eastern European Constitutional Courts that have set themselves in the role of protectors of the constitutional values, defining the limits of the penetration of EU law into the domestic constitutional order. Since the membership of the EU has been seen by the CEE countries as an instrument for securing democracy and human rights, it seems paradoxical that their constitutional courts use the human rights and democracy arguments to derogate from the EU law supremacy doctrine. Sadurski describes this approach as a *democracy paradox* whereby the consolidation of democracy that was used as a motor for European integration in these Member States is now being used as an argument against the legal integration of these countries into the Union (2006, p.36). Very illustrative example in that regard is the decision of the Polish Constitutional Tribunal on the European Arrest Warrant[64] that found the Polish law implementing the Framework Decision 2002/584/JHA unconstitutional as it was contrary to the constitutional prohibition on extradition of Polish nationals enshrined in Article 55 of the Constitution.

Croatian Constitutional Court also seized the opportunity[65] to determine that the Constitution is, by its legal nature, supreme to EU law (Goldner Lang *et al*, 2019, p.1147).

Finally, the present candidate countries, such as the Republic of North Macedonia, are expected in the future to take part in this 'judicial dialogue' on the supremacy doctrine, mainly through the role of the Constitutional Court as a main interlocutor. Current constitutional norm on the status of the international treaties, contained in Article 118 of the North Macedonia Constitution, provides that "international treaties ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law". Hence, ratified international treaties are supreme in relation to the national laws, but not regarding the Constitution. Among other steps for Europenization of the Macedonian constitutional order in the light of the accession to the EU, Constitution of the Republic of North Macedonia should be also amended so as to provide constitutional basis for the delegation of power and transfer of sovereignty to this supranational organization (Shkarikj, 2008, p.51). Having in mind the importance of the EU membership for the Republic of North Macedonia and the persistence in the accession process that has officially started in 2005, when it was granted the candidate country status, the judges should not oppose the acceptance and application of the supremacy of EU law in the context of the *democracy paradox* explained by Sadurski. For that purpose, judges should possess extensive knowledge in EU law and be trained in the manner of European judges. Ensuring stronger acceptance

[64] Polish Constitutional Tribunal, 27 Apr 2005, No P 1/05.

[65] Judgment U-VIIR-1159/2015, 8 April 2015 of the Croatian Constitutional Court; Judgment U-VIIR-1158/2015, 21 April 2015 of the Croatian Constitutional Court.

of the doctrine of supremacy and more uniform application by the Member States is a crucial prerequisite for smooth functioning and further development of the European integration and its legal system.

4. CONCLUSION

The establishment and functioning of a common legal order taking precedence over the legal systems of EU Member States has relied essentially on two pillars, namely the principle of supremacy of EU law and a close cooperation between national courts and the CJEU regarding its acceptance and transposition. As the CJEU envisioned the corollary of sovereignty of the EU legal order is the supremacy of EU law. However, this does not imply that national judges have blindly and unconditionally accepted the supremacy of EU law that still clearly retains its *bi-dimensional* character. The application of the supremacy principle cannot be separated from the transfer of competences and sovereignty of Member States to the Union and the very depth of the integration process. The most recent ruling from the BVerfG on the legality of the Union's fiscal policy showed that the supremacy issue cannot be put *ad acta* and still continues to be surrounded with ambiguity and controversy against its unconditional acceptance as the CJEU requires. It has eroded the judicial dialogue between national courts and Union's Court and the authority of the EU's jurisdiction. But, at the same time, the prompt reaction of the EU institutions confirms the significance of this principle for the overall functioning of the Union and the evolution of the European integration process. In its statement the CJEU recalled that "divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty". It reminded the Member States that this principle is the only way of ensuring their equality in the Union they themselves have created. Commission President von der Leyen even announced that launch of an infringement procedure was under consideration, as an inevitable course of action. One possible path, as suggested by Joseph Weiler and José Luis Requejo, may be the creation of a constitutional chamber within the CJEU, an *ad hoc* body composed of EU and national judges that rules upon the request of a supreme or constitutional court when it considers that the EU has manifestly exceeded its powers (as stated by Sarmiento and Utrilla, 2020). Whatever path it may take, it will clearly determine the future of the European integration process based primarily on the transfer of sovereignty of the Member States *vis a vis* the European Union, as further strengthening of the doctrine of supremacy is necessary to keep the unity of the EU law, ensuring legal certainty and equality of the Member States in the EU.

LIST OF REFERENCES

Albi, A. 2005. *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge: Cambridge University Press.

Albi, A. 2006. *Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of 'Co-operative Constitutionalism'*. Hanover: CONNEX Workshop. Available at: http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/2/Hanover2006/Albi%20EuConst%20Supremacy%20Hanover.pdf (03.09.2020).

Alter, K. J. 1996. The European Court's Political Power. *West European Politics*, 19(3), pp.458–487. DOI: 10.1080/01402389608425146.

Cartabia, M. 1990. The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community. *Michigan Journal of International Law*, 12(1), pp.173-203.

Cenevska, I. 2007. *In search of a 'recipe' for supremacy: The first experiences in the application of the doctrine in some of the new Member States (Hungary, Poland and the Czech Republic)*/master thesis. Bruges: College of Europe.

Charpy, C. 2007. The Status of (Secondary) Community Law in the French Internal Order. *European Constitutional Law Review*, 3(03, pp.436 – 462. DOI: 10.1017/S1574019607004361

Claes, M. 2005. Constitutionalizing Europe at its Source: The 'European Clauses' in the National Constitutions: Evolution and Typology. *Yearbook of European Law*, 24(1), pp.81-125. DOI: 10.1093/yel/24.1.81

Craig, P. and De Búrca, G. 2011. *EU Law: Text, Cases and Materials*. Oxford/New York: Oxford University Press.

Craig, P. The ECJ, National Courts, and the Supremacy of Community Law. In: Miccü, R and Pernice, I. (eds.), *The European Constitution in the Making*, Baden-Baden: Nomos Verlagsgesellschaft, pp.35-52.

Davies, G. 2012. Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Contex. *Journal of European Public Policy*, 19(1), pp.76–91. DOI: 10.1080/13501763.2012.632146.

Dorani, S. 2020. The Supremacy of EU Law over National Law: The ECJ's Perspectives. *Political Reflections*, 6(1), pp.15-21. Available at: http://politicalreflectionmagazine.com/wp-content/uploads/2020/01/PR_Issue22.pdf (14.08.2020).

Douglas, S. 2002. *Constitutional Law of the European Union*. London: Longman Pearson Publishers.

Gaja, G. 1990. New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law. *Common Market Law Review*, 27(1), pp.83-96.

Goldner Lang, I., Đurđević, Z. And Mataija, M. 2019. The Constitution of Croatia in the Perspective of European and Global Governance. In: Albi A., Bardutzky S. (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law.* The Hague: T.M.C. Asser Press, pp.1139-1177.

Grimm, D., Wendel, M. and Reinbacher, T. 2019. European Constitutionalism and the German Basic Law. In: Albi A., Bardutzky S. (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law.* The Hague: T.M.C. Asser Press, pp.407-492.

Leijon, K. 2020. National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?. *West European Politics,* 43. DOI: 10.1080/01402382.2020.1738113.

Maesa, Di Francesco, C. 2018. *Effectiveness and Primacy of EU Law v. Higher National Protection of Fundamental Rights and National Identity a Look through the Lens of the Taricco II Judgment*. Freiburg: EUCRIM. DOI: https://doi.org/10.30709/eucrim-2018-003.

Mattli, W. and Slaughter, A. 1998. Revisiting the European Court of Justice. *International Organization*, 52(1), pp.177–209. DOI: 10.1162/002081898550590

Mohay, A. 2020. I came in here for an argument! The German Federal Constitutional Court's ruling on the PSPP programme and the authority of EU law. *Pécs Journal of International and European Law - 2020/I.* pp.6-8.

Norberg, A. 2006. *Preliminary rulings and the cooperation between national and European Courts*/master thesis. Lund: University of Lund.

Oliver, P. 1994. The French Constitution and the Treaty of Maastricht. *The International and Comparative Law Quarterly,* 43(1), pp.1-25.

Paunio, E. 2010. *Conflict, power, and understanding – judicial dialogue between the ECJ and national courts*, Helsinki: NoFo 7. Available at: http://www.helsinki.fi/nofo/NoFo7Paunio.pdf (29.08.2020).

Peročević, K. 2017. European Union Legal Nature: EU as Sui Generis - A Platypus-Like Society. InterEULawEast Journal for the International and European Law, Economics and Market Integrations, 4(2), pp.101-116. DOI: 10.22598/iele.2017.4.2.7.

Rosas, A. 2007. The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue. *European Journal of Legal Studies*, 1(2), pp.1–16.

Sadurski W. 2006. *Solange, chapter 3: Constitutional Courts in Central Europe- Democracy-European Union*. Florence: EUI Working Paper LAW No. 2006/40.

Sarmiento, D and Utrilla, D. 2020. *Germany's Constitutional Court has gone nuclear. What happens next will shape the EU's future.* EURONEWS. Available at: https://www.euronews.com/2020/05/15/germany-constitutional-court-gone-nuclear-what-happens-next-will-shape-the-eu-future-view (10.09.2020).

Shkarikj, S. 2008. Evropskoto ustavno pravo I evropeizacijata na makedonskoto ustavno pravo. In: Kambovski, V, Mirchev, D. and Shkarikj, S. *Evolucijata na ustavniot system na Republika Makedonija vo presret na usvojuvanjeto na Ustavniot dogovor na Evropskata Unija*. Skopje: MANU, pp.27-56.

Steiner, J., Woods, L. and Twigg-Flesner, C. 2003. *Textbook on EC law* (8th ed). Oxford: Oxford University Press.

Svensson, S. 2008. *European Integration and the ECJ: The role of the European Court of Justice in the integration of the European Community*. Lund: Lund University Libraries. Available at: http://lup.lub.lu.se/student-papers/record/1316466 (12.08.2020).

Van Rossem, J. N. 2013. The autonomy of EU Law: More is less?. In: Wessel, R. A. and Blockmans, S. (eds.). *Between Autonomy and Dependence*. The Hague: T.M.C. Asser Press, pp.13-46.

Vauchez, A. 2008. *Integration-through-Law: Contribution to a Socio-history of EU Political Common Sense*. Florence: EUI Working Papers RSCAS 2008/10. Available at: https://cadmus.eui.eu//handle/1814/8307 (12.08.2020).

Vincenzi, C. and Fairhurst, J. 2002. *Law of the European Community* (3rd ed). London: Longman Pearson Publishers.

Weatherill, S. 1993. *EC Law, The Essential Guide to the Legal Workings of the European Community*. London: Blackstone.

Weiler, J. 1981. The Community System: the Dual Character of Supranationalism. *Yearbook of European Law*, 1(1), pp.267-306. DOI: 10.1093/yel/1.1.267.

Weiler, J. 1994. A Quiet Revolution: The European Court of Justice and Its Interlocutors. *Comparative Political Studies*, 26(4), pp.510–534. DOI:10.1177/0010414094026004006.

Witte, B. 1991. Community Law and National Constitutional Values. *Legal Issues of European Integration*, 18(2), pp.1-22.

Witte, B. 1999. Direct Effect, Primacy, and the Nature of the Legal Order. In: Craig, P. and De Búrca, G. (eds.), *The Evolution of EU Law,* Oxford/New York: Oxford University Press, pp.177-213.

Witte, B. 2011. Direct Effect, Primacy, and the Nature of the Legal Order. In: Craig, P. and De Búrca, G. (eds.), *The Evolution of EU Law,* Oxford/New York: Oxford University Press, pp.323-362.

LEGAL SOURCES AND CASE LAW

Case C-26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

Case C-6/64, *Flaminio Costa v ENEL* [1964] ECR 585, 593.

Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfur und Vorratsstelle fur Getreide und Futtermittel,* [1970] ECR 1125.

Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629.

Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd. and Others,* [1990] ECR I-2433.

Case C-105/14, *Ivo Taricco and Others,* ECJ (Grand Chamber) 8 September 2015.

Case C-42/17, *M.A.S. and M.B.*, ECJ (Grand Chamber) 5 December 2017, (also known as *Taricco II).*

Fromagerie Franco-Suisse Le Ski v. Etat Belge [1972] CMLR 330.

Frontini v Ministero delle Finanze [1974] 2 CMLR 372.

Spa Fragd v Amministrazione delle Finanze, Dec 232 of 21 Apr 1989 (1989) 72 RDI.

Dec of 24 May 1975 in *Administration des Douanes v Société 'Cafés Jacques Vabre' et SARL Weigel et Cie* [1975] 2 CMLR 336.

Dec of 20 Oct 1989 in *Raoul Georges Nicolo* [1990] 1 CMLR 173.

BVerfG, case 2 BvL 52/71, Solange I, order of 29 May 1974.

BVerfG, case 2 BvR 197/83, Solange II, order of 22 Oct. 1986.

BVerfG, case 2 BvR 2134, 2159/92, Treaty of Maastricht, judgment of 12 Oct. 1993.

BVerfG, 2 BvR 2661/06, 6 July 2010.

BVerfG, case 2 BvE 2/08 et al., Treaty of Lisbon, judgment of 30 June 2009.

BverfG, Judgment of the Second Senate of 05 May 2020 – 2BvR 859/15.

Polish Constitutional Tribunal, 27 Apr 2005, No P 1/05.

Judgment U-VIIR-1159/2015, 8 April 2015 of the Croatian Constitutional Court; Judgment U-VIIR-1158/2015, 21 April 2015 of the Croatian Constitutional Court.

Treaty of Maastricht on European Union. OJ C 191, 29.7.1992.

Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities. OJ C 080, 10/03/2001.

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities. OJ C 340, 10.11.1997.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. OJ C 306, 17.12.2007.

OFFICIAL STATEMENTS

PRESS RELEASE No. 58/20 following the judgment of the German Constitutional Court of 5 May 2020. Court of Justice of the European Union, Luxembourg, 8 May 2020. Available at:https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (10.09.2020).

PRESS RELEASE - ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate. European Central Bank, Frankfurt am Main, 5 May 2020. Available at: https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html (10.09.2020).

PRESS RELEASE - Statement by President VON DER LEYEN. European Commission, Brussels, 10 May 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846 (10.09.2020).

UDK: 339.9(EU) DOI: https://doi.org/10.18485/iup_rlr.2020.ch3

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THE BALKAN POLITICAL AREA: PROSPECTS FOR A RENEWED INTEGRATION OF THE EUROPEAN UNION

The contribution briefly analyses the methods and criteria for accession of a state to the European Union and investigates the accession process of the Western Balkans states. The contribution intends to underline the strategic importance of the states of the Balkan Region for the purpose of relaunching the process of European integration.

Key words: Balkan Region, accession to the EU, European integration, democracy.

1. INTRODUCTORY REMARKS

As it is well known, the European Union is an international organization open to the accession[66] of new states which, from the original six member states, has registered an ever-increasing number of accessions.

In particular, the enlargement of the European Union to the East for a variety of reasons has given rise to different points of view between those for and against; between those who considered the opening of the EU to the countries of the Balkan Region as a duty and those who, on the contrary, considered it a hasty and instrumental act to the interests of some Western European member states.

Whatever the position one wants to take, the fact remains that the Balkan region, despite all its contradictions and its various political and social traditions, represents an interesting political space that can constitute an important perspective for the relaunch of the process of European integration.

Undoubtedly, the fragility of the economic and social systems of some of the countries of the Balkan region and the reaction of some of them to the problems deriving from

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[66] In reality, it is a real admission procedure which, as evident, requires the accord the state requesting to be admitted and of the international organization accepting the request. On the contrary, the accession procedure concretizes the participation of the state, precisely, with the simple accession without the states which are already members being able to plead anything in relation to the new participant in the international organization.

mass immigration and the deportation policy carried out by some member states of the European Union is a problem that must be tackled from an integrationist point of view and not, as it has been until now, in terms of almost ghettoization of these states. The great opportunity that the enlargement to the East represents for the process of European integration remains a fact.

In this context, particular attention should be paid to the so-called "Visegrád Group", the political cooperation agreement that brings together Poland, Hungary, the Czech Republic and Slovakia[67], acting as a barrier not only to uncontrolled immigration[68] but also to hyper-liberal economic policies.

2. THE EU ACCESSION PROCEDURE

The procedure for the accession of new member States is governed by Article 49 of the TEU. This is an apparently simple procedure which in reality involves a complex system of bilateral negotiations conducted by the Commission and by the State that has applied for membership[69].

European States[70] can apply for EU membership by addressing the request to the Council, which decides unanimously after consulting the Commission and after approval by the European Parliament.

Not only the European Parliament but also the national parliaments must be informed of the application for the membership, in compliance with the new role assigned to them by the Lisbon Treaty.

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[67] As is known, the so-called "Visegrád Group" is a political cooperation agreement dating back to February 1991 concluded between Poland, Czechoslovakia and Hungary, close to the fall of the Soviet Union. Initially known as the "Visegrád Triangle", the group changed its name in 1993 following the division of Czechoslovakia into the Czech Republic and Slovakia.

[68] Some states of the Balkan region have been hit by the wave of migration along the so-called "Balkan route". On the other hand, the negative attitude of these states towards the reception and inclusion of migrants is shared by the latter who consider the Balkans a sort of "transit land" towards richer and more developed Central and Northern European states.

[69] After having acquired the status of candidate country, accession negotiations are started. There are thirty-five chapters relating to the negotiation procedure. Before its launch, the Commission publishes a report for each chapter recommending the start of negotiations for the chapter in question or setting parameters that must be respected by the candidate country. When the progress made by the state towards accession is considered satisfactory, the Commission can recommend "provisionally closing" the negotiating chapter. The Council again decides unanimously. When the negotiations of all chapters are completed, the general conditions - including any safeguard clauses and transitional provisions - are inserted in an accession treaty between the member states of the European Union and the candidate state. When the negotiations of all chapters are completed, the general conditions - including any safeguard clauses and transitional provisions - are inserted in an accession treaty between the member states of the European Union and the candidate state. See: Benedetti, *La crisi del processo d'integrazione europea tra ammissione e recesso. Le sfide e le opportunità dell'allargamento ai Balcani occidentali e della Brexit*, Roma, 2017.

[70] As for the geographical requirement, it should be noted that due to the indefinability of the borders of Europe, this is a criterion that was used on the basis of certain data only on the occasion of the rejection of Morocco's application for membership in 1987. In this regard, there are those who argue that the geographical borders of Europe are more than anything else the result of a sum of historical and psychological elements. See: Mikkeli, *Europa: storia di un'idea e di un'identità*, Bologna, 2002, p. 24 ss.

The application must come from the state that intends to join which must meet two requirements: a) a requirement of a geographical nature that the state must belong to Europe and b) a requirement of a political nature that the state must respect and promote the values referred to in Article 2 TEU on which the European Union is founded, namely the respect for human dignity, freedom, democracy, equality, the rule of law and human rights including the rights of minorities.

The accession of a new member state requires a unanimous decision by the Council and therefore, essentially, the approval of all member states.

The Council acts unanimously after consulting the Commission and after obtaining the consent of the European Parliament, which decides by a majority of its members.

The state thus acquires the *status* of candidate country for accession.

It should be noted that the obligation to consult the Commission does not bind the Council which, obliged exclusively to obtain the opinion of the Commission, can, however, also ignore it and decide in a different way.

On the contrary, the approval of the Parliament binds the Council which, in the event of non-approval by the Parliament, cannot decide on the admission of a new members State.

As for the "eligibility criteria agreed by the European Council", these are the criteria established at the Copenhagen European Council of 21-22 June 1993 where three categories of criteria were identified: 1) a legal criterion relating to the adaptation of the candidate state to the Treaties and the EU *acquis*; 2) a political criterion relating to the institutional stability of the candidate state which must guarantee democracy, the rule of law, human rights and the protection of minorities; in essence, the compliance with the values referred to in Article 2 TEU (formerly Article 6); 3) an economic criterion relating to the existence of an open market economy in a regime of free competition[71].

The accession procedure ends with the stipulation of an international agreement between the already member states and the acceding state which in an annexed document contains the conditions of admission and the adjustments made necessary by the new entry or entries.

The effective entry of the new member state (or states) will take place after the conclusion of the ratification procedures by all member states and the entry into force of the accession agreement[72].

Following the withdrawal of the United Kingdom, the European Union currently has 27 member states[73].

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[71] These criteria were identified precisely in function of the accession of the Eastern European states. It is no coincidence, in fact, that the political criteria specifically concern the presence of democratic institutions that guarantee the rule of law and a democratic order based on parliamentary representation, respect for fundamental rights and freedoms and respect for minorities. See, about it, in: Schimmelfenning-Sedelmeier (eds.), *The politics of European Union Enlargement: Theoretical Approaches*, London- New York, 2005.

[72] The accession procedure to become a member state to the European Union (as well as the withdrawal procedure), highlights the typically international profile of the EU, its lack of originality and its intimate link with the member states that determined its birth and determine its permanent existence.

[73] Compared to the original nucleus of the six founding states, the accession of the other member states took place in the following moments: 1 January 1973 - United Kingdom, Ireland and Denmark; 1 January 1981 - Greece; 10 January - 1986 Spain and Portugal; 1 January 1995 - Austria, Finland and Sweden; 1 May 2004 - Cyprus, Estonia, Lithuania, Latvia, Malta, Poland, Slovakia, Slovenia, the Czech Republic and Hungary; 1 January 2007 - Bulgaria and Romania; 1 July 2013 - Croatia.

3. THE ENLARGEMENT OF THE EUROPEAN UNION AS A POLITICAL PROCESS

Undoubtedly, the enlargement of the European Union and the accession of new member states can be considered a political process that takes place within a specific legal framework.

It is clear that the member states of the European Union have always considered enlargement as an instrument of political stability as well as of promotion (at least until a given moment) of the economic prosperity of its member states[74].

It is hardly necessary to recall that despite the important role played by the Commission, the accession process is a typically intergovernmental process that requires the unanimity of the Council and the ratification of the accession agreement by all states. And from this specific point of view, it is clear that the accession of a new state is conditioned more by political considerations and dynamics, which can influence and determine the outcome, than by strictly legal criteria.

If well managed, the enlargement process is the most important integration tool available to the European Union which, beyond the criticisms that can be made of its current political and economic situation, has contributed to a large extent to the functioning of democracies, respect for fundamental rights and freedoms and the rule of law in many European States (including those of the East) guaranteeing peace, security and political and economic stability.

In this sense, although it must be recognized that the hasty enlargement of 2004 contributed in no small measure to the current state of crisis of the European Union, affecting the ability of its institutions to function properly in the complicated political framework of the plurality of its states, there is no doubt that the opening towards the Balkan region and the conclusion of the accession process of the already candidate states can stimulate the resumption of the political integration process.

Currently the candidate countries for accession are Turkey, North Macedonia, Albania, Serbia, Montenegro and Iceland which, despite not having withdrawn the application for membership, in 2015 asked the European Union not to consider it anymore as a candidate country. Potential candidate states are Bosnia and Herzegovina and Kosovo.

On 30 September 2018 in the former Yugoslav Republic of Macedonia, the consultative referendum on changing the name of this small state, demanded by Greece as a condition for its accession to the European Union, failed (due to failure to reach a quorum). On October 19, the Parliament of the former Yugoslav Republic of Macedonia, albeit by a narrow margin, had approved the amendment to the Constitution to change the name of the country to the Republic of North Macedonia. At the beginning of January 2019, the parliamentary procedure was launched which definitively approved the constitutional amendment relating to the change of name as requested by Greece. At the end of January, the Greek Parliament also approved the relative agreement between the Greek Premier and the North Macedonian Premier and, at least from this specific point of view, one of

[74] Instability in the Balkan region is a problem in Europe and history has shown that the integration of the Western Balkans has been the primary means of ensuring security, stability and democracy.

the obstacles to the accession of the Republic of North Macedonia to the European Union has been overcome[75].

4. THE STATE OF THE ART OF THE ACCESSION PROCESS OF THE STATES OF THE BALKAN REGION

More than a legal process, the enlargement process can be considered a process influenced by political logic and calculations that leaves to the states which are already members a wide margin of discretion on whether or not to admit a state that has applied for membership (or admission) and the European Union reserves the right to decide when a state is ready to start the accession process.

As for the states of the Balkan region, the beginning of the negotiations and, therefore, the accession process was preceded by a Stabilization and Association Agreement that the Treaty (art. 217 TFEU) defines as an association involving reciprocal rights and obligations, joint actions and particular procedures, relating to political, economic, commercial and human rights issues. In other words, the association agreements define the legal basis on future mutual rights and obligations between the parties in view of a possible accession of the state to the European Union[76].

The gradual fulfilment of the commitments undertaken under the association agreements, as well as the achievement of the objectives set with the Copenhagen criteria, is the main condition for obtaining the necessary technical-financial assistance from the EU by the state that has applied for its membership. At this stage, the European Commission monitors the progress made by the states requesting admission to the European Union.

Once the pre-accession phase is concluded, the procedure is perfected, as mentioned, with the accession treaty.

Currently, the accession and pre-accession situation of the states of the Balkan region is as follows: Albania applied to join the European Union on 28 April 2009.

In 2012, the Commission showed positive progress and recommended the granting of the candidate *status* to Albania, subject to the necessary adoption of the reforms not yet implemented. This condition was largely satisfied before the elections held in June 2013 and in October of the same year the Commission recommended the recognition of Albania as a candidate country.

Since June 2014, Albania has acquired the *status* of candidate country and due to the progress made, the Commission has recommended the opening of accession negotiations with Albania.

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[75] Since December 2009, citizens of the former Yugoslav Republic of Macedonia (now the Republic of North Macedonia), Montenegro and Serbia have benefited from visa exemption in the Schengen area; this exemption for citizens of Albania and Bosnia and Herzegovina has instead been in force since November 2010. In January 2012, a dialogue with Kosovo on visa liberalization was launched and in July 2018 the Commission confirmed that Kosovo had satisfied the last criterion.

[76] See, in this regard: Inglis, *The Europe Agreements Compared in the Light of their Pre-accession Reorientation*, in *Common Market Law Review*, 37, 2000, pp.1173-1189.

In June 2018 the Council had reached the conclusion of a possible opening of accession negotiations with Albania in June 2019; however, the Council did not initiate the opening of accession negotiations and only in March 2020 the Council, in its "General Affairs" composition, decided to start the accession negotiations with the Republic of Albania.

Bosnia and Herzegovina is a potential candidate country. Its application for membership was submitted on 15 February 2016 and the Commission published its opinion in May 2019, including a list of 14 key priorities.

The former Yugoslav Republic of Macedonia (now the Republic of North Macedonia) applied to join the European Union in March 2004 and was granted candidate country *status* in December 2005.

Since 2009, the Commission, with the support of the Parliament, has recommended the opening of the accession negotiations. However, it was not possible to start accession negotiations mainly due to the dispute with Greece over the country's use of the name "Macedonia". The issue was resolved on the basis of the "Prespa" agreement on the new name "North Macedonia", with effect from February 2019. In March 2020, the Council in its "General Affairs" composition decided to start the accession negotiations with the Republic of North Macedonia[77].

Kosovo is also a potential candidate country for EU membership. Its future integration into the European Union, as well as that of Serbia, remains linked to the implementation of the EU-facilitated dialogue between Kosovo and Serbia, which should lead to a comprehensive and legally binding agreement on the normalization of their relations.

Montenegro applied to join the EU in December 2008. It was granted the *status* of candidate country in December 2010 and the accession negotiations began in June 2012.

At the end of 2018, 32 of the total 35 negotiation chapters had been launched, but only five had been provisionally closed. The last remaining key chapter (on competition policy) was not yet open in 2019.

As will be said, in February 2018 the Commission published a new strategy on the Western Balkans where it states that Montenegro (and Serbia) could join the European Union by 2025.

Serbia applied to join the European Union in December 2009 and, in March 2012, when Belgrade and Pristina reached an agreement on the regional representation of Kosovo, it was granted the *status* of candidate country.

Accession negotiations were formally launched on 21 January 2014. A total of 18 chapters had been launched by the end of 2019.

With the exception of Croatia which joined the European Union in July 2013, the other Western Balkan states have still made limited progress in the accession process.

Although the European Union since the European Council of Santa Maria de Feira in June 2000 had announced that the countries of the Balkan Region had a good chance of joining the EU, so far, as mentioned, Albania, the Republic of North Macedonia, Serbia and Montenegro are candidate countries while Bosnia and Herzegovina and Kosovo are potential candidate countries. This despite the fact that the European Union has for some

[77] See: Friedman, *The Name's Macedonia. North Macedonia*, in *Foreign Affairs*, October 2018.

time launched a legal-political framework aimed at guiding these States in the integration process, also defining some principles of political conditionality for the purposes of the Europeanization of an area of particular strategic importance for European political stability.

5. CONCLUDING CONSIDERATIONS

In 2017, the then President of the European Commission, Jean Claude Juncker, in his speech on the state of the Union, declared that for the purposes of European stability the Union cannot avoid considering "credible enlargement prospects for the Western Balkans"[78].

For its part, the European Commission has published a communication in which it foresees the accession of new states by 2025,[79] recommending the accession of the countries of the Balkan region in a perspective of greater security for the European Union and guarantees of democracy and respect for human rights by these countries[80].

However, the Commission did not fail to highlight that, despite the efforts made and the aid received by the European Union, including through the stabilization and association agreements (SAA), the countries of the Western Balkans are recording a serious delay in adapting their legal system to the Copenhagen criteria and therefore to the founding principles of the European Union.

In this context, the countries of the Western Balkans must implement extensive reforms in important areas: the rule of law, fundamental rights and governance must be strengthened. The reforms of the judicial system, the fight against corruption and organized crime, as well as the public administration reform must be translated into tangible results and the functioning of democratic institutions must be seriously strengthened.

These states must also continue along the path of economic reforms and resolve their structural weaknesses, low competitiveness and high unemployment.

Nonetheless, the Commission reaffirms the political-economic interest of the European Union in the incorporation of the Balkan region and underlines how the enlargement policy is part of a broader strategy of strengthening and geostrategic positioning within which the accession of the Western Balkans is essential.

Because of these considerations, the European Union is committed to increasing its support for the transformation process in the Western Balkans, hoping for the conclusion of accession negotiations by 2025.

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[78] "If we want more stability in our neighbourhood, then we must also maintain a credible enlargement perspective for the Western Balkans. It is clear that there will be no further enlargement during the mandate of this Commission and this Parliament. No candidate is ready. But thereafter the European Union will be greater than 27 in number. Accession candidates must give the rule of law, justice and fundamental rights utmost priority in the negotiations".

[79] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*, COM(208) 65 final, 6 February 2018.

[80] See: Rosanò, *Fra ipocrisia organizzata e allargamento strategico: l'Unione europea, i Balcani occidentali e alcune prospettive di crisi dello stato di diritto*, in *federalismi.it*, September, 2019.

LIST OF REFERENCES

Benedetti, *La crisi del processo d'integrazione europea tra ammissione e recesso. Le sfide e le opportunità dell'allargamento ai Balcani occidentali e della Brexit*, Roma, 2017.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*, COM(208) 65 final, 6 February 2018.

Friedman, *The Name's Macedonia. North Macedonia*, in *Foreign Affairs*, October 2018.

Inglis, *The Europe Agreements Compared in the Light of their Pre-accession Reorientation*, in *Common Market Law Review*, 37, 2000, pp.1173-1189.

Mikkeli, *Europa: storia di un'idea e di un'identità*, Bologna, 2002.

Rosanò, *Fra ipocrisia organizzata e allargamento strategico: l'Unione europea, i Balcani occidentali e alcune prospettive di crisi dello stato di diritto*, in *federalismi.it*, September, 2019.

Schimmelfenning-Sedelmeier (eds.), *The politics of European Union Enlargement: Theoretical Approaches*, London- New York, 2005.

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THE REVISED ENLARGEMENT METHODOLOGY FOR THE WESTERN BALKANS**

The article examines the EU Commission's Communication of 5 February 2020 introducing a revised enlargement methodology for the purpose of reinvigorating the accession process of the Western Balkans candidate countries and make it more effective. Reasons put forward by some EU Member States at the end of 2019 for vetoing the opening of accession negotiations with Albania and North Macedonia are also discussed. The article suggests that the strategy outlined by the Council Conclusions of 5 June 2020 of enhancing cooperation with Western Balkans partners in the field of justice and home affairs (in particular, by strengthening cooperation with relevant EU Agencies) might be the key driving force for a more credible and dynamic EU perspective for the Western Balkans.

Keywords: Western Balkans; EU Accession process; enlargement methodology; migration and security; EU agencies.

1. THE WESTERN BALKANS AS A GEOSTRATEGIC INVESTMENT FOR THE EU AT TIMES OF HEIGHTENED GEOPOLITICAL COMPETITION

Fundamental values enshrined in article 2 of the Treaty on European Union (TEU) are the most important reference for the enlargement policy. The accession of the Western Balkans to the EU is however a long and complex way to go due to foreseeable and unpredictable causes.

Among the foreseeable causes we can remember the legacy of past armed conflicts and the starting conditions of these neighbouring countries while among those unpredictable one should refer to some recent changes of the global geopolitical scenario such as, for

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instance, the increased political and economic role of China and Russia in the region which might influence the relationship between the EU and the Western Balkans countries.

New political actors in the region have "heightened geopolitical competition" and pushed the EU to reaffirm that full EU membership for the Western Balkans "remains more than ever a geostrategic investment in a stable, strong and united Europe" (European Commission, 2020a, p. 1). For the first time in the long history of European enlargements, the accession process is marked by a high geopolitical competitiveness with other global political actors. It is, therefore, not by chance that EU Institutions adopted several acts concerning this accession process to begin with the 2018 strategy for "a credible enlargement perspective for and enhanced EU engagement with the Western Balkans" (European Commission, 2018).

The European Commission (2018, pp. 1 and 18) clearly states that "the Western Balkans are part of Europe", their European future "is an investment in the EU's security, economic growth and influence" and "most fundamentally, leaders in the region must leave no doubt as to their strategic orientation and commitment [...] for making this historical opportunity a reality".

Credibility is the watchword for the Western Balkans which must be demonstrated by leaving no doubt as to their long-term political choices. Yet, credibility also requires credible efforts and reforms in crucial areas (e.g. rule of law, fundamental rights, governance) with delivery of tangible, everlasting and sustainable results. Finally, credibility also depends on overcoming the legacy of the past, establishing good neighbourly relations and "solving open issues well before their accession to the EU [because] the EU will not accept to import these disputes and the instability they could entail" (European Commission, 2018, pp. 7 and 3).

Credibility is also the watchword for the EU. It calls for enhanced engagement with the Western Balkans, made of new and/or strengthened actions and policies brought together by the Commission in a range of flagship initiatives aimed at better supporting comprehensive transformations and reforms in key crucial areas of common interest (rule of law, security and migration, socio-economic development, connectivity, digital agenda, reconciliation and good neighbourly relations).

2. THE 2019 COMMISSION COMMUNICATION ON EU ENLARGEMENT POLICY

The final Declaration of the EU-Western Balkans Summit held in May 2018 in Sofia reaffirmed the EU's "unequivocal support for the European perspective of the Western Balkans" and the recommitment of the Western Balkans "to the European perspective as their firm strategic choice [by way of a] clear public communication" (EU-Western Balkans Summit, 2018, § 2).

The subsequent Commission Communication on EU Enlargement Policy tried to take advantage of the positive political momentum created by the Sofia Summit. With regard to Montenegro and Serbia (current frontrunners in the accession negotiations), the European Commission left open their "membership in a 2025 perspective" but urged them to "significantly step up efforts" in reforming the crucial areas of the rule of law and fundamental rights. In addition, the European Commission praised Albania and North

Macedonia for having "embraced the opportunity and delivered on reforms" concrete and significant results (European Commission, 2019, pp. 1 and 11).

In particular, North Macedonia was praised for having "made great strides towards its strategic goal of EU and NATO integration" (North Macedonia eventually became a NATO member in 2020), "its determination to advance the EU reform agenda" and the "positive change in the mind-set" of national political actors as demonstrated by the 2019 Presidential elections held in a calm, peaceful and transparent manner (European Commission, 2019, pp. 14-15).

Albania was instead praised for its "good progress" and "continuous determination to advance on the EU agenda", notably in the implementation of justice reform and in the fight against organised crime and corruption (European Commission, 2019, p. 15).

In light of the progress achieved, the Commission thus recommended the opening of accession negotiations with Albania and North Macedonia. Yet, almost foreshadowing future problems, the Commission strongly underlined the urgent need for "Union's concrete and fast action [...] to lock in long-term positive momentum across the region" by opening the accession negotiations and, above all, the risk to damage its own credibility "throughout the region and beyond" and "help the EU's geopolitical competitors to root themselves on Europe's doorstep" in case of failure of rewarding the two countries for their progress (European Commission, 2019, p. 2).

With clear and eloquent words, the Commission highlighted the political crossroads to which EU Member States and institutions had reached in the enlargement process and warned about the dramatic consequences of making the wrong choice.

3. THE FRENCH NON-PAPER ON THE REFORMED APPROACH TO THE EU ACCESSION PROCESS

The European Commission's concerns proved to be justified a few weeks later with the adoption of its Communication on EU Enlargement policy.

At its June 2019 meeting, in fact, the Council did not endorse the Commission's recommendation on opening negotiations with Albania and North Macedonia in light of the limited time available and the importance of the matter and decided to revert to the issue no later than October 2019.

Unfortunately, at its October 2019 meeting the European Council decided to revert once again to the issue of enlargement before the EU-Western Balkans summit of May 2020. But most importantly the meeting highlighted deep divisions among the EU Member States on the opening of accession negotiations with the two countries. France vetoed the opening with both states (Denmark and Netherlands were against the opening only with Albania) for having not yet fully achieved the requested benchmarks (notwithstanding the different evaluation made by the Commission).

The deadlock at the European Council unleashed many criticisms.

As reported by the press (Rettman, 2019, pp. 2-3), in fact, Konrad Szymanski, Polish EU affairs minister, noted that "other countries – Russia and China [...] are just waiting for the EU to withdraw from this region". For his part, Micheal Roth, German EU affairs

minister, urged the EU to keep its promises while a German diplomat warned that "much can be lost by creating a strategic vacuum" in the region. Finally, then-EU enlargement commissioner Johannes Hahn apologised to North Macedonian and Albanian citizens for the EU having failed to deliver on its promises due to a "certain trend that those who are already in the EU are a little reluctant to let others in".

A few weeks later France reaffirmed its "unequivocal support to the European perspective of the Western Balkans countries" and circulated a brief non-paper advocating for a "renewed approach to the accession process" to make it more effective, concrete and responsive. The core idea was to organize negotiations "on several successive stages, which would form coherent policy blocks" so as to enable gradual access of candidate countries to EU policies and programmes until full and complete accession (France Non-Paper, 2019, p. 1).

Accession negotiations would no longer be based on simultaneous opening of a large number of thematic chapters but on a few "policy blocks" or "stages". Only the completion of each stage would allow the candidate country "to move to the next stage [and] open up the possibility to participate in EU programmes, to be involved in certain sectoral policies and, where appropriate, to benefit from certain targeted finance" (France Non-Paper, 2019, p. 2).

The "gradual association" would also require precise and detailed criteria linked to "easily and objectively verifiable indicators" (inspired by indicators set out by the EU and other international organizations) and stringent conditions to be effectively respected for moving from one stage to the next as well as tangible benefits and increased financial support to be provided by the EU and its Agencies (France Non-Paper, 2019, p. 2). French proposal was also grounded on the principle of reversibility ("whereby the candidate country, in whole or in part, no longer meets certain criteria or ceases to fulfil the commitments it has undertaken") and urged for a stronger political governance of the new process by Commission and Member States (France Non-Paper, 2019, pp. 2-3).

France proposed to organize the accession process in seven stages which would replace former corresponding chapters:

1) rule of law, fundamental rights, justice and security (once completed this stage, for instance, the candidate country would enter into cooperation agreements with Eurojust); 2) education, research and space, youth, culture, sports, environment, transport, telecommunications and energy (Erasmus+ and Horizon funds would then be available); 3) employment, social policy, health and consumer protection, competitiveness (once completed this stage, participation in the EU's industrial policy and/or involvement in important European projects would be possible); 4) economic and financial affairs (candidate country would then enter the banking union and the capital markets union); 5) internal market, agriculture and fisheries (access to the customs union and participation in the internal market); 6) foreign affairs (consular cooperation arrangements and possible involvement in defence programmes); 7) other matters (once completed this final stage, there would be full accession to the EU).

4. THE COMMUNICATION FROM THE COMMISSION ON THE REVISED METHODOLOGY FOR THE ACCESSION PROCESS OF THE WESTERN BALKAN COUNTRIES

Vetoes casted against the opening of accession negotiations with Albania and North Macedonia and the French non-paper had the merit to urge EU institutions and Member States to rethink and revise the whole process so as to make it more credible, useful and effective.

The debate on pros and cons of the accession process resulted in the February 2020 Communication from the Commission (European Commission, 2020a) aimed at enhancing the accession process through a revised methodology guidelines and general principles of which are influenced by the French non-paper.

In its Communication the Commission (2020a, pp. 1-2) reaffirms some benchmarks of the EU's approach towards the Western Balkans (unequivocal support for their European perspective; a geostrategic investment especially at times of heightened geopolitical competition; the need "to tackle malign third country influence" in the region; etc.) but, at the same time, the Commission revises the methodology of the accession process in four key-areas in order to reinvigorate its credibility, political nature, dynamism, predictability and conditionality (2020a, pp. 2-6).

More credibility must "rest on solid trust, mutual confidence and clear commitments on both sides". Western Balkans leaders "must deliver more credibly on their commitment to implement the fundamental reforms required", while the EU must reward candidate countries by advancing the accession process once they have met established criteria and conditions. In a few words, for Western Balkan countries credibility means to implement long-term, structural and tangible reforms and, in particular, those in the fields of rule of law, functioning of democratic institutions, public administration, and economy (European Commission, 2020a, pp. 2-3).

A "stronger political steer" in the accession process requires "to put the political nature of the process front and centre and ensure stronger steering and high-level engagement from the Member States". It seems that the Commission wanted the EU Member States to take more responsibility and show the face after some of them vetoed against Albania and North Macedonia notwithstanding the Commission had expressly recommended the opposite. The Commission, in fact, underlines that the European future of the Western Balkans "is a significant political and not simply technical undertaking" for the EU Member States and urges them "to contribute more systematically to the accession process, including via monitoring on the ground through their experts, through direct contributions to the annual reports and through sectoral expertise" so that political dimension of the accession process would be primarily handled by the EU Member States while technical and procedural dimension by the Commission (European Commission, 2020a, p. 3).

For this reason the revised methodology provides for "high level political and policy dialogue with the countries, through regular EU-Western Balkans summits and intensified ministerial contacts" and includes the opportunity to let candidate countries participate as observers in key EU meetings. For the same reason the revised methodology provides for country-specific intergovernmental conferences based on the Commission's annual

individual reports where EU Member States and candidate countries take stock of the overall accession process, discuss pros and cons of the situation of the candidate country and set out further developments and measures (European Commission, 2020a, pp. 3-4).

A "more dynamic process" essentially means that "the negotiating chapters will be organised in [six] thematic clusters" (European Commission, 2020a, p. 4). The influence of the seven "stages" proposed by the French non-paper is particularly evident, even though the French "gradual association" principle with its strict conditionality to move to the next stage is mitigated in the Commission's Communication.

The six thematic clusters outlined in the Annex to the Communication are as follows:

1) Fundamentals (gathering together several existing chapters such as, for instance, judiciary, fundamentals and justice, freedom and security); 2) Internal Market (free movement of goods, workers, services and capital; competition policy; company law; etc.); 3) Competitiveness and Inclusive Growth (information society and media; taxation; economic and monetary policy; etc.); 4) Green Agenda and Sustainable Connectivity (energy; transport policy; environment and climate change; trans-European networks); 5) Resources, Agriculture and Cohesion (agriculture and rural development; fisheries; etc.); 6) External Relations (external relations; foreign, security & defence policy).

Main benefits resulting from the re-organization of the chapters in thematic clusters are to "allow a stronger focus on core sectors in the political dialogue" and to better identify "the most important and urgent reforms per sector". Accordingly, negotiations will be opened as a whole on each cluster rather than on an individual chapter basis (European Commission, 2020a, p. 4).

The thematic clusters' approach applies to recently opened negotiations with Albania and North Macedonia, while with Serbia and Montenegro the new approach is only an option to be applied within the existing negotiations frameworks and with the consent of these two countries.

Finally, a strengthened predictability and conditionality of the accession process requires, in terms of more predictability, "greater clarity on what the Union expects of enlargement countries at different stages of the process, and what the positive and negative consequences are of progress or lack thereof". To this end and still echoing the French non-paper, the Commission states the principle that conditions set for candidate countries "must be objective, precise, detailed, strict and verifiable". Also, the Commission expressly committed to "provide clearer guidance on specific reforms priorities and alignment criteria as well as expectations for next steps in the process" in its annual enlargement communications and reports so that candidate countries may be better aware of effective progress and failures on their way towards the accession (European Commission, 2020a, p. 5).

In terms of strategic communication to citizens and societies, an important side-effect is also to eliminate any uncertainty and ambiguity in the political dialogue between the EU and the Western Balkans and, therefore, to better counter the influence or propaganda of other political actors in the region.

Of course, predictability and conditionality are closely interlinked and conditionality must be clearer and more transparent as well. The enhanced conditionality is based on incentives ("clear and tangible" and "of direct interest to citizens") and negative measures (to

be "more decisive" for sanctioning "any serious or prolonged stagnation or even backsliding in reform implementation and meeting the requirements of the accession process").

Incentives may consist both of "accelerated integration and 'phasing-in' to individual EU policies, the EU market and EU programmes" and of increased funding and investments on behalf of the EU. Instead, negative measures – informed by the Commission's annual report and proposed on its own or at motivated request of a Member State – are of many types in order to be adequately proportionated to the situation: a) put on hold in certain areas or overall suspension of the negotiations; b) re-opening or resetting of already closed chapters; c) decrease in EU funding; d) pausing or withdrawing access to EU programmes or other benefits coming from the phasing-in (European Commission, 2020a, pp. 5-6).

5. THE OPENING OF NEGOTIATIONS WITH ALBANIA AND NORTH MACEDONIA AND THE ZAGREB DECLARATION

Shortly after its Communication on enhancing the accession process, the Commission adopted two update reports on Albania (European Commission, 2020b) and North Macedonia (European Commission, 2020c) supplementing the 2019 yearly reports. The two documents updated and took note of further progress made in the latest period by both states in implementing fundamental reforms and fulfilling criteria and benchmarks set out by the EU.

The update on Albania underlined further advancing in the reform of judiciary system (new institutions for the self-governance of the judiciary were fully functional and effectively operating) and a proactive approach in the fight against corruption and organised crime (members of the Special Prosecution Office for Corruption and Organised Crime had been selected by the vetting institutions and had sworn). Police and judicial cooperation with the EU agencies and Member States law enforcement authorities had also increased and brought tangible results such as the creation of joint investigation teams, the conduct of successful large-scale law enforcement operations and the lowering of unfounded asylum application lodged by Albanian citizens to EU Member States (European Commission, 2020b, pp. 2-3 and 6-7).

The update on North Macedonia underlined the continuing progress on reforming public administration (i.e., adoption of the 2019-2021 Transparency Strategy), the continuing functioning of the reformed judiciary and the consolidation of the track record on investigating, prosecuting and trying corruption and organised crime cases (European Commission, 2020c, pp. 1-2 and 4).

On the basis of the updated reports of the Commission, at the meeting of 25 March 2020, the General Affairs Council endorsed the Commission Communication of 5 February 2020 (European Commission, 2020a) and decided to open accession negotiations with Albania and North Macedonia. The day after the European Council approved the revised enlargement methodology and the opening of negotiations without objections or vetoes.

The subsequent EU-Western Balkans Summit held in Zagreb on 6 May 2020 was therefore the first high-level meeting after the opening of negotiations with Albania and North Macedonia. The Zagreb Declaration recalls once again the unequivocal support for the

European perspective of the Western Balkans and the need to "reinforce our cooperation on addressing disinformation and other hybrid activities originating in particular from third-state actors seeking to undermine the European perspective of the region". To this end the EU also urged a "public acknowledgment" of the Balkan leaders that support and cooperation provided by the EU "goes far beyond what any other partner has provided to the region" (EU-Western Balkans Summit, 2020, §§ 1, 8 and 5).

6. THE JUNE 2020 COUNCIL CONCLUSIONS ON ENHANCING THE COOPERATION WITH WESTERN BALKANS PARTNERS IN THE FIELD OF MIGRATION AND SECURITY

The Zagreb Declaration pays particular attention to security challenges and threats affecting both the EU and the Western Balkans (terrorism, extremism, corruption, organised crime, money laundering, migration, etc.). The need of strengthening the cooperation in these areas by taking advantage of EU legal and procedural tools and frameworks (to begin with the EU agencies operating in the field of justice and home affairs such as Europol, Eurojust, Frontex, and EASO) is therefore self-evident and pressing for the EU.

On 5 June 2020, therefore, the Council adopted its Conclusions on enhancing the cooperation with Western Balkans partners in the field of migration and security (Council of the European Union, 2020) and marked a milestone for future relationships between the EU and the Western Balkans.

The lengthy Conclusions set out several pledges and commitments for EU Member States and Western Balkans countries, the Commission and the EU agencies.

The Conclusions also identified a series of objectives to be achieved by the EU Member States together with Western Balkans partners such as: a) "to keep supporting the Western Balkans partners on migration and security issues [...] in order to [...] ensure that partners in the Western Balkans will be considered as safe third countries" (Council of the European Union, 2020, § 27); b) "to further explore possibilities for closer cooperation with CEPOL, Europol, EASO and [Frontex]" (Council of the European Union, 2020, § 28); c) "to step up the Western Balkans partners' participation [...] in Joint Investigation Teams (with the possible set up of joint EU-Western Balkans investigation teams) and Operational Task Forces (e.g. police investigation units, customs authorities, Asset Recovery Offices, Financial Investigation Units, border operations)" (Council of the European Union, 2020, § 32); d) "to make effective use of the I.C.P.O Interpol tools, and in particular the Stolen and Lost Travel Documents database, and actively share security-related information via the I-24/7 network" (Council of the European Union, 2020, § 33).

The European Commission, instead, is called: a) "to intensify [...] efforts to secure the conclusion [...] as well as efficient implementation of all status agreement with the Western Balkans partners, thereby facilitating the stepping up of operational cooperation between them and [Frontex]" (Council of the European Union, 2020, § 37); b) "to support the development by partners in the Western Balkans of interoperable national biometric registration/data-sharing systems on asylum applicants and irregular migrants [...] thus enabling regular regional information exchange and ensuring their future interoperability

and compatibility with EU systems" (Council of the European Union, 2020, § 44).

The future (full) interoperability of national, EU (e.g. Visa Information System, Schengen Information System, European Criminal Records Information System, Entry/Exit System), and international (e.g. Interpol databases such as the Stolen and Lost Travel Documents and the Travel Documents Associated with Notices) information systems in the fields of police and judicial cooperation, asylum, migration, borders, and visas is the absolutely necessary condition to allow an efficient, effective and proactive integrated management of the EU external borders, address migratory and security challenges and threats, and prevent and combat transnational serious and organised crime. By adopting common standards, rules, and technical components (e.g. the future European search portal will be capable of querying simultaneously all relevant IT systems avoiding blind spots and different answers), in fact, interoperability allows to overcome certain structural shortcomings in the information management architecture (e.g. differently governed IT systems, information stored separately in unconnected systems, technical fragmentation) that leads to blind spots in queries on persons and objects.

The new approach to the management of data through interoperability ensures that "end-users, particularly border guards, law enforcement officers, immigration officials and judicial authorities have fast, seamless, systematic and controlled access to the information that they need to perform their tasks" (European Commission, 2017, p. 3) and does not require the collection of new data but only the best and more efficient consultation and utilization of existing data in the IT systems.

The EU is actively working on establishing the interoperability of IT systems *within* the EU and its Member States (two Regulations were adopted in 2019) but it is very telling for the European perspective of the Western Balkans countries that the EU would expressly envisage the future interoperability and compatibility with EU systems of their national databases on asylum and migration.

Finally, the June 2020 Council Conclusions call on relevant justice and home affairs EU agencies: a) to establish "interconnected national coordination centres for efficient migration policy, border management and tackling migration challenges" (Council of the European Union, 2020, § 46); b) "to step up the cooperation among the representative of the relevant JHA Agencies in the region, including their cooperation with local authorities" (e.g. by seconding officers and opening liaison office in the Western Balkans) (Council of the European Union, 2020, § 47); c) "to promote the exchange of information and knowledge [with] the Western Balkans partners [...] including by providing assistance for strengthening the capacity of border guards, police/other law enforcement, coast guards, migration, asylum and return authorities" (Council of the European Union, 2020, § 49).

7. STEPPING UP THE COOPERATION WITH EU AGENCIES IN THE FIELD OF JUSTICE AND HOME AFFAIRS AS A KEY DRIVING FORCE FOR THE ACCESSION PROCESS OF THE WESTERN BALKANS

The stepping up of the cooperation with EU agencies, foreshadowed by the Council Conclusions, starts from an already existing solid foundation.

In recent years, Europol has concluded operational agreements to prevent and combat organised crime, terrorism, and other forms of international crime with Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, and Serbia. These agreements mainly concern the exchange of information (including personal data and classified information) but they may be also extended to the exchange of specialist knowledge, general situation reports, information on criminal investigation procedures and crime prevention methods, strategic analysis, etc. In 2018, then Europol mobile offices were deployed in all the Western Balkans countries (except Montenegro) to support on-going investigations on migrant smuggling, drug trafficking, and document fraud. Europol mobile offices provide on-the-spot support, real-time access to SIENA (Europol's Secure Information Exchange Network Application) to quickly exchange of operational and strategic crime related data, forensic examinations, mobile device extraction kits, drug labs, etc. Moreover, since July 2019 Albania hosts Europol's first liaison office in the Western Balkans and this further highlights the importance of the Western Balkans countries as partners for Europol and the EU (the next two liaison offices will be opened in Bosnia and Herzegovina and Serbia).

Eurojust is stepping up the cooperation with the Western Balkans too.

In latest years Eurojust has concluded agreements on cooperation (concerning the exchange of information including personal data) with Albania (2019), Montenegro (2016), North Macedonia (2008), and Serbia (2019). It is also important to highlight the exchange of liaison prosecutors stationed at Eurojust and Montenegro, North Macedonia, and Serbia (by 2020 Albania will also exchange liaison prosecutors with Eurojust). Western Balkans countries are also increasingly involved in cross-border criminal investigations opened by the EU Member States: in 2019 Serbia has been requested to participate in 36 cases; Albania in 27 cases; North Macedonia in 16 cases; Montenegro in 9 cases.

Finally, Frontex (European Border and Coast Guard Agency) is closely cooperating with Western Balkans countries to improve control and management of EU external borders. Frontex provides technical and operational assistance and may also launch joint operations outside the EU by deploying officers and equipment and exchanging operational information, professional experiences, and best practices. It is noteworthy that in May 2019 the first joint operation ever launched abroad by Frontex was indeed in Albania (50 officers, 16 patrol cars and one thermo-vision van have been deployed from 12 EU Member States to support Albania in border control and tackling cross-border crime). To launch joint operations Frontex must previously conclude an international agreement ("status agreement") with the third state. To date, Frontex has concluded status agreements with Albania (2019) and Montenegro (2020) while agreements with Bosnia and Herzegovina, North Macedonia, and Serbia are being finalized. Frontex has also concluded non-binding working arrangements with the competent authorities (usually, the Minister of Interior) of Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia to manage the operational cooperation and exchange unclassified information.

All these data further confirm both the strategic importance of the Western Balkans countries for the EU (and *vice versa*) in the field of justice and home affairs and the firm foundations on which cooperation and dialogue are being developed among all parties concerned.

In our opinion, stepping up even more the cooperation in the field of justice and home affairs is absolutely needed not only for better tackling security challenges and threats but also for speeding up "from the bottom" the whole accession process of the Western Balkans countries.

The relevant EU agencies, in fact, may play a decisive role in the accession process and turn into a real game changer. Stronger and closer cooperation among the EU agencies, Member States and Western Balkans police and judicial authorities (including exchange of best practices and procedures, technical assistance, law enforcement training on operational matters, human rights and the rule of law) may inject into the accession process and "from the bottom" – that is, through dialogue and cooperation between equals (Western Balkans and European police and judicial authorities) – a strong amount of ethics, culture of compliance, and commitment to the rule of law. In fact, to further strengthen and develop these skills – that are fundamental to any judge, prosecutor, law enforcement officer and agent – may raise loyalty and awareness among the "servants of the State" and, as a result, may allow judiciary and police to fight against corruption and organised crime in more efficient and righteous way.

Western Balkans public and societies might be more positively impressed by tangible results achieved against corruption and organised crime through judiciary and police cooperation with the EU agencies than by strategic communication set "from above" (that is, from national and European politics) and focused on the fundamental values of the EU and the promotion of the European way of life in the wider world.

Of course, we are not calling into question the undisputed importance and centrality of the values enshrined in Article 2 of the TEU for the accession process of the Western Balkans. In a very pragmatic way, we are only wondering if a bottom-up approach (that is, enhanced training and cooperation with Western Balkans judiciary and police to strengthen ethics, compliance, and commitment to the rule of law) would not achieve the objective of promoting human rights and the rule of law better than a top-down approach (that is, strategic communication from EU institutions, national governments, and political parties).

We believe that helping to make more efficient and credible police and judicial authorities would be the best "business card" for the EU before the citizens of the Western Balkans countries. In fact, there may be a risk that a strategic communication based on EU fundamental values and principles might be perceived (albeit wrongly) by the public as something "out there", that is, away from everyday life's problems. Instead, positive and tangible results in the fight against corruption and organised crime due to the strengthening of skills and capacity of police and judicial authorities might better unveil to the public the deepest and more practical meaning of an "European perspective" for the region based on the respect for human rights and the upholding of the rule of law.

As a result, the accession process might gather more support from the public and be reinvigorated, while the future European perspective might become more credible and dynamic for all layers of the Western Balkans societies.

LIST OF REFERENCES

Council of the European Union 2020. Council Conclusions on enhancing cooperation with Western Balkans partners in the field of migration and security, Brussels, 5 June 2020, 8622/20

EU-Western Balkans Summit 2018. EU-Western Balkans Sofia Summit, Sofia Declaration, 17 May 2018

EU-Western Balkans Summit 2020. EU-Western Balkans Zagreb Summit, Zagreb Declaration, 6 May 2020

European Commission 2017. European Commission, Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, Strasbourg, 12.12.2017, COM(2017) 793 final

European Commission 2018. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, Strasbourg, 6.2.2018, COM(2018) 65 final

European Commission 2019. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2019 Communication on EU Enlargement Policy, Brussels, 29.5.2019, COM(2019) 260 final

European Commission 2020a. 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, Brussels, 5.2.2020, COM(2020) 57 final

European Commission 2020b. European Commission, Commission Staff Working Document. Update on the Republic of Albania, Brussels, 2.3.2020, SWD(2020) 46 final

European Commission 2020c. European Commission, Commission Staff Working Document. Update on the Republic of North Macedonia, Brussels, 2.3.2020, SWD(2020) 47 final

France Non-Paper 2019. Non-Paper. Reforming the European Union accession process, November 2019. Available at https://www.politico.eu/wp-content/uploads/2019/11/Enlargement-nonpaper.pdf (7.7.2020)

Rettman 2019. Rettman, A. 16 October 2019. *Balkans row to hit EU summit after French veto*. Available at https://euobserver.com/enlargement/146287 (7.7.2020)

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EUROPEAN PATH OF THE WESTERN BALKANS REGION – NORMATIVE ASPECTS AND GEOPOLITICAL FACTORS

The purpose of the study is to analyze the general and regional context of the process of accession of the Western Balkans region to the European Union (EU). The Union (EU) is in a negative stage of its development, especially following Brexit, and even more since the pandemic has seriously shaken complete global economy and the economy of the EU as well. Those unfavourable factors added a bad momentum to the on-going monetary crisis that started in 2008. Therefore, the general context of the EU enlargement process is to be taken into consideration when analyzing the accession of each candidate country from the Western Balkans region. The next relevant context is the regional one. The dynamics of the accession process of these countries to the Union remains open. The EU is at the turning point in its evolution in contemporary conditions. Consequently, many authors are posing the question of the future of the EU. The enlargement process is not a priority for the Union, bearing in mind its internal problems, institutional, and even more, economic problems, especially after the outbreak of the pandemic. After The EU – Western Balkans Zagreb Summit of May 2020, this became evident.

It remains to be seen in the upcoming period whether "Europe-Fortress" is on the scene, with semi-open doors to candidate countries from the Western Balkans region, or is it Europe without borders. Membership in the EU can be one, but not the only alternative to those countries that are committed to improving their relations with the Union.

Keywords: EU, enlargement, Western Balkans, crisis

1. INTRODUCTION

The European Union (EU) is in a negative phase of its development, especially after the recent Brexit and the outbreak of corona virus pandemic, which added a bad momentum

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to the current monetary crisis, which began in 2008. Therefore, the general context of the EU enlargement process, namely the internal crisis within the Union should be taken into account when analyzing the accession of each candidate country from the Western Balkans region. Another relevant context is the regional framework for the accession of the Balkan countries.

Despite the prolonged crisis, the Union has not completely given up expanding its membership, but there is certain development fatigue, "Fatigue de l'Europe", given the EU's numerous institutional, political and economic problems. It follows that the enlargement process is no longer a priority issue for the EU, which should primarily build its security and defense identity in the recurrent culmination of the migrant crisis (Gasmi&Zečević, 2016, p. 58). In addition, there has been a fall in EU membership since the departure of Britain (Gasmi, 2016, p. 235). All these geopolitical factors make bad news for the candidate countries from the Western Balkans region.

The good news is that at the EU-Western Balkans Summit in Thessaloniki in June 2003, the Union promised a strategic partnership with the Western Balkan countries in their accession to the EU and their secure European future, but without a precise timetable.

Due to the slow pace of the enlargement process, despite the formal progress of these countries towards accession, during the Bulgarian Presidency of the Council of Ministers, an EU-Western Balkans summit was held fifteen years later (May 2018, Sofia), under the striking title: „In the Western Balkans: Creating a region of growth, security and connectivity on the road to Europe. " The aim of this Summit was to give a fresh impetus to the integration of the Balkan countries into the Union by 2025. The prospect of possible future membership by 2025 represented a new opportunity for the region to complete all necessary internal reforms. Bulgaria has included in its program of the EU Council Presidency a strategic focus on connecting the Western Balkan countries with the Union, at all levels. The leading vision was of the EU as the best geo-strategic choice for the Western Balkans (Matias, 2018).

Meanwhile, in 2014, Germany launched the Berlin Process as an intergovernmental platform for cooperation with the Western Balkan countries. As part of this process, in the years 2014-2018, annual summits were held, attended by EU representatives and heads of state and government of the Western Balkan countries. However, the question of the timing of those countries' accession to the Union remained open.

Therefore, it is necessary to pose the essential question of the context of the contemporary process of accession of the Western Balkans countries to the Union, in order to provide an answer about the prospects of this process, especially given the pandemic, which is a global socio-economic cataclysm.

2. GENERAL CONTEXT OF THE EU ENLARGEMENT – UNION'S BLACK MOMENTUM

Seen through the prism of recent history, the EU suffered a huge influx of refugees during the tumultuous 2015, as well as, in the previous period, a debt crisis in Greece and two waves of terrorist attacks in Paris. Of all these, during the previous period, the most

devastating was the migrant crisis, which pointed to the EU institutional problems and the absence of a common Union migration policy.

Even then, there was talk of repealing the Schengen Agreement, which legally symbolized a borderless space among Member States, in the situation of raising concrete and wire barriers at border crossings between those same states and in the midst of their mutual accusation of a lack of solidarity in the care of refugees. The situation was all the more aggravated given the negative security dimension of the migrant crisis, because without the transparent registration of refugees, no one can guarantee that there are no well-trained terrorists among the migrants. The magnitude of migrants' attacks in Germany (Cologne), Finland and Austria are proof.

On the other hand, this situation has served to strengthen national extreme-right movements and Eurosceptics within the EU Member States, and has become even more an indicator of the Union's institutional weaknesses. The Schengen Agreement (1985) is a legal reflection of the idea of free movement of people, but also a reflection of the fears of immigration and cross-border organized crime. It was signed by the Benelux countries (the Netherlands, Belgium and Luxembourg), the Federal Republic of Germany and France, which are the five founding members of the Community.Other countries signatories joined gradually. The Schengen agreement originally provided for a gradual suspension of controls at the internal, common borders of these countries (Lopandić&Janjević, 1996, p. 225). The Schengen Agreement was followed by the Convention on its Implementation (1990), which entered into force in 1995. Those legal documents constitute the Schengen Acquis, which since the adoption of the EU Treaty of Amsterdam (1999), has become an integral part of the Acquis Communautaire.

Many regulations under the Schengen Acquis are recommendations i.e. the so-called soft law on the EU standards on migration policy, the right of entry, stay and return of foreigners, as well as the issues of preventing illegal migration, combating human trafficking and protection of personal data. All these types of recommendation are addressed to the Member States with a view to creating and implementing a common migration policy. It should be noted that the Schengen Acquis gradually expanded, although it has never extended to all Member States. Namely, the UK and Ireland remained outside, as did the new members who had to pass a period of compliance with the Schengen criteria (Romania, Bulgaria and more recently Croatia). Cyprus is outside Schengen due to the unresolved issue of Turkey's occupation of the northern part of the island. Non-EU countries are also signatories to Schengen (Norway and Iceland, 2001), followed by Switzerland (2008), as well as Liechtenstein (Piris, 2010, p. 192,193).

The Convention Implementing the Schengen Agreement established an Executive Committee with the task of normatively regulating the application of the provisions of the Schengen Agreement and monitoring their implementation. The Convention also regulates in more details the abolition of control at the internal borders of the Schengen members and the conditions of entry of foreigners, ie. all non-EU nationals. *Exempli causa*, specific consequences for third-country nationals, ie. those non-Schengen countries, include that the refusal of a visa by one Schengen Member State automatically means that the foreigner does not have the possibility of obtaining a visa in the other Schengen area. The Maastricht

Treaty (1993) in the provisions of Art. 100c introduces common visa lists and a uniform visa format in the EU Member States.

In this way, issues related to the visa regime (the list of third countries whose nationals are obliged to require visas) have been transferred to the competence of the EU bodies, ie the first pillar of supranational decision-making. This is not the case with the other issues of cooperation between the EU Member States in the area of justice and home affairs, which formed the former third pillar (Ivanda, 2001, p. 17), before the EU Treaty of Lisbon and the merger of all three pillars into one whole legal personality of the EU. This area is characterized by intergovernmental cooperation between the Member States, ie coordination of the Member States' national policies and unanimous decision-making.

Following the Treaty of Lisbon, the Council of Ministers is still responsible for determining the so-called white and black lists of the visa regime. One such example is Council Regulation no. 539 of 2001[81]. The complexity of Member States' cooperation in the areas of security, justice and home affairs, in addition to the existence of different national interests, was further exacerbated by the migrant crisis. The abolition of Schengen at the end of 2015 happened in a *de facto* manner, which is non-institutional and without a formal decision at the level of the Union bodies. Despite efforts to build the Union's security and foreign policy identity, reality has denied this endeavor.

Hungary is geographically the first country to be hit by the EU asylum procedure, which under the Dublin Convention provides that the first country where asylum seekers apply should implement the procedure for registering asylum seekers and considering the reasons for seeking asylum. Majority of migrants have refused registration, which has led to clashes with the Hungarian police and heightened tensions within the Union, following the ban on their further movement to other EU Member States. Hence, Italy, through its Foreign Minister, Paolo Gentiloni, emphasized the need for the adoption of unique EU asylum regulations. Specifically, it was noted that the asylum application system in the first Member State where the migrants were found was no longer viable, as exemplified by Hungary. On the other hand, it is necessary to respect the values of the EU that protect human rights and democracy, and to ensure that refugees in the spirit of the UN Geneva Convention (1951), who flee war or dark dictatorial regimes, are protected and separated from economic migrants. Italy and Germany have pointed out that dealing with asylum issues at the national level of the Member States dramatically threatens Schengen functioning and freedom of movement within the EU (Gasmi&Zečević, 2016, p. 68).

Some authors (Macek, 2015, p.3) even question whether there was a new East-West division within the EU, given the opposition of the former Visegrad Group (1991), Hungary, the Czech Republic, Slovakia and Romania to establishing a voluntary distribution of migrants through the EU quota system. Poland endorsed, at the last minute, the majority position of the Member States at the September meeting of the Council of Ministers (2015). It can be assessed that this is not a new East-West division within the EU, although there is a lack of unity among the EU members.

[81] Council regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement", Official Journal of EC, L 81, 21 March 2001, pp. 1-7.

The countries of the former Eastern Bloc were not colonial powers and have no tradition of accepting immigrant populations into their societies. Furthermore, democratic traditions differentiate in relation to Western Member States, as well as understanding of the concepts of the Union values, the degree of political culture and the perception of the identity of the EU and its place in the world. The dose of fear and rejection of refugees coming from outside Europe can be explained by the ignorance and considerable level of closure of Eastern European societies due to their former affiliation with the Eastern Bloc. If these cultural and geopolitical factors are added to the economic problems in these countries, where labor markets are not as attractive as in the West of the Union, the situation becomes easily explained. For example, the minimum wage per hour in Bulgaria and Romania is about one euro, while in Germany it is more than eight euros, starting from 2015 (Schulten, 2014, p. 4).

In this context, it is important to note that on April 2, 2020, the European Court of Justice ruled that three EU countries: the Czech Republic, Hungary and Poland violated EU regulations when they refused to receive migrants under the EU's temporary quota system of 2015. The Court said that in refusing to comply, the three Member States had no right to cite "maintaining law" or 'safeguarding internal security', or claiming that the relocation program was "dysfunctional"[82]. At the time of writing this paper, it is up to the EU Commission if it wants to follow the Court ruling. The Commission could determine that the original 2015 Council Decision[83] could still be implemented and launch a second infringement procedure for financial penalties. All of those Commission considerations would be subject to scrutiny by the Court.

The above facts illustrate the serious absence of economic and political cohesion within the Union.

Another major highlight in the culmination of years of the EU agony is Britain's withdrawal from the EU membership, as a result of a national referendum held in June 2016 with a negative answer to the question of remaining a member of the EU. At the time of writing this paper, the complete consequences of the UK leaving the EU membership are not completely perceived. On 23 June 2016, the UK organized a referendum on leaving the EU (BREXIT - Britain exit). According to the final results of the UK exit referendum, 51.9 percent voted to leave the country and 48.11 percent to remain in the Union[84]. Voting analysis shows that, for the most part, residents in smaller UK cities opted to exit the Union. It happened after forty-three (43) years of the UK membership.

It is a serious blow to the further institutional and economic development of the Union, the consequences of which will be felt for a long time. It can be assessed that

[82] ECJ Judgment in Joined Cases C-715/17, C-718/17 and C-719/17 Commission v Poland, Hungary and the Czech Republic, Court of Justice of the European Union PRESS RELEASE No 40/20 Luxembourg, 2 April 2020, www.curia.europa.eu.

[83] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80). The validity of that decision was the subject-matter of Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v Council, Press release No 91/17, www.curia,europa.eu.

[84] Based on the counted votes in all 382 local election centers, 17,410,742 citizens voted in favor and 16,141,241 voters remain. http://www.blic.rs/vesti/politika, June 24, 2016.

the Union is indeed at the turning point of its functioning. The UK's stay in the EU was also not helped by the fact that on 19th February 2016, the European Council decided to grant special status to Britain in case it voted to remain in the Union (Deloy, 2016, p. 2). This meant that 55% of national parliaments would be able in the future to use a "red card" to block a draft EU directive. In addition, with regard to social benefits for European immigrants, access to certain types of social benefits will be blocked indefinitely if "public services are exhausted".

The British referendum was nevertheless won by Euro-skeptics[85], who saw the main threat to the sovereignty of Great Britain in the current threatening migrant crisis, but even more so in the decisions of the Brussels administration, which they characterized as threatening the country's economic growth. Immediately after the referendum, the resignation of British Commissioner Lord Hill, a member of the EU Commission responsible for financial services and the capital market, followed. Former President Jean-Claude Juncker regretfully accepted the resignation and nominated Vice-President of the Commission V. Dombrovskis, otherwise in charge of the euro and social dialogue[86], by publishing a special Commission declaration on the EU's official portal. Particularly warning is the fact that the resignation took place immediately after the British referendum (BREXIT), despite the fact that the Commissioners are elected in a personal capacity on the basis of general competences and given their European engagement, which guarantees their independence from national governments[87].

The EU representatives' response to the BREXIT result came in the form of the Declaration of Foreign Ministers of the founding countries of the European Communities. The MFAs of France, Germany, Italy, Luxembourg, the Netherlands and Belgium met on June 25th, 2016, and expressed regret concening the decision of the British people to leave the Union. The Declaration estimates that there has been an upheaval for the EU, which has lost its Member State, thereby ending the proposal of the UK's special status, which was voted on at the February European Council meeting. Bearing in mind that the provisions of Art. 50 of the Lisbon Treaty foresees voluntary exit from the EU, ministers had called on the UK to activate the envisaged mechanisms for opening negotiations on the withdrawal Agreement[88]. This Agreement was finally reached at the end of January 2020, after cumbersome negotiations between the EU representatives and the UK Government and after breaking a two-year deadline for defining it.

Some authors have argued that after the UK exit, the so-called domino effect cannot be ruled out, bearing in mind that the Netherlands, due to some discontent with the expansion of EU membership. Specifically, on April 6th 2016, the Netherlands rejected the EU – Ukraine Accession Agreement with 61% of the negative votes in the referendum. The same effect evolved in France, where after the British referendum, a public debate

[85] http://www.electoralcommission.org.uk, 24th June 2016.

[86] http://europa.eu/rapid/press-release_STATEMENT-16-2332_fr.htm, 25.June 2016.

[87] Art. 17, par. 3 of the Lisbon Treaty, Annex I.

[88] http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/europe/evenements-et-actualites-lies-a-la-politique-europeenne-de-la-france/article/declaration-conjointe, 25, Juin 2016.

flared upon the so-called Frexit, which is the possibility of France leaving the EU(Chopin &Jamet, 2016, p. 5).

The United Kingdom has, over more than four decades of its membership, been permanently with one foot out of the EU, by the very fact that during the establishing of the EU it managed to get the so-called opt-out clause, i.e. a waiver of joining the monetary union and adopting a single currency. The second exception was rejecting the Social Protocol on Workers' Rights, when adopting the Maastricht Treaty (1993). In this context, it is also important to point out Britain's formal absence from the Schengen system of common visa lists and the area of freedom of movement and residence for EU citizens. (Gasmi, 2016, p. 238, 239). It follows that these are very serious exceptions to the membership obligations, which led to the final compromise proposal on the UK's special status in the event of her stay in the Union, adopted in February 2016 at the European Council. Nevertheless, the concept of maintaining the UK's strong national political and economic sovereignty prevailed.

The situation of the non-institutional abolition of the Schengen Agreement recurred during the March 2020 pandemic. Then again, the non-institutional termination of the Schengen Agreement happened due to the implementation of national preventive measures to restrict movement in order to combat the pandemic. On the one hand, one cannot dispute the justification of restrictions on the free movement of persons for the protection of public health, but on the other hand, it was worrying that there had been no previous decision at the level of the EU institutions. Each Member State introduced, at their own discretion and in different time intervals, preventive measures to combat the pandemic. The Commission subsequently presented the "COVID-19 Guidelines on Border Measures to Protect Health and Ensure the Availability of Essential Goods and Services"[89], which legitimized national closures of internal borders by Member States after they took place.

The absence of solidarity of other EU members towards Italy, France and Spain, the Member States that have suffered the most losses of lives due to the pandemic, indicated a breakdown in European values, which are legally protected and proclaimed in the Lisbon Treaty (Art. 2). Normatively seen, these provisions of the Treaty of Lisbon place emphasis on universal values, such as: human dignity, freedom, democracy, equality, the rule of law and respect for human and minority rights." These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Therefore, some authors point out that the Lisbon Treaty (TEU) is deeply rooted in human rights, since those provisions of Art 2 regarding the Union's values have not only political, but also concrete legal effects (Piris, 2010, p. 71). Lisbon Treaty gave to the EU Charter of Fundamental Rights the same legal value as the Treaties by virtue of Art 6 (1) TEU. Furthermore, in par. 2 of Art.6 stipulates the obligation of the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[89] "As regards measures linked to border management, coordination at EU level is key.Therefore, these guidelines set out principles for an integrated approach to an effective border management to protect health while preserving the integrity of the Single Market." Brussels, 16.3.2020, C(2020) 1753 final.

As being the case during the peak of the migrant crisis in 2015/2016, solidarity among the Member States has vanished again during the pandemic. The normative concept of solidarity is defined in Solidarity clause (Art. 222 of TEU), which sets forth a joint action of the Member States in a spirit of solidarity if a Member State is the object of a terrorist atck or a victim of a natural or man-made disaster. Joint action assumes mobilisation by the Union of all instruments at its disposal (Gasmi G, 2016: 88). The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council of Ministers. The European Parliament shall be informed. Furthermore, the European Council shall regularly assess the threats facing the Unionin order to enable the Union and its Member States to take effective action. However, this normative framework of solidarity was denied by reality of events during pandemic. Consequently, some authors (Brehon N. J. 2020) have assessed that the coronavirus has shown the fragility of the EU societies and their flawed solidarity.

Some EU countries have forbidden the export of necessary medical equipment during the pandemc even to other Member States of the Union, which proved to be disastrous especially to Italy and Spain that counted one thousand deaths a day and also to France and Belgium with their significant outbreak of the pandemic. Angela Merkel, the Chancellor of the Federal Republic of Germany, has warned in her speech of 6th of April 2020 that the EU is faced with the greatest challenge in its history[90], while other pro-Europeans accused the European Commission of a lack of action in issuing measures to manage this health crisis and its economic consequences. The pandemic affected all countries, but it hit especially hard in the countries of the EU South, which have already suffered most during the migrant crisis[91]. The president of the European Commission, Ursula von der Leyen, announced on Thursday (2 April) "a new solidarity instrument" of €100bn in financial assistance, in the form of loans, to support workers affected by the coronavirus outbreak. This unemployment reinsurance mechanism named SURE would require Member States to provide guarantees collectively, amounting to at least €25bn based "on a voluntary basis"[92]. Furthermore, regardless of whether it is called Coronabonds, Recoverybonds, Sanitarybonds, an exceptional investment plan, what the Union needed was a major act which was to express voluntarily its solidarity in the face of the pandemic. However, the deal on that issue was not reached. Instead, EU ministers of finance agreed on a financial aid package of billion euros. Therefore, some authors qualified the dramatic situation as „then or never" (Giuliani, 2020).

The EU, legally seen, has limited powers to tackle the pandemic - healthcare is in the national competence of the Member States. The European Commission is authorized to coordinate and support the Member States on health. It can make recommendations and give advice, but the Member States are free to ignore it. This is the exact reason why the pandemic proved to be a watershed moment for the EU solidarity. Finally, the negative momentum of the EU was underlined by the fact that a coordinated action of the EU

[90] https://euobserver.com/coronavirus/148003?utm_source=euobs&utm_medium=email.

[91] https://euobserver.com/opinion/147954?utm_source=euobs&utm_medium=email.

[92] https://euobserver.com/coronavirus/147976?utm_source=euobs&utm_medium=email.

Commission in combating the pandemic was very late, while chaos reigned in the market of necessary medical equipment. Therefore, it turned out that during the pandemic, the EU single market has totally totally given way to the national protectionist economic measures of the Member States.

Geopolitical factors that have occurred during the pandemic, indicated that the USA has underestimated the pandemic, and its central administration has proved that it no longer holds the necessary political and moral authority to effectively coordinate the battle against the global coronavirus. Therefore, the EU, in the context of multilateral cooperation, was expected to step in and pave the road for the management of the unprecedented health crisis and its social and economic consequences, and to link Europe's core values to the technical and political capacity in an innovative way offering the world a message of hope and strength against the pandemic. However, it did not happen.

EU High Representative for foreign policy, J. Borrell criticised Russia and China for their humanitarian aid during the pandemic, which had been used for spreading geopolitical influence in Europe[93]. China has clearly taken advantage of the geopolitics of money as it takes part of the Silk Roads through the region, lending considerable sums of money to the Balkan States or acquiring many companies in strategic sectors (energy, transport, etc.), thereby making these countries highly dependent on this new Chinese diplomacy. It was clear that China achieved success in this global geopolitical game.

3. SPECIFIC CHARACTERISTICS OF THE WESTERN BALKANS IN THE EU ACCESSION - A VIEW FROM THE REGION

The countries of the Western Balkans (WB) do not have a common strategy aimed at improving and accelerating their accession to the EU. Hence, the regional context can only be described conditionally, from the standpoint of the specific characteristics of the region itself. The term Western Balkans refers to the grouping of countries, which the Union has introduced under the political designation of the region and includes Bosnia and Herzegovina, Albania, North Macedonia, Serbia and Montenegro. These countries view the normatively defined criteria for enlargement of the EU membership, in the Lisbon Treaty on the EU (Art. 49), above all as a political criterion, being a barrier that the EU has set for these countries.

The primary feature is that the region lacks homogeneity in economic and political terms. Partly due to the EU approach, there ia a stratification of each country's political status into the so-called "in" countries (candidate countries) and on the other hand "out" ie. non-candidate countries. Of course, this complex stratification also has some legal, but even more geopolitical and economic consequences for the homogeneity of the region.

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[93] "There is a geo-political component including a struggle for influence through spinning and the 'politics of generosity. Overall, the task for the EU is to defy the critics and demonstrate in very concrete terms that it is effective and responsible in times of crisis."Borrell, https://eeas.europa.eu/delegations/china/76401/eu-hrvp-josep-borrell-coronavirus-pandemic-and-new-world-it-creating_en, accessed in April 2020.

When these facts are added to the prevailing unfavorable geopolitical image of the region within the EU[94], seen as a post-conflict area with strong security challenges –a "powder keg", due to insufficiently resolved neighborhood relations in the region, the need for a common strategy in the EU accession by different countries in the region is obvious. This phenomenon is a huge challenge in the accession process, especially given the complex problem of Kosovo.

The example of Serbia in the process of the EU accession shows insufficient support from the region, especially from the former EU candidate - Croatia, who became a full-fledged EU member in July 2013. In this context, the question arises of the expediency of the EU conditionality policy, proclaimed at the Thessaloniki Summit, with the idea of evaluating the economic, legal and political reforms achieved in the candidate countries. Since joining the EU, Croatia has found itself in a position that allows it to use the EU accession process as a means of pressure in its bilateral relations with Serbia. The situations of denial of Croatia's agreement to open the EU negotiations with Serbia on individual chapters persist (eg Chapter Twenty-six on Culture and Education, in 2018).

Hence, the regional context of these problems is also very significant. Thus, in the absence of regional solidarity of the candidate countries in the region, many deviations occur in the process of their EU accession. An example of this is the decline in support for European integration in some Western Balkans countries due to a non-coherent official EU approach.

In addition, there is an insufficient degree of developed regional cooperation among the countries of the region, as a direct manifestation of a commitment to European integration. More precisely, the Union (Fouéré, 2015, p. 2) advises the candidate countries not to ask each other what they are not prepared to offer in terms of economic cooperation, reconciliation processes and political stability.

After the initial recovery, the region entered a phase of recession and stagnation, especially after 2008, when a monetary crisis erupted, reflecting the region's further backwardness, high unemployment, corruption and organized crime, as well as the deteriorating political climate in the region. There are certainly exceptions from this bleak picture, due to Serbia's successful economic recovery from 2014 to 2019. The unfavorable situation of the region was exacerbated by the pandemic in early 2020 with devastating consequences for the public health and economies of the countries in the region as well as globally. The International Labor Organization estimates that about 200 million jobs will be lost as a result of the pandemic, globally seen[95]. At the time of writing the present paper, the tentative estimates of global socio-economic damages resulting from the pandemic are contained in the UN report: "Global growth in 2019 was already the slowest since the global financial crisis of

[94] EU member states and enlargement towards the Balkans, July 2015, European Policy Centre http://aei.pitt.edu/66050/1/pub_5832_eu_member_states_and_enlargement_towards_the_balkans.pdf.

[95] Workers in four sectors that have experienced the most "drastic" effects of the disease and falling production are: food and accommodation (144 million workers), retail and wholesale (482 million); business services and administration (157 million); and manufacturing (463 million). Together, they add up to 37.5 per cent of global employment and this is where the "sharp end" of the impact of the pandemic is being felt. https://news.un.org/en/story/2020/04/1061322, accessed in April 2020.

2008/2009. COVID-19 has plunged the world economy into a recession with the potential of deep consequences and historical levels of unemployment and deprivation".[96] The EU did mobilise a package of over €410 million in reallocated bilateral financial assistance to support the Western Balkans during the coronavirus emergency and had identified additional €290 million to help the socio-economic recovery of the whole region[97]. However, this EU approach was overwhelmed by the Chinese quick aid during pandemic, which fuelled comments about widening of Chinese geopolitical influence in the region[98].

There is also partial responsibility on the Union side. Namely, the region lost a lot of time and enthusiasm in the EU association and also in the accession process, but even after the EU's firm promises of a clear European perspective at the Thessaloniki EU-Western Balkans Summit in 2003, the expectations of most countries in the region were not met. The Stabilization and Association process, set up by the Union as a mechanism for integrating the countries of the region into the EU (Gasmi - Ilic, 2002, p.22), lacked the strength and momentum to accelerate the consolidation of the post-conflict region and assist its essential long-term stabilization. The current tensions in the region prove this assessment. Therefore, the dynamics of the accession process of these countries to the Union remains open. The Union has given the green light to open accession negotiations with Northern Macedonia (a candidate country since December 2005) and with Albania on 25th March 2020[99], at the same time as the pandemic culminated. The EU is faced with difficulties to define a negotiating platform in absence of common views of its Member States on certain issues (Bulgaria's standpoint on the historical frame of North Macedonia and Greece's caution towards North Macedonia).

Nevertheless, as distant as it may be, the prospect of the EU membership is nonetheless *spiritus movens* of all the positive changes in the region (Gasmi, 2016, p. 125-126). On the other hand, a high level of economic cooperation is one of the causes of the spillover of the economic crisis from the EU to the Western Balkans. The comparative experience of the previous EU enlargement cycles shows that candidate countries are intensely aligning their markets with the Union's single market (Ceylan, 2006, p. 3). This has led to an additional transfer of the Union's monetary and economic crisis to the economies of the countries of the region.

EU membership may be one, but not the only alternative to the countries that are committed to improving their relations with the Union. There are numerous examples of international trade cooperation models, such as the EEA (European Economic Area), EFTA (European Free Trade Area), etc., which show that other forms of collective cooperation can be equally successful and in no way lack the benefits arising from such forms of cooperation with the EU. With the formation of the Regional Cooperation Council (RCC), composed

[96] "Shared responsibility, global solidarity: responding to the socio-economic impacts of COVID-19" UN, March 2020, https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf, accessed in April 2020.

[97] https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/coronavirus_support_wb.pdf.

[98] https://foreignpolicy.com/2020/04/08/china-serbia-aleksander-vucic-xi-jinping-coronavirus/.

[99] Launch of membership negotiations with Albania and North Macedonia, 25 March 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_519.

more broadly than the Western Balkans, the countries of the region have already made strides in this direction[100].

The examples above indicate the possibilities to keep in mind when monitoring the further development of the EU, which will significantly affect its attitude towards the Western Balkan countries, as well as the position of the region towards the Union. The Western Balkan countries, as part of a regional framework represented by structures such as the RCC, may remain in close liaison with the EU as associate members, or continue to pressure the national governments of the EU Member States to accept them as new members.

The region needs stronger co-operation for the joint development of the regional infrastructure, trade, cohesion policy and, in particular, bilateral relations between individual countries of the Western Balkans, which have recently deteriorated significantly. Doing so would highlight the shared common values of the Western Balkans, such as multiculturalism, natural resources, tourism capacities and cohesion. One valuable attempt of enhancing regional cooperation is the initiative of Serbian President A. Vučić to establish so-called Mini – Schengen area in the region, but only North Macedonia and Albania have joined this Serbian initiative through the agreement. The reason for such failure is negative impression in the rest of the region, i.e. that Mini - Schengen was meant to be a substitute for an EU membership. Furthermore, many authors regard the EU conditionality policy towards Serbia in relation to the problem of Kosovo as a huge obstacle to the accessin process, since there are no tangible results of the conditionality approach (Zečević S. 2020[101]). EU stability at its southeastern borders can be ensured through its extension to the Western Balkan countries, since the EU's security dimension is incomplete without the Western Balkans region.

The EU requirements for candidate countries have become more complex, more precise and larger in number than the previous twenty-four chapters required a decade ago for the accession of the countries of Central and Eastern Europe. Now there are thirty-one of them, as well as more temporary benchmarks, equilibrium clauses and additional emphasis on political and economic criteria[102]. Some authors particularly criticize the inadequate approach of the EU in the process of harmonization of the national legal systems of the countries of the region with the Acquis Communautaire, i.e. with EU regulations and

[100] The Regional Cooperation Council (RCC) was officially launched at the meeting of the Ministers of Foreign Affairs of the South-East European Cooperation Process (SEECP) in Sofia, on 27 February 2008, under which auspices it continues to operate. RCC has been working very closely with all the governments in the region and relevant regional cooperation mechanisms. RCC) is an all-inclusive, regionally owned and led cooperation framework. This framework engages RCC participants from the South East Europe (SEE), members of the international community and donors on subjects which are important and of interest to the SEE, with a view to promoting and advancing the European and Euro-Atlantic integration of the region.https://www.rcc.int/pages/97/participants-from-see.

[101] Zečević S. "Analysis of the Zagreb Declaration – view from Belgrade", expose at the Webinar entitled EU– Western Balkans Summit and the issue of the EU enlargement, held under the auspices of the Hanns Seidel Stiftung in the Institute of European Studies on 19th May 2020,http://www.ies.rs/wp-content/uploads/2020/05/%D0%98%D0%95%D0%A1-%D0%A5%D0%A1%D0%A1-%D0%B2%D0%B5%D0%B1%D0%B8%D0%BD%D0%B0%D1%80-19052020.pdf.

[102] European Commission, Communication on Enhancing the accession process - A credible EU perspective for the Western Balkans, Brussels, 5.2.2020 COM(2020) 57 final.

policies –being a legal "patchwork" (Mustafaj, 2020, p. 4) in the sense that insufficient account is taken of local legal specifics. The process of harmonization of the national legal systems of the candidate countries constitutes the legal criterion defined in the EU Lisbon Treaty. The accession process is further burdened by the marginalization of this issue on the European Union's agenda due to the actions of the Eurosceptics, but especially because of the pandemic crisis (2020).

There are other challenges for the Western Balkan countries in relation to their future in the EU. Viewed from the Union's perspective, the term "Balkans" refers to the turbulent events of the 1990s, followed by an absence of the rule of law, corruption, organized crime and a failed transition. Although the situation in the region has improved significantly since then, certain aspects of the political and economic situation in the Western Balkans have brought to life these negative stereotypes. The responsibility of the countries of the region themselves for the bad image that survives from the past, lies in the hands of their political elites, who have not wholeheartedly dealt with the traumatic past, nor have they cooperated closely to build common regional interests.

The specificity of the Western Balkans region is contained in its geo-strategic importance for the stability of the Union, despite the challenges and shortcomings outlined above. Therefore, the importance of the region as an essential geopolitical factor for the security and stability of the EU must be reassessed during the accession process of the candidate countries in this area. The comparative advantage of the region lies in its so-called weakness, because it is more constructive and cost-effective for the Union to fully integrate the region into its structures, than to send humanitarian aid and peacekeeping missions (Gasmi-Ilic, 2002, p. 21). Furthermore, from the standpoint of each candidate country, having clearly defined common regional interests in the EU accession process, which are based on solidarity and cohesion, is far more preferable than negotiating solely on their own with a much stronger Union.

The EU has restated its marriage proposal to Western Balkan aspirants, while quietly warning them of Chinese and Russian influence. It is more of an issue of the EU identity than real political competition, since both Russia and China are not against the EU accession of the region. „The EU once again reaffirms its unequivocal support for the European perspective of the Western Balkans," the bloc's 27 leaders said in what they called the "Zagreb Declaration", after meeting their six Balkan counterparts in a video-summit on 6th May 2020[103]. However, this Declaration does not mention the enlargement of the EU, which was interpreted in the region as a dissapointing EU approach, despite the EU financial aid of €3.3 billion aimed at economic recovery of the region. There is a prevailing perception in the Western Balkans region that the Union does not provide sufficient and concrete support for these candidate countries on their path to the EU, compared with the EU's generous approach towards candidate countries of Central and Eastern Europe during their accession stages. This view is also a consequence of mismanagement of expectations in the region with regard to the EU, which does not take into account the internal agony that the Union has been in for a long time (Gasmi, 2016, p. 287), as discussed above.

[103] https://euobserver.com/, accessed on 10th May 2020.

4. CONCLUDING REMARKS

It is important to point out that the current geopolitical context in Europe is reluctant to further enlarge the EU. Most people in the EU Member States highlighted the migrant crisis, security issues, the rise of ultra-right ideologies and movements, the instability of the Eurozone and the complicated EU bureaucratic procedures as responsible. There are views that these problems could be exacerbated if new countries join the internal structures of the EU. The global pandemic adds enormously to the particularly gloomy tone to these challenges.

Jean Monnet wrote in his memoirs that "Europe will move forward in crises, and will be the sum of the solutions adopted for those crises". What is certain is that national support for the EU accession will be diminished in proportion to the absence of the Union's assistance to the candidate countries in the Western Balkans in the longer term on their path to the EU and in the process of their socio-economic recovery from the pandemic. The EU package of a post-pandemic economic support of €3.3 billion for the region is relatively small compared with the aid to the Member States.

Candidate countries are not only hostages to the current EU institutional weaknesses and a lack of solidarity among the EU Member States, especially during the pandemic, but generally view the Union as a distant target without an adequate policy in the continuing urgent migrant crisis and pandemic. In order to avoid prolonging this situation, it is necessary for each country in the Western Balkans region to focus on the benefits of possible EU membership. In this context, it is useful to highlight the positive aspects of EU candidate countries' membership, in particular: stability in Europe, multiculturalism and diversity, high potentials of tourism and other economic sectors and development of natural resources. This is necessary to dispel negative stereotypes about the Western Balkan countries, but also dilemmas on the part of the Union questioning the need to expand it in order to preserve its own stability and prosperity.

It remains to be seen in the upcoming period whether "Europe-Fortress" is on the scene, with semi-open doors to candidate countries from the Western Balkans region, or is it Europe without borders, with welcome signals to its future members. It would be recommendable and in mutual interest to see the EU's "open doors" for countries of the Western Balkans.

LIST OF REFERENCES

Bertelsmann Stiftung, 2015. *What Do the People Want? Opinions, Moods and Preferences of European Citizens,* Gütersloh, Germany: Bertelsmann Stiftung. https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/Study_EZ_EUpinions_2015.pdf (15th December 2018).

Brehon, N. J. 2020.*The European Union and the Coronavirus*, Paris. Robert Schuman Foundation. Policy Paper, European issues,n°553, 7th April 2020.http://www.robert-schuman.eu (10th April 2020).

Ceylan,O.2006.*A Co-integration Analysis Approach to European Union Integration: The Case of Acceding and Candidate Countries*, Vienna, European Integration online Papers (EIoP) Vol. 10 (2006) N° 7; http://eiop.or.at/eiop/texte/2006-007a.htm (May 2011).

Chopin, T. &Jamet. J.F. 2016, *After the UK's EU referendum: redefining relations between the "two Europe"*, Paris. Robert Schuman Foundation. Policy Paper, European issues, n°399, 5. 07. 2016, http://www.robert-schuman.eu (September 2016).

Deloy, C, 2016. *Supporters and adversaries to the UK remaining in the European Union are running neck and neck in the polls just one month before the referendum*, Paris. Robert Schuman Foundation. Policy Paper. http://www.robert-schuman.eu(24. 06. 2016).

Deloy,C.2016. *43 ans après leuradhésion, lesBritanniquesdécident de quitter l'Unioneuropéenne,* Paris. Robert Schuman Foundation. Policy Paper. http://www.robert-schuman.eu, (24.06. 2016).

European Policy Centre. 2015. *EU member states and enlargement towards the Balkans*, Brussels: European Policy Centre.http://aei.pitt.edu/66050/1/pub_5832_eu_member_states_and_enlargement_towards_the_balkans.pdf (25. 01. 2016).

Fairhurst, J. 2010.*Law of the European Union.*England: Longman, Pearson Education L.

Fouéré, E. 2015.*The EU's Enlargement Strategy 2015: Will the 'new elements' make a difference?* Brussels: CEPS Commentaries. https://www.ceps.eu/system/files/EF%20Enlargement%20Package%202015.pdf (17. 03. 2016).

Gasmi, G. 2016. *Quo Vadis EU? Relevantni pravni i institucionalni faktori*. Beograd: Institut za uporedno pravo.

Gasmi, G. &Zečević, S.2016.*Evropskibezbednosniiodbrambeniidentitetimigrantskakriza*. Beograd: Institut za uporedno pravo. Strani pravni život.god. 2015, br. 2, p. 57 – 76

Giuliani, J.D. 2020. *Now or never,*Paris: Foundation Robert Schuman. https://www.jd-giuliani.eu/en/article/cat-2/679_Now-or-Never.html (12. 04. 2020).

Ilić – Gasmi, G. 2002. *EU Policy towards Western Balkans and the Position of Serbia*. Belgrade: GTZ GmBH.

Ivanda, S. 2001.*Schengenski sporazumi i unutarnja sigurnost*, Zagreb: Sveučilišna knjiga.

Lopandić, D. &Janjević, M. 1996. *Sporazum iz Šengena – Za Evropu bez granica.* Beograd: Međunarodna politika.

Macek L. 2015. *Refugee Crisis: A new East – West rift in Europe?*Paris: Foundation Robert Schuman. www.robert-schuman.eu (28. 04. 2016).

Matias, B.*What the Bulagarian presidency of the Council of the EU meant for the Western Balkans*.Sofia: Group for legal and political studies. http://www.legalpoliticalstudies.org/bulgarian-presidency-council-eu-meant-western-balkans (June 20, 2018).

Mustafaj, A.*Advocating a true reform of the European Union's enlargement process*.Paris: Foundation Robert Schuman. www.robert-schuman.eu(2- 04. 2020).

Piris, J.C. 2010. *The Lisbon Treaty – A legal and Political Analysis*. Cambridge: Cambridge University Press.

Schulten T. 2014. *Contours of a European Minimum Wage Policy Study*, Berlin: Friedrich Ebert Stiftung, http://www.fes.de/international/moe (18. 10. 2014).

Regional Cooperation Council, 2013. *South-East Europe 2020*. Sarajevo: RCC. http://www.rcc.int/files/user/docs/reports/SEE2020-Strategy.pdf (28. 10. 2015).

Sgueo, G. 2015. *Lobbying in the EU - the cost of a lack of transparency*. Strasbourg: European Parliamentary Research Service. https://www.scribd.com/document/281758925/Lobbying-in-the- EU-The-cost-of-a-lack-of-transparency (28. 03. 2016).

LEGAL SOURCES

ECJ Judgement, 2020. Judgment of the General Court in Joined Cases C-715/17, C-718/17 and C-719/17 Commission v Poland, Hungary and the Czech Republic, Court of Justice of the European Union PRESS RELEASE No 40/20 Luxembourg, 2 April 2020, www.curia.europa.eu (15. 04. 2020).

EU Communication 2020. EU, 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, Brussels, 5.2.2020 COM(2020) 57 final,http://ec.europa.eu/enlargement/pdf (26. 04. 2020)

EU Communication 2015. EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Enlargement Strategy, Brussels, 10.11.2015, http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_strategy_paper_en.pdf (24.05. 2016).

EU Regulation 2001. EU, Council regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement", Official Journal of EC, L 81, 21 March 2001: 1-7.

EU Decision 2015. EU, Council Decision (EU) 2015/1601 of 22 September 2015 Establishing provisional measures in the area of international protection for the benefit of Italy and Greece. OJ 2015 L 248, p. 80. (17. 04. 2016.).

EU Enlargement Strategy, 2015. Montenegro 2015 Report, European Commission, SWD (2015) 210 final, Brussels, 10 November 2015, http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_montenegro.pdf (29. 03. 2016).

UN Report, 2020. Shared responsibility, global solidarity: responding to the socio-economic impacts of COVID-19. UN, March 2020, https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf (10. 04. 2020).

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HOW COVID-19 PANDEMIC INFLUENCES RULE OF LAW BACKSLIDING IN EUROPE

The phenomenon of rule of law backsliding raised attention over the last decade after judicial reforms in Hungary and Poland where Governments have sought to reduce judicial independence and jeopardize checks and balances by limiting the power of their respective constitutional courts. The EU has activated political and legal mechanism to address challenges with rule of law in member states, while negotiation processes with accession countries provide more options for influence on judicial reforms.

However, new challenges for rule of law are raised. For the past few months, Europe and the world have been facing with COVID-19 pandemic that put at risk the lives of the people and capability of healthcare systems to provide their services. To prevent the spread of the COVID-19, governments have imposed restrictive measures, while some of them declared state of emergency. The greatest threat for rule of law in Europe is posed by the recent events in Hungary, where unrestricted powers of ruling by decree were given to the government, without any deadline, without any further parliamentary control. Some countries introduced new crimes that could violate human rights. COVID-19 pandemic has posed unprecedented challenges to the functioning of judiciaries. Courts and prosecution services are working with limited capacities to ensure social distancing. Some countries, like Serbia, introduced ICT tools to organize hearings, which raised the question of protecting the rights of defendants. Despite the obvious need for introducing extraordinary measures during pandemic, these measures should be proportionate and time limited.

The paper offers an assessment of the recently introduced changes, restrictions and fast-track procedures that jeopardize separation of powers and rule of law in EU member states and candidate countries. Authors emphasized the need to protect rule of law and independence and impartiality of the judiciary in order to prevent further erosion of the rule of law, separation of powers and position of the judiciary in the member states. The

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role of independent courts is even more essential during the emergency period to protect citizens' fundamental rights and freedoms against any kind of violation or abuse.
Keywords: rule of law backsliding, separation of powers, independence of judiciary, emergency measures.

1. WHY THE RULE OF LAW MATTERS

The rule of law is at the core of the EU system. Although the origins of the notion to the rule of law can be traced to Ancient Greece, the European Commission provided its own understanding of the rule of law. Under the rule of law, all public authorities always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.[104] The rule of law requires the respect of legality, equality of citizens, legal certainty, independence of the judiciary, accountability of decision-makers and the protection of human rights.[105]

The rule of law is incorporated in the EU founding treaties and case law of EU Court of Justice. In a judgment *Les Verts,* the Court of Justice of the European Union for the first time referred to what was then known as the European Community as "based on the rule of law" (von Danwitz, 2012: 1314).[106] This judicial reference was followed by the treaty amendments that reinforced the significance of the rule of law. The 1997 Amsterdam Treaty inserted a new provision into the EU Treaty which provided that the Union is founded on the rule of law,[107] which is later replicated in the 2007 Lisbon Treaty.

According to Article 2 of the Treaty of European Union, 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. The abovementioned values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The European Commission, together with all other EU institutions, is responsible under the Treaties for guaranteeing the respect of the rule of law as a fundamental value of the Union and making sure that EU law, values and principles are respected.[108] The rule of law means that all members of a society – governments and parliaments included - are equally subject to the law, under the control of independent courts, irrespective of political majorities.

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[104] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, {SWD(2020) 300-326}, COM(2020) 580 final, p. 1.

[105] See, e.g., Case C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez*, EU:C:2017:126, para. 37-38.

[106] Case 294/83 *Les Verts v Parliament* [1986] *ECR* 1339, para. 23.

[107] Ex-Article 6(1) of the Treaty of EU.

[108] Editorial Comments, (2016) The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems, *Common Market Law Review* (2016), Vol 53, p. 599.

The rule of law principle is further included in the Charter of Fundamental Rights of the EU. According to article 47 paragraph 2 the Charter of Fundamental Rights of the EU everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

In the EU founding treaties, the rule of law is also used as a benchmark to assess the action of candidate countries and compliance with the rule of law is set as a condition for EU membership (Halmai, 2018: 172). The Amsterdam Treaty stressed the importance of the political criteria and inserted a provision of article 49 TEU, which provides that "any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union". The rule of law chapters, 23 and 24 of the acquis, are at the heart of the European accession process. European Commission expectations of candidate countries are compliance with EU principles relating to the Rule of Law, Judiciary, Fundamental Rights and Anti-Corruption. Areas of focus of Chapter 23 of accession negotiations focus on improving judicial independence, both conceptually and functionally, and strengthening impartiality, accountability, professionalism and efficiency of the judiciary. The oversight of the rule of law should continue after accession of the country to ensure continuation of consistency with the rule of law values (Closa, 2016:19).

Independence of the judiciary as one of the elements of the rule of law is a value separately treated in the EU founding treaties. In accordance with Article 19(1) Treaty of EU, the member states are obliged to ensure that courts and tribunals within the meaning of the EU law meet the requirement of effective legal protection within the denotation of the Charter of Fundamental Rights of the EU. Courts and tribunals can provide such protection only if sustaining their independence (Matić Bošković, 2020: 333).

According to the Venice Commission Opinion on the protection of human rights in emergency situations, the rule of law must prevail.[109]It is a fundamental principle of the rule of law that state actions must be in accordance with the law, including emergency decrees of the executive.[110] In many countries, constitutions provide for a special legal regime, increasing powers of the executive in case of war or a major natural disaster or another calamity. Additionally, the state of emergency should be of limited duration and scope. However, checks on the execute actions during the state of emergency must be ensured through parliament and the judiciary.[111]The role of the judiciary becomes even more important during the time of emergency, since the judiciary serves as an essential check on the other branches of the state and ensures that any laws and measures adopted to address the crisis comply with the rule of law, human rights and, where applicable, international humanitarian law.[112]

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[109] CDL-AD(2006)015), para. 13.

[110] Venice Commission Rule of Law Checklist (CDL-AD(2016)007), paras. 44 and 45.

[111] PACE Recommendation 1713 (2005), Democratic oversight of the security sector in member states, p. 38.

[112] Legal Commentary to the ICJ Geneva DeclarationUpholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, International Commission of Jurists, 2011.

2. BACKSLIDING OF THE RULE OF LAW IN THE EU

Shortcomings in the rule of law in one member state impact other member states and the EU as a whole and challenge its legal, political and economic basis. Should an EU member state be suspected of breaching the rule of law, a number of procedures are available to verify this and remedy the situation (Konstadinides, 2017: 38).

Since 2015, the Polish authorities have enacted a series of judicial reforms including the creation of new disciplinary procedures and a supervisory body that have dramatically increased political oversight of the judiciary (Pech, Scheppele, 2017: 3). As early as 2016, the European Commission triggered its mechanism under the EU Framework to strengthen the rule of law and to prevent further adverse developments regarding it in Poland by adopting 1st Rule of law recommendation 2016/1374 (Bogdany et al, 2018: 983).[113]The EU Commission concluded that legislative reforms in the area of court organizations would limit the independence of ordinary courts (Niklewicz, 2017: 284). In addition, judgement of the EU Court of Justice in Case C/216 PPU regarding the decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice system, re-confirms the relevance of the rule of law for the EU. The safeguarding of judicial independence in Poland was one of the country-specific recommendations addressed in the context of the 2020 European Semester.[114]

The same mechanism was triggered against Hungary in 2017 for concerns about the functioning of the country's institutions, including problems with the electoral systems, independence of the judiciary and the respect for citizens' rights and freedoms (Müller, 2015: 151).[115] One of the problems in Hungary was the fact that the competences of the Hungarian Constitutional Court were limited as a result of the constitutional reform, even

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[113] Commission Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, 2017 O.J.(L 17/50),https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0103&from=EN.

[114] Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland, p. 15 (OJ C 282/21); see also European Commission, Country Report Poland 2020, SWD(2020) 520 final, p. 6 and 36.

[115] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL). According to article 7(1) of the Treaty on European Union in a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. According to Article 7(2) of TEU the European Union Council acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member States of the values referred to in Article 2., after inviting the Member State in question to submit its observations. In situations when a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.

with regard to budgetary matters, the abolition of the *action popularis* and other important issues. The Venice Commission expressed concerns about the mentioned limitations and the procedure for the appointment of judges. The Venice Commission made recommendations to the Hungarian authorities to ensure the necessary checks and balances in its Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted on 19 June 2012 and in its Opinion on the Fourth Amendment to the Fundamental Law on Hungary adopted on 17 June 2013. During 2018,the UN Human Rights Committee expressed concerns that the current constitutional complaint procedure affords more limited access to the Constitutional Court, does not provide for a time limit for the exercise of constitutional review and does not have a suspensive effect on challenged legislation.[116]

The Venice Commission in its Opinion of Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted on 19 June 2012, noted that General Prosecutor has extremely wide powers within the prosecution system. The report from 2015 made by GRECO urged the Hungarian authorities to take additional steps to prevent abuse and increase the independence of the prosecution service by removing the possibility for the Prosecutor General to be re-elected. In addition, GRECO called for disciplinary proceedings against ordinary prosecutors to be made more transparent and for decisions to move cases from one prosecutor to another to be guided by strict legal criteria and justifications.[117]

Problems observed in Hungary also regarded the conflict of interests and corruption. During 2016, the Open Government Partnership Steering Committee received a letter from the Government of Hungary announcing its withdrawal from the partnerships. The Government of Hungary had been under review by Open Government Partnership as of July 2015 for concerns raised by civil society organizations, in particular regarding their space to operate in Hungary. According to the Global Competitiveness Report 2017-2018, published by the World Economic Forum, the high level of corruption was one of the most problematic factors for doing business in Hungary.[118] The problems were also identified in the following areas: privacy and data protection, freedom of expression, academic freedom, freedom of religion, freedom of association, right to equal treatment, rights of persons belonging to minorities, including Roma and Jews, protection against hateful statements against such minorities, fundamental rights of migrants, asylum seekers and refugees, economic and social rights. Regarding the above mentioned issues the Council adopted the decision proclaiming that there was a clear risk in Hungary of a serious breach of the values on which the Union is founded and recommended that Hungary should take necessary actions within three months of the notification of the Council's Decision.

In its Resolution of January 16, 2020, the European Parliament noted that EU's discussion with Poland and Hungary had not yet led these countries to realign with the EU's founding values, indicating that "the situation in both Poland and Hungary has deteriorated since

[116] Recital (8) and (9) of the European Parliament resolution of 12 September 2018.

[117] *Ibid.* Recital (19).

[118] *Ibid.* Recitals (22) and (24).

the triggering of Article 7(1)".[119] These recent experiences with EU member states and challenges in the negotiation process with candidate countries shaped a New Methodology for Running EU Accession Negotiations that was adopted on February 5, 2020. However, the application of the methodology will depend on the rule of law progress in the member states and genuine delivery of reforms in candidate countries to ensure irreversibility of the process.

An additional instrument for protection of the rule of law in the EU is incorporated in the proposal for introduction of rule of law conditionality in the management of EU funds (Fisicaro, 2019: 696). The European Commission put forward a Proposal for a regulation on the protection of Union's budget in case of generalized deficiencies as regards the rule of law in the Member States[120] in 2018, the Parliament adopted first-reading legislative resolution in April 2019, while the Council not yet adopted position.It remains to be seen how it will mitigate current challenges in the rule of law area.

As a new preventive tool, in September 2020 the European Commission for the first time prepared the Rule of Law Report that captures development of the rule of law in the EU member states. The aim of the Rule of Law Report is to identify possible problems and best practices as a basis for annual dialogue between the Commission, the Council and the European Parliament and member states on the rule of law.[121]

3. COVID-19 PANDEMIC, EMERGENCY MEASURES AND RULE OF LAW SAFEGUARDS

The particular circumstances of 2020 have brought about additional challenges for the rule of law due to COVID-19 pandemic. On 30 January 2020, World Health Organization declared COVID-19 a Public Health Emergency of International Concern, and on 11 February 2020 it was declared a global pandemic. Apart from the rapid speed of transmission of the virus, an important feature of pandemic is the lack of available and effective treatment for the disease.

In addition to the immediate health and economic impact, the COVID-19 pandemic created a variety of challenges for the public administration, legal and constitutional systems. The judiciary also needs to protect the right to life and right to health of individual judges, lawyers, prosecutors and court staff. The fact that COVID-19 mortality increases with the age may be a particular consideration since among the judiciary there is usually a higher proportion of older persons than in other professions.

As a response to the pandemic, states have taken exceptional measures to protect public health and introduced some form of state of emergency that leads to increasing executive branch powers to enable rapid procedures that derogate the normal functioning of the

[119] European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP).

[120] Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final.

[121] See: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757 30.09.2020.

democratic state.[122]State of emergency does not violate the principles of the rule of law, although it does create an environment where rule of law safeguards are simultaneously more critical and difficult to uphold.

Governments across the globe have had to balance between health, economy and fundamental freedoms. Some governments introduced new surveillance techniques, including the use of drones and new data-mining technologies that use mobile phone networks to track public movements.[123]

Poland and Hungary have been faced with backsliding of the rule of law over the past five years and COVID-19 pandemic has made the situation even more difficult. Poland was among the first countries in the EU to enact measures limiting freedom. However, the concern was raised due to the instrument that was used and which does not exist in the Constitution. Although Constitution of Poland features potential state of emergency and provision for declaring a state of natural disaster as the only situations when fundamental rights can be limited, the Polish Government used state of epidemic as the legal grounds for limiting human rights and freedoms. The state of epidemic was introduced by the Regulation of 20 March 2020 of the Minister of Health. This decision raised discussion on legality of taken measures and on the fact that state of epidemic has no pre-fixed duration and can be prolonged by the Government.[124]

Hungary also imposed rigorous measures to combat the spread of COVID-19 enacting a state of emergency on 11 March 2020. Two weeks later, on March 30 the Hungarian parliament adopted law that extends government powers during pandemic and enables the Government to rule by decree without set limit and parliamentary approval. This decision raised concerns among European Parliament members, EU Commission and EU member states.[125]Triggered by extended powers without any oversight, 13 EU member states call for COVID-19 emergency measures to be temporary and in line with rule of law principles. On June 18, the Government ended the emergency rule by decree and declared a state of medical crisis until mid-December. Under the state of medical crisis, the Government is allowed to issue decrees, but cannot change laws on its own or limit human rights.[126]

As a response to COVID-19 a number of countries have closed courts or limited or suspended their main activities.[127] Currently, only 8 percent of justice systems continue to work normally; and while 92 percent of judicial authorities are now delaying or

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[122] See: The Impact of COVID-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU, Policy Department for Citizens' Rights and Constitutional Affairs, European Union, PE651.343.

[123] Pathfinders for Peaceful, Just and Inclusive Societies, (2020) *Justice in a Pandemic - Briefing One: Justice for All and the Public Health Emergency,* New York, Center on International Cooperation, p. 11.

[124] 2020 Rule of Law Report – Country Chapter on the Rule of Law Situation in Poland, SWD(2020) 320 final, p.16.

[125] See: https://www.politico.com/news/2020/04/01/13-countries-deeply-concerned-over-rule-of-law-16094230.09.2020.

[126] See: https://www.politico.eu/article/hungary-replaces-rule-by-decree-controversial-state-of-medical-crisis/ 30.09.2020.

[127] International Union of Judicial Officers, Courts,https://rm.coe.int/courts-covid-19-measures-as-of-15-april-2020/16809e2927 30.09.2020.

suspending all matters except those deemed urgent, in some countries serious doubts arise as to their capacity to maintain the rule of law during the pandemic, or to prevent the arbitrary infringement of civil liberties, whether by private individuals, organizations or governmental authorities.[128] This is especially challenging due to the fact that the judiciary needs to remain guardian of the rule of law and fundamental rights through review of emergency legislation.

According to Fair Trials the disruptions of court activities affected access to justice.[129]The impact of measures ranges from a restricted ability to challenge executive decisions, to delays in judicial processes, challenges related to access to justice and a further increase of backlog cases in the courts due to delays of hearings.

The COVID-19 pandemic and restriction of courts operations specifically impacted certain group of cases, like cases with defendants in detention, cases where immediate protection is required for vulnerable groups (women, children), and other urgent family disputes.

In addition, it is expected that pandemic and following economic crisis will increase demand for justice as a consequence of delays and incoming new cases that have started as a result of COVID-19.[130]The judiciaries across the world are already facing financing challenges and limited resources, while economic crises will only increase the existing problem.[131] The scarcity of public resources will require additional strategic planning to ensure sustainable and adequate funding of judiciaries in post-COVID-19 time.

4. COVID-19 PANDEMIC AND JUSTICE RESPONSE

The reduced activities in courts and lockdown measures have impact on court operations. Majority of countries were looking for solutions that would limit interaction with courts and suspension of non-urgent cases was one of the applied measures. To enable functioning of the courts, countries where levels of information technology development allowed introduced modalities of online hearings and/or other use of modern technologies during proceedings, like, for instance, electronic filing. Promotion of alternative dispute resolution and court settlement was also a tool used in some of the countries.

In Hungary, the Government ordered by Decree that the functioning of Hungarian courts be suspended, apart from certain urgent cases, for an undefined period of time.[132] Two weeks later, the Government introduced changes to the procedural laws, aimed at

[128] Impacts of COVID-19 on Justice Systems, (2020) Global Access to Justice Project, survey available at: http://globalaccesstojustice.com/impacts-of-covid-19/ 30.09.2020.

[129] Fair Trials (2020), COVID-19 Justice Project, https://www.fairtrials.org/covid19justice?field_tags_tid%5B0%5D=1142 30.09.2020.

[130] The Rule of Law in the Times of Health Crisis, (2020), Advocates for International Development, Rule of Law Initiatives.

[131] Charging for Justice – SDG 16.3 Trend Report (2020) HILL, https://www.hiil.org/wp-content/uploads/2020/04/HiiL-report-Charging-for-Justice-3.pdf 30.09.2020.

[132] Government Decree 45/2020 of 14 March 2020.

facilitating the operation of the justice system during the state of danger.[133] In Bulgaria, following a decision of the Judges' chamber of the Supreme Judicial Council,[134] the processing of court cases was temporarily suspended for one month during the state of emergency, except for urgent cases.[135]In Austria, most activity of courts was temporarily suspended from 16 March to 13 April 2020 due to the COVID-19 pandemic, with specific measures adopted to postpone procedural deadlines, which could lead to increased backlogs in the justice system. [136]

Although suspension or limitation of courts' operations were necessary measure at the beginning of pandemic, it was not sustainable solution and Governments and judiciary were obliged to find more suitable solutions, either through the use of information technologies, or amendments to procedural legislation and incentives for court settlements. Such an approach was taken in Italy, where Government adopted organizational measures in cooperation with the Heads of Judicial Offices and the High Council for Judiciary, allowing for remote civil and procedural hearings.[137]The crisis led to an acceleration of digitalization in criminal trials, where the Prosecution service was granted the possibility to hear witnesses and examine suspects through video conference, as well as to appoint experts.[138]

Spain declared state of alarm on 14 March[139] and during the initial period of three months the activities of the courts were limited, procedural deadlines suspended, and procedural acts maintained only in urgent procedures. Concerns have been raised that these measures may have impact on the justice system as it will have to deal with the backlog generated during the state of emergency.[140] Efforts are undertaken to minimize the impact of the COVID-19 pandemic on the justice system through adoption of new legislation foreseeing special procedural and organizational measures.[141] The measures envisaged also include a wider use of digital technologies for procedural acts.

In Portugal, several measures were adopted related to teleworking and possibilities to hold hearings and conduct other procedures remotely.[142] Deadlines in non-urgent cases

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[133] Government Decree 74/2020 of 31 March 2020. That Decree became ineffective on 18 June 2020, in accordance with Article 53(4) of the Fundamental Law.

[134] Extraordinary Session, Short Protocol No. 9, 10 March 2020.

[135] Such as those on reviewing pre-trial detention, or undertaking victim protection measures and child protection measures.

[136] 1. *und* 2. *COVID-Justizbegleitgesetz.*

[137] Art. 83 of the Decree-law of 17 March 2020 n. 18.

[138] 2020 Rule of Law Report – Country chapter on rule of law situation in Italy, SWD(2020) 311 final, p.5. Information received in the context of the country visit and of the consultation process for the preparation of the report, e.g. Ministry of Justice contribution (an increase of 89% in videoconferences has been registered in May 2020 with respect to May 2019).

[139] Royal Decree 463/2020, declaring the state of alarm as a result of the health crisis caused by COVID-19.

[140] The Commission has also addressed this issue in the context of the European Semester. Recital 28, Council Recommendation on the 2020 National Reform Programme of Spain and delivering a Council opinion on the 2020 Stability Programme of Spain, p. 8 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0509&from=EN30.09.2020.

[141] For example, 11 to 31 August were declared working days for procedural purposes.

[142] 2020 Rule of Law Report – Country Chapter on rule of law situation in Portugal, SWD(2020) 321 final, p. 5.

were suspended, and non-urgent cases were adjourned. Portugal foresees a set of measures to address challenges after initial lockdown. Special focus of the measures is to address increased demand for justice and need to reduce backlog. One of the envisaged measures is a temporary regime of reduction of court fees to facilitate reaching of court agreements.

The digitalization of the justice system was used as an opportunity to overcome challenges caused by the COVID-19 pandemic. A number of initiatives are being taken ranging from allowing court users to monitor on-line the stages of proceedings to organized on-line hearings. Countries in which e-justice systems are well advanced, like Estonia and Latvia, showed a high degree of accessibility to court users and functioning of the courts continued without significant disruption during COVID-19 pandemic.[143]

Although the e-justice is useful tool during pandemic, there are potential challenges for use of information technologies in the justice system from an access to justice perspective, since there is significant population being digitally excluded. Plans for the future should include safeguards for all, including those who do not have access to internet.

The COVID-19 outbreak has also had an impact on the exercise of procedural rights of suspects and accused persons. Direct communication with lawyers, interpreters or with third persons (while the suspects or accused persons are deprived of liberty) is more difficult. In the Netherlands, stakeholders have raised concerns about the effective safeguarding of the right to a fair trial and quality of justice during pandemic,[144] since the prosecution service has announced plans to make increased use of its power to decide itself on certain criminal cases.[145] This could have an impact on the right to a fair trial, if citizens are not adequately informed.[146]

In France, some measures raised significant discussion. Measures relating to the functioning of the justice system included the early release of certain categories of detainees, and automatic prolongation of the length of pre-trial detention.[147] Measure of automatic prolongation of the length of pre-trial detention implies putting at risk the fundamental right to liberty.[148] Based on the legal action contesting the legality of prolongation, the Court of Cassation ruled that the court that would normally have decided on the prolongation should rapidly review the validity of the prolongation decision.[149]

In addition to legislative actions, safety measures should be adopted, such as glass

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[143] 2020 Rule of Law Report – The Rule of Law situation in the European Union, SWD(2020) 580 final, p. 11.

[144] See: The Netherlands Committee of Jurists for Human Rights (2020), Letter on concerns about corona measures in criminal justice.

[145] Such decisions by the prosecution service cannot impose a prison sentence and can be contested in court. See the Letter from the Minister for Justice and Security and the Minister for Legal Protection to the House of Representatives of 25 June 2020: 'Contours of the Approach to Address Backlogs in Criminal Justice'.

[146] See in that regard: National Ombudsman, Proper Provision of Information is the Basis of Access to Justice – Bottlenecks in the Provision of Information about Penalties and Dismissal Decisions.

[147] Art. 16, Ordinance 2020-303 of 25 March 2020.

[148] See also criticising a lack of clarity: Magistrates Union (2020), Automatic extension of provisional detentions: after the scandal and the mess, nonchalance!

[149] Judgment no. 974 of the Court of Cassation of 26 May 2020 (20-81.910).

protections at police stations or in detention facilities, in order to enable the exercise of the right of access to lawyer or the right to an interpreter.

In Serbia, only urgent cases were tried, like pre-trial detention and cases related to the breaches of emergency rules relating to the COVID-19 pandemic. Although the Serbian Criminal Procedure Code did not envisage trial by video conference, except in specific circumstances,[150] the Serbian Government adopted a decree[151] by which during the state of emergency, a judge could decide that a defendant's participation can be ensured through a video link. In addition to the lack of legal basis, the measure is not in line with the European Court of Human Rights case law.

According to the jurisprudence of the European Court of Human Rights, telephone and video conference as alternative for hearings and other procedural actions, may be used if they are based in law, time-limited and demonstrably necessary and proportionate in the local circumstance and do not prevent confidential communication of a person with their lawyer. In the case *Vladimir Vasilyev v Russia*[152] it was stressed that article 6 of the European Convention of Human Rights does not guarantee the right to be heard in person at a civil court, but rather a more general right to present one's case effectively before the court and to enjoy equality of arms (para. 84).

European Court of Human Rights in case *Riepan v Austria*[153]assessed importance of publicity of trials in criminal cases. The use of video link during trial in criminal case prevents publicity and public character of criminal trial serves to maintain confidence in the courts and contributes to the achievement of a fair trial (para. 40). However, even in the criminal cases participation in the proceedings by videoconference is acceptable to the European Court of Human Rights when it is explicitly provided in the national legislation (*Marcello Viola v Italy,*[154]para. 65) and if technical conditions enable smooth transmission of the voice and images (para. 74).

It is important that use of videoconference do not prevent confidential communication with the defence counsel. The European Court of Human Rights pointed out this condition in case *Marcello Viola v Italy* (para. 75), which was ensured through direct contact with lawyer. Since face to face meetings with lawyers were limited during pandemic the Fair Trials developed detail recommendations[155] on access to a lawyer, especially access to legal assistance for defendants in detention to ensure confidentiality. Recommendations were focused on secure and unlimited use for telephones, so that calls cannot be intercepted or recorded.

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[150] Article 104 of the Criminal Procedure Code.

[151] Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog 15. marta 2020. godine, *Službeni glasnik RS*, broj 49/2020.

[152] Application no. 28370/05, judgement of 10 January 2012.

[153] Application no. 3511/97, judgement of 14 February 2001.

[154] Application no. 45106/04, judgement 5 October 2006.

[155] Safeguarding the right to a fair trial during coronavirus pandemic: remote criminal justice proceedings, (2020) Fair Trials, https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf, 30.09.2020.

In times of COVID-19, the procedural rights of suspects and accused persons need to be respected in order to ensure fair proceedings. Limited derogations, which are provided for by the decrees, should be interpreted restrictively by the competent authorities and not be employed on a large scale.

5. THE NEED TO STRENGTHEN THE JUSTICE DURING HEALTH EMERGENCIES

The crisis with COVID-19 pandemic is ongoing. Although countries relaxed lockdown measures, the virus is spreading, and operation of the state institutions and judiciary is not completely returned to normal functioning. It is expected that new challenges will be during the winter when citizens will be exposed to both, regular flu and COVID-19.

It is important to ensure judicial control of decisions adopted during state of emergency to maintain public trust in institutions. To enable that the judiciary needs to be independent and separation of powers should be strengthened to prevent any abuses of executive.

In order to prepare judiciary to deal with the health emergency situation it is necessary to develop the case management system and framework and enable flexible court case triage between urgent and non-urgent case. Countries that have e-justice system should improve its functionalities to remove any unnecessary direct contacts with courts and prosecution offices. There is a need to explore if there is a need to amend legislation to ensure legal basis for use of online hearings and e-filings. However, safeguards for fair trials should be incorporated in the legislation and practice.

In addition, states and judiciary should be prepared for post-crisis period when it is expected to have increase of incoming cases on the top of created backlog. One of the solutions could be introduction of incentives for court settlement and use of alternative dispute resolutions. Pandemic is also putting pressure on alternative dispute resolutions community to find innovative solutions like e-mediation, e-arbitration and use of artificial intelligence in proceedings (Fan, 2020: 6).

REFERENCES

Von Bogdany, A., Bogdanowicz, P., Canor, I., Taborowski, M., Schmidt, M., (2018) A potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines, *Common Market Law Review,* Vol. 55, No. 4, p. 963-996.

Closa, C. (2016) Reinforcing EU monitoring of the rule of law. In: Closa, C., Kochenov, D. (ed.) *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, p. 15-35.

Von Danwitz, T. (2014) The Rule of Law in the Recent Jurisprudence of the ECJ', *Fordham International Law Journal*Vol. 37, Issue 5, p. 1312-1347.

Fisicaro, M. (2019) Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values, *European Papers*, Vol. 4, No. 3, p. 695-722.

Halmai, G. (2019) The Possibility and Desirability of Rule of Law Conditionality, *Hague Journal on the Rule of Law,* Vol. 11, Issue 1, p. 171-188.

Konstadinides, T. (2017) *The Rule of Law in the European Union: The Internal Dimension,* Hart Publishing.

Matic Boskovic, M. (2020) Role of Court of Justice of the European Union in Establishment of EU Standards on Independence of Judiciary, *EU and Comparative Law Issues and Challenges Series (ECLIC),* Issue 4, p. 329-351.

Müller, J.W. (2015) Should the EU Protect Democracy and the Rule of Law inside Member States? *European Law Journal,* Vol. 21, Issue 2, p. 141-160.

Niklewicz, K. (2017) Safeguarding the rule of law within the EU: lessons from Polish experience, *European View,* Vol. 16, str. 281-291.

Pech, L. Scheppele, K.L. (2017) Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies*, Vol. 19, p. 3-47.

INTERNET SOURCES

Fan, K. (2020) The Impact of COVID-19 on the Administration of Justice*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2020/07/10/the-impact-of-covid-19-on-the-administration-of-justice/*

Editorial Comments, (2016) The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems, Common Market Law Review,Vol 53,Issue 3, 597-606.

International Union of Judicial Officers, Courts, https://rm.coe.int/courts-covid-19-measures-as-of-15-april-2020/16809e2927

Pathfinders for Peaceful, Just and Inclusive Societies, (2020) *Justice in a Pandemic - Briefing One: Justice for All and the Public Health Emergency,* New York, Center on International Cooperation, https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/6c192f_0658a70ae607408098643815ab855a65.pdf

Safeguarding the right to a fair trial during coronavirus pandemic: remote criminal justice proceedings, (2020) Fair Trials, https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf

Impacts of COVID-19 on Justice Systems, (2020) Global Access to Justice Project, survey available at: http://globalaccesstojustice.com/impacts-of-covid-19/

Fair Trials (2020), COVID-19 Justice Project, https://www.fairtrials.org/covid19justice?field_tags_tid%5B0%5D=1142

The Rule of Law in the Times of Health Crisis, (2020), Advocates for International Development, Rule of Law Initiativeshttps://www.roleuk.org.uk/sites/default/files/files/RULE%20OF%20LAW%20IN%20TIMES%20OF%20Health%20Crises_FINAL.pdf

Charging for Justice – SDG 16.3 Trend Report (2020) HILL, https://www.hiil.org/wp-content/uploads/2020/04/HiiL-report-Charging-for-Justice-3.pdf

https://www.politico.com/news/2020/04/01/13-countries-deeply-concerned-over-rule-of-law-160942

https://www.politico.eu/article/hungary-replaces-rule-by-decree-controversial-state-of-medical-crisis/

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RETHINKING THE THEORY OF STATE OF EXCEPTION AFTER THE CORONAVIRUS PANDEMIC? – THE CASE OF HUNGARY

This article focuses on today's most important debate on emergency theory in the context of coronavirus pandemic. The theory of the state of exception in constitutional law is a matured one in a global point of view. Nevertheless, after the measures taken by the Hungarian Government, there are real concerns on the applicability of the classical theories. The paper reflects on the mentioned issue by presenting the so-called classic theories of this phenomenon and also the most relevant measures taken by the Hungarian government in 2020. The question remains: is it possible to preserve constitutionalism in an age of state of emergencies?

Keywords: state of exception, emergency models, the rule of law, Hungary, coronavirus

1. INTRODUCTORY REMARKS

Emergencies are mostly sudden, and states in most cases are using extraordinary measures to deal with them. For this reason, constitutional democracies have standing constitutional or exceptional legal powers to derogate constitutional values for the sake of order. Those democracies that do not have such powers use impromptu ones. The main subject of this paper is exceptional situations, the emergencies and the possible responses of states to these with particular attention to the coronavirus pandemic. The topic is always actual because there are countless emergencies in the world (such as civil wars, terrorist attacks, economic emergencies, natural disasters, industrial accidents, not to mention the climate change and its effects on modern states and societies) and it seems that this is an ever-increasing problem in constitutional democracies.

It is widely accepted between the scholars that emergencies are various and very diverse, they include external violent attacks, internal disturbances such as revolutions, natural disasters (environmental catastrophes are also included), epidemics and economic crisis

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(Sajó & Uitz, 2017, 419). According to Subrata Roy Chowdhury (Chowdhury, 1989, p. 15-16), there are three different situations which may arouse the need of state of emergency. The first could be grave political crises with violence, such as are armed conflicts, terrorist attacks, rebellions and riots. The second category involves natural disasters and industrial accidents, while the third is an economical and financial crisis. These categories may require different actions from the states, for example, a violent crisis may require a prompt and definite reaction from the government (or from the legislation), while an economic crisis – mostly – allows for more extended response periods. Chowdhury's ordination has to be amended with a new one which category is already the reality of our life and can be described as the concept of a permanent state of emergency. The background of this issue is that the global climate change and the technological development results in new challenges which have already become the core elements of our everyday living and also raise the question: is it possible to maintain the classical view of the rule of law and constitutionalism?

2. THE QUESTION OF CONSTITUTIONALISM IN THE CONTEXT OF STATE OF EXCEPTION

There are at least two main problems with the responses to an emergency. First of all, the state must respond to an emergency effectively and therefore shall use measures which are not allowed during normal times. It is the state's responsibility to protect itself and also the nation, but the more serious question is how a state deal with an emergency and at the same time could protect the values of constitutionalism?

The core element of constitutionalism means a wide range of principles, theories, values and institutions that are concerned with the authorization, organization, direction and most importantly, the constraint of political power. 'Constraint' means that neither anarchy nor a totalizing concentration of power is consistent with constitutionalism. A constitutionalist system includes three immanent elements, and if only one is lacking, the system is not constitutional. First: the institutions authorized by and accountable to the people. Second: some notion of limited government (there are already various types of this element). Third: the rule of law. There are other essential elements as well such as sovereignty, a written constitution, some form of judicial review, and the presence of a civil society autonomous from the government (Brandon, 2015, p. 763). The aim of constitutionalism with its various principles is limiting government power in order to prevent despotism. Therefore, constitutionalism suggests that authority may be limited by various techniques of separation of powers, checks and balances, and the protection of human rights. Thus, constitutionalism presumes a legally binding document (the constitution) which provides the necessary limitations of government (sovereign) power (Sajó & Uitz, 2017, 13). However, constitutionalism has a more or less strict system of requirements; the elements of the rule of law can be more diverging. The reason behind this is that the rule of law is a jurisprudential topic; therefore, we have to take into account the historical, cultural and sociological aspects. The common element of the rule of law is the significant limitation of possible arbitrary power (Selznick, 1999, p. 21). It is also more

or less evident that in the post-socialist or "transition" countries (such as Hungary) the Courts (especially the Constitutional Courts) made great efforts in order to support and to consolidate constitutionalism and the rule of law (Örkény & Scheppele, 1999, p. 58-65).

These principles are not only the essential elements of constitutionality, and therefore, constitutional democracy but also these values are the most vulnerable ones during a time of emergency. At this point, the effective judicial review is the only real guardian of constitutionalism and fundamental rights (Davis & Londras, 2016).

3. THE PROBLEM WITH EMERGENCIES

As we had seen during the period of the Weimar Republic, the most dangerous aftermath of emergency regimes is the possibility for an authoritarian government to abuse emergency powers in order to stay in power. The Weimar Constitution was already accepted in a background of ominous use of emergency powers and delegated legislation with an economic crisis in a country without democratic backgrounds and commitment. It was also accepted to delegate legislation in a time of crisis if a law passed with a two-thirds majority and therefore legislative powers could be transformed to the executive. Furthermore, the president could pass decrees – with the prime minister's countersign – with a force of a statute in an undefined state of emergency according to Article 48 of Germany's Weimar Constitution (Mommsen, 1996, p. 56-57). This power was undefined and unrestrained, and in 1930's it was used to replace constitutional democracy and the Parliament's sole legislative power with a presidential government which was using decrees instead of statues (Sajó & Uitz, 2017, p. 231, 420). So, a constitutional democracy needs to have strict limits for the duration, circumstances and scope of emergency powers. This phenomenon is the leading legal question of emergencies and can be described as the 'inside-outside' debate, which also reflects on the Janus-faced character of the state of emergencies. The starting point of this debate is reflected in the relationship with the rule of law and the exception. According to the German theorist Carl Schmitt, "*the sovereign is he who decides on the state of exception*" (Schmitt, 2005, p. 5). This definition reflects on the decision and even more on the exception/normality dichotomy. The concept of the exception is based on the German political and economic crisis of the 1920-30s. Therefore, Schmitt tried to resolve these perils to the state by requiring the suspension of customary law. This approach – which we call decisionist – prefers a sovereign decision against the norm.

Giorgio Agamben (Agamben, 1998, p. 17-18) calls this exception a "*kind of exclusion*". Moreover, "*what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension.*" In his work, Agamben tried to specify the nature of the state of emergency, which he called 'zone of indifference'. Agamben's definition contradicted the inside/outside opposition theories concerning the state of exception and focused instead on the characteristics of the norm, the judicial order and the suspension. In his view, the state of emergency (or state of exception, as he calls it, Agamben, 2005, p. 23) is "*neither external nor internal to the juridical order [...] The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order.*"

On this decisionist ground Gross also emphasized that the officials must step outside the legal order if a particular case necessitates it (Gross & Aioláin, 2006). Gross's concept also contains the assumption that the rule continues to apply in general. Finally, it is up to the people to *ex-post* ratify the official's extra-legal actions or punish for the illegal conduct. This *ex-post* prosecution adds some kind of legality to this 'extra-legal measures model.'

Others emphasize the relevance of the rule of law even in a time of emergency. According to the former (Dicey, 1982, p. 182-183.), the state of emergency (martial law) "*means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals is unknown*". He asserted that the 'Declaration of the State of Siege' is unknown, and from this point of view he offers 'permanent supremacy of law' in times of emergency as well. On this theoretical background David Dyzenhaus (Dyzenhaus, 2006) questions the decisionist approach. This perspective tries to define who decides on what in a state of emergency, or more precisely, who decides on fundamental issues of legality. In his interpretation, the responses to emergencies should also be governed by the rule of law, and in this relation, the rule of law is nothing more than the rule of fundamental constitutional principles which protect individuals from the state's arbitrary action. He accepted, of course, that in a time of emergency, democracies have to suspend individual rights in order to preserve themselves. However, he also added that in our modern era there are several emergencies (such as terrorism, and here I also add financial and economic crisis) which have no foreseeable end, and therefore they are permanent. For those who are troubled with the trend that a state of emergency could last for an uncertain period, Dyzenhaus offered the rule of law project. The phenomenon contains the cooperation of the legislative and the executive power and a significant role of the judges. He also mentioned that the rule of law meant more than formal or procedural principles, which could be regulated in the constitution, and which only protect the rights to the manner of decision-making. This concept of the rule of law with the state of emergency reflects the moral resource of law or the inner morality of law (Dworkin, 2013, 400-415). Taking everything into consideration, he asserted that judges have an essential task in maintaining the rule of law.

The theories resulted in at least two models of the state of emergencies: the 'legislative' and 'executive model' of emergency powers. The former requires the legislative body to design a *sui generis* 'emergency' legal regime in order to handle the situation. The latter is the most commonly used constitutional method which delegates the executive (especially the president or the government) the authority to decide the existence of an emergency and if it is the case to respond to it by using emergency or extra-legal measures. In a rule of law perspective, it is also vital to grant the possibility of judicial review, and if judicial supervision is given a relatively large role, one might see a third constitutional state of emergency model: the 'judicial model' (Dyzenhaus, 2012, 442).

To summarize the theories as mentioned earlier, there are two endpoints of emergency theories. On the one hand, when a state deals with an emergency, it might use extra-legal measures, so it is evident that the rule of law does not have a full impact on emergency politics. This theory is called the 'exceptionalist view' (Lazar, 2009, p. 3) which says that norms are applied in everyday situations, but during exceptional times these rules are not in effect, therefore, the emergency powers do not violate the rule of law and human

rights because one can hardly violate a rule that is not in effect. The concept and theory of exception in a constitutional point of view nearly means a temporary dictatorship, although it is not as simple as we think. There is a big difference between a state of emergency and dictatorship: according to the previous, it is evident that although the standard rules do not apply there are other rules that do which means that there are some legal aspects during a state of emergency. Because of this nature of the state of exception, Clinton Rossiter used the framework of Constitutional Dictatorship in order to characterize the ambivalent nature of the state of emergency (Rossiter, 2009).

There is also the option with the nearly full power of legality; in this case, the rule of law has its effect on emergency politics, practically due to the effective judicial review. The problem with this standpoint is that with a full judicial review power on the one side, the other side, namely effective state self-defence and security could suffer great sacrifices. Consider, for example, that broad judicial review can also entail belated emergency measures, and in this way, the state cannot fight effectively against the emergency.

Another vital aspect might represent the core problem of the first standpoint. If we accept that there is a constitutional authority to use the law itself to suspend the law, and in this way, we create an exceptional regime near or upon the ordinary legal order, then we claim that the responses to an emergency mean a dualist legal order – one which response to everyday situation, and the 'emergency law' which response to exceptional situations.

Nearly all constitutional democracies use state of emergency regimes implemented into the constitutions which – in a theoretical point of view – means the in practice constitutional democracies accept the so-called exceptionalist viewpoint. By the way, one has to be aware to prevent the abuse of emergency powers in order to prevent the autocratic transition we had seen during the 'Weimar era'. Therefore, it is widely accepted that in modern constitutional democracies, emergency regimes are meant to be temporary with a precise aim to restore the usual way of constitutionalism. It also means that the emergency rules of constitutions have to fit some regulatory requirements in order to prevent the abuse of constitutionalism (Sajó & Uitz, 2017, p. 424-433). It is widely accepted that national constitutions shall use exact constitutional definitions of emergencies which means some kind of taxation (with explanations as well) of the specific scenarios of external, violent attacks, internal disturbances and various national emergencies. It is also essential to rule the exact procedure for declaring an emergency, and it is also essential to include some kind of checks in the system in order to prevent the values of constitutionalism and the rule of law. The *sui generis* emergency regime can be easily separated from emergency measures which are indispensable to restore constitutional normalcy.

It is also widely accepted between constitutional law theorists that a state of emergency is generally meant to be temporary in the definition. The restrictions of the rule of law values and fundamental rights should not last longer than necessitated to handle the emergency, and these measures aim to restore the functioning of the standard constitutional system. Finally, there has to be a 'follow-up' procedure implemented to review and end the taken emergency measures (Sajó & Uitz, 2017, p. 432-433). This element is crucial because, without it, there is a real threat that emergency measures are leaking into the standard legal order, which can lead to the erosion of constitutional values.

4. THE HUNGARIAN 'EMERGENCY REGIME' AND COVID-19

The Fundamental Law of Hungary created a *sui generis* state of emergency chapter, which means that it follows an 'exceptionalist view'. This chapter is called the special legal orders, which contains the state of national crisis and emergency, state of preventive defence, state of danger and unforeseen intrusion. Article 54 of the Basic Law also represents the standard rules relating to special legal order, such as the possibility to suspend or restrict fundamental rights beyond the extent of ordinary law standards. This article contains unique guarantees such as the prohibition of suspension of the Fundamental Law and other temporal restrictions. Although the Fundamental Law has a visibly unified emergency power system it also has to be indicated, that the prelude of Hungary's new constitution had a connection with the political and economic crisis as well and the constitution has its 'crisis-constitution' nature (Mészáros, 2018, p. 278-282). Not to mention that the Hungarian Parliament also used ordinary legislation, which contains extra-legal measures in order to deal with so-called emergencies as we have seen during the 'mass migration crisis' which resulted in a new emergency regime outside the Fundamental Law's mechanism (Mészáros, 2017, p. 135-137).

Soon after the official declaration of the first infection by the new coronavirus on 4 March 2020, the government declared a state of emergency (state of danger) using Article 53 of the Fundamental Law by Decree 40/2020 (III. 11.). The first paragraph of Article 53 allows the government to declare a state of danger and to introduce emergency measures – these measures defined in an implementing act (The Act CXXVIII of 2011 on emergency management and the amendment of specific relevant laws) – in the case of a natural or industrial disaster endangering lifes and property or to mitigate the consequences thereof. During a state of danger, the government may issue decrees empowered – under the implementing act of Act CXXVIII of 2011 on emergency management and the amendment of specific relevant laws – to suspend the application of certain laws or to derogate from the provisions of laws, and to take other extraordinary measures. Nevertheless, this decree of the government shall remain in force for fifteen days only, except if the government – based on an authorization from Parliament – extends the effect of the decree. According to the last paragraph of Article 53 upon the termination of the state of danger, the decree of the government should cease to affect.

It seems clear that the Fundamental Law is granting the opportunity to declare this kind of state of emergency and the implementing act is responsible for regulating the relevant emergency measures to be used in a state of danger. According to the Fundamental Law, there are only two relevant situations that would result in a state of danger: natural and industrial disasters. The human epidemic is not involved in the listing of the constitution. However, the relevant implementing act, Act CXXVIII of 2011 concerning disaster management and the amendment of specific relevant laws extends the cases by the 'other dangers' specified in Article 44, which allows declaring a state of danger to protect the health and life of citizens when a human epidemic jeopardizes human life and property and causes mass infections. Consequently, the Act overwrote the Fundamental Law's specification of the relevant cases and enabled the declaration of a state of danger by using a provision of the Act instead of

the Fundamental Law. For the Fundamental Law, this provision is unconstitutional (for a detailed analysis on this matter see: Mészáros, 2020). The government can declare the state of danger by a decree, and it is also possible for the government to use temporary nullification measures – it can be found in the Act on Emergency Management – but this latter Act cannot ease the enumeration of the Constitution.

After the declaration of a state of danger, the Hungarian government issued more than a hundred decrees and also used ordinary legislation to handle the situation. The most controversial was the so-called 'Enabling Act', which was accepted by 2/3rd of the Parliament on Monday 30 March and was signed by the President within two hours. This 'Enabling Act' has given the Government free rein to govern directly by decree without the constraint of existing law. It has also allowed suspending the enforcement of specific laws, departed from statutory regulations and implemented additional extraordinary measures by decree in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 concerning disaster management and the amendment of specific relevant laws. The government could have taken these measures by referring to the 'Enabling Act' instead of corresponding to the Fundamental Law's strict emergency regime, which means that the coronavirus situation led to an anomalous situation (Mészáros, 2019, 63-72). The Hungarian legislation and government used a hybrid regime – which means extra-legal measures implemented into the standard legal order – in order to handle the pandemic emergency.

5. CONCLUSIONS

As I have briefly mentioned above the coronavirus situation called worth the rethinking of state of exception's classical theories because it seems that the Hungarian Fundamental Law's regime was ineffective at least in two ways: first of all the government believed that with the available constitutional state of emergency rules the situation could have hardly been handled effectively. Secondly and most importantly, in this way, the constitutional guarantees were not sufficient enough to preserve the rule of law values and to help to regain normalcy. I agree that times of emergency put the rule of law to its most significant test (Dyzenhaus, 1999) when people rely on political leaders who are using sovereign prerogative but behind these acts one can easily find out that the aim is to act for the public good (Sarat, 2010, p. 1). It is also important to mention that the real relevance of law is to fulfil the requirements which rule of law values generate in constitutional democracies. Therefore, it is evident that the rule of law (as an essential requirement of law-making) is about tempering power and arbitrariness (Krygier, 2016). If the law has an alternate objective, it proposes constitutional concerns. Based on Hans Kelsen's theory, modern constitutional democracies are constructing emergency powers with the assumption of separating normalcy from the emergency. Therefore, they use emergency measures separated from ordinary rules (Gross, 2018, 585). These regulation aims to assure that extra-legal measures can be used solely in extraordinary times; therefore, the taken actions remain separated from normalcy. State of emergencies used worldwide in context with the threat of coronavirus has raised the critical question again, especially in Hungary: is it possible to make bright-line distinctions between normalcy and the state of emergency in an era

when the emergency government is becoming the norm (Gross & Aoláin, 2006, p. 171-243)? The question asked by the famous legal theorist Ronald Dworkin is also remaining: How far do our moral obligations and responsibilities depend on what the law provides and do we have a moral obligation to obey the law, whatever it is (Dworkin, 2013, p. 401)? I am afraid we have to wait and see for the answer until the end of the situation caused by the coronavirus.

REFERENCES

Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press.

Agamben, G. 2005. *State of Exception* (Kevin Attell trans.). Chicago-London: University of Chicago Press.

Brandon, M. E. 2015. Constitutionalism. In: Tushnet, M., Graber, M. A. and Levinson, S. (eds.), *The Oxford Handbook of the U.S. Constitution*, Oxford: Oxford University Press, pp. 763-784.

Chowdhury, S. R. 1989. *The Rule of Law in a State of Emergency – The Paris Minimum Standards of Human Rights Norms in a State of Emergency*. London: Printer Publisher.

Davis, F. F. & de Londras, F. eds. 2016. *Critical Debates on Counter-Terrorism Judicial Review*. Cambridge: Cambridge University Press.

Dicey, A. V. 1982. *Introduction to the Study of the Law of the Constitution*. 8th ed. Indianapolis: Liberty Classics.

Dyzenhaus, D. 1999. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. New York: Oxford University Press.

Dyzenhaus, D. 2012. States of Emergency. In: Rosenfeld, M. and Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, pp. 442-462.

Dyzenhaus, D. 2006. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge: Cambridge University Press.

Dworkin, R. 2013. *Justice for Hedgehogs*. Cambridge-Massachusetts-London: Harvard University Press.

Gross, O. 2018. The Normal Exception. In: Graber, M. A., Levinson, S. and Tushnet, M. (eds.), *Constitutional Democracy in Crisis?* Oxford: Oxford University Press.

Gross, O. & Ní Aoláin, F. 2006. *Law in Times of Crisis – Emergency Powers in Theory and Practice*. Cambridge: Cambridge University Press.

Krygier, M. 2016. The Rule of Law: Past, Presents, and Two Possible Futures. *Annual Review of Law and Social Science*, 12, pp. 199-229.

Lazar, N. L. 2009. *States of Emergency in Liberal Democracies*. Cambridge: Cambridge University Press.

Mészáros, G. 2018. *Constitutionalism in Crisis? – Emergency models in Constitutional Democracies*. Budapest: Menedzser Praxis (Hungarian)

Mészáros, G. 2020. Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19. *Review of Central and East European Law*, Forthcoming in 2020 or 2021 (already accepted for publication)

Mészáros, G. 2019. Is it Justified to Use Emergency Powers during Coronavirus Pandemic?: Constitutional Concerns regarding the 40/2020 Governmental Decree. *Fundamentum*, 23 (3-4), pp. 63-72. (Hungarian)

Mészáros, G. 2017. The Hungarian Response to Terrorism: a 'Blank Check' for the Government. Pécs: *Studia Iuridica Auctoritate Universitas Pecs Publicata Yearbook 2016*, 154, pp. 129-142.

Mommsen, H. 1996. *The Rise and Fall of Weimar Democracy* (Robert Forster and Larry Eugene Jones trans.). Chapel Hill: University of North Carolina Press.

Örkény, A. & Scheppele, K. L. 1999. Rules of Law: The Complexity of Legality in Hungary. In: Krygier, M. and Czarnota, A. (eds.), *The Rule of Law after Communism*. London: Routledge. pp. 55-76.

Rossiter, C. 2009. *Constitutional Dictatorship – Crisis Government in the Modern Democracies*. 6th ed. New Brunswick: Transaction Publishers.

Sajó, A. & Uitz, R. 2017. *The Constitution of Freedom – An Introduction to Legal Constitutionalism*. Oxford: Oxford University Press.

Sarat, A. (ed.) 2010. *Sovereignty, Emergency, Legality*. Cambridge: Cambridge University Press.

Schmitt, C. 2005. *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans.). Cambridge: University of Chicago Press.

Selznick, P. 1999. Legal Cultures and the Rule of Law. In: Krygier, M. and Czarnota, A. (eds.), *The Rule of Law after Communism*. London: Routledge. pp. 21-39.

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*Helga Špadina**

NEW CHALLENGES FOR SOCIAL POLICIES IN HEALTH CARE IN CROATIA IN LIGHT OF COVID-19 PANDEMIC

Social policies in the area of access to health care have been high on the agenda of the European Union which continuously monitors the state of healthcare in its Member States, particularly following the introduction of European Pillar of Social Rights with healthcare being one of the key areas of its Social Protection and Inclusion. Social policies in the area of access to healthcare have to deal not only with direct access to health care providers, but also with gender, age and education related disparities in access to healthcare, indirect and sometimes invisible causes of health disparities and social disparities leading to lower life expectancy.

In the times of the pandemic, it becomes clear that countries cannot successfully tackle the fight against communicable diseases without having sound social policies dealing with access to healthcare. During the corona virus public health crisis, new challenges to access to healthcare emerged, such as rapid digitalization of health care and introduction of telemedicine and obstacles in access to reproductive healthcare and immunization for children.

The paper provides an analysis of the main obstacles to effective access to health care in Croatia during the Covid-19 crisis, including access to reproductive health care, immunization for children and prevention of mortality, since Croatia is among the five EU Member States with the lowest cancer survival rate and has a shorter life expectancy by 2,9 years than the rest of the EU. We looked into the comparative health care policies of Sweden and the UK and analysed the most recent case law of the European Court of Human Rights in the area of access to reproductive health care that will shape all future discussions on social policies in health care. The purpose of this paper is to contribute to possible and much needed development of social policy in health care in Croatia.

Keywords: social policies, reproductive health, Covid-19.

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1. INTRODUCTION

Social policies in the area of health care areone of the most important pillars of development in modern societies. Advanced social policies must have three angles: formulation of health policies, development of sound strategies for protection of public health care and protection of particularly health-vulnerable individuals (children, elderly, persons with chronic illnesses, oncology patients).

States have an obligation to respect and allow the right to access to health care, an obligation to protect and to prevent impediments to health care access, and an obligation to fulfil legal obligations in providing a legal framework for non-discriminatory health care. Without state involvement in the development of sound and well-planned health policies, we cannot hope for long life expectancy, healthy life and low risks from chronic and communicable diseases (cf. Deaton, 2002, 2013; Bambra, 2005, 2016, Whitehead, 2001). Health policies alone cannot guarantee the best health outcomes and one cannot neglect the influence of other relevant factors such as behavioural impacts to good health, as well as genetic, environmental, economic, sanitary and water factors, income levels and social wellbeing (Hill, Irving, 2020, p.140). We support the view of Hill and Irving that "*the maintenance of good health depends upon a combination of protection from risks provided by public policies other than medicine, as well as the decisions people take for themselves*" (Hill, Irving, 2020, p.142).

By evaluation of the ICESCR General Comment No. 14, the right to health must include four criteria:

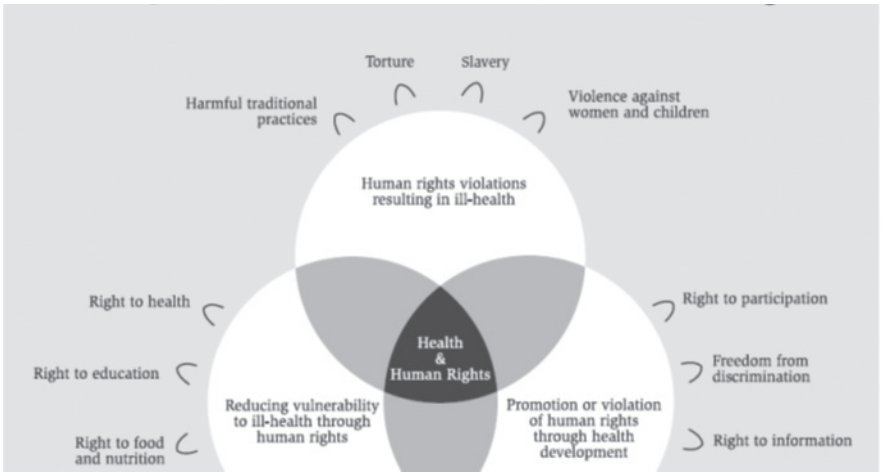
- availability (the functioning of public health and health-care facilities, goods and services, as well as programmes, which have to be available in sufficient quantity);
- accessibility of facilities, goods and services, for health requires non-discrimination, physical accessibility, affordability and the adequate information;
- acceptability (all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, sensitive to gender and life-cycle requirements, as well as designed to respect confidentiality and improve health and the health status of those concerned) and
- quality (health facilities, goods and services must be scientifically and medically appropriate and of good quality) (ETC, 2012, p.152).

2. THE RIGHT TO HEALTH AND ITS IMPACT OF HEALTH CARE SOCIAL POLICIES

The right to health has been recognized as a fundamental human right since the inception of international human rights legal framework. The Constitution of the World Health Organization defined health for the first timein 1946, and two years later provisions of 1948 Universal Declaration of Human Rights reinforced health as a fundamental human right ("*Everyone has the right to a standard of living adequate for the health and well-being of himself and his family...")*. All subsequent legal fundamental rights instruments were

very clear that health is a precondition for all other rights and the main source of possible inequalities and discrimination. This is further highlighted by the notion that health is closely linked to all other human rights and cannot be defined independently from other human rights, as shown in next graph:

Graph 1 Examples of links between health and human rights



Source: ETC, Understanding Human Rights, Manual on Human Rights Education, 2012, p. 149.

Therefore, we should not approach the creation of healthcare social policies from a one-dimensional perspective, but should always bear in mind that creation of healthcare policies must be approached from a broader angle and taking into consideration multitude of factors and possible impact to other human rights. Particularly important for public health policies is the notion expressed in the above graph, that we can significantly reduce vulnerability to ill-health by respecting other human rights. Unless we have this in mind when designing health care policies, they could lead to further social exclusion and creation of new forms of inequalities and discrimination. In the current times, we can already see how health care policies did not target all the individuals at risk prior to the pandemic. A new study conducted showed that corona virus infection rates were significantly higher among children of minorities and those of a lower socioeconomic status. The study examined 1,000 child patients tested between March 21 and April 28 2020 in Washington DC, USA. Only 7.3% of white children tested positive for corona virus, in contrast to 30% of African-American children and 46.4% of Hispanic children. Three times as many African-American children reported known exposure to the virus than white children, the researchers reported in the journal Paediatrics (CNN, 2020). The report concluded that inequalities could stem in part from limited access to health care and resources, as well as bias and discrimination. "*Understanding and addressing the root causes of these disparities are needed to mitigate the spread of infection*," the researchers wrote (CNN, 2020).

Over 3 billion people do not have access to basic hand-washing facilities, over 1.5 billion children are out of schools during the current pandemic and many will never return to schooling due to poverty and early child marriages, 32% of children worldwide who show symptoms of pneumonia are not being cared for by a health provider (UNICEF, 2020, p. xvi, cf. Bambra, 2016), so it is not difficult to envision the possible outcomes of health disparities for vulnerable individuals, primarily children, during and after the pandemic. The latest report by the UN Secretary-General Every Women, Every Child movement, underlined that efforts to contain Covid-19 have frequently resulted in disruptions to the delivery of essential services, putting women, children, and adolescents at a higher risk of death, disease, and disability from preventable and treatable causes. Some of the most severely impacted services have been routine immunisation services, malaria bed net distribution campaigns, family planning and antenatal care services (UNICEF, 2020, p. xix). In order to mitigate the negative impact of public health care emergencies, we need to focus on developing new well-elaborated, targeted social policies in access to healthcare.

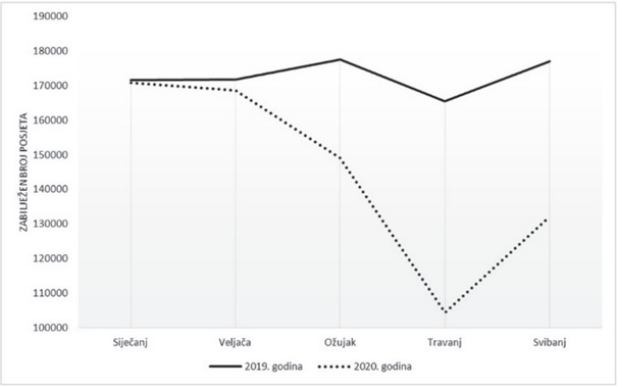
3. SOCIAL POLICIES ON ACCESS TO REPRODUCTIVE HEALTH CARE

The latest report by the United Nations alerts to disruptions in meeting family planning needs due to the C-19 lockdown, which seriously affected the ability of women to get access to reproductive health care and to prevent unintended pregnancies. Estimated 47 million women were unable to use contraceptives out of 450 million women who had been using them prior to the COVID-19 pandemic (UNPFA, 2020). Difficulties ranged from medical staff being unable to provide services, closure of health facilities, fears of COVID-19 exposure or due to movement restrictions, leading to women refraining from visiting healthcare facilities, supply chain disruptions limiting availability of contraceptives, women being unable to use their preferred method of contraception, and instead using a less effective short-term method, or discontinuing contraceptive use entirely. UNFPA estimated that for every 3 months of the C-19 lockdown, assuming high levels of disruption, up to 2 million women may be unable to use modern contraceptives and if the lockdown continues for 6 months, an additional 7 million unintended pregnancies are expected to occur. Without mitigation strategies, depending on the degree that health services are disrupted and the duration of these disruptions, it is estimated that between 13 million and 51 million women who otherwise would have used modern contraceptives, will be unable to prevent unintended pregnancies (UNFPA, 2020, p.1).

In Croatia, we still do not have sufficient research data on the availability of family planning services and contraceptives during Covid-19 lockdown, so it is very difficult to assess whether women had access to reproductive health care. We do have recent data on the use of primary reproductive health care facilities by women, showing a steep decline of more than 40% in the use of reproductive health services during lockdown compared to previous year. This decline should be a call for urgent changes in health care policies, as it might have very serious consequences to reproductive health of women in Croatia and might lead to disruptions in taking contraceptives, as well as regular medical check-ups.

Graph 3, Comparison of frequency of contacts with primary health care providers of reproductive care for women in first five months of 2019 and 2020.

Translation of terms: Left side of the table: Number of health care visits; First row of the bottom of the table: January, February, March, April May; Second row of the bottom of the table: Year 2019, 2020.



Source: Croatian Institute for Public Health, September 2020.

In such circumstances, increase of unintended pregnancies, higher rate of sexually transmitted diseases, higher health risks and worse outcomes of curable reproductive system diseases might be a direct result of women being unable to access reproductive health care providers. It is particularly concerning that the relevant Ministry of Health did not publish any public documents on the access to reproductive health care during the Covid-19 pandemic; nor did it provide guidance to women on how to obtain reproductive healthcare services during lockdown. Women were left to deal with their reproductive health issues individually with their gynaecologists and so far, we do not have relevant information whether gynaecologists were available for on-line appointments or whether they were flexible enough to ensure maximum possible capacity of healthcare.

Having in mind that on 31 December 2019, Croatian healthcare providers were lacking 61 gynaecological teams (Ombudsperson for Gender Equality, 2020, p.271), we cannot be overly optimistic on the availability of reproductive health care to women in Croatia during the pandemic. In addition to this, prior to the pandemic,59% of licensed medical staff in Croatia refused to assist in abortions due to their religious faith and conscience (Ombudsperson for Gender Equality, 2020, p. 269), extending this even to pharmacists who refused to provide contraceptive pills to women with medical prescriptions. In April 2020, the non-Governmental organization Platform for Reproductive Justice conducted research on the availability of abortions during lockdown and results showed unavailability of abortion in 8 out of 29 hospitals, 6 being public hospitals covering large territorial areas of the country (Platform for Reproductive Justice, 2020). Refusal to perform abortion on grounds of religious faith was explicitly dismissed by the European Court of Human Rights in decision Linda Steen v. Sweden (Application no. 62309/17 Linda STEEN against Sweden of 11 February 2020). The Court pursued the legitimate aim of protecting the health of women seeking abortion; observing that Sweden provides nationwide abortion services

and therefore has a positive obligation to organise its health system in a way that ensures the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of such services (ECtHR, 2020). This decision might have long-reaching consequences regarding all practices of refusal to perform legally allowed abortions and will probably have significant impact on reproductive health care policies in all countries where the right to religious beliefs precedes the right to safe medical service of termination of pregnancy.

Unavailability of public reproductive health care services directly affects the ability of women to achieve gender equality and to participate in all spheres of private and public life (Ombudsperson for Gender Equality, 2020, p. 272), but it also represents one of the worst violations of fundamental human rights because it forces women to seek illegal services which might jeopardize their health and might end up with fatal consequences. Therefore, sound and well-planned reproductive health care policies are necessary, particularly in times of public health emergencies, like a pandemic, where women suffer disproportionate discrimination if those policies do not provide them with uninterrupted health care.

One of the consequences of the pandemic lockdown to reproductive health care services was the unavailability of in-vitro fertilisation procedures. The most recent survey done by Croatian non-Governmental organization RODA showed that spring lockdown resulted in 47 days to two months unavailability of in-vitro fertilisation procedures. This led to a decrease of 60-70% of in vitro procedures during a three-month period (between March and June 2020), which might result in an estimated decline of 200 pregnancies. As this estimate is only based on official data from public hospitals, the amounts have to be doubled to account for a decline in private clinics (RODA, 2020). Despite the public health emergency, the Ministry of Health did not provide any guidance on in-vitro procedures during lockdown.

Another concerning aspect from the point of view of social policies is the continued deterioration of antenatal and postnatal health services. Research by RODA showed that delivery and breast feeding training were cut down by 56% during C-19 lockdown, with 79% of pregnant women attending on-line training. Particularly concerning is the finding that 68, 4% of pregnant women were not contacted by field nurses during lockdown, nor were they informed about the availability of such a service. Pregnancy health care during the pandemic lockdown was downsized in public health centres (a survey demonstrated that 9% of pregnant women did not have regular medical check-ups during lockdown) which referred pregnant women to private clinics(RODA, 2020).Pregnant women who were admitted to public health facilities were required to provide protective equipment themselves (50%), while 34% had to ensure permits to travel to other regions due to the unavailability of health centres in their place of residence. Prior to the lockdown, 62% of women in Croatia had a birth partner in the delivery room, while during C-19 that number went down to only 21%, causing women to have worse experiences with delivery than with a birth partner. This was practised despite the recommendations of the World Health Organization that there is no reason to deny the right to a birth partner during Covid-19 pandemic (RODA, 2020). Other novelty issues relevant for social policies in healthcare are the inability to move after delivery, the duty of patients to wear a face mask during

delivery (31%), and only 36,38% mothers not being separated from their babies which then led to only 41,32% of breastfed babies at hospitals during lockdown. RODA warned that such practices are shifting child-friendly policies in Croatian hospitals in the opposite direction. Survey data demonstrates an urgent need to adopt a national breastfeeding plan in crisis situations, but also a need to develop more targeted support for vulnerable groups, among which the most vulnerable are women and children living in the rural parts of the country (RODA, 2020).

If we are to look for positive examples on how to successfully develop reproductive health care policy in times of public health emergencies like the current Covid-19 crisis, we can use the example of the British National Health Service (NHS) which on its web site clearly specifies what women can expect from reproductive health care providers during the pandemic. Access to health care services is fully ensured and the NHS underlines that all pregnant women still had regular appointments and scans, but with adjustments like the possibility of midwife appointments being online, over the phone or video call, the duty to wear a mask or gown and a possibility of rescheduling appointments. The NHS highlights the importance of having a midwife present during delivery to keep the woman and the baby safe, thus completely supporting the idea of delivery at home if the mother and the baby are well. Other possibilities are delivery in a midwifery-led unit or in a birth centre in case of complicated pregnancies or corona virus infection of the mother. The NHS also promotes a health policy of having a birth partner if they do not have the symptoms of corona virus, recognizing how important a birth partner is for the safety of pregnant women and wellbeing during labour and birth (NHS, 2020). In the case of a corona virus infection of a planned birth partner, the NHS provides alternative options to women by stipulating a policy in which they should choose a backup birth partner. Finally, the NHS is very supportive of breastfeeding and encourages all women to breastfeed, as „*there is no evidence corona virus can be passed on to babies in breast milk, so the benefits of breastfeeding and the protection it offers outweigh any risks.*" This reproductive health policy can serve as an example of a sound, targeted and comprehensive social policy. The NHS took into consideration a variety of possible issues related to pregnancy and COVID-19 and provided detailed, easy to understand guidance on the access to health care. It is very likely that provision of reproductive health care services in the UK was uninterrupted during the pandemic as it should have been in other countries as well and that women will not suffer health consequences of non-existent health policies where the authorities simply ignored the fact that reproductive health care cannot be put on hold even in public health emergencies.

4. PREVENTION OF MORTALITY THROUGH IMPROVED HEALTH CARE POLICIES

Due to insufficient inter-sectoral health policies for removal of the main causes for poor health, which contribute to the high mortality rates from diseases that could have been prevented and cured, along with poor health care quality, Croatian life expectancy is 2,9 years shorter than the rest of the EU (OECD, 2020). Croatia is in the 4th place in the

world for mortality from colon cancer, in the 8th place in the world for mortality from lung cancer (3rd in the EU) and in the 23rd place in the world for breast cancer (Index, 2020).

Taking into consideration that the average waiting time for the medical scans related to the possibility of early detection of cancer is one year, if the doctor does not suspect cancer and does not refer the patient for urgent procedure, (Ombudsperson, 2020); we can clearly notice the link between inadequate health care policies and fatal health outcomes. Despite having an alarming curable cancer mortality rate, Croatia still does not have a national plan for prevention of cancer, nor coherent strategy on early detection. It is very difficult to understand why the EU Member State did not adopt a strategic plan formulating health care policy for such an important area, as it is removal of the main causes for cancer mortality. According to the European Commission survey, the most prominent causes of lung and colon cancer are widespread smoking (Croatia holds the 3rd place in the EU among female and teenage smokers) and poor nutrition (in 2017, every fifth adult was obese, with a significant increase in obesity rates among children).

Cancer is currently detected through routine check-ups inonly 6% of cases, while in 72% of cases it is detected upon the patient's explicit request (House of Human Rights, 2020). The same report identifies insufficient radiological capacity of health care providers, unequal territorial access for cancer patients and the lack of relevant information as the main issues undermining quality healthcare and higher positive outcomes for cancer patients. In addition to the already existing healthcare gaps in treatment of cancer, the current Covid-19 pandemic adds a new layer of problems. The Chief of the Oncology Department of the Clinical Centre Split gave a TV interview in September in which he presented a survey conducted to analyse the number of newly diagnosed breast cancer patients in Croatia during lockdown. The results showed that in the first two weeks of May, the number of newly diagnosed breast cancer patients was almost 50% lower than in first two weeks of 2019, despite the continued increase of breast cancer rates and a failure to diagnose breast cancer will lead to later detection and worse health outcomes (Slobodna Dalmacija, 2020). The doctor presented data showing that only 20% of patients get an early detection of colon cancer and approximately 65% of women get an early detection of breast cancer. The number of coronavirus patients was almost the same as the number of newly diagnosed cancer patients, but mortality rates are vastly different because 203 persons died of coronavirus, while 6000-7000 persons died of cancer. Still, it seems that health care authorities did not consider it necessary to work urgently to develop health care policies, expand existing cancer care capacities and work collaboratively with all relevant actors to reduce cancer incidence and to prevent negative health outcomes of all curable cancers.

Sweden is a good example of a well-organised network of specialized centres along with advanced cancer policies and strategy documents, a strategy to reduce the burden of tobacco use, as well as obesity and physical inactivity. Sweden's National Board of Health and Welfare has recommended national screening programmes for cervical cancer, colorectal cancer, breast cancer and 25 congenital diseases for newborn children, leaving it to each health-care region to decide whether to implement the programme (WHO, 2020).

5. IMMUNIZATION RATES AS INDICATOR OF HEALTH CARE POLICIES

Vaccination is a human right, underpinning global health security as a vital tool in the battle against antimicrobial resistance (WHO, 2020b). Vaccines reduce risks of getting20 life-threatening diseases and preventing 2-3 million deaths every year from diseases like diphtheria, tetanus, pertussis, influenza and measles by working with the body's natural defences to build protection. (WHO, 2020b)

Only 86% of children worldwide received the three necessary doses of the DPT3 vaccine in 2019, while preliminary data for the first four months of 2020 points to a substantial drop in the number of children completing three doses of the vaccine against DTP3 which is the first time in 28 years that the world may see a reduction in DTP3 coverage due to disruptions in the delivery and uptake of immunization services caused by COVID-19 (WHO, 2020d).

Prior to the corona virus, Croatia generally had low vaccination rates in adults and children. Only 21% of adults older than 65 in 2016got the flu vaccine, only half of the EU average (of 44%) and far below the WHO recommended vaccination rate of 75%. (OECD, 2020, p. 14). Despite the fact that immunization is obligatory for all children, 93% of children were vaccinated against diphtheria, tetanus and pertussis (DPT3) and measles, thus not achieving collective immunity for which a vaccination rate of 95% is required (OECD, 2020, p. 14).

Low vaccination rates in Croatia did not trigger further development of health care policies(OECD, 2020, p. 14) which would target public awareness and would introduce specific measures of promoting benefits of specific vaccinations for elderly population, children and all other vulnerable categories. Developing collective immunity is particularly topical with the outbreak of the new corona virus, as countries around the globe will have to adopt new health policies on vaccinating vulnerable groups to prevent and control ongoing and future infectious disease outbreaks. In these circumstances, health policies can use the opportunity to develop measures aimed at the advancement of current vaccination rates, since one of the most important goals in current public healthcare is to strengthen the human immunity to be able to fight already existing and new viruses and to reduce mortality rates of C-19.

6. DIGITALISATION OF HEALTH CARE DURING CORONA VIRUS HEALTH CRISIS

The Croatian healthcare system had been trying to introduce digitalisation of healthcare services for at least the past decade, but it never managed to fully do so. This was partially due to the widespread resistance from various sides involved in the idea to digitalize one part of health services where direct contact between medical staff and patients was not necessary. Digitalisation was difficult to imagine in a country where only 35% of the population had above basic digital skills in 2019 (Skills Panorama, 2020). The only part of the health system where certain progress in digitalisation has been made was the introduction of electronic prescriptions directly submitted by medical doctors to

pharmacies. E-prescriptions now form 80% of all prescriptions in Croatian pharmacies (OECD, 2020, p.21). E-appointments aimed at achieving more transparency with specialist appointments in hospitals and health centres through the website showing the availability of certain medical services, but this had very limited success due to the cost of travel to other cities for specialist scans and thus, inability of patients to afford use of health services. We can say that the Croatian health system did not further progress from e-prescriptions until the corona virus outbreak when digitalisation of the majority of health services was suddenly introduced as a matter of necessity in the provision of healthcare in public health emergencies. This was done without any particular health policy change or guidance by the relevant Ministry of Health, so we had an unusual situation in which healthcare policy followed practical implementation. Patients, particularly elderly and chronic patients, were satisfied with the unexpected introduction of digitalisation and availability of telemedicine for certain health needs because they were not required to personally go to health centres for minor health issues like prescriptions of chronic illness medications or simple consultations. It remains to be seen whether the authorities will accept transformative changes brought about by C-19 and formulate health policies incorporating best practices in digitalisation of health services and telemedicine during the C-19 outbreak. If this does not happen, we cannot expect any digital progress in health care.

7. CONCLUSION

The Corona virus pandemic is currently changing all aspects of our lives, with profound changes in sectors of healthcare and education. Some new developments seriously undermined previously achieved standards and levels of healthcare (like the inability to conduct child immunisations, restricted access to reproductive health care services or limited availability of early cancer detection), but many Covid-19-related changes can also be a transformative force in healthcare. This is primarily related to the sudden and widespread introduction of digitalisation of healthcare services and the availability of telemedicine consultations, which might significantly reduce social disparities and remove all obstacles to access to healthcare if they are related to travel costs or unavailability of specialist medical staff in certain remote regions. Healthcare policies are usually not formed during public health emergencies, but in this case, we can use the ongoing emergency to learn more about the importance of uninterrupted and widely available reproductive healthcare, as interruptions might lead to fatal outcomes of sexually transmitted diseases or illegally performed abortions if safe ones are unavailable. We also learned that child-friendly policies in delivery rooms primarily related to breastfeeding, presence of birth partner and contact between mother and baby should never be suspended without strong medical arguments. The Covid health crisis can also provide valuable contributions to the development of targeted and very specific cancer detection programmes, which could start as early as at birth like in Sweden. Cancer prevention healthcare policies should not neglect the crucial impact of nutrition, smoking, alcohol consumption and physical activity on the development of

certain types of cancer and should reflect measures to decrease poor food choices and fight obesity, closely linked not only to several different cancers, but also diabetes and cardio-vascular diseases.

With over 33 million people infected and over one million deaths from corona virus, we might even stop questioning vaccination efforts and start developing health care policies to promote vaccination as much as possible and as early as possible whenever vaccines are sufficiently tested and medically approved.

LIST OF REFERENCES

Bambra, C. 2005. Worlds of Welfare and the Health Care Discrepancy. Social Policy ad Society, 4(1):31-41.

Bambra, C. 2016. Health Divides: Where You Live Can Kill You. Bristol. Policy Press.

CNN.Infection rates are significantly higher for minority and low-income children, study finds. Article published on 5 August 2020.Available at:https://edition.cnn.com/world/live-news/coronavirus-pandemic-08-05-20-intl/h_1b5968cefe9e57429550f5550492cd06(20.09.2020).

Croatian Public Health Institute (Hrvatskizavod za javnozdravstvo) (HZJZ). Use of primary health care facilities during pandemic of COVID-19 in Republic of Croatia published 23 September 2020. Available at:https://www.hzjz.hr/sluzba-javno-zdravstvo/koristenje-primarne-zdravstvene-zastite-u-vrijeme-epidemije-covid-19-u-republici-hrvatskoj/(20.09.2020).

Deaton, A. 2002. Policy Implications of the Gradient of Health and Wealth, Health Affairs, 21: 13-30.

Deaton, A. 2013. The Great Escape: Health, Wealth and the Origin of Inequality. Princeton. New York. Princeton University Press.

European Court of Human Rights,Application no. 62309/17 Linda STEEN against Sweden of 11 February 2020.https://hudoc.echr.coe.int/fre#{"itemid":["001-201732"]}(20.09.2020).

Hill, M.Irving, Z.2020. Exploring the World of Social Policy: An International Approach. UK.Policy Press. University of Bristol.

Hunter, D. 2003. Public Health Policy. Cambridge. Polity Press.

Index.hr, news portal, https://www.index.hr/vijesti/clanak/hrvatska-je-u-svjetskom-vrhu-po-raku-debelog-crijeva-ovo-su-glavni-razlozi-za-to/2184502.aspx (30.09.2020)

NHS. National Health Service.UK.Available at:https://www.nhs.uk/conditions/coronavirus-covid-19/people-at-higher-risk/pregnancy-and-coronavirus/(20.09.2020).

OECD/European Observatory on Health System and Policies. 2019. State of Health in the EU, Hrvatska: Pregledstanjazdravljaizdravstvenezaštite2019.OECD Publishing, Paris/European Observatory on Health System and Policies. BrusselsAvailable at:https://read.oecd-ilibrary.org/social-issues-migration-health/hrvatska-pregled-stanja-zdravlja-i-zdravstvene-zastite-2019_df8b2178-hr#page1(10.09.2020).

Ombudsperson for Gender Equality.2020. Annual Report for 2019. Zagreb.Available at:https://www.prs.hr/index.php/izvjesca/2019(14.09.2020).

Ombudswoman of the Republic of Croatia.2020. Annual Report for 2019. Zagreb, Available at:https://www.ombudsman.hr/hr/izvjesca-puckog-pravobranitelja/(14.09.2020).

Platform for Reproductive Justice research published on 28 April 2020. Available at:https://www.reproduktivna-pravda.hr/2020/04/28/mi-to-ne-radimo-pobacaj-u-hrvatskoj-

nedostupan-i-skup-a-do-informacija-se-tesko-dolazi/(14.09.2020).

RODA, Results of Survey on Availability of Health Care for Women during Pandemic COVID-19. 2020.Available at:https://www.roda.hr/udruga/projekti/zagovaranje-za-zdravstvenu-skrb-zena-temeljenu-na-dokazima-u-doba-pandemije-covid-19/rezultati-istrazivanja-dostupnost-zdravstvene-skrbi-zena-tijekom-pandemije-covid-19.html(15.09.2020).

Skills Panorama. European Commission. 2020. Croatia: Key Facts. Available at: https://skillspanorama.cedefop.europa.eu/en/countries/croatia(20.09.2020).

Slobodna Dalmacija, Oncologist EduardVrdoljakwarns of concerning statistics: Coronavirus did not save us from cancer; Covid caused mortality of 203 people, cancer caused mortality of six to seven thousand patients, newspaper article based on TV interview published on 9 September 2020,Available at:https://slobodnadalmacija.hr/vijesti/hrvatska/onkolog-eduard-vrdoljak-donosi-zabrinjavajuce-brojke-korona-nas-nije-spasila-od-raka-od-covida-je-umrlo-203-ljudi-a-od-raka-sest-do-sedam-tisuca-1043236(20.09.2020).

Spicker, P. 2014. Social Policy, Theory and Practice. UK Policy Press. University of Bristol.

UNFPA, Impact of the COVID-19 pandemic on family planning and ending gender-based violence, female genital mutilation and child marriage: pandemic threatens achievement of the transformative results committed to by UNFPA. Interim Technical Note. New York. 2020.Available at:https://www.unfpa.org/resources/impact-covid-19-pandemic-family-planning-and-ending-gender-based-violence-female-genital(10.09.2020).

UNICEF, WHO, UNFPA, GFF. 2020. Every Woman Every Child.Available at:https://reliefweb.int/sites/reliefweb.int/files/resources/2020-Progress-Report-on-the-EWEC-Global-Strategy.pdf(15.09.2020).

Whitehead, M. Dahlgren, G. Gilson, L. 2001. Developing the Policy Response to Inequalities in Health: A Global Perspective, in Evans, T. Whitehead, M. Diderichsen, F. Bhuiya, A. Wirth, M. (eds) Challenging Inequalities in Health: From Ethics to Action. Oxford. Oxford University Press.

WHO 2020 a.World Health Organization Regional Office for Europe.Sweden's health authorities streamline health screening programmes. Available at:https://www.euro.who.int/en/countries/sweden/news/news/2020/2/swedens-health-authorities-streamline-health-screening-programmes(17.09.2020).

WHO. 2020b Available at: https://www.who.int/health-topics/vaccines-and-immunization?gclid=EAIaIQobChMI8fubk96J7AIVj9iyCh3h1AzEEAAYASAAEgIm4vD_BwE#tab=tab_1 (17.09.2020).

WHO. 2020c. Sweden Country profiles on cancer prevention, Available at: https://www.who.int/cancer/country-profiles/swe_en.pdf?ua=1(17.09.2020).

WHO. 2020d. Available at: https://www.who.int/news-room/detail/15-07-2020-who-and-unicef-warn-of-a-decline-in-vaccinations-during-covid-19(17.09.2020).

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THE SITUATION OF TELEWORK REGULATION IN HUNGARY**

The article analyses different forms of telework, which often present forms of work with radically different characteristics. Firstly, the paper examine the contents of the telework framework agreement concluded by ETUC, UNICE/UEAPME and CEEP on July 16 2002 provide guidelines for telework; which contains provisions for the special characteristics of this form of work. Showing the growing needs of employment practice in Hungary the main question is the differentiation between an employment relationship created for telework and the so-called "home office" employment. The increase of persons employed in the framework of telework it seems unavoidable to review and reconsider the regulation, the paper review directions where it is worth considering the (re)regulation of telework in Hungary.

Keywords: Telework, Home office, European telework framework agreement, Hungarian telework regulations

1. THE IMPACT OF ANTI-EPIDEMIC MEASURES IN THE PLACE OF WORK

As a consequence of the anti-epidemic measures introduced in spring 2020, remote work, which was only a possibility until then, became a necessity. Several research papers and surveys have been trying to evaluate what percent of employees and in what ways were affected by working from home in Hungary during these months. These studies with different approaches are definitely uniform in that they show a significant increase in work performance from home. From the surveys already published, it can be concluded with a great degree of certainty that many more employees and employers were affected by home-

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based employment than in the past. This fact justifies posing legislative questions and the supervision of legal provisions related to telework, which was already a topic intensively discussed in labour law literature.

2. APPROACHES TO THE CONCEPT OF TELEWORK, VARIOUS FORMS OF TELEWORK

Up to recently, a large number of forms were developed for work performed as telework, which often present forms of work with radically different characteristics. Therefore, the various forms of telework are usually presented in literature as a classification:

a) one of the aspects for classification is division on the basis of the location of work, considering which places can be used as remote workplaces;

b) another common grouping type is classification on the basis of the work to be performed;

c) finally, there are studies differentiating between forms of telework on the basis of the legal relationship providing its framework.

ad a) The location mentioned in the definition of telework as "a geographically separate location from the employer's site" is most often the *home* of the person performing work. Later, the so-called *telecottages* (also called *local centres* or *neighbourhood centres*) were formed, with the primary aim to decrease social isolation of teleworkers working independently at home, and also to perform training tasks required for work. The idea was to bring modern IT and telecommunications tools close to the homes of people working in this way. These are usually computerised workplaces used in the suburbs; typically, teleworkers working here do not belong to the same employer, and the goal of these institutions is usually to help the spread of telework supported by state and municipality employment policies. The so-called *satellite office* is a remote office, and has an important feature of having been created by the employer for their own teleworkers. It can be compared to the traditional office because the satellite office creates the possibility of supervising remote work in a similar way to traditional offices.[156] Huws[157] raised the issue that it is very difficult to distinguish a satellite office belonging to an employer from a so-called *branch-office*, which only maintains telecommunications connection with the headquarters. In the case of *mobile telework*, there is no permanent, fixed workplace, it is a means of work made possible by portable IT and telecommunications devices. The so-called *transborder teleworking* and the question of the so-called *digital nomads* pose more complex problems (see section 6).[158]

156 John Stanworth – Celia Stanworth: Telework: The Human Resource Implications. Institute of Personnel Management, London, 1991. p. 14.

157 UrsulaHuws: New TechnologyHomeworkers. EmploymentGazette. 1984/1. p. 37.

158 Digital nomads, from a labour law viewpoint, are employees who do not work at a defined workplace but at various places, even possibly on the basis of several legal relationships with several employers. See JácintFerencz: A digitalizációhatása a munkajogra, különöstekintettel a munkaidőszámításáraésnyilvántartására. (The Impact of Digitisation on Labour Law, with Special Regard to Calculating and Recording Working Time.)

ad b) Classification based on the tasks that can be performed include the range of tasks that can be performed with modern IT and telecommunications devices. There are numerous such classifications, but it is a generally valid statement that all labour tasks involved in the classification must include managing, entering or searching for information.[159] These classifications are more relevant from a labour organisation viewpoint, when groups are formed in the context of various professions, jobs, and forms of activity, but they illustrate well that in each case an essential element of telework is work performed by way of an IT device.

*ad c)*When examining this phenomenon (and creating regulations), it can also be of great importance to consider that the expression ´´telework´´ in itself does not answer the question of what kind of legal relationship or agreement this kind of labour requires when performed. [And another, separate question may be: which legal relationship(s) frameworks for telework does the legislation regulate].

3. THE REFERENCE POINT OF LEGISLATION – THE EUROPEAN TELEWORK FRAMEWORK AGREEMENT

Looking at the legal documents of the European Union, the contents of the telework framework agreement concluded by ETUC,[160] UNICE/UEAPME[161], and CEEP[162] on July 16 2002 provide guidelines for telework; the agreement contains provisions for the special characteristics of this form of work. It must be emphasised in relation to this agreement that this is an agreement of the European social partners, the third one after the framework agreements on part time and fixed-term employment. The difference between this agreement and the former two is that they were later formulated as directives, but in the case of this agreement, the regulations came into force on a national level, by means of the social partners. According to the definition of the framework agreement, telework is a type of work where the person performing the work uses IT devices, and the work that could be performed on the premises of the employer is regularly performed remotely (see point 2 of the framework agreement). The framework agreement mentions the voluntary nature of telework early on (see point 3 of the framework agreement). Telework can be specified in the employment contract of the employee, but this option can also be chosen later, on a voluntary basis. According to this, if telework is not a part of the original job description, and the employer offers this form of work, the employee can accept or reject

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In: GyulaBerke – ZoltánBankó – Erika TálnéMolnár (ed.): Quid juris? Ünnepikötet a MunkaügyiBírákOrszágosEgyesületemegalakulásának 20.évfordulójára. (A Volume Celebrating the 20th Anniversary of the Formation of the National Association of Labour Judges.)Kúria, PécsiTudományegyetemÁllam-ésJogtudományiKar, MunkaügyiBírákOrszágosEgyesülete (Supreme Court, Faculty of Law of the University of Pécs, National Association of Labour Judges, Budapest), 2018, pp. 73–83.

[159] Stanworth – Stanworth ibid. p. 16.

[160] European Trade Union Confederation.

[161] Union of Industrial and Employers' Confederations of Europe/European Association of Craft, Small and Medium-sized Employers.

[162] *European Centre* of *Enterprises* with *Public Participation* and of *Enterprises* of *General Economic Interest.*

this offer. If the employee expresses his or her desire to do telework, the employer can accept or reject this offer. Switching to telework in itself – since it only modifies the way of work –does not change the legal status of the employee. If the employee rejects the option of telework, this in itself cannot form the basis for the employer to dismiss the employee or change the conditions of the employment (see point 3 of the framework agreement). If telework is not a part of the original employment contract, the agreement on telework can be restored. Restoration means that the employee continues to work at the premises of the employer, either at the request of the employer, or the employee. The ways of restoration are fixed in an individual contract or a collective agreement (see point 3 of the framework agreement). Regarding the employment conditions of employees doing telework, the framework agreement first of all contains the prohibition of discrimination (see point 4 of the framework agreement). Conforming to data protection provisions and the notification obligation during telework, according to the framework agreement, it is declared to be the obligation of the employer (see point 5 of the framework agreement): the employer is responsible for providing adequate software related measures to protect the data used and processed by the teleworker in the scope of their job. The employer informs the teleworker about company regulations on data protection and the legislation in force, and the teleworker is obliged to conform to these. On the basis of the framework agreement, the employer may prescribe and notify the employees of any restrictions related to the use of information technology tools (for example related to internet use), and bear the sanctions for not observing these restrictions.

In the case of telework performed from home, the protection of the privacy of the teleworker is a fairly important question. In relation to this, it should be stated that any surveillance systems installed by the employer must meet Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment, and must be commissioned with regard to this regulation (see point 6 of the framework agreement). The provision of working equipment, and assuming overhead costs during telework is a question of crucial importance for the employees. Based on the framework agreement, as a general rule, we can conclude that the employer is obliged to provide, install and maintain the equipment for performing regular telework, except when the employer uses his or her own devices (see point 7 of the framework agreement). This issue is elaborated in detail in the framework agreement in order to protect the interests of the employees: if telework is performed on a regular basis, the employer is obliged to compensate for or to cover the immediate costs of work, especially costs related to data transfer and communication. The employer shall also provide appropriate technical background services for the employee. The teleworker is obliged to properly maintain the equipment provided to him or her, and must not collect or disseminate illegal content from/to the internet using this equipment. In relation to workplace health and safety, technical working safety provisions implicitly need to be observed by the employee. A closely related dogmatic labour law issue is the indemnification obligations of the employer in relation to the employment relationship of the teleworker (accidents, health damages away from the employer's premises). If legislation concludes that the employer is liable, regardless of negligence, protection is provided to the teleworker. A rule related to this issue is that the

employer, employee representative, and/or the relevant authorities must be granted free access to the place of telework to the extent permissible by national legislation and collective agreements. If the teleworker works from home, the employee must be notified in advance about the intention to access this area, and their consent must be obtained (see point 8 of the framework agreement). The next provision of the framework agreement assumes the position that the teleworker must be able to decide, whenever possible, how they wish to organise their work time (see point 9 of the framework agreement). An important feature of the most common forms of telework is the independent work schedule, but this principle does not have to be fulfilled in all circumstances.[163] The framework agreement itself is worded cautiously in this respect, mentioning the possibility of an independent work schedule "in the framework of the legislation in force, collective agreements, and the company's regulation". The isolation of teleworkers working remotely is often mentioned as a disadvantage of telework. According to this, the obligation of the employer to take measures against the isolation of the teleworkers from the other workers of the enterprise can be prescribed, for example in such a way that options for the employee to regularly meet co-workers, as well as access information related to the enterprise need to be provided (see point 9 of the framework agreement). Another issue related to this is the applicability of collective labour law institutions (trade union, collective agreement, works councils, works agreements, see below). Teleworkers must be given the same training and professional career possibilities as the employees at the premises of the company, and the same evaluation system must be used in relation to their work (see point 10 of the framework agreement). In many cases, telework-related collective labour law issues can also have an important role when performing the legal relationship. In this respect, the framework agreement in fact declares the prohibition of discrimination by stating that employees performing telework have the same rights as employees working at the employer's premises. According to this requirement, the same conditions must apply to them in relation to employee involvement, and resorting to employee advocacy services. Teleworkers must also be taken into consideration when calculating the threshold values for employee advocacy institutions, according to European national legislation, collective agreements, and relevant practice. The organization for the representation of the collective rights of the teleworker must be determined at the beginning of the employment relationship. The employee representatives must be informed, and they should be consulted according to the European and national legislation, collective agreements, and relevant practice at the introduction of the telework system (see point 11 of the framework agreement).

[163] This is with special respect to the employee protection nature of rules pertaining to work schedule. Naturally, the observation of rules on work schedule (and its supervision) poses several further questions.

4. EMPLOYMENT RELATIONSHIP ESTABLISHED FOR TELEWORK IN THE LABOUR CODE

In Hungary, Act XXII of 1992 on the Labour Code (hereinafter: Labour Code of 1992)[164] already from 2004 provided special provisions for employees performing telework.[165] The general opinion in Hungarian literature about this regulation is that Hungarian rules for telework are adequate, they conform to EU requirements, but they can be realised in very few cases because of the low volume of telework.[166] There are only a few examples in Europe of such a detailed legislative regulation of the contents of the framework agreement; this happened in national legislations where social partners did not wish to express them by national level agreements but rather thought that they should seek the help of legislators.[167] According to the definition in Act I of 2012 on the Labour Code, currently in force (hereinafter: Labour Code), telework encompasses any activities performed regularly, at a separate location from the employer's premises, carried out with an IT device, and the result of which is transmitted electronically [Labour Code, Section 196, Paragraph (1)]. The Labour Code sets forth the special contents of a work contract about telework: the employment contract must contain that the employee shall be employed in the form of telework [Labour Code, Section 196, Paragraph (2)]. The employer – in addition to the provisions set forth in Section 46 of the Labour Code – shall inform the employee

a) about the rules on supervision by the employer,

b) about the rules on restricting the use of information technology or electronic devices, and

c) about the organisational unit the employee belongs to, in relation to his or her work [Labour Code, Section 196, Paragraph (3)]. The rule about equal treatment of teleworkers is that the employer must provide all the information to teleworker employees that they provide to other employees [Labour Code, Section 196, Paragraph (4), see also Act CXXV of 2003 on equal treatment and promoting equal opportunities]. The employer is also obliged to ensure that the employee is allowed to enter the employer's premises and maintain contact with other employees [Labour Code, Section 196, Paragraph (5)]. As a rule, the legislator allows to parties to differ, even in stating that the employer's right to give

[164] Between 2004 and 2012, Section 192/C–193/A of the Labour Code of 1992, from July 1 2012, Section 196–197 of the Labour Code.

[165] This solution where issues dealt with in the framework agreement are defined in the labour code is evident in Hungary in recent times; nevertheless, in other member states it is rather exceptional. See for example Manfred Weiss: Germany. In: Roger Blanpain (ed.): European Framework Agreements and Telework. Law and Practice, A European and Comparative Study. Kluwer, Alphen anndenn Rijn, 2007. For the specific solutions of the member states, see also JelleVisser and Nuria Ramos Martin: Expert Report on the Implementation of the Social Partner's Framework Agreement on Telework. University of Amsterdam, Amsterdam, 2008.

[166] Tamás Gyulavári: A szürkeállomány. A gazdaságilagfüggőmunkavégzés a munkaviszonyésazönfoglalkoztatáshatárán. (The Grey Matter. Economically Dependent Labour on the Border of Employment Relationship and Self-employment.) Pázmány Press, Budapest, 2014, p. 108.

[167] The Czech Republic, Poland, Hungary, and Portugal can be mentioned as examples where legislative regulation of telework is present. Roger Blanpain (ed.): European Framework Agreements and Telework. Law and Practice, A European and Comparative Study. Kluwer, Alphen anndenn Rijn, 2007, 53. o. Regulation through collective agreements is much more typical.

instructions – if the parties do not agree otherwise – and this applies only to specifying the tasks assigned to the employee [Labour Code, Section 197, Paragraph (1)]. Another such provision is that the work schedule of the employee is flexible if the parties do not agree otherwise [Labour Code, Section 197, Paragraph (5)]. Nevertheless, it must also be noted that in the case of a flexible schedule, this is only a possibility for the employee to freely determine his or her work schedule, and not a possibility to not conform to the binding regulation on work schedule.[168] In the absence of other agreement, the means of supervision, as well as the shortest interval between the notification about supervision at the property serving as the place of work and its actual onset is determined by the employer. The supervision cannot pose undue burden to the employee, or other persons using the property serving as the location of work [Labour Code, Section 197, Paragraph (4)]. The willingness for employment in the form of telework in Hungary (the conclusion of employment contracts with such contents) is also largely influenced by the common law system and specifically the labour protection rule system. Section 86/A of Act XCIII of 1993 on occupational safety (hereunder: Occupational Safety Act) prescribes that special rules must be applied to telework. The Occupational Safety Act sets forth that in case of telework the workplace is a room agreed upon by the parties in the employment contract where the employee performs work regularly with an information technology device [Occupational Safety Act, Section 86/A, Paragraph (8)]. At the workplace, the employee may not change circumstances relevant from a labour safety perspective without the consent of the employer [Occupational Safety Act, Section 86/A, Paragraph (3)]. Telework – based on the agreement with the employer – can also be performed by means of the employee's own equipment. In case of such a working equipment, the employer ascertains that the equipment is safe during a risk assessment. In this case, the employee shall ensure the safe status of the working equipment [Occupational Safety Act, Section 86/A, Paragraph (2)]. The employer shall inform the employee about workplace safety and advocacy possibilities and practice, as well as the persons responsible for carrying out such activities, and their contact information. The labour safety representative can enter the property serving as the workplace and stay there only withthe employee´s consent [Occupational Safety Act, Section 86/A, Paragraph (6)]. The supervisory body can only perform an official audit on working days, between 8 a.m. and 8 p.m. The labour safety authority shall notify the employer and the employee at least three working days prior to the onset of the audit. The employer shall acquire the consent of the employee for entering the property that serves as the working place at least by the time of the beginning of the audit [Occupational Safety Act, Section 86/A, Paragraph (7)].

[168] GyulaBerke – György Kiss: Kommentár a munkatörvénykönyvéhez. (Commentary for the labour code.) Complex, Budapest, 2012, p. 497.

5. THE SO-CALLED "HOME OFFICE" AGREEMENTS AND EMPLOYMENT RELATIONSHIPS ESTABLISHED FOR TELEWORK IN HUNGARIAN LABOUR LAW LITERATURE

Work activities performed during telework can be carried out in the framework of an employment relationship, but a service contract, a works contract, or an employment contract can also be concluded for these activities. Based on German labour law literature, Tamás Prugberger was the first in Hungary to analyse the question of distinction between telework and home working legal relationship in 1998, well before the codification of telework.[169] The basic proposition – according to which whenever the parties can decrease their expenditures by choosing this contract type, it is the normal and reasonable for the labour market operators to opt for the cheapest contract type[170] – is perhaps the most evident in the case of telework, which is also manifested recently.[171] It is not possible to cover the question of differentiating between various employment legal relationships from each other in this study,[172] but it can nevertheless be stated that in case of telework, the location of work, the nature of activities, the relationships between the parties, etc. in most cases display many characteristics that are usually not mentioned as traits of the employment relationships when making this differentiation. Telework performed in the framework of an employment relationship is an important question examined by several authors in the recent Hungarian labour law literature and shows the growing needs of employment practices in this respect. This question differentiates between an employment relationship created for telework and the so-called *"home office"* employment.[173] Opinions can be considered uniform in the respect that *"home office"*, i.e. work performed from home should be dogmatically distinguished from certain atypical employment forms, especially from telework.[174] According to the definition in studies on the subject, we consider the *"home office"* phenomenon as an exceptional situation when an employee working in a traditional employment relationship (full time work in the framework of an employment contract with an indefinite duration), temporarily, on an exceptional basis, is authorised by the employer to perform work at another location than the permanent workplace, which is usually the home of the employee. Therefore, this type of work is different from

[169] TamásPrugberger: A házibedolgozásés a távmunka. (Home working and telework.)MunkaügyiSzemle (Labour Law Review), 1998/12.

[170] Gyulavári: ibid. p. 110.

[171] See for example IldikóBreinerné Varga: A távmunkahumánpolitikája. (Human Policy of Telework.) EmberiErőforrás- menedzsmentMódszertaniFüzetek (Human Resource Management Booklets), 2004/6; CsabaMakó – Roland Keszi – DánielMester: Munkáltatóivélemények a távmunkabevezetésénekelőfeltételeirőlésgyakorlatáról. Kutatásijelentés.(Employer Opinions on the Preconditions and Practice of the Introduction of Telework.Research report.)Társadalomkutatás (Society Research), 2004/2–3, pp. 203–243.

[172] On contract related differentiating questions, see for example GyörgyGellért (ed.): A polgáritörvénykönyvmagyarázata (Explanation of the Civil Code). Wolters Kluwer, Budapest, 2012, p 1624.

[173] Lajos Pál: A szerződésesmunkahelymeghatározása– a „home office" és a távmunka (Determining the Contractual Workplace – "Home Office" and Telework). Munkajog (Labour law), 2018/2, p. 59, Ferencz: ibid. 2018, pp. 73–83

[174] Pál: ibid. p. 59.

telework because a person employed in telework concludes the employment contract in a way that performing work in a different location than the site of the employer is not a possible choice but an expectation.[175] An essential element of the employment contract forming the basis of telework is that the employee performs the work at a workplace that is separate from the employer's premises. Thus, in this case the parties specify the contractual workplace as in the case of a typical employment relationship; nevertheless, this is never the employer's premises but usually the home of the employee. In the case of the so-called *"home office"*, the place of fulfilment is probably also the home of the employee, but in this case the employee can choose this, while in the case of a telework contract it is specified in the contract by the parties.[176] Studies emphasise that in case of telework the special rules of the Occupational Safety Act (Section 86/A) are the responsibility of the employer, and on this basis the employer is obliged to provide labour safety of the workplace and work, and – as we could see earlier – they are obliged to verify the conditions. On the other hand, there is no such obligation when giving up determination of the fulfilment site *(home office)*. As a consequence of the verification obligation, obviously the employer's liability for damages can/should also be judged in a different way.[177] Another significant difference compared to the *"home office"* is that the employer's right to give instructions – if the parties do not agree otherwise – applies only to the extent of specifying the tasks assigned to the employee. Another important difference is the working schedule, since as a main rule, in case of telework the employees work with flexible working hours.[178]

In the differentiation, from a practical aspect it would be helpful to have a Supreme Court decision where it would be decided if the agreement of the parties was in accordance with the legal definition of telework. Up to now, there has been no such Supreme Court decision. It is even more difficult to decide this question because in lower level judicial law enforcement in Hungary, the concept of telework is not presented uniformly.[179] For example, according to the reasoning from November 2008 decision of the Veszprém Labour Court, by the most general definition of telework, a teleworker is a person employed in a way that he or she spends at least 50 percent of his or her working time away from the main site of the employer, using a computer and a telecommunications link for his or her work.[180] According to the reasoning of another decision of the Veszprém Labour Court, in case of a telework contract, the essence of telework is that the employer and the employee are spatially separated, i.e. the employer does not have an organizational unit at a given location where the employee could perform work.[181] In my opinion, if it is disputed if an

[175] Ferencz: ibid. 2018, p. 75.

[176] Pál: ibid. p. 59.

[177] Ibid. See also the opinion of JácintFerencz on the exemption possibility from the employer damages liability, Ferencz: ibid. 2018, p. 73.

[178] Pál: ibid. p. 59.

[179] Ferencz: ibid. 2015, p. 82.

[180] M.187/2008/14, referenced by Ferencz: ibid. 2015, pp. 82–83.

[181] Mf.20071/2009/5, referenced by Ferencz: ibid. 2015, pp. 82–83 Agreeing to the opinion of Jácint Ferencz, these two decisions are contradicting each other, and none of them reflects the actual legal contents (Ferencz: ibid. 2015, p. 83).

employment relationship aimed at telework was concluded between the parties, when examining essential elements of the codified law definition (apart from the place and tools for performing work) the concept of "regularity"[182] must be prudently evaluated in law enforcement.

6. ASPECTS OF (RE)REGULATING WORK PERFORMED AT HOME

Opinions in Hungarian literature can be considered uniform in that with the increase of persons employed in the framework of telework, it seems unavoidable to review and reconsider the regulation. In my opinion, there are at least two directions where it is worth considering the (re)regulation of telework: *a)* taking that telework cannot only be performed in the framework of an employment relationship, one direction can be to consider legislative actions going beyond the borders of this branch of law (primarily by supporting this kind of employment, and defining basic guarantees); *b)* the other direction can be a new regulation of labour law and labour safety provisions.

ad a) According to the opinion of Jácint Ferencz, the phenomenon that will eventually make the framework of traditional employment relationships inappropriate is the employment of digital nomads, considered special even in the scope of telework.[183] Agreeing to this, it must also be stated right away that while the questions generated by digital nomads will "eventually" make the traditional framework inappropriate, every manifestation of telework will also necessarily require thinking beyond the employment relationship framework for labour law legislation.[184]

ad b) When regulating the labour law and labour safety rule set, the most urgent task is to consolidate the relationship of work performed at home (see section 5), telework employment relationship, and home worker employment relationship, which must include the re-structuring of the theoretical framework, helping provide the often mentioned flexible employment forms and settling basic guarantees. After this, the provisions of the Occupational Safety Act can also be reviewed.

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[182] The Labour Code does not contain either a reference to the actual working time nor a ratio about how much time the teleworker spends away from the employer's premises, only that he or she regularly performs work this way. For a more detailed interpretation of "regularity", see László Román: A munkajogalapintézményei. (Basic Institutions of Labour Law). Vol. II PTE ÁJK, Pécs, 1996, p. 132.

[183] Ferencz: ibid. 2018, p. 73.

[184] For a general approach to the issue, see for example Gyulavári: ibid.,GáborKártyás: A munkajogújkihívásai a XXI. századelején, különöstekintettel a munkaerő-piackettészakadásáraésazatipikusfoglalkoztatásra. (New Challenges For Labour Law at the Beginning of the 21st Century, with Special Regard to the Split in the Labour Market and Atypical Employment.) In: György Kiss – GyulaBerke – ZoltánBankó – Edit Kajtár (szerk.): Emlékkönyv Román Lászlószületésének 80. évfordulójára. (Commemorative Book for the 80th Anniversary of László Román's Birth.) PTE ÁJK, Pécs, 2008., György Kiss: The Problem of Person having a Similar Legal Status as Employees (Workers) and the Absence of Regulating this Legal Status in the Hungarian Labour Code, In: György Kiss (ed.): Recent Developments in Labour Law – Studies of Constitutive Meeting MTA-PTE Research Group of Labour Law. AkadémiaiKiadó, Budapest, 2013, pp. 259–279.

LIST OF REFERENCES

Berke, Gy. &Kiss, Gy. 2012.*Kommentár a munkatörvénykönyvéhez. (Commentary for the labour code.)*Budapest: Complex.

Blanpain, R. (eds.) 2007.*European Framework Agreements and Telework. Law and Practice, A European and Comparative Study.* Alphen anndenn Rijn:Kluwer.

BreinernéVarga, I. 2004. A távmunkahumánpolitikája.(Human Policy of Telework.) *EmberiErőforrás- menedzsment Módszertani Füzetek (Human Resource Management Booklets)*, 6.

Ferencz, J. 2018.A digitalizációhatása a munkajogra, különöstekintettel a munkaidőszámításáraésnyilvántartására.(The Impact of Digitisation on Labour Law, with Special Regard to Calculating and Recording Working Time.) In: Berke, Gy. and Bankó, Z. andTálnéMolnár, E. (eds.): *Quid juris? Ünnepikötet a Munkaügyi Bírák Országos Egyesületemegalakulásának 20. évfordulójára. (A Volume Celebrating the 20th Anniversary of the Formation of the National Association of Labour Judges.)* Budapest: Kúria, PécsiTudományegyetemÁllam- ésJogtudományiKar, MunkaügyiBírákOrszágosEgyesülete (Supreme Court, Faculty of Law of the University of Pécs, National Association of Labour Judges), pp. 73–83.

Gellért, Gy.(eds.) 2012.*A polgáritörvénykönyvmagyarázata (Explanation of the Civil Code)*. Budapest: Wolters Kluwer, p. 1624

Gyulavári, T. 2014.*A szürkeállomány. A gazdaságilagfüggőmunkavégzés a munkaviszonyésazönfoglalkoztatáshatárán. (The Grey Matter. Economically Dependent Labour on the Border of Employment Relationship and Self-employment.)*Budapest: Pázmány Press.

Kártyás, G. 2008.A munkajogújkihívásai a XXI.századelején, különöstekintettel a munkaerőpiackettészakadásáraésazatipikusfoglalkoztatásra. (New Challenges For Labour Law at the Beginning of the 21st Century, with Special Regard to the Split in the Labour Market and Atypical Employment.) In: Kiss, Gy. andBerke, Gy. andBankó, Z. andKajtár, E. (eds.): *Emlékkönyv Román Lászlószületésének 80. évfordulójára. (Commemorative Book for the 80th Anniversary of LászlóRomán's Birth.)*Pécs: PTE ÁJK.

Kiss, Gy. 2013. The Problem of Person having a Similar Legal Status as Employees (Workers) and the Absence of Regulating this Legal Status in the Hungarian Labour Code, In: Kiss, Gy. (eds.): *Recent Developments in Labour Law – Studies of Constitutive Meeting MTA-PTE Research Group of Labour Law.*Budapest: AkadémiaiKiadó, pp. 259–279.

Makó, Cs. &Keszi, R. &Mester, D. 2004.Munkáltatóivélemények a távmunkabevezetésénekelőfeltételeirőlésgyakorlatáról.Kutatásijelentés.(Employer Opinions on the Preconditions and Practice of the Introduction of Telework.Research report.) *Társadalomkutatás (Society Research)*, 2–3, pp. 203–243.

Pál, L. 2018. A szerződésesmunkahelymeghatározása– a „home office" és a távmunka (Determining the Contractual Workplace – "Home Office" and Telework). *Munkajog (Labour law)*, 2.

Prugberger, T. 1998. A házibedolgozásés a távmunka. (Home working and telework.) *MunkaügyiSzemle (Labour Law Review)*, 12.

Román, L. 1996. *A munkajogalapintézményei.(Basic Institutions of Labour Law).*Vol. II. Pécs: PTE ÁJK.

Stanworth, J.&Stanworth, C. 1991.*Telework: The Human Resource Implications*. London: Institute of Personnel Management.

Visser, J. &Ramos Martin, N. 2008.*Expert Report on the Implementation of the Social Partner's Framework Agreement on Telework.* Amsterdam: University of Amsterdam.

Weiss, M. 2007. Germany. In: Blanpain, R. (eds.): *European Framework Agreements and Telework. Law and Practice, A European and Comparative Study.* Alphen anndenn Rijn:Kluwer.

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Daniela Ježová*

PRINCIPLE OF PRIVACY BY DESIGN AND PRIVACY BY DEFAULT**

The paper introduces two concepts in data protection: privacy by design and privacy by default. Those concepts are closely connected. They already existed in data protection, although the data protection reform made them a legally binding concept. The article outlines the new ePrivacy Directive and its specification of the discussed concepts.

Keywords: Data protection, European Union, ePrivacy Directive, Digital Single Market, GDPR, Privacy by Design, Privacy by Default

1. INTRODUCTION

The European Union found it important to expand the current EU single market, which consists of the free movement of goods, services, labour and capital. The single market frees the EU territory of any barriers. Currently, the four freedoms included in the internal market need to reflect societal development and the digital era. After creating the Digital Single Market, the European Union can reach its full potential.[185] The creation of a Digital Single Market is definitely a priority of the Union. The Data protection reform is an important part of the formation of the digital single market where the goal is to free European Union of any digital barriers.

The Personal Data Protection Reform includes the General Data Protection Regulation[186],which was adopted in April 2016 and entered into force on 25 May 2018. It

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[185] Ježová, D.: EU Digital Single Market – Are we there yet?, In: AD ALTA: journal of interdisciplinary research, year 7, No. 2 (2017), p. 100.

[186] Regulation (EE) 2016/679 of The European Parliament and of The Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

includes Directive[187],which states that Member States must incorporate into their national law by 6 May 2018, as well as the upcoming new ePrivacy Regulation. The GDPR replaced the original Data Protection Directive no. 95/46/EC as of 1995.[188]Currently, another legislative piece for data protection which is up for discussion, is a legislative process for adopting the new Privacy and Electronic Communications Regulation[189], proposed by the European Commission on 10 January 2017. The new regulation should replace the 2009 Directive.

In this article several data protection issues will be discussed with the focus on the protection of the individual by default settings, by engineering software, data retention cases and cookies. The issues will be analysed from an EU perspective.

2. DATA PROTECTION

The reform of personal data protection is fundamental to the creation of a digital single market. It is a priority of the Union and its goal is the achievement of liberties associated with the EU single market to expand to the digital world.[190]The main pillar of the reform is the new regulation GDPR, which primarily strives to strengthen the rights of individuals to protection of their personal data and reduction of the administrative burden associated with their protection. Another goal was to enable the free flow of personal data in the digital single market area. The General data protection regulation can be called a significant milestone in data safety. Although the GDPR is a European Union Regulation, its territorial scope does not stop at European boundaries. Given the global economy with multinational groups and cross-border data transfer, international aspects have been taken into consideration upon creating the GDPR.[191] It means that the registered seat and the territory where the data is processed is not a significant factor for determining whether the controller should comply with the GDPR rules or not. The GDPR also altered the view on protected data.[192] The importance of the GDPR and its compliance is also emphasized by the structure of the fines and the penalty system which considers the annual turnover of the controlled subject.

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[187] Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA.

[188] Ježová, D., 2018. Data Protection Reform in the EU as a Part of the Forming Digital Single Market. In: European Studies, The review of European Law, Economics and Politics, vol. 5, 2018, p.: 295.

[189] Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017) 10 final, 2017/0003(COD).

[190] Ježová, D., 2017. Data Protection in Virtual World, In: Právnírozpravy 2017, Hradec Králové: Magnanimitas, 2017, p. 63, ISBN: 978-80-87952-18-4.

[191] Voigt, P., Bussche, A., 2017. The EU General Data Protection Regulation (GDPR) A Practical Guide, Springer – Verlag Berlin Heidelberg, 2017, p. 22.

[192] Ježová, D., 2018. Comparative Study of Slovak and Austrian Approach to GDPR, In: AD ALTA: journal of interdisciplinary research, year 8, No. 1 (2018), p.116 – 119.

Today, personal data is very valuable and can be used as source of income for organizations and criminals alike. Therefore, the protection of data is necessary. In this context, the concept of privacy by design and privacy by default has to be considered a mandatory solution.

These concepts represent the evolution of privacy since they explicate the inclusion of privacy within the design of business processes and IT application support, in order to include all the necessary security requirements at initial implementation stages of such developments (privacy by design), or rather put in place mechanisms to ensure that only personal information needed for each specific purpose is processed "by default".

3. CONCEPT OF PRIVACY BY DESIGN

As mentioned above, the GDPR significantly changed rules of privacy. Although this concept is not new, and it has always been a part of the data protection law. Directive 95/46 of the European Union already referred to the requirement of the appropriate technical and organizational measures to be taken both when designing the system and during processing. Generally speaking, the concept of privacy by design means that if a system includes choices for the consumer on how much personal data will be shared with others, the default settings should be the most privacy friendly ones. Privacy by default generally means that if the system provides choices for the data subject regarding how much personal data he/she wants to share with others, the default settings should be the strictest ones[193]. Companies are encouraged to implement technical and organizational measures at the earliest stages of the design of the processing operations in a way that safeguards privacy and data protection principles right from the start. The key change by the GDPR is that it is now a legal requirement. Privacy by design and privacy by default are frequently discussed topics in connection with data protection and are two changes introduced by GDPR. Privacy by designs under GDPR means that data processors shall consider privacy at initial stages when designing and developing a product as well as services that involve processing personal data. The GDPR introduced the new requirements in this concept.

The aspect of the concept of Privacy by design is established in the GDPR recital 78[194] and article 25 para 1. Based on recital 78 "*appropriate technical and organisational measures be taken to ensure that the requirements of this Regulation are met*." Paragraph 1 of Article 25 GDPR stipulates that "*taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall […] implement appropriate technical and organisational measures*".

Based on the author Cavoukian, privacy by design is "the philosophy and methodology of embedding privacy into the design specifications of information technologies, business

[193] See also the definition prepared by the European Commission webpage available: https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/what-does-data-protection-design-and-default-mean_en (01.09.2019).

[194] Part of the recital no. 78 GDPR: „The protection of the rights and freedoms of natural persons with regard to the processing of personal data require that appropriate technical and organisational measures be taken to ensure that the requirements of this Regulation are met."

practices, and networked infrastructures as a core functionality. Privacy by design means building in privacy right up front, directly into the design specifications and architecture of new systems and processes.."[195]

Privacy by design is a concept introduced in the 90´s by Ann Cavoukian, ex-commissioner of Information and Privacy in Ontario, Canada. Cavoukian defined 7 foundational principles of privacy by design in her work. The main principles are[196]:

a) proactive not reactive, preventative not remedial: explicit recognition of the value and benefits of proactively adopting strong privacy practices, early and consistently in order to prevent privacy risks from occurring (for example, preventing internal data breaches from happening);
b) privacy as the default setting: the collection of personal information must be fair, lawful and limited to that which is necessary for the specified purposes. The design of programs, information and communications technologies, and systems, should begin with non-identifiable interactions and transactions, as the default. Wherever possible, identifiability, observability, and linkability of personal information should be minimized;
c) privacy embedded into design: privacy is embedded into design of business processes, technologies, operations, and information architectures in a holistic, integrative and creative way;
d) full functionality – positive – sum, not zero-sum: accommodate all legitimate interests and objectives in a positive-sum "win-win" manner, not through a dated, zero-sum approach, where unnecessary trade-offs are made. Privacy by Design avoids the pretence of false dichotomies, such as privacy vs. security, demonstrating that it is possible, and far more desirable, to have both.
e) end-to-end security – full lifecycle protection: privacy must be continuously protected across the entire life-cycle of the personal data. There should be no gaps in either protection or accountability. The security has special relevance here because without strong security, there can be no privacy
f) visibility and transparency: Privacy by Design seeks to assure all stakeholders that whatever the business practice or technology involved, it is in fact, operating according to the stated promises and objectives, subject to independent verification. Its component parts and operations remain visible and transparent, to both users and providers alike.
g) respect for user privacy: Above all, Privacy by Design requires architects and operators to keep the interests of the individual uppermost by offering such measures as strong privacy defaults, appropriate notice, and empowering user-friendly options

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[195] Cavoukian, A., 2011. Privacy by design in law, policy and practice. A white paper for regulators, decision-makers and policy-makers, 2011. Available: http://www.ontla.on.ca/library/repository/mon/25008/312239.pdf (01.09.2019), p. 3.

196 Cavokian, A.: Privacy by Design, The 7 Foundational Principles, Implementing and Mapping of Fair Information Practices, available at https://iapp.org/media/pdf/resource_center/Privacy%20by%20Design%20-%207%20Foundational%20Principles.pdf (01.03.2020).

According to the author Shaar, privacy by design should not be limited to developing clever technical solutions and incorporating them into systems. It is equally important to examine very early in the planning process whether and how to limit the amount of personal data to the absolute minimum necessary... Privacy by design goes beyond maintaining security. Privacy by Design includes the idea that systems should be designed and constructed in a way to avoid or minimize the amount of personal data processed. The key elements of data minimization are the separation of personal identifiers and content data, the use of pseudonyms and the anonymization or deletion of personal data as early as possible.[197] Authors Gurses, Troncoso and Diaz[198]focused on privacy by design and its principles which they found vague and with many open questions about their application when engineering systems" and they "show how starting from data minimization is a necessary and foundational first step to engineering systems in line with the principles of privacy by design.

EU law requires that controllers put in place measures to implement data protection principles effectively and to integrate the necessary safeguards to meet the requirements of the regulation and protect the rights of data subjects. These measures should be implemented both at the time of processing and when determining the means for processing[199]. When implementing these measures, the controller must to take into account the state of the art, the costs of implementation, the nature, scope and purpose of personal data processing and the risk and severity for the rights and freedoms of the data subject[200]. This principle is linked to article 24 GDPR where controller responsibility is laid out and refers to the implementation of all data protection principles and the compliance with the whole of the GDPR.

Article 25 is based on the realisation that the conditions for data processing are fundamentally set by the software and hardware used for the task. The accelerating pace of technical progress turns data protection through technology into the regulatory approach of the future. Technological concepts for preventive protection shall serve as the basis for minimally invasive data processing.[201]

When looking at the legal framework of the Council of European law such as Convention 108+[202], it is also required that controllers and processors assess the likely effect of processing personal data on the rights and freedoms of the data subjects before the processing (ex. art. 7). In addition, controllers and processors are obliged to design data processing in such a

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[197] Schaar, P. 2010. Privacy by Design. Privacy by Design Issue of Identity in the Information Society Volume 3, Number 2, pp 267-274, available:https://link.springer.com/article/10.1007/s12394-010-0055-x (01.09.2019).

[198] Gurses, S., Troncoso, C., Diaz, C. Engineering Privacy by Design, available: https://software.imdea.org/~carmela.troncoso/papers/Gurses-CPDP11.pdf (01.09.2019).

[199] See Article 29 Working Party. 2017. Guidelines on Data Protection Impact Assessment (DPIA) (wp248rev.01) avialable: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611236 (01.09.2019).

[200] See also ENISA 2015. Privacy and Data Protection by Design – from Policy to Engineering, available: https://www.enisa.europa.eu/publications/privacy-and-data-protection-by-design (01.09.2019).

[201] Voigt, P., Bussche, A., 2017. The EU General Data Protection Regulation (GDPR) A Practical Guide, Springer – Verlag Berlin Heidelberg, 2017, p. 62.

[202] Convention 108+ Convention for the protection of individuals with regard to the processing of personal data.

way as to prevent or minimise the risk of interference with those rights and fundamental freedoms (art. 10 para 2) and implement technical and organizational measures which take into account the implications of the right to the protection of personal data at all stages of the data processing.[203]

In his Preliminary Opinion on privacy by design[204], the European Data Protection Supervisor stated that a wider spectrum of approaches may be taken into account for the objective of "privacy by design" which includes a visionary and ethical dimension, consistent with the principles and values enshrined in the EU Charter of Fundamental Rights of the EU.

The principle of privacy by design can be identified as the key tool for increasing trust in information technology. Privacy must be approached through proactive measures, and not just as a reaction to breaches or other faults. The way to proactive action is to think about privacy from the beginning of a service/product lifecycle, in the design phase.

Compliance with data protection rules and the privacy by design principle shall be a cooperation between technical, legal and information technical knowledge in order to ensure correct implementation of the concept of privacy by design. In large companies, more experts shall be involved in the design process of the service/product.

Effectiveness is at the heart of the concept of data protection by design. The requirement to implement the principles in an effective manner means that controllers must be able to demonstrate that they have implemented dedicated measures to protect these principles, and that they have integrated specific safeguards that are necessary to secure the rights and freedoms of data subjects. Each implemented measure must have an actual effect. This observation has two consequences. Firstly, it means that Article 25 does not oblige controllers to implement any prescribed technical and organizational measures or safeguards, as long as the chosen measures and safeguards are in fact appropriate when implementing data protection into data processing. Secondly, controllers must be able to demonstrate that they have implemented measures and safeguards to achieve the desired effect in terms of data protection. To do so, the controller may determine appropriate key performance indicators to demonstrate compliance. Key performance indicators may include metrics to demonstrate the effectiveness of the measures in question.[205]

Based on this study[206], it is proposed that from the very first moment a company predicts a business activity, it must include the required assessments in relation to the personal and processing data that will have to be incorporated in that activity. Based on this study

[203] EU publications. 2018. Handbook on European data protection law 2018 edition, available: https://publications.europa.eu/en/publication-detail/-/publication/5b0cfa83-63f3-11e8-ab9c-01aa75ed71a1 (01.09.2019).

[204] EDPS, opinion 5/2018. Preliminary Opinion on privacy by design, May 2018 available: https://edps.europa.eu/sites/edp/files/publication/18-05-31_preliminary_opinion_on_privacy_by_design_en_0.pdf (01.09.2019).

[205] The European Data protection Board enacted guidelines: Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, Adopted on 13 November 2019 available https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_201904_dataprotection_by_design_and_by_default.pdf (01.03.2020) - version for public consultation.

[206] Romero, S., De-Pablos-Heredero: Contribution of Privacy by Design (of the Processes), In: Harvard Deusto Business Research, available https://www.researchgate.net/publication/322795436_Contribution_of_Privacy_by_Design_of_the_Processes (02.03.2020).

of privacy by design, it is a popular design philosophy, and therefore it is important to make it more concrete.[207]Based on another study[208], the results indicate that, contrary to the popular view that consumers are unlikely to pay for privacy, consumersmay be willing to pay a premium fee for privacy.

The proposal of the new ePrivacy Regulation introduces the concept of "Privacy by design" more deeply, whereby users opt for a higher or lower level of privacy.

4. PRIVACY BY DEFAULT

The concept of privacy by default stated in article 25 para 2 GDPR should ensure that personal data is processed with the highest privacy protection. By default, personal data isn't made accessible to an indefinite number of persons and only personal data that is necessary for a specific reason shall be obtained. The principles of data minimization and purpose limitation relate to the concept.

Privacy-friendly default settings usually provide for maximum privacy in such a way that users do not have to change the settings of a service or product upon first use or access in order to protect themselves. When users wish to change these settings, they should have to opt in and amend the settings by themselves.[209] (ex. to share more of their personal data with others).

In accordance with the principle of data minimization, by default, only the amount of personal data that is necessary for the processing shall be processed. The amount of personal data refers to the quantitative as well as qualitative considerations. Controllers must consider both the volume of personal data, as well as types, categories and level of detail of personal data. If personal data is not needed after the first processing, then it shall by default be deleted or anonymized. Any retention should be objectively justifiable and demonstrable by the data controller in an accountable way. Anonymization of personal data is an alternative to deletion, provided that all the relevant contextual elements are taken into account and the likelihood and severity of the risk, including the risk of re-identification, is regularly assessed.[210]

Article 25(2) further states that personal data shall not be made accessible, without the individual's intervention, to an indefinite number of natural persons. The controller must by default limit accessibility and consult with the data subject before publishing or otherwise making available personal data about the data subject to an indefinite number of natural persons.

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[207] Colesky, M; Hoepman, J; Hillen, Ch.: "A Critical Analysis of Privacy Design Strategies," 2016 IEEE Security and Privacy Workshops (SPW), San Jose, CA, 2016, pp. 33-40.

[208] Tsai, J., Egelman, S., Cranor, L., Acquisti, A.: The Effect of Online Privacy Information onPurchasing Behaviour: An Experimental Study, In.: Information Systems Research, Vol. 22, No. 2, June 2011, pp. 254–268.

[209] Voigt, P., Bussche, A., 2017. The EU General Data Protection Regulation (GDPR) A Practical Guide, Springer – Verlag Berlin Heidelberg, 2017, p. 63.

[210] The European Data protection Board enacted guidelines: Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, Adopted on 13 November 2019 available https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_201904_dataprotection_by_design_and_by_default.pdf (01.03.2020) – version for public consultation.

5. THE NEW ePRIVACY REGULATION

Recital 173 of the GDPR stipulates that the ePrivacy Directive shall be reviewed. Like in GDPR, the full harmonization concept is followed when changing the Directive to Regulation. In 2017, the new ePrivacy Regulation was introduced as a proposal adopted by the European Commission. The proposal is one of the actions needed for the creation of the Digital Single Market. In the Council, the examination of the proposal has been carried out in the Working Party on Telecommunications and Information Society (WP TELE). Within its WP TELE configuration, the EU Council made some progress and published several redrafts of the proposal since September 2017. The following issues were discussed: the need to clarify the relationship between ePrivacy and the GDPR; privacy settings; the legal grounds for data processing other than consent, as well as the applicability of the new rules to service providers assisting competent authorities for national security purposes, and the concept of public interests as a basis justifying restrictive measures.

Another point of discussion was related to data retention and to the related restrictions of rights, related to the current decision of the CJEU in the case Tele2 Sverige and Ministerio Fiscal[211]. This court decision makes an important clarification in the field of data retention. The CJEU drew a more precise line between admissible and inadmissible law enforcement access to data retained initially for commercial purposes by private providers of electronic communications services. In the previous case Tele 2 and Watson[212], the CJEU ruled that access to the retained data is limited to cases involving serious crimes. In the case of Digital Rights Ireland and Seitlinger and others[213], the CJEU criticised the general application of the Directive that required the collection of data on "all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made". In line with these criticisms, the CJEU found the Directive to be a disproportionate interference with the EU Charter. The right of respect for private life and the right to protection of personal data as provided for in Articles 7 and 8 of the EU Charter were central to the holding of the Court.[214]

The new regulation shall also interact with new technologies such as Machine-to-Machine, Internet of Things or Artificial Intelligence. The issue of processing of electronic communications data for the purposes of prevention/detection/reporting of child abuse imagery is also not closed.[215]Currently under the Finish presidency, the WP TELE examined the possible changes in the proposal of the new ePrivacy Directive dated on 10 January 2017.[216]

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[211] Judgment of 2 October 2018, Tele2 Sverige and Ministerio Fiscal, C-207/16, EU:C:2018:788.

[212] Judgement of 21 December, Tele2 and Watson, C-203/15 and C-698/15, EU:C:2016:970.

[213] Judgment of 8 April 2014, Digital Rights Ireland and Seitlinger and others, C-293/12 and C-594/12, EU:C:2014:238.

[214] See Murphy, M. Data Retention in the Aftermath of Digital Rights Ireland and Seitlinger (2014). 24(4) Irish Criminal Law Journal 105.

[215] Progress report of the Presidency 2017/0003 (COD), 22 May 2019, available https://data.consilium.europa.eu/doc/document/ST-9351-2019-INIT/en/pdf (01.09.2019, 15.03.2020).

[216] Progress report of the Presidency 2017/0003(COD), 14447/19, 17 November 2019, available https://data.consilium.europa.eu/doc/document/ST-14447-2019-INIT/en/pdf (15.03.2020).

From the legal perspective the relationship between the new ePrivacy regulation and GDPR is that the new ePrivacy regulation will be *lex specialis* to GDPR. All matters concerning the processing of personal data not covered by ePrivacy regulations are covered by the GDPR as the general legal framework. As far as the new ePrivacy regulation is a part of the data protection reform the, penalties follow the pattern given by GDPR and can be calculated from the annual worldwide revenue of the undertaking.

The ePrivacy regulation relies on the definition of "electronic communication services" provided by the proposal for a Directive establishing the European Electronic Communication Code. Such an approach is intended to ensure equal protection of end-users when using functionally equivalent services. Therefore, the definition encompasses not only internet access services and services consisting wholly or partly in the conveyance of signals, but also interpersonal communication services, such as voiceover IP, messaging services and web-based e-mail services. The ePrivacy Regulation also covers interpersonal communications services that are ancillary to another service and have communication functionality.[217]

Privacy by default and Privacy by design concepts mostly include the options of cookies. Currently, the default settings for cookies in most current browsers are 'accept all cookies'. Therefore, providers of software enabling the retrieval and presentation of information on the internet should have an obligation to configure the software so that it offers the option to prevent third parties from storing information on terminal equipment; this is often presented as 'reject third party cookies'. End-users should be offered a set of privacy setting options, ranging from higher (for example, 'never accept cookies') to lower (for example, 'always accept cookies') and intermediate (for example, 'reject third party cookies' or 'only accept first party cookies'). Such privacy settings should be presented in a an easily visible and intelligible manner.[218]

In this regard, the recent case of Planet49[219] shall be mentioned. The decision deals with the consent under GDPR regarding the question about consent and the cookies. The official press release from the CJEU eliminates any confusion. It is titled *Storing cookies requires internet users' active consent* and makes it clear that "*a pre-ticked checkbox is therefore insufficient*". Any cookies not strictly necessary are prohibited from being pre-checked, regardless of whether the data processed is categorized as personal or not. Consent is not valid if given by way of pre-checked checkboxes which the users must deselect to refuse their consent. The court of Justice also stated that the expiration date of cookies and third-party sharing should be disclosed when obtaining consent, different purposes should not be held together in one consent requirement. In the case of Planet 49, the Court did not discuss one key element of consent, whether it was given freely, since this had not been an element of consent, whether it has been freely given, since this

[217] Asensio, P.: Data Protection in the Internet: A European Union Perspective: In.: Vincente, D., M., de Vasconcelos Casimiro, S. (ed), Data protection in the Internet, Springer, 2020, Switzerland, p. 469.

[218] Recital 23 of the Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017) 10 final, 2017/0003(COD).

[219] Judgment of 1 October 2019, Planet49, C-673/17, EU:C:2019:801.

had not been raised by the referring court. However, it applied a strict approach to the three other elements of consent; that it should be specific, informed and unambiguous.[220]

6. CONCLUSION

'Privacy by design' is an increasingly popular paradigm. It is the principle or concept that privacy should be promoted as a default setting of every new ICT system and should be built into systems from the design stage.[221]

We have seen a number of stages in user desires and needs for privacy through the last century, driven by advancements in technology: a) Privacy 1.0 – leave me alone in my domestic sphere (Warren and Brandeis, b) Privacy 2.0 – let me control what is known about me outside the domestic sphere (Westin), c) Privacy 3.0 – let me control how I am known, i.e. moving beyond a take-it-or-leave-it choice.[222] Currently we are at the stage of Privacy 3.0, and may even be entering a new stage of Privacy 4.0.

The growing digital world needs strict rules on data protection. Making the concepts Privacy by Design and Privacy by Default legally binding puts more pressure on software designers to put data safety in the first place while creating the system. In the recent case law, The CJEU also emphasized that the default setting when using cookies shall contain only the necessary elements of consent, no other consent is considered as valid in case there are opt out options.

[220] Docksey, Ch.: The EU Approach to the protection of rights in the digital environment: today and tomorrow – State obligations and responsibilities of private parties – GDPR rules on data protection, and what to expect from upcoming ePrivacy regulation, In: Human Rights Challenges In Digital Age: Judicial Perspective, Council of Europe, 2020 p. 71.

[221] Koops, B., Leenes, R.: Privacy regulation cannot be hardcoded. A critical comment on the 'privacy by design'provision in data-protection law. In: International Review of Law, Computers & Technology, 2014, 28.2: 159-171.

[222] Edwards, L.: Data Protection and e-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling, In.: Law, Policy and the Internet, Hart, 2019, p. 163.

LIST OF REFERENCES

Article 29 Working Party. 2017. Guidelines on Data Protection Impact Assessment (DPIA) (wp248rev. 01) available: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611236 .

Asensio, P.: Data Protection in the Internet: A European Union Perspective: In.: Vincente, D., M., de Vasconcelos Casimiro, S. (ed), Data protection in the Internet, Springer, 2020, Switzerland, p. 469.

Cavokian, A.: Privacy by Design, The 7 Foundational Principles, Implementing and Mapping of Fair Information Practices, available on https://iapp.org/media/pdf/resource_center/Privacy%20by%20Design%20-%207%20Foundational%20Principles.pdf (01.03.2020).

Cavoukian, A., 2011. Privacy by design in law, policy and practice. A white paper for regulators, decision-makers and policy-makers, 2011. Available: http://www.ontla.on.ca/library/repository/mon/25008/312239.pdf (01.09.2019), p. 3.

Colesky, M; Hoepman, J; Hillen, Ch.: "A Critical Analysis of Privacy Design Strategies," 2016 IEEE Security and Privacy Workshops (SPW), San Jose, CA, 2016, pp. 33-40.

Convention 108+ Convention for the protection of individuals with regard to the processing of personal data.

Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA.

Docksey, Ch.: The EU Approach to the protection of rights in the digital environment: today and tomorrow – State obligations and responsibilities of private parties – GDPR rules on data protection, and what to expect from upcoming ePrivacy regulation, In: Human Rights Challenges In Digital Age: Judicial Perspective, Council of Europe, 2020 P. 71.

EDPS, opinion 5/2018. Preliminary Opinion on privacy by design, May 2018 available: https://edps.europa.eu/sites/edp/files/publication/18-05-31_preliminary_opinion_on_privacy_by_design_en_0.pdf (01.09.2019).

Edwards, L.: Data Protection and e-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling, In.: Law, Policy and the Internet, Hart, 2019, p. 163.

ENISA 2015. Privacy and Data Protection by Design – from Policy to Engineering, available: https://www.enisa.europa.eu/publications/privacy-and-data-protection-by-design.

EU publications. 2018. Handbook on European data protection law 2018 edition, available: https://publications.europa.eu/en/publication-detail/-/publication/5b0cfa83-63f3-11e8-ab9c-01aa75ed71a1 (01.09.2019).

Gurses, S., Troncoso, C., Diaz, C. Engineering Privacy by Design, available: https://software.imdea.org/~carmela.troncoso/papers/Gurses-CPDP11.pdf (01.09.2019).

Ježová, D., 2017. Data Protection in Virtual World, In: Právnírozpravy 2017, Hradec Králové: Magnanimitas, 2017, p. 63, ISBN: 978-80-87952-18-4.

Ježová, D., 2018. Comparative Study of Slovak and Austrian Approach to GDPR, In: AD ALTA: journal of interdisciplinary research, year 8, No. 1 (2018), p. 116 – 119.

Ježová, D.:, 2017. EU Digital Single Market – Are we there yet?, In: AD ALTA: journal of interdisciplinary research, year 7, No. 2 (2017), p. 100.

Judgement of 21 December, Tele2 and Watson, C-203/15 and C-698/15, EU:C:2016:970.

Judgment of 1 October 2019, Planet49, C-673/17, EU:C:2019:801.

Judgment of 2 October 2018, Tele2 Sverige and Ministerio Fiscal, C-207/16, EU:C:2018:788.

Judgment of 8 April 2014, Digital Rights Ireland and Seitlinger and others, C-293/12 and C-594/12, EU:C:2014:238.

Koops, B., Leenes, R.: Privacy regulation cannot be hardcoded. A critical comment on the 'privacy by design'provision in data-protection law. In: International Review of Law, Computers & Technology, 2014, 28.2: 159-171.

Murphy, M. Data Retention in the Aftermath of Digital Rights Ireland and Seitlinger (2014). 24(4) Irish Criminal Law Journal 105.

Progress report of the Presidency 2017/0003 (COD), 22 May 2019, available https://data.consilium.europa.eu/doc/document/ST-9351-2019-INIT/en/pdf (01.09.2019).

Progress report of the Presidency 2017/0003(COD), 14447/19, 17 November 2019, available https://data.consilium.europa.eu/doc/document/ST-14447-2019-INIT/en/pdf (15.03.2020).

Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017) 10 final, 2017/0003(COD).

Regulation (EE) 2016/679 of The European Parliament and of The Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Romero, S., De-Pablos-Heredero: Contribution of Privacy by Design (of the Processes), In: Harvard Deusto Business Research, available https://www.researchgate.net/publication/322795436_Contribution_of_Privacy_by_Design_of_the_Processes (02.03.2020).

Schaar, P. 2010. Privacy by Design. Privacy by Design Issue of Identity in the Information Society Volume 3, Number 2, pp 267-274, available: https://link.springer.com/article/10.1007/s12394-010-0055-x (01.09.2019).

Single Market. In: European Studies, The review of European Law, Economics and Politics, vol. 5, 2018, p.: 295.

The European Data protection Board enacted guidelines: Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, Adopted on 13 November 2019 available https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_201904_dataprotection_by_design_and_by_default.pdf (01.03.2020) - version for public consultation.

Tsai, J., Egelman, S., Cranor, L., Acquisti, A.: The Effect of Online Privacy Information onPurchasing Behaviour: An Experimental Study, In.: Information Systems Research, Vol. 22, No. 2, June 2011, pp. 254–268.

Voigt, P., Bussche, A., 2017. The EU General Data Protection Regulation (GDPR) A Practical Guide, Springer – Verlag Berlin Heidelberg, 2017.

UDK: 347.951.2+341.231.14 DOI: https://doi.org/10.18485/iup_rlr.2020.ch11

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THE RELATIONSHIP BETWEEN THE PRELIMINARY RULING AND A FAIR TRIAL – ECHR PROSPECTIVE

The European human rights architecture is considered one of the most relevant regional human rights systems. In this context, the Council of Europe and the European Union play crucial roles. All the EU member states happen to be members of the Council and Europe as well as Contracting Parties to its most remarkable treaty, the European Convention on Human Rights (hereinafter: ECHR). This paper attempts to examine an issue arising from the two most significant tools of the two regimes, on the EU side that would be the preliminary ruling procedure and on the ECHR side, the right to a fair trial. The analyzed issue is whether the refusal by the national court to submit a preliminary ruling request as initiated by the party in national proceedings can lead to violation of Article 6 of the ECHR. As concluded in the paper and supported by the relevant case law, a party's submission before a domestic court that is a member of the EU and a Contracting Party to ECHR, might embody the violation of Article 6 if the court of last instance rejects the reference of parties to initiate a preliminary ruling procedure without giving reasons for it. However, similarly to the relationship between the EU legal order and ECHR, the analysed issue also has many open concerns.

Keywords: preliminary ruling, fair trial, Article 6, case law, European human rights architecture

1. INTRODUCTION

In the European human rights architecture, the Council of Europe and the European Union are certainly some of the most relevant, if not *the* most relevant, players. All the EU member states happen to be members of the Council and Europe and Contracting Parties to its most significant treaty, the European Convention on Human Rights (hereinafter: ECHR). This paper attempts to examine an issue arising from the two most significant institutes of the two regimes, on the EU side that would be the preliminary ruling procedure and on the ECHR side, the right to a fair trial. What happens when these two institutions

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are cross-checked? The issue arising is whether refusing a motion to submit preliminary ruling references by the national court can be regarded as a violation of the right to a fair trial as per ECHR case law. Such a violation of Article 6 has already occurred on several occasions, although it cannot be stated that the court has a well-established case law on the subject matter. The stance supported in this paper is that the European Court of Human Rights (hereinafter: the Court, ECtHR) can rather be considered only a promoter of minimum standards.

The paper first outlines the importance of Article 6, then elaborates upon the case law involving the EU before the ECtHR and lastly contextualizes the case law on Article 6 in the case of refusal to initiate a preliminary ruling procedure.

However, analyzing the tendencies, it needs to be pointed out that the ECtHR is more frequently involved in the analysis of the EU courts' matters than it was the case some decades ago. As reiterated by Advocate General Wahl, "Nowadays, (…) the European Court of Human Rights [is] regularly seised of proceedings relating to an alleged failure to refer under Article 267(3) TFEU.[223]"

2. ARTICLE 6 ECHR IN A NUTSHELL

The overall significance of Article 6 can be proven in both quantitative and qualitative terms.

The applications analyzed by the ECtHR predominantly refer to the alleged violation of Article 6. In 2019, from the judgments delivered by the Court, nearly a quarter of the violations concerned Article 6.[224] When elaborating on Article 6, as stated by some authors, (Doobay, 2013p.261) while many claimants raise detailed allegations about specific provisions of Article 6, the Court tends to take a more holistic view and to consider the overall fairness of the proceedings taking into account the interests of other parties to the process."[225]

As for the qualitative terms, Article 6 is also quite central to the enforcement of other fundamental rights. The 'rule of law', which is set out in the Preamble to the ECHR and which is central to its vision, cannot exist if there is no fair trial.[226]

In general, it can be concluded that relating to Article 6, the Court has a well-established case law, although Article 6 also entails issues which have not received enough attention so far. Such an example is whether the refusal of a motion set forth by a party before a national court to initiate a preliminary ruling procedure can be considered breaching Article 6. Whenever referring to a refusal within this paper, it will always mean the issue

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[223] OPINION OF ADVOCATE GENERAL WAHL delivered on 13 May 2015 Joined Cases C72/14 and C197/14 ECLI:EU:C:2015:319.

[224] Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 05. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (09.09.2020).

[225] Doobay, A. 2013*The right to a fair trial in light of the recent ECtHR and CJEU case-law*ERA Forum 14**,** p. 251–262.

[226] Schabas,W.A. 2015 *The European Convention on Human RightsA Commentary* Oxford: Oxford University Press.

as described above. Needless to say, Article 6 does not expressly cover the preliminary ruling procedure, a well-known milestone from the EU legal order, however gradually the ECtHR recognized it within its evolutive case law.

The aim of this paper is to analyze the criteria established by ECtHR when assessing whether the refusal by the national court to refer for a preliminary ruling as initiated by the party can amount to violation of Article 6. However, when analyzing this rather complex issue, it is important to underline that the same issue can be brought up as an alleged violation of Article 13 – the right to an effective remedy,[227] which could represent another dimension of analysis not pursued in this paper.

Besides the variety of articles that may entail the alleged issue, it is important to have in mind the variety of angles from which the issue can be scrutinized. Namely, the question of refusal to initiate a preliminary ruling procedure in the light of a potential violation of the right to a fair trial can also be analyzed from constitutional aspects. This relates to the national players within the European human rights architecture, most commonly national constitutional courts, and it mainly concerns the question of what criteria are applied by the EU member states and constitutional courts in order to assess what the consequences in relation to the potential violation of the right to a fair trial are in cases where the motion to initiate a preliminary ruling procedure is refused by the competent courts.[228] In that regard, it would be interesting to examine whether the consequences differ in such cases in the procedural laws of the EU member states and before the ECtHR.

However, when establishing the context to analyze the interferences between the right to a fair trial and refusing the initiative to refer to a preliminary ruling, it of course cannot be examined in isolation, bearing in mind the practice and features of the ECtHR's *modus operandi*. As outlined in case Otto Preminger, the Convention is to be read as a whole, in harmony with the logic of the Convention [229]

Although the refusal by the national court to initiate a preliminary ruling procedure can amount to violation of Article 6, the exact reasons for establishing a violation and the extent of the given reasons are still fluid.

3. SOME REFLECTIONS ON THE RESPONSIBILITY OF EU MEMBER STATES FOR VIOLATIONS OF ECHR WHEN EXECUTING EU LAW

A comprehensive overview of the relationship between European Union and European Court of Human Rights is quite a far-reaching issue. In this chapter, I will only outline the

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[227] See e.g.: Adams and Benn v. United Kingdom, Application No.: 28979/95,30343/96 ECLI:CE:ECHR:1997:0113DEC002897995, although it is important to outline, that the ECtHR emphasized in the case of Ullens de Schooten and Rezabek v. Belgium Application No.: 3989/07 and 38353/07 that Article 6 offers a higher level of protection, including thus the protection safeguarded by Article 13.

[228] In the Hungarian context, the right to a fair trial is enshrined in Fundamental Law Article XXVII. For a European comparative note see Valutyte, R. 2012. *Legal consequences for the infringement of the obligation to make a reference for a preliminary ruling under constitutional law.* Jurisprudencija: mokslodarbai.

[229] Otto Preminger Institut v. Austria, Application No.:13470/87ECLI:CE:ECHR:1994:0920JUD001347087 para 47.andKlass and Others V. Germany Application No.:5029/71 ECLI:CE:ECHR:1978:0906JUD000502971 para 68.

main areas of interference. In a formal sense, both the Charter of Fundamental Rights and the ECHR contain provisions referring to the other[230], however the informal relationship should not be underestimated either.

Currently the relationship between the EU and the ECHR is to the greatest extent guided by a failed attempt of the EU to join the ECHR. As long as this process is on hold, we can only rely on case-law and more precisely, the Bosphorus presumption, according to which state actions taken in compliance with the obligations arising from the EU are justified as long as the EU is considered to be protecting fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance in a manner which can be considered at least equivalent to that for which the Convention provides.[231] The Bosphorus presumption has been further nuanced in the case of Avotiņš in which the Court concluded that although the Bosphorus presumption was to be applied, it showed a cautious approach with regard to an automatic and mechanical application of the principle of mutual recognition.[232]

4. INTERFERENCE BETWEEN ARTICLE 6 AND THE PRELIMINARY RULING PROCEDURE

4.1 Access to a court as read in ECtHR case law

Article 6 does not explicitly include access to a court; this right emerged from a creative interpretation of the provision by the Court in the leading case of Golder v. the United Kingdom.[233] As elaborated by the ECtHR in Roche, the right of access to a court is an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power, which underlay much of the Convention.[234]

According to the Golder case, Article 6 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.[235]The rule of law and the avoidance of arbitrary power are crucial principles underlying the Convention[236]

When it comes to access to a court in the EU law terms, the Court reiterated in the Herma case that the Convention does not guarantee, as such, any right to have a case referred to the ECJ for a preliminary ruling, Nevertheless, refusal of a request for such a referral may infringe the fairness of proceedings if it appears to be arbitrary [237]

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[230] However, the ECHR contains in Article 59 (2) only a reference on the accession of the EU to the ECHR.

[231] Bosphorus Hava Yolları Turizmve Ticaret Anonim Şirketi v. İreland, Application No.: 45036/98 ECLI:CE:ECHR:2005:0630JUD004503698para 55.

[232] Avotins v. Latvia, Application No.: 17502/07ECLI:CE:ECHR:2016:0523JUD001750207para 116.

[233] Schabas W.A. Ibid. and Golder v. United Kingdom, Application No.: 4451/70ECLI:CE:ECHR:1975:0221JUD000445170 para. 28.

[234] Roche v. United Kingdom, Application no. 32555/96 ECLI:CE:ECHR:2005:1019JUD003255596para. 116.

[235] Golderv. United Kingdom, ibid.para 36.

[236] Taxquet v. Belgium, application no. 926/05, ECLI:CE:ECHR:2010:1116JUD000092605para. 90 and Baydarv. The Netherlands, application no. 55385/14ECLI:CE:ECHR:2018:0424JUD005538514para. 39.

[237] Herma v. Germany, Application No.: 54193/07ECLI:CE:ECHR:2009:1208DEC005419307, para. 2.

From this question derives the issue analyzed in this paper, namely what are the consequences of refusing to initiate a preliminary ruling procedure upon the motion of a party. Needless to say, this issue arises only if the state in question is a member state of the EU and the Contracting Party to ECHR. Such a situation occurs if the national court against whose decision there is no remedy ignores or rejects the motion of a party or parties to initiate a preliminary ruling procedure and does not give reasons for such refusal.

However, in ECHR practice, Article 6 -unlike some other Articles- is not labeled as an absolute right[238], therefore the right to compel a court to refer a case for a preliminary ruling cannot be described as absolute either: as outlined in this chapter it is rather the consequence of ECHR *acquis*.

4.2 EU perspective - the preliminary ruling procedure and the Charter of Fundamental Rights

The preliminary ruling procedure is one of the cornerstones of the EU the legal order. One would assume that it also means that all the aspects of the preliminary ruling procedure are therefore regulated in a crystal-clear way.

As stated by some authors (Broberg & Fenger, 2011 p. 276) the prominent role of the preliminary reference procedure in the EU legal system, together with a very considerable number of preliminary ruling cases, some of them e.g. Dorobantu[239], contain specific fundamental rights interpretations. These have been decided by a court, which naturally leads us to assume that all more important aspects of the preliminary ruling procedure have long been clarified.[240] However, this is not the case. On a positive note, when it comes to the Charter of Fundamental Rights, a clear increase in requests for a preliminary ruling mentioning the Charter can be observed[241].

As per Article 267 of the TFEU[242], the aim of the preliminary ruling procedure is two-fold: to interpret the Treaties; and to interpret and decide on the validity of secondary norms. Therefore, it could be concluded that those aims also have harmonizing effects in a sense.

The national courts have the right to initiate preliminary proceedings, although in some cases it is a duty not merely a right[243]. As stated by some authors (Gerards 2014, p. 642), the existence of an obligation rather than a mere competence, to refer preliminary questions

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[238] More on absolute rights in ECHR, see e.g. Mavronicola, N. 2012. What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights Human Rights Law Review, 12(4), p. 723–758.

[239] Dumitru Tudor Dorobantu. Case C-128/18. ECLI:EU:C:2019:857See the critical appraisal: Mohay Á. 2020 The Dorobantu case and the applicability of the ECHR in the EU legal order Pécs Journal of International and European Law.

[240] Broberg, M &Fenger, N 2011, Preliminary references as a right: But a right for whom? The Extent to which Preliminary Reference Decisions can be Subject to Appeal, European Law Review, vol. 36, no. 2, pp. 276-288.

[241] Fundamental Rights Report 2019, Fundamental Rights Agency, ISBN 978-92-9474-895-9.

[242] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326.

[243] BlutmanL. 2014 *Az Európai Uniójoga a gyakorlatban* Budapest, HVG ORAC p.122.

to the CJEU in cases where new issues of interpretation have arisen, has resulted in a frequent involvement of the CJEU in national cases and a major impact of its judgments and interpretations.[244]

Such a case might occur if there is no remedy against the decision of a national court. The exceptions to the duty to refer for a preliminary ruling were recorded by the Court of Justice of the European Union (hereinafter: CJEU) in the CILFIT case [245] such as the cases of *acteclair, acteeclairé* and in the case in question are not relevant.

Referring to the Charter of Fundamental Rights, Article 47 (2) safeguards the right to an effective remedy and to a fair trial[246] containing thus more specific provisions than Article 6 ECHR. Ironically, the possibility of private individuals to directly refer to the CJEU is rather limited which is in contradiction to its effectiveness [247]

Comparing Article 47 of the Charter and Article 6 of ECHR, they partially entail the same provisions, however – the Charter's personal, material and application scope is different. Also, the two fundamental rights documents have a converging minimum standard embodied in Article 52 (3) of the Charter. The Article governs the meaning and scope of the ECHR/Charter corresponding rights. In my view, this also means that the violation of Article 6, as per the papers analyzed issue, at the same time constitutes the violation of Article 47 of the Charter, if the circumstances of the case allow this (i.e. the case concerns the application of EU law in the sense of Article 51(1) of the Charter).

4.3 Duty to refer in the light of Article 6 case law

The ECtHR, and previously the Commission, have dealt with the issue for more than two decades. Initially ECtHR connected the issue pertaining to the refusal to initiate a preliminary ruling to the concept of arbitrariness. However, as seen from the procedural background, the Court did not succeed to set up a well-established case law despite the twenty-year time frame. The most recent judgment was delivered in February 2020 in the case of Sanofi Pasteur.

The court reached some rudimentary conclusions in the cases of Dotta[248], Moosbrugger[249] and Coëme.[250] In the case of Moosbrugger, the applicant alleged the violation of Article 6 because the Austrian Supreme Court failed to refer a preliminary ruling to CJEU. In the case of Coëme, however, the violation was alleged to happen in a purely national context

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[244] Gerards J. 2014 *Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal* Maastricht Journal of European and Comparative law p. 642.

[245] C-283/81 - CILFIT v Ministerodella Sanità.

[246] Charter of Fundamental Rights of the European Union2012/C 326/02.

[247] Galera Rodrigo S. 2015 *The right to a fair trial in the European Union: lights and shadows* Revista Investigacoes Constitucionais vol.2 no.2.

[248] Dotta v. Italy, Application No.: 38399/97, ECLI:CE:ECHR:1999:0907DEC003839997.

[249] Peter Moosbrugger v. Austria, Application No. 44861/98, ECLI:CE:ECHR:1990:0305DEC001198186.

[250] Coëme and Others v. Belgium, Application No.:32492/96, 32547/96, 32548/96, 33209/96, 33210/96 ECLI:CE:ECHR:2000:0622JUD003249296.

that is when the Belgian Court of Cassation rejected the motion to initiate proceedings towards Administrative Jurisdiction and Procedure Court. Despite the national context, because of the analogy, the Coëme case was referred on several occasions in the later case law.

So, in Moosbrugger, as in Coëme, the Court applied a restrictive interpretation and noted that Article 6 - and the Convention itself- does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling.[251] In Moosbrugger it specifically referred to the CJEU[252] while in the Coëme case the dispute was about a national authority. Coëme also outlined that "the right to a court", of which the right of access is one aspect, is not absolute.[253] Speaking of not being an absolute right, it is important to briefly refer to the margin of appreciation of ECHR Contracting States. The Court has extended the margin of appreciation to procedural guarantees also to Article 6 (1).[254] According to the Court –inter alia in the Coëme-case- it is primarily on the national authorities, notably on courts, to resolve problems of interpretation of domestic legislation[255]. This was later repeated in the Bosphorus case as well. However, in that case the Court went even further by referring to the supranational layer of European human rights architecture, which is the Community, whose judicial organs are in a better position to interpret and apply Community law.[256] This tells us how the ECtHR is aware of its mandate and role in guaranteeing human rights.

These initial conclusions were later on further expanded in the cases of Ullens de Schooten and Rezabek v. Belgium.

According to the first conclusion, an obligation is imposed onto domestic courts to give reasons for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis.[257]

When it comes to the actual extent of the duty to give reasons, the Court analysed the CILFIT-exemptions[258] and adopted its stance accordingly, reiterating that it was on the national courts against whose decisions there is no judicial remedy under national law, to decide "whether a decision on a question of Community law is necessary to enable them to pass judgment". The CILFIT judgment states that the exemptions to refer for a preliminary ruling are the following: if the national courts establish that the question "is irrelevant", that he Community provision in question has already been interpreted or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt"[259]. Therefore, when assessing whether for the national court there is no

[251] Coëme and Others v. Belgium, para. 114.

[252] Moosbrugger v. Austria, para. 2.

[253] Coëme and Others v. Belgium, para. 114.

[254] See e.g.: Spielmann D. *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* Cambridge Yearbook of European Legal Studies 14, p.381-418.

[255] Coëme and Others v. Belgium, para. 115.

[256] Bosphorus Hava Yolları Turizmve Ticaret Anonim Şirketiv. Ireland, para, 143.

[257] Ullens de Schootenand Rezabek v. Belgiumpara. 60.

[258] C-283/81 - CILFIT v Ministero della Sanità.

[259] Ullens de Schootenand Rezabek v. Belgium, para .56.

need to refer for a preliminary ruling, the court has to give reasons for such conclusion based on the CILFIT criteria[260].

Sticking to the concept of arbitrariness, the Court also further elaborated on the concept of arbitrariness, outlining that it is to say where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto, where the refusal is based on reasons other than those provided for by the rules, and where the refusal has not been duly reasoned in accordance with those rules[261].

Furthermore, when it comes to the national court, the Court did not rule out the possibility that where a preliminary reference mechanism exists, a refusal by a domestic court to grant a request for such a referral, in certain circumstances may infringe the fairness of proceedings – even if that court is not ruling in the last instance[262]. I personally consider such a scenario hard to imagine, since in that case, if the court is not of last instance, I consider it highly likely that ECtHR would not even examine the application as not all domestic legal remedies have been exhausted, which is a precondition enshrined as an admissibility criteria in Article 35 ECHR.[263]

Evaluating the conclusions from the Ullens case, according to some authors, the case set up qualitative but not quantitative criteria[264].

Of further relevance is the Dhahbi case, which concerns, inter alia, the violation of Article 6. According to the factual background of the case, the Tunisian national applicant lodged an application with the national court seeking payment of a family allowance based on an agreement between the European Union and Tunisia. The applicant requested that a question be referred to CJEU for a preliminary ruling however, the Italian courts rejected, or possibly ignored, his request. Therefore, it is not clear whether the issue, which was disputed by the applicant, fell within the CILFIT-exemptions categories of *acteéclairé, acteclaire* or was considered not a relevant question. Furthermore, the decision of the national court did not even contain a reference to CJEU practice[265]. The Court reiterated the duty to give reasons, as already seen in the Ullens case, though without expressly referring to the case.

The violation of Article 6 was quite evident in the latter case. Therefore, it was not really challenging to the Court to establish a violation of Article 6. I personally consider that the judgment needs some more of a context and methodological guidance on the importance of the duty to give reasons, and for the sake of coherence, a referral to the Ullens judgment.

In the case of Baydar v. the Netherlands, the Supreme Court refused to refer the request of the applicant for a preliminary ruling to the CJEU. However, the Court did not find it a violation of Article 6. When assessing the non-violation, the Court acknowledged an additional aspect, i.e. the acceptance of using a summary reasoning in an accelerated

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[260] *Ibid*., para 62.

[261] *Ibid*., para. 59.

[262] *Ibid*., para. 59.

[263] European Convention on Human Rights, *op.cit*.

[264] Majić H. & Mintas Hodak Lj. 2019 *Preliminary reference procedure and the scope of judicial review of the European Court of Human Rights* EU and Member States - Legal and Economic issues.

[265] Dhahbiv. Italy , Application No.: 17120/09 ECLI:CE:ECHR:2014:0408JUD001712009 para.33.

procedure as an acceptable practice[266]. The judgment refers to both the Ullens and the Dhahbi cases[267].

By ruling on summary proceedings, I believe the ECtHR also ruled on the minimum standards of the duty to give reasons. Analysing the *de minimis* rule, the Court considered it acceptable to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue, referring to the John case [268].

This case also had potential relevance from the point of view of the relationship between the ECHR and the EU legal order, because the European Commission was invited to intervene as a third party. However, the Commission informed the ECtHR that it did not intend to submit written observations, which was an unfortunate development, at least from the perspective of analyzing the EU-ECHR relationship.

As for domestic courts needing to provide reasons for their judgments and decisions, the ECtHR further pointed out that the extent to which the duty to provide reasons may vary according to the nature of the decision[269], therefore it always has to be analyzed *in concreto*.

Another case in which the summary reasoning was sufficient is the Stichting Mothers of Srebrenica case. As concluded by the Court, having already found that the United Nations enjoyed immunity from domestic jurisdiction under international law, the Supreme Court was entitled to consider a request to the CJEU for a preliminary ruling redundant.[270]

In the case of Somorjai v. Hungary, the court stuck to its previously developed case-law. According to the factual description, the pension rights of the applicant under EU law were not taken into consideration by the domestic authorities. On the issue of the need for a preliminary ruling, the ECtHR noted that, as per the CJEU's relevant case-law, even if the initiative of a party is not necessary for a domestic court against whose decisions there is no judicial remedy under national law to be obliged to bring a question concerning the interpretation or the validity of EU law before the CJEU, it is solely on that court to decide in the light of the particular circumstances of the case[271].

Besides the role of the domestic court, the ECtHR also ruled on its own role, reiterating its duty to ensure the observance of the obligations undertaken by the Contracting Parties to the Convention. This also means that the ECtHR is not competent to rule formally on the compliance with the domestic law, other international treaties or EU law. The task of interpreting and applying the provisions of EU law falls firstly to the CJEU, in the context of a request for a preliminary ruling, and secondly to the domestic courts in their capacity as courts of the Union. It is therefore primarily on the national authorities, notably the

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[266] Baydar v. the Netherlands, Application No.:55385/14 ECLI:CE:ECHR:2018:0424JUD005538514, para. 50.

[267] *Ibid.*, para. 44.

[268] *Ibid.*, para. 46.

[269] *Ibid.*, para. 40.

[270] Stichting Mothers of Srebrenica and others v. the Netherlands, Application No.:65542/12ECLI:CE:ECHR:2013:0611DEC006554212 para. 173.

[271] Somorjai v. Hungary, para. 61.

courts, to interpret and apply the domestic law, if necessary, in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention [272]

In the case of Harisch v. Germany[273] and Repcevirág Szövetkezet v. Hungary[274] the Court confirmed its previous case law, pertaining to the criteria to assess the refusal to initiate a preliminary ruling procedure.

The most recent case in the subject matter is the Sanofi Pasteur v. France[275] where the Court found violation of Article 6 based on the previously established criteria.

4.4 The scale of duty to give reasons

Bearing in mind that Article 6 is not an absolute right, the obligation of a domestic court does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority[276]. The role of the court is only to ascertain the reasons for the eventual refusal to initiate a preliminary ruling procedure in the light of Article 6. Therefore, in my understanding, the ECtHR can be characterized as a standard setter of minimal requirements.[277]

Analyzing the exact volume of the duty to give reasons based on the case law, the cases can be classified in the following way:

1) The decision contains no reasons due to ignorance of domestic courts.
2) The decision is reasoned, based on CILFIT or any other criteria.
3) The decision does not have to be reasoned.

Referring to the first scenario, as seen in the Dhahbi case, the fact that the domestic court ignores to justify the decision can be relevant in ECHR contact and might lead to the violation of Article 6. As already outlined in this particular case, the applicant's motion was sufficiently elaborated while the domestic court ignored to give reasons, therefore in such cases the violation of Article 6 is highly probable.

Referring to the second scenario, if the national court justifies the decision, the justification as a certain qualitative standard has to be aligned with the criteria stemming from either Ullens-case or any other criteria, such as elaborated in Baydar and Stichting Mothers of Srebrenica cases.

The third scenario relates to the issue where the decision does not have to be justified. Such case occurred in the John case where submissions of the applicant neither contained

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[272] Somorjai v. Hungary, para. 53.

[273] Harisch v. Germany, Application No.:50053/16 ECLI:CE:ECHR:2019:0411JUD005005316

[274] Repcevirág Szövetkezet v. Hungary, Application No.:70750/14 ECLI:CE:ECHR:2019:0430JUD007075014

[275] Sanofi Pasteur v. France, Application No.: 25137/16ECLI:CE:ECHR:2020:0213JUD002513716

[276] Somorjai v. Hungary, para 54.

[277] Limante A. *Refusal to refer for preliminary ruling and a right to a fair trial: Strasbourg court's position* KSLR EU Law Blog available at: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1098#.XtdeqmgzaUk.

an express request for a reference under Article 234 EC Treaty nor the precise reasons for the alleged necessity of a preliminary ruling.[278]

Even from these scenarios, it is easy to see that the *acquis* developed by ECtHR is rather fragile and established on *in concreto* basis. However, there is a high probability that the domestic court of last instance has a duty to give reasons in case of rejecting the submission of parties to initiate preliminary ruling procedure. Although the scale to give reasons is diverse, referral to CILFIT-exceptions is usually considered dominant. However, it cannot be asserted with certainty from the case law to what extent this should be detailed. On the other hand, what is probable is that if the domestic court fails to provide reasons, this might be considered arbitrary and therefore in breach of Article 6.

5. CONCLUDING REMARKS

The party's submission before a domestic court of a state which is a member of the EU and a Contracting Party to ECHR at the same time might lead to the violation of Article 6 if the court of last instance rejects the submission of the parties to initiate a preliminary ruling procedure and does not give reasons for it. According to the ECtHR's view, there is an autonomous, yet not absolute, right to a preliminary ruling from the CJEU that might be infringed due to the unreasoned refusal to submit the applicant's request to the CJEU.[279]

However, such scenario occurs only in *ultima ratio* cases, because the ECtHR has held on numerous occasions that it is primarily up to the national courts to interpret and apply the domestic law, if applicable in conformity with EU law, and to decide whether it is necessary to seek a preliminary ruling[280]. This also applies in cases when that law refers to international law. Equally, the EU's judicial institutions are a better place to interpret and apply EU law.[281]

In my view, with the existing duty to give reasons as imposed by the ECtHR, the ECtHR contributes to the dialogue between the national courts and the CJEU itself. While, if we take into consideration Protocol No.16, the dialogue occurs between the designated national courts and the ECtHR, the Strasbourg and Luxembourg courts maintain a different kind of dialogue with the national courts, yet still there is some convergence between the effects of their decisions and judgments, as in the case of the CILFIT exceptions.

The ECtHR only assures, as inter alia in the Somorjai case, the court's role being confined to ascertaining whether the effects of domestic adjudication are compatible with the Convention. This is in line with the role of the ECHR as read per Article 53 of the Convention. The underlying importance of the ECHR, within the European human rights architecture lies in the fact that this minimum standard sometimes also entails the maximum level protection.

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[278] Lutz John v. Germany Application No.: 15073/03ECLI:CE:ECHR:2007:0213DEC001507303, para 2.

[279] Lacchi, C.2015. T*he ECtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure* Review of European Administrative Law, 8(2), p. 95–125.

[280] See e.g. Harisch v Germany, para. 33.

[281] See Bosphorus case, para. 143.

From the Bosphorus case onwards, we have witnessed the possibility that the ECtHR reviews in an indirect manner the ECHR compatibility with the EU legal order, or in other words, it will not refrain itself from interfering with the cases which fall under the exclusive EU jurisdiction. According to some authors, in Bosphorus the ECtHR retained the role of the ultimate guardian of the respect for human rights in the EU.[282]

The relationship underlying the European human rights architecture might be reminiscent of the features of federalist systems, where the ECHR stands as the ultimate guardian of human rights.

By embarking on the journey to analyze the issue of the relationship between a fair trial and refusing a submission to initiate a preliminary ruling procedure one cannot ignore the elephant in the room, namely the formally unregulated relationship between the EU legal order and the ECHR itself. In such context, defining the relationship between the preliminary ruling procedure and the right to a fair trial might serve as a topic which begins a wider debate.

[282] Majić H. &Mintas Hodak Lj., *op.cit.*

LIST OF REFERENCES

Books and monographs

Blutman L. 2014 Az Európai Uniójoga a gyakorlatban Budapest, HVG ORAC

Broberg P. &Fenger N. Preliminary References as a Right: But for Whom? The Extent to which Preliminary Reference Decisions can be Subject to Appeal European Law Review 36(2)

Doobay, A. 2013 The right to a fair trial in light of the recent ECtHR and CJEU case-law ERA Forum 14

Gerards J. 2014 Advisory Opinions, Preliminary rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal Maastricht Journal of European and Comparative law

Lacchi, C. 2015. The ECrtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure Review of European Administrative Law

Majić H. & Mintas Hodak Lj. 2019 Preliminary reference procedure and the scope of judicial review of the European Court of Human Rights EU and Member States - Legal and Economic issues

Schabas,W.A. 2015 The European Convention on Human Rights A Commentary Oxford: Oxford University Press

Internet sources

Charter of Fundamental Rights of the European Union2012/C 326/02

Consolidated version of the Treaty on the Functioning of the European Union OJ C 326

Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 05. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005

Fundamental Rights Report 2019, Fundamental Rights Agency, ISBN 978-92-9474-895-9

Galera Rodrigo S. 2015 The right to a fair trial in the European Union: lights and shadows Revista Investigacoes Constitucionais vol.2 no.2

Limante A. Refusal to refer for a preliminary ruling and a right to a fair trial: Strasbourg court's position KSLR EU Law Blog available at: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1098#.XtdeqmgzaUk

Mavronicola, N. 2012. What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights Human Rights Law Review, 12(4)

Mohay Á. 2020 The Dorobantu case and the applicability of the ECHR in the EU legal order Pécs Journal of International and European Law

Spielmann D. Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European

Review? Cambridge Yearbook of European Legal Studies 14.

Case law

Adams and Benn v. United Kingdom, Application No.: 28979/95,30343/96 ECLI:CE:ECHR:1997:0113DEC002897995

Avotins v. Latvia, Application No.: 17502/07ECLI:CE:ECHR:2016:0523JUD001750207

Baydar v. The Netherlands, application no. 55385/14 ECLI:CE:ECHR:2018:0424JUD005538514

Baydar v. the Netherlands, Application No.:55385/14 ECLI:CE:ECHR:2018:0424JUD005538514

Bosphorus Hava Yolları Turizmve Ticaret Anonim Şirketi v. İreland, Application No.: 45036/98 ECLI:CE:ECHR:2005:0630JUD004503698

C-283/81 - CILFIT v MinisterodellaSanità

Coëme and Others v. Belgium, Application No.:32492/96, 32547/96, 32548/96, 33209/96, 33210/96 ECLI:CE:ECHR:2000:0622JUD003249296

Dhahbiv. Italy, Application No.: 17120/09 ECLI:CE:ECHR:2014:0408JUD001712009 para.33.

Dotta v. Italy, Application No.: 38399/97, ECLI:CE:ECHR:1999:0907DEC003839997

Dumitru Tudor Dorobantu. Case C-128/18. ECLI:EU:C:2019:857

Harisch v. Germany, Application No.:50053/16 ECLI:CE:ECHR:2019:0411JUD005005316

Herma v. Germany, Application No.: 54193/07ECLI:CE:ECHR:2009:1208DEC005419307

Klass and Others V. Germany Application No.:5029/71 ECLI:CE:ECHR:1978:0906JUD000502971

Lutz John v. Germany Application No.: 15073/03ECLI:CE:ECHR:2007:0213DEC001507303

OPINION OF ADVOCATE GENERAL WAHL delivered on 13 May 2015 Joined Cases C72/14 and C197/14 ECLI:EU:C:2015:319

Otto Preminger Institut v. Austria, Application

No.:13470/87ECLI:CE:ECHR:1994:0920JUD001347087

Peter Moosbrugger v. Austria, Application No. 44861/98,
ECLI:CE:ECHR:1990:0305DEC001198186

RepcevirágSzövetkezet v. Hungary, Application No.:70750/14
ECLI:CE:ECHR:2019:0430JUD007075014

Roche v. United Kingdom, Application no. 32555/96
ECLI:CE:ECHR:2005:1019JUD003255596

Stichting Mothers of Srebrenica and others v. the Netherlands, Application
No.:65542/12ECLI:CE:ECHR:2013:0611DEC006554212

Taxquet v. Belgium, application no. 926/05, ECLI:CE:ECHR:2010:1116JUD000092605

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THE ROLE OF THE EUROPEAN BORDER AND COAST GUARD AGENCY (FRONTEX) IN THE MANAGEMENT OF THE EXTERNAL BORDERS OF THE EUROPEAN UNION: THE COOPERATION AGREEMENTS WITH THE WESTERN BALKANS COUNTRIES

The paper, entitled "The role of the European Border and Coast Guard Agency (FRONTEX) in the management of the external borders of the European Union:the cooperation agreements with the Western Balkans Countries", deals with the analysis of the agreements that the EU has recently signed with Albania in October 2018, Montenegro in October 2019 and Serbia in November 2019. Similar agreements have also been initialled with North Macedonia in July 2018 and Bosnia and Herzegovina in January 2019, and are pending finalisation.

The objective of these "status agreements" is to allow the European Border and Coast Guard Agency to coordinate operational cooperation between EU Member States and the Western Balkans States on the management of the borders that the latter have in common with the European Union. In particular, FRONTEX is allowed, within the framework of the agreements, to assist Balkan States concerned in border management, carry out joint operations and deploy teams in the regions that border the EU. The activities aim at tackling irregular migration, in particular sudden changes in migratory flows, and cross-border crime, and can involve the provision of increased technical and operational assistance at the border.

Starting from the examination of these new agreements, to be placed in the more general framework of the relations between the European Union and the Countries - candidates and potential candidates for accession - of the Western Balkans, the paper is aimed at assessing the effectiveness of the means put in place by the EU to ensure the cross-border security of the South-East European border, with particular regard to the effective role played by the European Border and Coast Guard Agency.

Keywords: Frontex, EU Borders, Western Balkans, Status Agreements, Security.

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1. INTRODUCTION

The cooperation agreements recently signed between the European Union and some Western Balkan countries on the actions of the European Border and Coast Guard Agency (Frontex) in their territory rekindle attention on the role of Frontex in the management of the external borders of the European Union.

On the basis of the actions implemented so far by the Agency, this work thus aims to examine how it has contributed to guaranteeing the security of the external borders of the European Union, with particular regard to the borders with the Western Balkans, and what role it may play in the future, also in light of the recent "Status Agreements".

These are in particular those agreements that the European Union signed with Albania in October 2018, Montenegro in October 2019 and Serbia in November 2019. Similar agreements were also signed with North Macedonia in July 2018 and Bosnia and Herzegovina in January 2019 and are waiting to be finalized[283].

The objective of these "Status Agreements" is to allow the European Border and Coast Guard Agency to coordinate operational cooperation between EU Member States and Western Balkan States on border management that they have in common with the European Union. In particular, Frontex is authorized, within the framework of the agreements, to assist the Balkan States interested in border management, to carry out joint operations and to deploy teams in the regions - of these countries - bordering the EU. The activities mainly aim at combating irregular migration, in particular sudden changes in migratory flows and transnational crime, and may involve the provision of increased technical and operational assistance at the borders.

Starting from the examination of these new agreements, to be included in the more general framework of relations between the European Union and the countries - candidates and potential candidates for accession - of the Western Balkans, this work aims to evaluate the effectiveness of the means put in place by the EU to ensure the cross-border security of the borders of South Eastern Europe, with particular regard to the role actually played by the European Border and Coast Guard Agency.

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[283] It is, in particular, of the following Agreements: *Status Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina* Brussels, 26 March 2019; *Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro*, Brussels, 12 March 2019; *Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia*, Brussels, 21 January 2019; *Status Agreement between the European Union and the former Yugoslav Republic of Macedonia on actions carried out by the European Border and Coast Guard Agency in the former Yugoslav Republic of Macedonia*, Brussels, 25 September 2018; *Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania*, Brussels, 10 July 2018; *Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro*, Brussels, 12 March 2019.

2. FRONTEX AND THE COOPERATION WITH THIRD COUNTRIES FOR AN INTEGRATED BORDER MANAGEMENT

The *Status Agreements* with the Western Balkan countries are to be placed in the broader framework of the relations between Frontex and third States. Cooperation with third countries is in fact an integral part of Frontex's mandate to ensure the implementation of an*integrated* European *border management* (IBM) as well as one of the strategic priorities for the Agency's work.

In this regard, it appears as a matter of priority to recall that the European Border and Coast Guard Agency was founded in 2004 to assist the Member States of the European Union and the Schengen associated countries in protecting the external borders of the EU free movement area[284].

Frontex's function is mainly to promote, coordinate and develop the European border management and, to do so, it monitors the situation at the borders and helps border authorities to share information with Member States. The Agency also carries out vulnerability assessments to evaluate the capacity and readiness of each Member State to address the challenges at its external borders, including migratory pressure. In addition, Frontex coordinates and organizes joint operations and rapid interventions to assist Member States at the external borders, including humanitarian emergencies and rescue at sea[285].

Again with regard to the management of migratory flows, Frontex can carry out operations on the territory of non-EU countries bordering at least one Member State, in the event of migratory pressure at the border of a non-EU country. Even in identifying migrants, the Agency supports Member States with screening and acquisition of fingerprints. The officials of the Agency can provide initial information to persons who need or wish to apply for international protection, cooperating with the European Asylum Support Office (EASO), without prejudice to the competence of the competent national authorities to decide on the right to international protection. The Agency is also assigned the task of assisting the Member States of the Union in the forced repatriation of people who have exhausted all legal means to legitimize their stay in the EU[286].

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[284] In particular, Frontex was established by the Council Regulation (EC) No 2007/2004 of 26 October 2004 *establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, in OJ L 349, 25.11.2004, p. 1–11. The 2004 Regulation was repealed by the Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 *on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC*, in OJ L 251, 16-9-.2016, p. 1–76. The latest modification of Frontex's mandate is to be traced back to the entry into force of the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, in OJ L 295, 14-11-2019, p. 1–131.

[285] On the functions of Frontex in this area, see, among others, M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law*, Oxford University Press, Oxford, 2019; R. Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge University Press, Cambridge, 2016.

[286] On the European policies of security and management of migratory flows we refer, in particular, to: P. Bargiacchi, *Non-State Actors and Illegal Migration: A New European Approach to Security Policies*, in *South-*

Returning to the examination of the modalities of cooperation between Frontex and third States, it should be remembered that, together with partners outside the EU, Frontex proposes to develop an increasingly connected global border management community that respects the highest standards for border management and security, including at coastguard level, law enforcement and repatriation, and ensuring the protection of fundamental rights through close cooperation aimed at tackling irregularities linked to migration and transnational crime. To this end, Frontex develops and maintains a network of partnerships with the competent authorities of third countries, in particular the countries bordering the EU, as well as with countries of origin and transit for irregular migration; for this reason, the countries of the Western Balkans are particularly involved in this sense[287].

In this context, cooperation with third countries (also, therefore, with the Balkans) is based on priorities and principles outlined in Frontex's international cooperation strategy. In particular, Frontex undertakes to ensure that the agency's international cooperation work is: consistent with EU rules and policies, including its foreign and security policy; implemented in collaboration with other relevant EU institutional actors; respectful of fundamental rights; based on risk analysis; respectful of the mutual interests of both parties; committed to sustainable solutions.

The actions so far implemented by Frontex have been concentrated in particular in a series of areas of international cooperation, which correspond to all areas of the operational work of the Agency, from information exchange, risk analysis, joint operations, repatriation, training, research and innovation.

Cooperation is generally based on agreements between the Agency and the competent authorities of the non-EU country, through which the methods of participation and collaboration of the partners in the various Frontex activities are regulated; partners who, in turn, benefit from the Agency's support in terms of technical assistance and training.

For example, there is a large network of regional intelligence sharing communities where Frontex plays a crucial role in facilitating the sharing of information and knowledge, as well as joint analysis between the EU and non-participating third countries. An example of this, as far as we are concerned, is the Western Balkans Risk Analysis Network(WB-RAN).

Observers from some non-EU countries may also, with the consent of the host Member State, be invited to participate in the operational activities of the Agency.

Numerous coordination points were then set up at the border crossings between two third countries that have a working agreement with Frontex and are activated for a defined period at the request of the partner countries. Observers from the European Border and

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Russian Journal of Social Sciences, n. 1/2019, pp. 24-39; Id. *Are European Security Policies Learning Some Lessons from United States on Migration and Human Rights?*, in Novakovic (ed.), *Common Law and Civil Law Today - Convergence and Divergence*, Vernon Press, Wilmington, 2019, pp. 137-162; Id., *Elementi di convergenza del modello di sicurezza europeo verso il modello statunitense nella gestione dei flussimisti irregolari*, in *Rivista della Cooperazione Giuridica Internazionale*, n. 58, 2018, pp. 61-84; A. Sinagra, *Security and National Borders of the States,* in *Riv. coop. giur. internaz.*, n. 48, 2015, p. 37-45.

[287] On this point see T. Russo, *What boundaries of European Security: Political versus economic?*, in *Geopolitica*, Vol. IV, n. 1, p.127-137; S. Stojanović Gajić, F. Ejdus (eds.), *Security Community Practices in the Western Balkans*, Routledge, London, 2018.

Coast Guard Teams are then deployed at these coordination points to facilitate cooperation and exchange of information, particularly in relation to the early detection of irregular migration trends.

Frontex can also support the neighboring countries of the European Union (including the Western Balkans, therefore) with joint operations coordinated by Frontex itself with executive powers. To this end, the Union must conclude an international status agreement with that country, and that is what will be discussed below. We should before recall, however, that there is another aspect relating to Frontex's activity that certainly has an impact on relations with the Western Balkans, namely the technical assistance projects in non-EU countries.

These targeted EU-funded projects complement and enhance the Agency's external cooperation work, supporting the development of sustainable border management solutions. In this context, the Agency is committed to ensuring that its technical assistance action fits in the general EU external relations policies.

While each project focuses on a different region and priority topics, all project activities aim to respond to the specific needs of the beneficiary countries and to support them in building their capacities in the field of border security and management. Technical assistance projects help lay the foundations for strategic cooperation or build on already established functional relationships between Frontex and the national authorities of the countries concerned.

Currently, three projects funded by the European Union are being implemented with a total funding of € 14 million and a quarter is in preparation. This is, first of all, the *EU4BorderSecurity Project*, whose beneficiary countries are the countries of the southern neighbourhood. The objectives of the project are to strengthen border security in the southern Mediterranean region, North Africain particular.

Still with regard to the African continent, a second project is aimed at strengthening the Africa-Frontex intelligence community (*Strengthening the Africa-Frontex Intelligence Community*).

A third project funded by the Union involving Frontex is the "Eastern Partnership Integrated Border Management Capacity Building Project (EaP)"(*Progetto di sviluppodellecapacità di gestione integrate dellefrontiere del partenariatoorientale* (EaP*),* whose beneficiaries are Armenia, Azerbaijan, Belarus, Georgia, Moldovaand Ukraine.

As far as this is concerned, however, the project that is of particular interest is the project of "RegionalSupport to Protection-Sensitive Migration Management in the Western Balkans and Turkey (IPA II), Phase II", whosebeneficiaries are Albania, Bosnia and Herzegovina, North Macedonia, Kosovo, Montenegro, Serbia and Turkey.

The project, whose reference time frame runs from 1 July 2019 to 30 June 2021, involves, as partners, the *European Asylum Support Office* (EASO), the *International Organization for Migration*(IOM) and the *United Nations High Commissioner for Refugees* (UNHCR).

The amount allocated by the European Union for the project is 3.4 million euros (as an instrument of pre-accession assistance). The objectives of the project are, in particular, to

introduce and share Union standards and best practices on the management of protection-sensitive migration, as well as to support beneficiaries in developing a protection-sensitive response to mixed migratory flows by strengthening their identification, registration, reporting, asylum and return mechanisms[288].

3. THE "STATUS AGREEMENTS" CONCERNING FRONTEX ACTIONS IN THE WESTERN BALKANS: A NEW COOPERATION FRAMEWORK FOR BORDER MANAGEMENT

In the context, mentioned above, of Frontex's consolidated collaboration with the countries of the Western Balkans, place themselves the recent cooperation agreements for border management, the so-called "status agreements", signed on 8 October and on 19 November 2019 respectively between the European Union and Montenegro (concerning the actions of the European Border and Coast Guard Agency in Montenegro) and between the European Union and Serbia (concerning the actions of the same Agency in Serbia). These agreements allow Frontex to assist countries in border management, carry out joint operations and deploy teams in their respective regions bordering the EU[289].

We recall that on May 1, 2019 the Agreement on the status between the European Union and the Republic of Albania (concerning the actions of the European Border and Coast Guard Agency in the Republic of Albania) entered into force[290].

As mentioned, other agreements have been signed with Bosnia and Herzegovina and Macedonia[291].

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[288] On this and other EU projects that involve the countries of the Western Balkans, also with a view to the prospect of accession of these countries to the EU, see, among others, J. Džankić, S. Keil, M. Kmezić (eds.), *The Europeanisation of the Western Balkans: A Failure of EU Conditionality?*, Palgrave Macmillan, London, 2019; S. Keil, Z. Arkan (eds.), *The EU and Member State Building: European Foreign Policy in the Western Balkans*, Routledge, London, 2015.

[289] The signature of the Status Agreements between the European Union and the individual Western Balkan States on the actions of Frontex is generally authorized, on behalf of the Union, by a Council Decision (subject to the conclusion of this agreement). In the case of Montenegro, the reference deed is the Council Decision (EU) 2019/453 of 19 March 2019 *on the signing, on behalf of the Union, of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro*, in OJ L 79, 21-3-2019, p. 1–3. As for Serbia, instead, see the Council Decision (EU) 2019/400 of 22 January 2019 *on the signing, on behalf of the Union, of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia*, in OJ L 72, 14-03-2019, p. 1-3.

[290] With regard to the Agreement with Albania, the reference is to the Council Decision (EU) 2018/1031 of 13 July 2018 *on the signing, on behalf of the Union, of the Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania*, in OJ L 185, 23-7-2018, p. 6–8.

[291] For these countries see, respectively, the Council Decision (EU) 2019/634 of 9 April 2019 *on the signing, on behalf of the Union, of the Status Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina*, in OJ L 109, 24-4-2019, p. 1–3, and the Council Decision (EU) 2018/1535 of 28 September 2018 *on the signing, on behalf of the Union, of the Status Agreement between the European Union and the former Yugoslav Republic of Macedonia on actions carried out by the European Border and Coast Guard Agency in the former Yugoslav Republic of Macedonia*, in OJ L 257, 15-10-2018, p. 23-25.

As regards the agreement with Montenegro on cooperation in border management between Montenegro and the European Border and Coast Guard Agency (Frontex), we recall that the aim of the Agreement is to allow Frontex to coordinate operational cooperation between EU Member States and Montenegro in the management of the common borders between the European Union and Montenegro. The signing of the Agreement was hailed as a further demonstration of the ever deeper and broader cooperation with Montenegro, and as an element that will bring benefits to both parties, particularly in terms of enhancing border management activities[292].

Under the agreement, Frontex can assist Montenegro in border management, carry out joint operations and - with the consent of Montenegro - employ teams in the regions of the country bordering the Union. These activities aim to fight against illegal immigration, in particular against sudden changes in migratory flows, as well as against cross-border crime, and may involve increased technical and operational assistance at the border with the aim of further enhancing security for external borders of the EU.

With these objectives, the Agreement covers"all aspects that are necessary for carrying out actions by theAgency that may take place on the territory of Montenegro whereby members of a team of the Agency have executive powers"[293].

It should be noted that the Agreement defines as "action" "a joint operation", namely "an action aimed at tackling illegal immigration or cross-border crime or aimed at providing increased technical and operational assistance at the border of Montenegro neighbouring a Member State and deployed in the territory of Montenegro". The Agreement also specifies that a "rapid border intervention" is to be intended as "an action aimed at rapidly responding to a situation of specific and disproportionate challenges at the borders of Montenegro neighbouring a Member State and deployed in the territory of Montenegro for a limited period of time", and a "return operation" as "an operation that is coordinated by the Agency and involves technical and operational reinforcement being provided by one or more Member States under which returnees from one or more Member States are returned either on a forced or voluntary basis to Montenegro"[294].

The launching of the action thus understood can be proposed by the Agency to the competent authorities of Montenegro; however, the competent authorities of Montenegro may also request the Agency "to consider launching an action". In any case, the consent of the competent authorities of Montenegro and of the Agency is required to carry out an action[295].

Any joint operation or rapid border intervention decided by the Agency and Montenegro must be based on an "operational plan" agreed between the parties and approved by

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[292] The negotiations with Montenegro for the signing of the status agreement were finalized on 5 July 2018 and the draft agreement was signed by Commissioner Avramopoulos and the Minister of the Interior of Montenegro (Mevludin Nuhodžić) in February 2019.The Council then authorized the signing of the Agreement on 19 March 2019. As is known, the draft decision on the conclusion of the Agreement then passes to the European Parliament, which must give its approval for the Agreement itself to be concluded.

[293] Art. 1, *Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro*, Brussels, 12 March 2019.

[294] *Idem*, art. 2.

[295] *Idem*, art. 3.

the Member State or Member States bordering the operational area. In particular, the operational plan must define in detail "the organisational and procedural aspects of the joint operation or rapid border intervention"[296].

As for the tasks and skills of the team members, art. 5 provides that team members have the authority to carry out the tasks and to exercise the executive powers required for border control and return operations, always respecting"the laws and regulations of Montenegro"[297].

In addition, team members may only perform tasks and exercise powers in the territory of Montenegro "under instructions from and, as a general rule, in the presence of border guards or other relevant staff of Montenegro". Montenegro shall issue where appropriate, instructions to the team "in accordance with the operational plan". Montenegro may "exceptionally" authorise members of the team to act on its behalf[298].

The Agency, through its coordinating officer, may communicate its views to Montenegro on the instructions given to the team. In that case, Montenegro shall take those views into consideration and follow them to the extent possible.

If the instructions issued to the team are not in compliance with the operational plan, "the coordinating officer shall immediately report to the executive director of the Agency", who "may take appropriate measures, including the suspension or the termination of the action"[299].

It should be noted that the Agreement authorizes the members of the team, while performing their tasks and exercising their powers, "to use force, including service weapons, ammunition and equipment, with the consent of Montenegro and the home Member State, in the presence of border guards or other relevant staff of Montenegro and in accordance with the national law of Montenegro. Montenegro may authorise members of the team to use force in the absence of border guards or other relevant staff of Montenegro"[300].

Montenegro may also authorise members of the team to consult its national databases if necessary for fulfilling operational aims specified in the operational plan and for return operations. The members of the team "shall only consult data which is necessary for performing their tasks and exercising their powers". Montenegro shall, in advance of the deployment of the members of the team, inform the Agency of the national databases which may be consulted. That consultation shall be carried out "in accordance with the national data protection law of Montenegro"[301].

[296] The operational plan shall set out, in particular: "a description and an assessment of the situation; the operational aim and objectives; the operational concept; the type of technical equipment to be deployed; the implementation plan; the cooperation with other third countries, other agencies and bodies of the European Union or international organisations; the provisions in respect of fundamental rights including personal data protection; the coordination, command, control, communication and reporting structure; the organisational arrangements and logistics; and the evaluation and the financial aspects of the joint operation or rapid border intervention" (*Idem*, art. 4).

[297] *Idem*, art. 5, par. 1 and 2.

[298] *Idem*, art. 5, par. 3.

[299] *Idem*, art. 5, par. 3.

[300] *Idem*, art. 5, par. 6.

[301] *Idem*, art.7.

The possibility remains, for each of the two parties (Montenegro and the Agency), to suspend the action if it considers that the other party has not respected the Agreement or the operational plan[302].

Furthermore, Montenegro or the executive director may suspend or terminate the action "in cases of breach of fundamental rights, of violation of the principle of non-refoulement or of data protection rules"[303].

Moving on to examine the agreement with Serbia, it should be noted that it certainly represents a further strengthening of relations with the partners of the Western Balkans, aimed, in the words of Commissioner Avramopoulos, "to shorten the distance between this region and the EU"[304].

Again, thanks to the agreement, Frontex can assist Serbia in managing its borders, carry out joint operations and, with the agreement of Serbia, send teams to the regions of the country bordering the EU. All activities aimed at combating illegal immigration and cross-border crime may include increased technical and operational assistance at the border.

As for the detail of the content of the Agreement, it largely follows what has already been described with regard to the Status Agreement with Montenegro. The status agreements with Albania, Bosnia and Herzegovina and Macedonia also have a similar content.

To briefly close the picture on the role of Frontex in the management of the external borders of the European Union, it is hardly necessary to recall that, recently, following a proposal from the European Commission, the European Parliament and the Council adopted a new Regulation aimed at strengthening the role of the European Border and Coast Guard Agency:Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624[305].

The new regulation brings numerous changes and innovations to the current legal framework, expanding the mandate of the Agency, with the aim of strengthening its operational capacity. To this end, among the various interventions, the gradual provision of the Agency, starting from January 2021, of its own permanent body of border guards should be noted.

The strategic objective of a capacity of 10,000 operational staff members, as set out in Annex I, is expected to be achieved in 2027. The standing corps will consist of four categories of operational staff: on the one hand, the Agency's statutory staff, employed within teams to be deployed in the operational areas (Article 55), in addition to the staff

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[302] *Idem*, art. 6, par. 1-4.

[303] *Idem*, art. 6, par. 3.

[304] We recall that, for the EU, the *Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia* (Brussels, 21 January 2019) was signed by Maria Ohisalo, Minister of the Interior of Finland and President of the Council, and by Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, while for the Republic of Serbia it was signed by Nebojša Stefanović, Deputy Prime Minister and Minister of the Interior.

[305] *Regulation* (EU) *2019/1896* of the European Parliament and of the Council of 13 November 2019 *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, in OJ L 295, 14-11-2019, p. 1–131.

responsible for the operation of the ETIAS central unit; on the other hand, a part of the staff made available by the Member States, as long-term staff seconded to the Agency by the Member States (Article 56); staff ready to be made available to the Agency for short-term employment (Article 57) and, finally, the rapid reaction pool composed of staff from the Member States ready to be employed in rapid interventions (Article 58).

In line with the broader mandate assigned to the Agency, this staff will not only assist States in controlling external borders, but may be employed in relation to the functions of countering cross-border crime, secondary movements, as well as in the field of repatriation.

4. CONCLUDING REMARKS

In conclusion, it seems useful to propose some critical remarks about the opportunity, as well as the effectiveness of these agreements, hailed as of fundamental importance at the time of their signature by the representatives of the EU institutions. Indeed, they certainly represent a step forward as regards the cooperation between the European Union and the Balkan countries in terms of border security and management. And this is also to be read from the perspective of an increasingly integrated management of borders which, sooner or later, are expected to become internal borders of the European Union with the accession of these countries to the Union itself.

However, the possibility for Frontex to carry out joint missions and operations in the territory of neighbouring countries, naturally subject to the conclusion of a status agreement between the European Union and the country concerned (operations of which a first example is the joint operation carried out in Albanian territory on May 22 of the last year), risks being perceived as a sort of further "intrusion" of the European Union, even carried out by border guards - coordinated, in fact, by Frontex - authorized to resort to the use of force in its national territory.

This could further exacerbate the conviction of a large part of the citizens of the Region that the countries of the Western Balkans increasingly let the EU "decide at home", yielding to a conditionality that is sometimes unwilling to take into account the concrete and daily needs of the populations of these countries. A belief that has often triggered and continues to trigger anti-European reactions or in any case of generalized distrust in public opinion, as also demonstrated by the recent political elections in Serbia of 21 June 2020, in which high abstention is to be read also as a political choice of the main opposition parties - and their voters - to turn on the spotlight and draw the European Union's attention to internal political issues. A European Union that is considered almost "tyrannical" in enforcing the conditionality and the objectives set for the opening and closing of the various chapters of the accession negotiations (as well as demanding, in the case of Serbia, the solution of the problem linked to the recognition of Kosovo) but to say the least "distracted" as regards problems - political and economic - perceived as of primary importance by citizens.

LIST OF REFERENCES

P. Bargiacchi, Non-State Actors and Illegal Migration: A New European Approach to Security Policies, in South-Russian Journal of Social Sciences, n. 1/2019, pp. 24-39.

P. Bargiacchi, Are European Security Policies Learning Some Lessons from United States on Migration and Human Rights?, Novakovic (ed.), Common Law and Civil Law Today - Convergence and Divergence, Vernon Press, Wilmington, 2019, pp. 137-162.

P. Bargiacchi, Elementi di convergenza del modello di sicurezza europeo verso il modello statunitense nella gestione dei flussimisti irregolari, in Rivista della Cooperazione Giuridica Internazionale, n. 58, 2018, pp. 61-84.

J. Džankić, S. Keil, M. Kmezić (eds.), The Europeanisation of the Western Balkans: A Failure of EU Conditionality?, Palgrave Macmillan, London, 2019.

M. Fink, Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law, Oxford University Press, Oxford, 2019.

S. Keil, Z. Arkan (eds.), The EU and Member State Building: European Foreign Policy in the Western Balkans, Routledge, London, 2015.

R. Mungianu, Frontex and Non-Refoulement: The International Responsibility of the EU, Cambridge University Press, Cambridge, 2016.

T. Russo, What boundaries of European Security: Political versus economic?, in Geopolitica, Vol. IV, n. 1, p.127-137.

S. Stojanović Gajić, F. Ejdus (eds.), Security Community Practices in the Western Balkans, Routledge, London, 2018.

A. Sinagra, Security and National Borders of the States, in *Riv. coop. giur. internaz.*, n. 48, 2015, p. 37-45.

EU REGULATION

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, in OJ L 349, 25.11.2004, p. 1–11.

Council Decision (EU) 2018/1031 of 13 July 2018 on the signing, on behalf of the Union, of the Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, in OJ L 185, 23-7-2018, p. 6–8.

Council Decision (EU) 2018/1535 of 28 September 2018 on the signing, on behalf of the Union, of the Status Agreement between the European Union and the former Yugoslav Republic of Macedonia on actions carried out by the European Border and Coast Guard

Agency in the former Yugoslav Republic of Macedonia, in OJ L 257, 15-10-2018, p. 23-25.

Council Decision (EU) 2019/400 of 22 January 2019 on the signing, on behalf of the Union, of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, in OJ L 72, 14-03-2019, p. 1-3.

Council Decision (EU) 2019/453 of 19 March 2019 on the signing, on behalf of the Union, of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, in OJ L 79, 21-3-2019, p. 1–3.

Council Decision (EU) 2019/634 of 9 April 2019 on the signing, on behalf of the Union, of the Status Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina, in OJ L 109, 24-4-2019, p. 1–3.

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, in OJ L 251, 16-9-2016, p. 1–76.

Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, in OJ L 295, 14-11-2019, p. 1–131.

Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, Brussels, 21 January 2019.

Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, Brussels, 12 March 2019.

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CRIMINAL LIABILITY OF LEGAL PERSONS IN BOSNIA AND HERZEGOVINA AND CROATIA

Debate whether legal persons can be criminally liable has been subject of academic interest and discussions for a long time. Led by Latin phrase "societas delinquere non potest", the vast majority of legal systems did not accept criminal liability of legal persons for a long time. The key argument for this viewpoint was the lack of „mens rea" element (the "guilty mind" or intention of an individual). Yet, it would be unfair to say that legal persons were not responsible for breach of law in any other way. Legislation of the Former Republic of Yugoslavia recognized economic transgressions as a separate category of criminal offence. After the dissolution of the Former Republic of Yugoslavia, all member states showed commitment to European integration. In order to join the European Union, candidates for future membership had to harmonize national law with "acquis communautaire" and consequently introduced criminal liability of legal persons in criminal and criminal procedure codes. In the paper, besides the historical background, the author analyzes differences and similarities between criminal liability of legal persons in Bosnia and Herzegovina and Croatia, focusing on specific features of criminal proceedings against legal persons. Both countries adopted a model of derived, subjective and cumulative liability. Author compares differences between specific matters of criminal procedure against legal persons. The issue that deserves special attention in the context of derived liability of legal persons is whether a natural person and a legal person can have joint defense. Besides specific features of a criminal procedure against legal persons, the paper also elaborates different regulation of sanctions, security measures and consequences of conviction for against a legal person. Finally, in the conclusion, the author advocates intervention in B&H legislation, following the solutions prescribed by the Law on the Liability of Legal Persons for Criminal Offenses regarding joint and mandatory defense, and, especially, for establishing of a public criminal register of convictions against legal persons. Public

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criminal register of convictions against legal persons has a vital role in national economy, having in mind that legal persons are most common users of financial services.

Key words: criminal liability of legal person, model of derived liability, joint defense of legal person, mandatory defense of legal person, public criminal register of convictions against legal persons.

1. INTRODUCTION

The change in the social and economic system, the transition from socialism to capitalism that took place in the territory of former Social Federal Republic of Yugoslavia (hereinafter SFRY) in the last decade of the 20th century, influenced development of new norms of criminal liability of legal persons. The revision process of the provisions of substantive and criminal procedural law in the six former republics of SFRY was enhanced by the efforts to join European integrations. After the end of the war activities in the 90-ies, all of the states of former SFRY, with no exception, expressed their determination to become EU members. The process of EU association requires implementation of *acquis communautaire*[306]. More precisely, it is the Second Protocol based on Article K 3 of the European Treaty to the Convention on the protection of financial interests of the European communities from 1997, which prescribes criminal liability of legal persons in cases of fraud or bribery, or money laundering, perpetrated in their own interest, which inflicts, or may inflict, damage to the financial interests of the European Communities.[307] Another document, which is also significant besides the Protocol, is the Framework Decision of the Council on strengthening of criminal legislative framework for the implementation of the legislation against ship-source sea pollution .[308] What makes this Decision specific is reflected in the fact that the European Union recognized the necessity of common sanctions against legal persons for criminal offences inflicted against the environment.

However, it would be unfair to claim that the criminal liability of legal persons for criminal offences is a novelty brought by the process of accession to the EU of former SFRY republics. This issue was considered by the academic community much earlier than it could have been deemed that the former SFRY republics would become EU candidates or member states. The authors of the Criminal law of SFRY textbook (Srzentić & Stajić, 1961, p. 9, Srzentić, Stajić & Lazarević, 1984, p. 14) compared the nature of violations committed by legal persons as criminal offences with those committed by natural persons. Consequently, the introduction of criminal liability of legal persons into the criminal

[306] The reference implies collection of shared rights and obligations by all member states. It is mandatory for all candidate states for membership in the EU to incorporate *acquis communautaire* in their respective national rule of law by the accession date and to start imlementing it thereof.

[307] The Convention and the Second Protocol were replaced by the European Parliament and the Council Directive (EU) 2017/1371, July 5, 2017, on the fight ofagainst fraud to the Union's financial interests by means of criminal law.

[308] The Decision was amended by the adoption of the Directive 2005/35/EZ by the European Parliament and the Council of 7. 9. 2005 on ship-source pollution and on the introduction of penalties for infringements to be replaced by the EU Directive 2009/123/EZ by the European Parliament and the European Council of 21. 10. 2009.

legislation of former SFRY republics is not a novelty in the legislative tradition they all share. (Derenčinović & Novosel, 2012, p. 585).

The present paper is divided in three parts. The first part is a background of the development of the concept of criminal liability of legal persons in Bosnia and Herzegovina and Croatia. The second part deals with basic similarities and distinctions in the legal arrangements of the matter, whereas the third part deals with specific features of criminal procedures against legal persons for the purpose of comparative analysis.

2. DEVELOPMENT OF CRIMINAL LIABILITY CONCEPT IN BOSNIA AND HERZEGOVINA AND CROATIA

The initiative to introduce criminal liability of legal persons into the substantive criminal law of the Federal People's Republic of Yugoslavia emerged as early as 1951 (Perić&Obrad, 1986, p. 21). Although the Draft of the Criminal Code of 1951 contained provisions on criminal liability of legal persons, they were ultimately abandoned. According to Zlatarić, criminal liability of legal persons should have been prescribed by a special law, taking into account the criteria distinguishing the conduct of individuals, and that of legal persons, as criminal liability from administrative transgression. (Zlatarić, 1955, p. 49). With the establishment of economic (commercial) courts in 1954, legal persons, i.e. their responsible persons were held liable for economic breaches prescribed by numerous provisions (Zlatarić, 1955, p.65, footnote 32). The consolidation of substantive and procedural regulations prescribing specific punishable offences in economy committed by legal persons resulted in the adoption of the Law on economic transgressions in 1960 (Lawon Corporations). The Law prescribes economic transgression as an act of violation of the rules in economic and financial transactions by economic entities and other legal persons that caused or may have caused serious consequences and that were prescribed as an economic transgression, by a competent authority,. The nature of economic transgressions that were regulated in such a manner was a subject of considerations by the academic community. Srzentić and Stajić (1961, p. 9), for example, state that economic transgressions have much greater likeness to criminal offences because it can be concluded that economic transgressions are, to a certain extent and in certain areas, socially threatening acts, despite the fact that the legal definition of economic transgressions does not include a threat to the society as an element of criminal offense, and that they are rather violations of economic or financial disciplines that have caused or may have caused serious consequences. Such explanation could lead us to a justified conclusion that economic transgressions are criminal offenses *sui generis*. The additional similarity between an economic transgression and a criminal offense is reflected in the fact that, in the case of an economic transgression, in terms of the procedure, it is the court of law that is the competent authority which decides on pecuniary penalty, as it is an exclusive criminal sanction. The authors, finally, highlight that, in cases where there is a liable person in a legal person or a corporation, such person shall be charged with a criminal offence and not with an economic transgression; this is due to the fact that legal persons cannot, legally speaking, commit criminal offences or be held liable for them. (Srzentić & Stajić, 1961, p. 10)

Such legal regulation of economic transgressions, unintentionally served as a basis for the introduction of liability of legal persons into the criminal legislations of Bosnia and Herzegovina and Croatia at the beginning of the first decade of 2000.

After the dissolution of SFRY, Bosnia and Herzegovina and Croatia took over the Law on Corporations. The adoption of the laws on minor offences in the two countries resulted in economic transgressions being renamed as minor offenses. In 2003, criminal liability of legal persons was introduced for the first time in the criminal legislation in Bosnia and Herzegovina with the adoption of Criminal Code (hereinafter CC BiH) and the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter CPC BiH). In september of the same year, in September, the Republic of Croatia adopted the Law on the Liability of Legal Persons for Criminal Offences (hereinafter LLPCO) .

3. FUNDAMENTAL SIMILARITIES AND DISTINCTIONS

When speaking about criminal liability of legal persons in Bosnia and Herzegovina and Croatia, the first, evident distinction lies in the manner it has been regulated. The Republic of Croatia decided to regulate criminal liability of legal persons by a *lex specialis* (LLPCO) and subsidiary enforcement of the provisions of the Criminal Code, Criminal Procedure Code and the Law on the Office for the Suppression of Corruption and Organized Crime. Unlike Croatian solution, substantive and procedural provisions on criminal liability of legal persons in Bosnia and Herzegovina are prescribed in separate chapters of *lex generalis*: theCriminal Code and the Criminal Procedure Code. Regardless of the differences in legislative policies, both countries adopted the model of derived criminal liability of legal persons. Based on this model, criminal liability of a legal person is derived from the criminal liability of a natural person. It is the status, i.e. the powers that a natural person may have in a legal person that creates the first distinction between the two legislations. According to the Article 3 of LLPCO, a legal person shall be punished for a criminal offense committed by a responsible person in a legal person, if such criminal offence inflicts damage to the duty of the legal person or, if the legal person acquired or was toacquire illegal personal benefit or benefit on behalf or for the benefit of another person. Consequently, sanctioning of a legal person must be preceded by finding the natural person, having the status of a liable person, guilty. The grounds for finding legal persons liable for criminal offences are somewhat wider in the CC BiH. The natural person will be find liable if he or she has committed a criminal offense on behalf of or for the benefit of thelegal person in the following cases: a) when the substance of the criminal offense derives from a conclusion, an order or approval/authorisation by managing or supervising body of the legal person; b) or, when the managing or supervising bodies of the legal person influenced the perpetrator, or made it possible for the perpetrator, to commit the offence; c) when a legal person disposes with illegally acquired financial benefit or uses objects acquired by the criminal offense; d) when managing or supervising bodies failed to duly carry out supervision over the legality of work of the employees. Furthermore, the authorisation of a certain person to act, on behalf or for the benefit of a legal person, as well as the scope of action that she/he is authorised to undertake, may be derived from the law or any legal

provision or internal regulation, individual document or agreement concluded between the perpetrator an the legal person (Filipović & Ikanović, 2012, p. 29).

In previously mentioned cases, the perpetrator may not necessarily have a leading position in the legal person which implies being vested with the general authorization to represent it, to make decisions on its behalf, or to have supervising powers. Such a person does not necessarily have to be a member of the legal person/entity, its employee, in order to be found criminal liable. Naturally, any exhibit of evidence on criminal liability of a legal person will be much easier if there is formal and legal authorization given to the perpetrator to undertake given actions. This does not imply that this is the exclusive case where criminal proceedings will be instituted.. Criminal liability of a legal person will also exist in case the court finds that the perpetrator was practically authorized to undertake actions on behalf of the legal person or for its benefit (Filipović & Ikanović, 2012, p. 29).

The existence of legal or true obstacles in determination of guilt of a liable person, i.e. natural person liable for committing a criminal offence on its behalf, or in its interest or for its benefit, does not imply abandoning of criminal action against the legal person. The exception is identical both in the LLPCO and CPC BiH. It is worth mentioning, at this point, that it is possible to bring charges and pronounce conviction against the legal person even though it is impossible to identify the perpetrator, provided that there are sufficient evidence for reasonable suspicion that an criminal offense was committed (Filipović & Ikanović, 2012, p. 43). The difference in definitions of the status (liable person) and the authorizations (act on behalf, in the interest, for the benefit) of a natural person, who is the perpetrator and whose offence is a presupposition for sentencing the legal person, is the basic difference in the analysed legal texts. Responsible or liable person is a natural person in charge of conducting business of a legal person, or is in charge of conducting business in the field of its business activity (Article 4 of the LLPCO). Likewise, the CC BiH includes the definition of a liable person which, inter alia refers to the position and authorizations of a natural person within the legal person (Article 1, paragraph 5 of the CC BiH). However, the legislator, regardless of this fact, does not refer to it in prescribing criminal liability of legal persons.

Certain distinctions and similarities in prescribing and enforcement of criminal sanctions against legal persons, as well as the application the principle of opportunity can be noticed. Both legislations provide the following as main sanctions: fine and termination of legal person. The CC BiH, additionally, prescribes seizure of property and dispossession of legal persons. The conditions for pronouncing suspended sentence instead of a fine, may vary. It is possible to pronounce a suspended sentence, if a fine of less than 50.000,00 HRK (approximately 13.000,00 BAM) is pronounced against the legal person with probation period from one to three years. (Article 13 of the LLPCO -a). Nevertheless, although the term of prescribed probation by the CC BiH is longer - amaximum of five years - the amount of the fine in case of a suspended sentence is 115 times higher (Article 136 of the CC BiH). The legal norms are different when it comes to the issue of security measures. In Croatian legislation, prohibition of conducting certain activities or affairs, prohibition of acquiring licenses, authorizations, concessions or subventions, as well as prohibition of conducting business affairs with national or local budget beneficiaries are treated as security measures.

In BiH legislation, the prohibition to operate based on a license, authorization or concession issued by a foreign state, as well as prohibition to operate based on a license, authorization or concession issued by BiH institutions, is foreseen as a possible legal consequence of a conviction against a legal person in case of committing a criminal offence. Seizure of objects (dispossession) from a legal person, prohibition of certain activities and affairs are security measures envisaged in both legislations. Additionally, the CC BiH prescribes the public announcement of the verdict as a security measure. Public announcement of the verdict based on Article 21 of the LLPCO is separately regulated. Dispossession of illicit gains, as a *sui generis* measure is foreseen by both laws.

However, entirely different solutions are foreseen when it comes to the statute of limitations (enforcement of sanction, i.e. termination of legal person). In Croatia, the sanction can be enforced at any time, given that its enforcement is not subject to the statute of limitations by law. In Bosnia and Herzegovina, on the contrary, the statute of limitations applies to legal persons, and it amounts to five years afterthe legal validity of the court ruling. Finally, LLPCO prescribes that it is the duty of the Court, upon its judgement convicting of a legal person, to inform without delay the Court Register, or any other register where the legal person may have been registered, as well as the Ministry of Justice. Such an *ex officio* action by the Court is not foreseen in the criminal legislation provisions in Bosnia and Herzegovina simply because there is no register of court penalties against legal persons. In the author's opinion, this is a major failure, which has considerable consequences in the real economy life. The existence of such a register would have a multiple benefit in allocating bank loans or participating in public bids.

The principle of opportunity is foreseen by both legislations. A prosecutor may have decide not to press charges and institute court proceedings against a legal person when there is circumstantial evidence indicating that there is no property, or where the property at stake is not sufficient to cover even the costs of the proceeding, or if bankruptcy procedure is instituted against the legal person. Furthermore, the CPC BiH prescribes the power of the prosecutor not to institute criminal proceedings in cases when a contribution of a legal person to the commitment of a criminal offense is insignificant, or when the perpetrator is the sole owner of the legal person. In this manner the legislator excluded the possibility to punish the same natural person twice: once, as a natural person for committing criminal offence, and the second time, as a legal person, the exclusive owner of the legal person (Sijerčić-Čolić et al, 2005, p. 927).

After this brief review of the similarities and distinctions in regulating liability of legal persons, the author will deal with some of the specific features of criminal proceedings against legal persons for criminal offenses in Bosnia and Herzegovina and Croatia.

4. SPECIFIC FEATURES OF CRIMINAL PROCEEDINGS/PROCEDURES AGAINST LEGAL PERSON: BOSNIA AND HERZEGOVINA AND CROATIA

Legal persons do not have rights and obligations granted and inherent to natural

persons[309]. They do not possess mental capacity of memorizing, observing or giving statements (Đurđević, 2003, p. 757). However, these distinctions do not affect their status of a party to a criminal proceeding. They only result in the necessity to adjust provisions of a criminal proceeding against an individual to the proceeding against the accused/charged legal person. Given the adopted model of the derived liability, which stems from the inseparable liability of a legal person for criminal offence from criminal liability of natural person who is a liable person or acted on his/her behalf, benefit or interest. Against this background, the adjustments are reflected in:

1. Joint criminal proceedings/procedure against liable natural person and legal person;
2. Involvement of a representative of a legal person;
3. Involvement of defence lawyer of a legal person;
4. Specific features of the course of the main hearing.

4.1 Joint criminal proceeding/procedure

Joint criminal proceedings/procedure against a legal and liable person, or natural person acting on its behalf or in its interest or to its benefit is justified for two reasons. Firstly, it would satisfy the principle of efficiency. If the evidence to prove the causal link between the criminal offender (liable person/natural person) and the legal person, which consists of either harm to the duty or, in realization of illicit financial gain of the legal person, does not exist, the legal person shall not be held guilty for the criminal offence (Sijerčić-Čolić et al, 2005, p. 926). Secondly, it is much easier for the court to establish criminal liability of a natural/liable person and legal person if it comprehensively and in "one place" considers all the evidence and facts in order to find the causal connection.

The present solution has been adopted by both legislations, with prescribed exceptions.In Croatia, criminal proceedings against legal persons will be instituted when it is not possible to institute criminal proceeding against the liable person due to legal or other reasons. A similar, albeit somewhat modified provision is included in the CCP BiH. In addition to the identical exception, it possible to institute, i.e. to conduct, criminal proceedings against legal persons even in the case where criminal procedure against natural person has already been finalized.

The analysis of relevant provisions in the legislations of Bosnia and Herzegovina and Croatia leads us to a single conclusion that it would be most purposeful to have a joint criminal proceeding/procedure against the criminal offender and legal person due to the derived nature of criminal liability of a legal person. However, the prescribed exceptions indicate that the state insists on its *ius puniendi*, even in cases where it is not possible to conduct, due to legal, or realistic obstacles, criminal proceeding against a natural person which, eventually, would result in sanctioning a legal person. The question that remains open for those who deal with this issue in practice, is whether it will be possible to determine the responsibility of a legal person for criminal offense in such a case.

[309] This refers to the rights that natural persons have pursuant to the Constitutional provisions, national legislation and international conventions and treaties.

4.2 The role of a legal representative in criminal cases

A representative of a legal person in a criminal proceeding is a natural person who represents criminal law subject not inherent to individual criminal proceedings. He/she does not have the status of accused individual and acts only for the purpose of defence (Filipović & Ikanović, 2012, p. 77). The obligation to determine a legal person representative and the conditions to be satisfied for this procedural role are foreseen by both legislations. The representative of a legal person is a person authorized to represent a legal person by law, an act by competent state authority, statute, charter of foundation or any other act by a legal person (Bosnia and Herzegovina), or by person authorized by the authorities of a legal person, i.e. persons representing it based on the law, decision of a competent body, statute, social agreement or a decision by a legal person (Croatia). Whereas the provisions of the CPC BiH (Article 378, paragraph 1) prescribe for the representative to be a person with power to represent legal person based on the law, act of a competent state authority or the statute, charter of foundation or any other act by a legal person, entailing that the powers of the representative have already been established by a regulation/internal act, the LLPCO (Article 27) leaves this to the body of a legal person or a person authorized to represent the legal person, to determine who the representing person will be.

The distinction in the legal provisions may be disregarded given the fact that the power of an individual to act on behalf, in the interest or to the benefit of the legal person in legal transactions in dealing with other natural and legal persons is differently addressed by other norms. Based on the LLPCO and the CPC BiH, a legal person can have only one representative. It is the duty of the court conducting a criminal case to ascertain the identity of representative and her/his authorization to take part in the case before the court. Both laws prescribe a triple ban on individuals who may act as a representative of a legal person. Accordingly, a representative cannot be the same individual invited in the capacity of a witness, a person against whom the same criminal proceeding is instituted, or a defence counsel (Article 382 of the CCPBiH and Article 27, paragraph 5 of the LLPCO). Based on the CPC BIH provisions, the cumulative role of both an accused person and the representative of an accused legal person is permitted only in case where the accused person is, at the same time, the only member of a legal person. This procedural issue is not recognized in the LLPCO.

The court has the power and the duty to appoint a representative to a legal person, if the legal person had appointed the representative contrary to the mentioned conditions, upon the expiry of the reasonable time for appointing another representative (Article 28, paragraph 4 of the LLPCO and Article 379, paragraph 3 of the CPC BiH).

The key distinction in addressing the rights and obligations of the representative of a legal person in criminal proceedings against legal persons is that the Court may decide to hold the hearing, after the legal person has pleaded guilty/innocent, in absence of the representative who has been duly summoned but whose presence is not ultimately necessary (Article 34, paragraph 4 of the LLPCO). The CPC BiH, however, does not recognize this option. The presence of the representative is mandatory (Article 377, paragraph 1 of the CPC BiH).

4.3 Defence counsel of a legal person in criminal cases

The right of a legal person to have a defence counsel in addition toa representative, is optional. However, the issue of whether a legal person and a liable/natural person may share the same defence counsel, is addressed differently. A legal and liable person may have the same defence counsel if the same criminal case is at stake (same criminal offense) and if it is not in contradiction with their defence (Article 32 paragraph 2 of the LLPCO). The arguments by Croatian legislator are that it should be permitted to both a legal person and a liable person to have the same defence counsel because there will always be one criminal procedure for the same criminal offense, and if a liable person is successful in the defence, this will constitute a successful defence for the legal person as well (Đurđević, 2003, p. 763). Contrary to the above, the CPC BiH explicitly forbids that the legal and natural persons as suspects, i.e. the accused persons, have/share the same defence counsel. According to the Commentaries to the CCP BiH, the engagement of the same defence counsel is not justified because there is a realistic possibility for a collision between the interests of a natural and legal person when the same criminal proceeding is held simultaneously (Sijerčić-Čolić et al, 2005, p. 932). However, the above position is ill-founded because of the derivative nature of the liability of the legal person, which is derived from criminal liability of a natural person acting on its behalf, in its interest, or for its benefit. This is not contested by the authors of the Commentaries to the CPC BiH, who recognise that the accused natural person is the central figure and the reason why she/he should be given priority rather than the representative of a legal person at the main hearing (Sijerčić-Čolić et al, 2005, p. 933). Based on the above position of the authors, the natural person should have priority at the main hearing, because the liability of the legal person rests on the liability of natural person, liable person in legal person, and it can be, only logically, concluded that the accused natural person should be the first to present the views about the grounds of the charges/indictment against her/him (Sijerčić-Čolić et al, 2005, p. 933). This leads us to the conclusion that the prohibition of engagement of the same defence counsel cannot be logically justified, because the accused natural person will always attempt to contest the charges, and if she/he succeeds in doint so, that will, automatically, lift the charges against the legal person.

Another issue, speaking about the right to defence, is whether a legal person has right to mandatory defence. The LLPCO explicitly excludes implementation of provisions set forth by the Code on Criminal Procedure on mandatory defence in cases of legal persons being accused. This can be justified because it is impossible to satisfy listed legal conditions for mandatory defence of a natural person. Unfortunately, the same possibility is not foreseen by the CPC BiH. It foresees only the subsidiary implementation of the provisions referring to a natural person which includes provisions on mandatory defence (Article 387, CPC BiH). Pursuant to the present analogy, a legal person should have the right to mandatory defence in case of a criminal offence that entails a conviction to a long term prison, or the time when the person is charged with a criminal offence for which he or she may be convicted to a prison sentence of ten or more years. However, since a legal person cannot be convicted to prison, the present provisions do not apply. The explanation given in the

Commentaries to the CPC BiH is not a satisfactory one. Namely, it reads that mandatory defence provisions exclusively refer to a natural person and that the right to a defence counsel for legal person is prescribed only as a possibility, rather than obligation. The cases where a legal person is charged with a criminal offence for which punishment may be ten years of imprisonment, or even more serious, are not elaborated. The implementation of other provisions on the right to mandatory defence is, naturally, excluded, because a legal person cannot be deaf or dumb, mentally ill, nor can the detention measure be pronounced (Đurđević, 2003, p. 763, footnote 178). It cannot be argued that the BiH legislator should have adopted the identical solution as the Croatian one thus removing all the possible dilemmas.

4.4 Specific features of the main hearing course

The derived responsibility of legal persons in criminal offences conditioned the change in sequence of actions referring the legal basis of the charges, course of the main hearing and presentation of evidence. The liable person, or natural person acting on behalf, in the interest or for the benefit of a legal person, shall have the priority in giving statement on the charges against the legal person representative. The same analogy applies to the presentation of evidence at the main hearing. At the main hearing, the priority in presenting evidence is given to the liable/natural person acting on behalf, in the interest or for the benefit of legal person. The modified sequence, in the course of the main hearings in both legislations, is justified since the criminal liability of legal persons is based on the criminal liability of natural persons with special status or powers. This is confirmed by the provisions on the sequence of closing addresses once the presenting of evidence has been finalized. The last final address always belongs to the liable person, or natural person who acted on behalf, in the interest, or for the benefit of a legal person, not to a legal representative or defence counsel of a legal person. It is obvious that the accused natural person enjoys a wider scope of rights than those of the accused legal person (Đurđević, 2003, p. 764).

5. CONCLUSION

The issue of criminal liability of legal persons was already a subject of numerous academic and expert discussion during the time of former SFRY. The authors, in that period, analysed the nature of economic transgressions (or corporate offenses) and their likeness to criminal offenses. However, the incentives for introduction of the criminal liability of legal persons failed. They were discouraged based on the Latin principle *societas delinquere non potest* due to the absence of *mens rea* that a legal person cannot have. The process of accession of former SFRY republics to European integration conditioned changes in national legislations and the introduction of criminal liability for legal persons. Bosnia and Herzegovina and Croatia adopted the model of derived liability. The fundamental postulate of the model is that the liability of a legal person for a criminal offense is derived from the criminal liability of a natural person and the unbreakable bond between the offender and legal person. However, regardless of the adoption of the same model, its implementation

in the two legislations differs. The first evident distinction lies in the fact that Croatia decided to regulate criminal liability of legal persons by a special law, unlike Bosnia and Herzegovina, where these provisions are incorporated into the general substantive and procedural legislation. What is more essential than the distinctions in the legislative policies is the departure or deviations of relevant provisions concerning: conditions for establishing inseparable connection between the liability of a legal person and natural person, perpetrator of a criminal offense; comprehension and prescription of security measures; penal policy; implementation of single criminal procedure and the right of a legal person to a representative and a defence counsel. The inseparable connection, as a condition for criminal liability of a legal person exists, if it's responsible or liable person (Croatia) or person acting on its behalf, in its interest or to its benefit (Bosnia and Herzegovina) is proved to be guilty. Along this line, it is much easier to present evidence on criminal liability of a legal person, given the decisive provision prescribing that a legal person will be found guilty for criminal offenses committed by a natural person in charge of business affairs of the legal person, or a person who is entrusted with carrying out business affairs in its domain (legal definition of a liable person) under precisely prescribed conditions. To present conclusive proof that a natural person acted on behalf, in the interest or to the benefit of a legal person demands far more efforts without having legally prescribed what precisely this person should have done, or what status she/he should have had (Bosnia and Herzegovina). In view of the author, without entering into the analysis as to whether certain prohibitions should have been prescribed as security measures, or as possible legal consequences of the conviction against a legal person for a criminal offense, it would be necessary for Bosnia and Herzegovina to take over the solution of the Croatian legislator and set up a register of sanctions over legal persons. Based on the model of derived criminal liability of legal persons, it would be justified to have access to criminal register of legal persons, particularly giventhat the same already applies to natural persons.

In the analysed legislations, concerning penal policy, the probation period depends on the amount of a fine. It is necessary to amend the CC BiH provision, which provides a suspended sentence against a legal person in case where the determined fine is not exceeding 1.500.000 BAM (Article 136, paragraph 2 of the CC BiH), because, in terms of criminal offenses, instead of being deterring, it is rather inciting.

In view of the right to defence, the amendments should go in two directions. The right to mandatory defence should be removed, which would eliminate all the legal ambiguities elaborated in the present analysis. Also, the right to a joint defence counsel for both legal and natural persons, because of the already adopted model of derived liability, should be adopted. Against the background of the adopted model and its postulates, the Croatian legislator should also take over the provision of the CCP BiH and, consequently, the opportunity principle, which applies both in the case where the criminal offender is the only owner of the legal person, against whom criminal procedure would have been anyway instituted.

Finally, it is quite certain that, although the criminal liability of legal persons was introduced in both legislations seventeen years ago, the answer to most outstanding questions will be provided by case law only.

LIST OF REFERENCES

Books, monographs and textbooks

Filipović, Lj. & Ikanović, V. 2012. *Criminal Procedure Against Legal Entities - educational module*. Sarajevo: High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

Sijerčić-Čolić, H. et al. 2005. *The Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina*. Sarajevo: Council of Europe/European Commission.

Stajić, A & Srzentić, N. 1961. *Criminal law SFRY. General part*. 3rd ed. Belgrade: Modern Administration.

Stajić, A, Srzentić, N. & Lazarević, Lj. 1984. *Criminal Law SFRY. General Part*. 12th ed. Beograd: Modern Administration.

Scholarly Articles

Derenčinović, D. & Novosel, D. 2012. Act on the Criminal Responsibility of Legal Entities –Temporary Childhood Diseases or the Squaring of the Circle? *Croatian Annual of Criminal Sciences and Practice,* Vol. 19-2, pp. 585-613.

Đurđević, Z. 2003. Criminal Liability and the Criminal Procedure for Legal Entities in the Republic of Croatia. *Croatian Annual of Criminal Sciences and Practice,* Vol. 10-2, pp. 719-770.

Perić, O. 1986. The Function of Corporate Offenses in Our Legal System and Elements for the Demarcation of other Categories of Punishable Delicts. *Law-Theory and Pratice*, No. 10-11, pp. 21-32.

Zlatarić, B. 1955. The Problems of Corporate Offences. *Our Legality*, No. 2, pp. 49-72.

Legal sources

Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07,8/10, 47/14, 22/15, 40/15, 35/18.

Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18.

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. Available at: https://eur-lex.europa.eu/legal-content/hr/TXT/?uri=CELEX:32017L1371 (18. 8. 2020).

Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (Text with EEA relevance). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009L0123 (18. 8. 2020).

Law on economic transgressions, Official Gazette of the Federal People's Republic of Yugoslavia, No. 16/60.

Law on the Liability of Legal Persons for Criminal Offences, Official Gazette of the Republic of Croatia, No. 151/03, 110/07, 45/11, 143/12.

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MISTAKE OF LAW - CURRENT STATUS AND PERSPECTIVES

A mistake of law in present day criminal law in the world is one of the most interesting legal institutes. Its significance comes from the fact that as a wide-spread institute of criminal law it is in the process of comprehensive transformation equally in both, continental and common law system. Some of the most prominent continental law system institutes proceeded from the traditional mistake of law meaning ignorantia iuris nocet or ignorantia iuris neminem excusat to the excusable mistake of law. In these systems the mistake of law presents an excuse from the convict's responsibility if the mistake of law is non-excusable. In opposite cases, it may present a reason for a lower sentence from its regular value. On the other hand, mainly common law system countries kept firmly to the traditional meaning of the mistake of law institute. In most of these systems, the mistake of law is attached to its traditional phrase: ignorantia iuris nocet or ingnorantia iuris neminem excusat. It means that mistake of law has no effect to a convict's responsibility if he/she objects to the mistake of law. However, even though both systems choose their approaches to the mistake of law problem in the world, it is quite obvious that both systems are not so convinced in decisions they adopted in their systems. Many prominent criminal law theorists in the world try to find out in which way this institute will go in future. This paper is a part of that complex debate.

Keywords: mistake of law, continental, common law, criminal law, system

1. INTRODUCTION

Mistake of law presents one of the oldest criminal law institutes in both continental and common law systems. Before long, both systems shared the same meaning of the institute. That traditional meaning of the mistake of law institute was widely known as a Roman law expression *ignorantia iuris nocet* or *ignorantia iuris neminem excusat.* The ordinary meaning of this expression is that whoever objects in a criminal procedure that he/she did not know the law, which is breached is actually responsible, because the mistake of law objection does not have excusable meaning. In a very limited number of cases, the mistake of law

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objection used to be only a reason for mitigating a punishment form. Reasons behind this approach were acceptable and reasonable, especially for that time. Actually, for centuries the number of laws and different prohibition norms in almost all systems in the world were rather small. Their understanding was mainly attributable to two reasons. First, the limited number of prohibition acts, and second, the fact that these prohibitions usually overlapped with the same traditional religious norms, understandable to everyone at that time. No one was in a position to say that he/she did not know that killing somebody is illegal or that stealing anyone's property is allowed. There was a universal consensus in the whole world at the time that the acts, like killing, stealing, betraying or similar ones were forbidden. As it was said before, these prohibitions were mainly listed in religious books, including the Bible , but not only in them. Modern societies adopted different norms that govern ordinary people's lives in those societies. In the very beginning, they coincided with similar religious orders. However, over the time, these civil regulations grew up and became more and more numerous. At certain moments, the number of different prohibitions and their complexity became so complicated that ordinary people were not able to understand and to respect them. For a short period of time, the situation in which somebody had difficulties to understand and to follow certain rules moved to almost complete inability to understand and to pursue them. The second half of the XX century and first two decades of XXI century were very important moments in the world development, when the number of formal norms increased enormously and reached a number never met before in human history. For example, Larkin (2013, p. 1) stated that "the result in recent decades has been the "overcriminalization" of the law, with thousands of criminal offenses in federal statutes and hundreds of thousands in federal regulations. No person could possibly expect to know them all or even to know all of those that may apply to his/her daily activities." So, the author (Larkin, 2013, p. 1) continues that "there are more than 4,500 federal crimes and potentially more than 300,000 relevant federal implementing regulations. No one could know them all – not a judge, not a lawyer, and certainly not an average citizen untrained in the law." In such circumstances, it becomes almost clear that the traditional mistake of law approach in a criminal law is not applicable any more. It was very difficult to expect from somebody to know all these regulations or their core or wider description or punishment for that specific criminalization. Because of that, contemporary criminal law theorists and practitioners initiated consideration of another approach to the issue of the mistake of law. That new approach was based on the need for recognition of the fact that it could not be expected from the modern age man to know all regulations and to follow them. The outcome of such concerns was the widespread professional opinion that the mistake of law should be an excuse only in some limited situations and under very strict conditions. Some criminal law systems recognized that need even during the first half of the XX centuries, like China in 1920, Denmark in 1930, Switzerland in 1937, Argentine in 1951, and Japan in 1961 (Стевановић, 1989, p. 72). However, the first systematic approach to the recognition of the mistake of law as an excusable institute occurred in Germany during seventies of the XX century (Neuman, 1996, p. 207). Later on, many other countries adopted the same legal doctrine, including France, Italy, Poland and some other EU countries. In addition, some other non-EU

countries such as Serbia, Montenegro, North Macedonia, and Republic of Srpska also adopted the same legal doctrine (Бабић-Марковић, 2007, 265). Since that moment, the trend of recognition of the mistake of law as an excusable legal institute has been spreading in many countries of the continental legal system, as well as in some countries of the common law system. However, even though such trend was obvious, it was not a global and unanimously accepted one. Still many criminal law systems in the world remained stuck to the traditional non-excusable mistake of law institute, as it is the case with the USA, Great Britain and others, and within some continental systems, like it is the case with the Russian Federation, Ukraine and many others. Interestingly, these systems look for solutions to soften the current traditional conservative approach regarding the mistake of law institute, while criminal law systems that accepted the excusable mistake of law institute set many additional restrictions upon this institute in terms of strict implementation rules or limited number of cases where the institute was implemented. For instance, Arzt (1986, p. 731) noticed that "…on a practical level, recognizing that mistake of law may excuse has not led to breakdown of law and order in Germany." Arzt (1986, p. 731) continued with the explanation for such an outcome with the explanation that "the defense is so complicated that a disproportionate number of those who benefit are either lawyers or defendants who are well counseled by lawyers." On the other hand, the USA *Model Penal Code* and many state laws accepted certain modifications of the traditional mistake of law non-excusable institute. Simmons (2003, p. 181) stated that "figuring out which mistakes and which cases of ignorance will result in nonliability is just a question of "logical relevance": Does the mistake or ignorance negate the required *mens rea* or not?" It is a sign of decades long streaming of some American criminal law theorists and practitioners who tried to emphasize the unsustainability of the current situation with the mistake of law institute as a non-excusable approach in the USA. Among them, Larkin Jr. takes a significant place. Larkin Jr (2013, p. 77-78) emphasized the opinion of certain scholars who "believe that it (mistake of law institute) should be re-examined and rejected or modified". They believe, regardless of what was true at common law, it no longer is credible to claim that everyone knows the law, particularly since "[t]he tight moral consensus that once supported the criminal law has obviously disappeared." So, what is the current position of both systems and which way both systems will go regarding the mistake of law institute is one of the most interesting and significant legal dilemmas in the modern criminal law.

2. TRADITIONAL MISTAKE OF LAW APPROACH

Traditional approach in the civil criminal law system is based on the Roman law maxima *ignorantia iuris nocet* or *ignorantia iuris neminem excusat*. Similarly, the common law systems define the institute of the mistake of law as non-excusable in the XVIII century, William Blackstone Commentaries (Blackstone, 1753). As Hall (1957, p. 15) noticed, "the Roman theory – that the law is 'definite and knowable' – seems to have been interpreted quite literally." Consequently, Blackstone (1753, p. 27) noted that "every person of discretion[…] may[...] know it", so ignorance is non-excusable. Following Blackstone's approach, Hall (1957, p. 19) found that "to permit an individual to plead successfully that he had a different

opinion or interpretation of the law would contradict the above postulates of legal order." Actually, the rationale for the traditional mistake of law institute that comes from the Roman expressions *ignorantia iuris nocet* and *ignorantia iuris neminem excusat* has two aspects. The first one is "that the principle of legality implies the doctrine of *ignorantia iuris*, while the second one is "that the doctrine is necessary to the maintenance of the objective morality of the community" (Hall, 1957, p. 23). This approach has remained dominant theory in modern criminal law for centuries. Based on these elements, the knowledge of illegality has become a crucial and unavoidable part of the *mens rea* that is needed for one's culpability. Deeply incorporated inside the *mens rea* institute, the ignorance of the law has not had any particular relevance for one's culpability. The theory has also prevailed in normative regulations of almost all criminal law systems up to the XX century. These systems accepted the strict criminal liability principle as the primary one. The commonly accepted exception to the principle was in the area of punishment. Under certain circumstances, the one who has committed a crime and objected to his/her responsibility because of the mistake of law could be punished less than those who were fully aware of the crime they had committed. Both, the continental and the common law system, have this principle incorporated in their criminal laws. The USA criminal law system has kept its primary strict liability principles up to now. So has Great Britain. But, not only common law system countries have remained committed to the traditional *ignorantia iuris nocet* principle. Many continental criminal law system countries also have remained committed to the same principle. It is the case with the Russian Federation, Ukraine, and many other countries. The way these countries implement the principle varies but the doctrine has remained the same. Holmes Jr. (2011, p. 45) is clear that "ignorance of the law is no excuse for breaking it." Arzt (1986, p. 712) quoted Fletcher who criticized this approach as an "instrumental approach […] that is typical, however, for initial phases of doctrinal development in the field of mistake of law." Verseveld (2012, p. 10) emphasizes an "almost mystical power held by the maxim (*ignorantia iuris nocet*) over the judicial imagination." Even though some contemporary theorists suggest certain corrections within strict principles, many theorists "suggest that a defense of reasonable mistake of law should be accepted in the case of *malum prohibitum* offences but not in the case of *malum in se* offenses…" (Simmons, 2008, p. 8). This tendency was materialized in the first legal codification on federal level in the USA, known as *Model Penal Code* (1985, p. 26-28). The codification adopted light softening of the strict rule regarding the mistake of law in a certain way that will be explained in the next chapter. Despite new tendencies, the strict liability rule remained and preserved its primary place in the US criminal law system which also meant the non-excusable mistake of law institute. Similarly, Great Britain also based its mistake of the law approach on Blackstone *Commentaries* (Blackstone, 1753). That meant the domination of the *ignorantia legis non excusat* principle in the English criminal law (Verseveld, 2012, p.18). Nevertheless, the English law is much more rigorous in implementing the non-excusable mistake of law institute. Two explanations play crucial role for such approach. First, as Smith (Verseveld, 2012, p.18) noted it is about the fact that "English Courts lack the power to declare statutes unconstitutional, like American courts can under article 2.04(3)(b) Model Penal Code", while the second one lies in "…

the fact that the English system applies without much difficulty the doctrine of strict liability to a whole range of regulatory offences in which mistake of law is most likely to occur." Consequently, the mistake of law institute is irrelevant for one's culpability in the English law. In accordance to that, the Criminal law Draft from 1989 clearly stated that "… ignorance or mistake as to a matter of law does not affect liability to conviction for offence except (a) where so provided, or (b) where it negatives the fault element of the offence" (van Verseveld, 2012, p.18). In a different way but following the same principle, continental criminal law systems that remained adhered to the *ignorantia iuris nocet* and *ignorantia iuris neminem excusat* expressions from the Roman law, define the mistake of law institute in their normative documents as a non-excusable institute. The Russian Federation and Ukraine are typical examples of the continental criminal law system that followed the ignorance of the law approach without consequences to one's culpability. The mistake of law institute does not make formal consequences as it is the case in the German criminal law, for instance. A defendant in Russia cannot raise the mistake of law institute in order to prove his/her innocence. The mistake of law institute in the Russian Criminal Code is defined as a "wrong perception" of some conduct or act legality or illegality (Петрович, 2008, p. 102). However, the mistake of law institute has been indirectly included in some crime acts in the Russian Criminal Code. This is the case with the crime acts related to the labor protection (Article 143 Russian Criminal Code), pyrotechnics' handling and protection (Article 218 Russian Criminal Code) and fire protection (Article 219 Russian Criminal Code) (Петрович, 2008, p. 102). Also, as Veresha (2016, p. 8021) stated, "mistake of law in Ukrainian criminal law has no criminal-legal value." Similar to the Russian Federation, the mistake of law institute has been involved in the criminal law system in Ukraine in some ways and does affect one's culpability. This is the case with Article 212 of the Criminal Code of Ukraine and Articles 52-53 of the Tax Code of Ukraine that will be explained below (Veresha, 2016, p. 8021).

In sum, a traditional mistake of law approach, regardless of certain countries and their criminal codes could basically only mitigate the punishment without significant impact on somebody's culpability. However, in the second half of the XX century, this approach started to change. The end of the XX century was a turning point for considering the institute of the mistake of law in a different way than it was the case before.

3. CONTEMPORARY MISTAKE OF LAW APPROACH

As a matter of fact, the second half of the XX century was just a time of turning point. In essence, the real reason behind this new trend was in the overcriminalization that hit the up-to-date world. There is no specific definition of the notion of "overcriminalization", but it could be presented easier. Larkin Jr. firstly mentioned this phrase and gave its extra explanation (Larkin, 2013, p. 2). He recalled the fact that the rule against the mistake of law as a defense made sense during the development of the English common law, the ancestor of our common law, hundreds of years ago (Larkin, 2013, p. 2). But, the author (Larkin, 2013, p. 2) further noted that it is not the case anymore given that only in the USA "there are more than 4,500 federal crimes and potentially more than 300,000 relevant

federal implementation regulations. In a similar vein, Vuković (Вуковић, 2014, p. 464) talks about "hypertrophy of legal norms that [...] alienate legal norm from its roots – a social and moral norm". As a result of that, Vuković (Вуковић, 2014, p. 464) concluded that global society came in a situation that "it is legally forbidden something that an average person does not see as socially destructive, socially unallowed or morally inadmissible". Besides moral and social arguments, some authors questioned justification aspect of the institute of the ignorance of the law. For instance, Kumuralingam (1995, p. 429) stated it was "suffice to say that the rule's historical origin is uncertain, its rationale for existence questionable, and its application in criminal law without certainty." Consequently, as we stated above, criminal law of some continental law systems have started considering ignorance of law as a defense under certain and defined circumstances, while on the other hand, common law criminal systems have been keeping to the principle that the mistake of law is no defense. In the civil law system, Germany and France accepted an approach under which ignorance of law is a defense in certain situations.

The mistake of law was introduced as a defense in Germany with the historical court decision in the case *Bundesgerichtshof* from March 18, 1952 (Verseveld, 2012, p. 26). Before that court decision, the German Criminal Law from 1871 had not recognized mistake of law as a defense or as an excuse (Verseveld, 2012, p. 26). Since the *Bundesgerichtshof* decision, Vesterveld (2012, p. 28) stated that in the case of ignorance of law, "the perpetrator is fully aware of the factual circumstances of his behavior, but he erroneously believes his behavior to be lawful." Even though this court decision made historical breakthrough in the civil law criminal system, almost twenty-three years had passed before this principle was incorporated in the German Criminal Code (StGB) in 1975 (Verseveld, 2012, p. 26). Since then, Article 17 of the German Criminal Code clearly defines that "if the perpetrator, when committing the act, lacks the insight into his wrong-doing, he is not criminally liable if this mistake was unavoidable. In the case; this mistake was avoidable, the punishment can be mitigated according to Article 49, sec. 1." (Neumann, 1996, p. 208). So, knowledge of unlawfulness is not an element of *mens rea*, as it used to be the case before that and as it is the case in many other civil and common law systems, but the element of criminal liability, which is the part of, the so called, *Schuldtheorie* in the German criminal law theory (Neumann, 1996, p. 208). Today, the German Criminal Code recognizes direct and indirect mistake of law. The direct mistake means that "the defendant is completely ignorant of the norm in question", while the indirect mistake means that "the defendant knows the norm in question and its legal scope, but erroneously believes there is a justification for his behavior in violation of this norm" (Verseveld, 2012, p. 28-29). Also, it is necessary to mention that, in accordance with the German criminal law theory, "the knowledge of the moral wrongfulness of the act" is not enough to establish the mistake of law defense (Neumann, 1996, p. 209). It is also the case with "the social harm" approach for which there is a wider consensus that is closer to the criminal law request regarding the excusable mistake of law institute than the "moral wrongdoing" but still not enough (Verseveld, 2012, p. 38, Neumann, 1996, p. 210). What is suffice to establish the mistake of law defense is "the knowledge that the act is in opposition to the binding substantive value order of the law and is, thus, legally prohibited" (Neumann, 1996, p. 211). Thereby, the mistake of law

institute adopted in the German criminal law theory and practice have been an example followed by many continental law systems, mainly in Europe.

The French mistake of law institute model presents a combination of both, the German civil law and the Anglo-American common law system. What comes from the Anglo-American common law system is its loyalty to the Roman law principle or to the basic rule known as *ignorantia iuris nocet* or *ignorantia iuris neminem excusat* (Verseveld, 2012, p. 48). What comes from the German civil law system is the recognition of the mistake of law defense under very strict conditions. This is the unique approach of the French Criminal Code. Article 122-123 of the Penal Code explains the mistake of law as follows: "A person is not criminally liable who establishes that he believed he could legitimately perform the action because of a mistake of law that he was not in a position to avoid" (French Penal Code, 2005). Similarly, Elliot states "A person is not criminally responsible who can justify having believed he or she could legitimately accomplish the act in question, as a result of an unavoidable mistake of law" (Elliot, 2000, p. 37). Therefore, the French Penal Code recognizes only the unavoidable mistake of law as a ground for excluding criminal liability. Desports and Le Gunehec (2007, p. 622-689) define three main conditions that should be fulfilled in order to exclude one's criminal liability as a result of the ignorance of law. These are: "first, the defendant must have made a mistake of law; second, the mistake (or ignorance) must have been unavoidable; and third, the defendant was certain about the lawfulness of his act…" (Desports and Le Gunehec, 2007, p. 622-689, Verseveld, 2012, p. 50). The French approach is considered unique mostly due to the fact that it combines two major approaches coming from two different criminal law systems.

Other civil law systems, basically in Europe, usually follow the German criminal law approach regarding the issue of the mistake of law. This means that the mistake of law as a separate institute excludes the defendant's liability instead of excluding his/her *mens rea* as it is the case in the Anglo-American common law systems. This is the case in Italy (Kirsch, 1999), Austria, Spain, Norway, Poland, San Marino, France, Japan (Veresha, 2016, p. 8018), and many other countries in Europe as well.

4. PERSPECTIVES

Nevertheless, in principle it cannot be concluded that the overall criminal law systems are globally divided in those that adopted the avoidable mistake of law institute and those which did not do so. The current trends and perspectives are more complex and they cannot be simplified. As a matter of fact, even though two approaches regarding the institute are evident, they are not strict and both have certain deviations from their basic principles. In the case of the common law system, the deviation lies in the fact that some state codes and the federal *Model Penal Code* accepted the mistake of law institute under certain conditions. On the other hand, certain civil law systems that are based on the *ignorantia iuris nocet* or *ignorantia iuris neminem excusat* principle, have also adopted the excusable mistake of law institute in very specific cases. On the contrary, civil law systems that adopted the unavoidable mistake of law institute as an excuse have registered a very restrictive implementation practice.

Actually, even though principally the most of common law systems remained stuck to the *ignorantia iuris nocet* or *ignorantia iuris neminem excusat* principle, some of them adopted certain normative solutions that accepted the excusable mistake of law institute under specific references. The South African Criminal Code accepted the mistake of law institute as an excuse under conditions similar to those in civil law systems (Kumuralingam, 1995, p. 430). On the other hand, the *Model Penal Code* has anticipated the excusable mistake of law in very limited situations. The *Model Penal Code* Article 2.04 emphasized that "ignorance or mistake as to a matter of fact or law is defense if (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offence" (Fletcher, 1998, p. 155). Similarly, Article 2.04 anticipates that "a belief that conduct does not legally constitute an offence is a defense to prosecution for that offence based upon such conduct when: (a) the statute or other enactment defining the offence is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged or (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; (iv) an official interpretation of the public officer of body charged by law with responsibility of the interpretation, administration or enforcement of the law defining the offence" (Verseveld, 2012, p. 12). Besides that, some state courts in certain decisions also open the room for the excusable mistake of law to enter the strict liability system in the USA state court practice. For instance, in the case *Cheek v. U.S. (1991),* the Supreme Court explained the meaning of the "willfulness" element in some tax cases. It said that the "willfulness" element "requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty" (*Cheek v. U.S.*, *1991*). In regard of such decision, Verseveld (2012, p. 14) concluded that "this means that a good faith mistake, whether reasonable or not, will negate the element of willfulness." This deviation practice from the basic rule the *ignorantia iuris nocet* or *ignorantia iuris neminem excusat* is not the exception only in the common law systems, but in the civil law systems that adopted the same rule, as well. For instance, in Ukraine, the mistake of law "has no criminal-legal value" (Versesha, 2016, p. 8021). It is the case even in regard to Article 212 of the Ukrainian Criminal Code that anticipates tax evasion as a criminal act for tax-payers who evade the tax. However, Articles 52 and 53 of the Ukrainian Tax Code stipulate that "relevant bodies provide tax-payers with free consultations on the practical implementations of specific norms of tax legislation" (Versesha, 2016, p. 8021). So, in regard of that, the Ukrainian criminal practice stands the position that "tax-payers who acted on the advice of the tax consultant, which was put on paper, cannot be prosecuted" (Versesha, 2016, p. 8021-8022). Similar to Ukraine, some theorists in the Russian Federation, like Yurievich (Юрьевич, 2014, p. 133) recommends the editing of Article 141 of the Russian Federation Criminal Code in a way the mistake of law to have positive influence on one's liability, which means to be an excusable institute. From the following examples we can see that most of criminal law systems that are loyal to the traditional *ignorantia iuris nocet* or *ignorantia iuris neminem excusat* principles have been looking for certain legal solutions to address the general need

for a different approach in the era of the "overcriminalization" (Larkin, 2013, p. 1) that puts many people in an unfair position to be liable for disobeying laws and regulations they have never heard of. Interestingly, on the other hand, criminal systems that adopted the excusable mistake of law institute have registered different practice that would be expected in regard of that criminal law institute. Actually, the tendency in these systems' practice is completely different. For example, Arzt (1986, p. 731) underlined that "…on a practical level, recognizing that mistake of law may excuse has not led to a breakdown of law and order in Germany." Moreover, the author (Arzt, 1986, p. 731) concluded that "the defense is so complicated that a disproportionate number of those who benefit are either lawyers or defendants who are well counseled by lawyers." Similarly, Babic and Markovic (Бабић-Марковић, 2007, p. 266) also state that domestic practice in Republic of Srpska and other former Yugoslav countries in regard of the excusable mistake of law institute is also very restrictive. It looks like that most of these systems are very cautious in its implementation, most probably with the idea not to let this new criminal law institute make radical changes in terms of defendant's culpability. In our opinion, this is a positive approach to the excusable mistake of law institute because these systems want to see real effects from its implementation on a practical level prior to their final attitude regarding the institute's future.

5. CONCLUDING REMARKS

The mistake of law as a criminal law institute has been based on traditional principles *ignorantia iuris nocet* or *ignorantia iuris neminem excusat* for centuries. Even though some theorists question the origin of the principle, the position of the principle has been undisputable up to recent days. The mistake of law institute was established in the Roman law, as a main source of the civil law systems, but also in the Blackstone's *Commentaries*, as a main source of the common law system. Since the second half of the XX century, the situation has changed, primarily as a result of the huge increase of numbers of different laws and regulations. Certain theorists referred to that phenomenon as to "overcriminalization." Consequently, some criminal law systems adopted the mistake of law as an excusable institute that negates one's liability under certain conditions, thus not only mitigating the punishment, as it was the case with the institute's traditional form and meaning. Germany and many other continental law systems made the breakthrough in recognizing the new status of the institute of the mistake of law in criminal law. Some common law systems did the same but most of them remained loyal to the traditional meaning of the *ignorantia iuris nocet* or *ignorantia iuris neminem excusat* principle. However, even though a new trend with the excusable mistake of law institute have been evident, the practice has not followed the same enthusiasm as it was with theorists. Actually, the current practice is very restrictive, mainly because of a very complicated defense concept in regard of the excusable mistake of law. Despite that, many criminal law systems that are stuck to the mistake of law traditional meaning have decided to move toward accepting some forms of the excusable mistake of law under very strict conditions. In such circumstances, it is apparent that the mistake of law perspective will be characterized with two following tendencies: first,

further softening of the traditional approach with accepting different excusable forms of the concept and second, further restrictive implementation of the excusable mistake of law institute, mainly as a result of the justified vigilance of criminal law practitioners. In our opinion, this cautiousness of criminal law practice is needed and acceptable. Only in that way, new mistakes of law meaning could be properly managed by the court system and the criminal law theory in order to prevent its negative consequences and to bring forth benefit to all in the modern world.

LIST OF REFERENCES

Arzt, G. 1986. The Problem of Mistake of Law. *BYU Law Review,* 3(8), pp. 712-731.

Бабић, М. & Марковић, И. 2007. *Кривично право, општи део.* Бања Лука: Правни факултет.

Blackstone, W. 2011. *Commentaries on the Laws of England in Four Books.* Indianapolis.

Desportes, F. Le Gunehec, F. 2007. *Droit pénal général, 14th edn. Economica*. Paris.

Elliott, C. 2000. The French law of intent and its influence on the development of international criminal law. Criminal Law Forum. 11, pp. 35–46.

Fletcher, G.P. 1998. Basic Concepts of Criminal Law. *Oxford University Press.* 3, pp. 155.

French Penal Code 2005.

Hall, J. 1957. Ignorance and mistake in criminal law. *Indiana Law Journal.* 33(1), pp. 19.

Holmes, O. W. Jr. 2011. *The Common Law*. Toronto.

Kirsch, A. 1999. France Mistake of law in French criminal law. *Amicus Curiae.*

Kumaralingam, A. 1995. Mens Rea and Mistake of Law in Criminal Cases: A Lesson from South Africa. *UNSW Law Journal.* 18:2, pp. 429-430.

Larkin, P.J. Jr. 2013. The Need for a Mistake of Law Defense as a Response to Overcriminalization. *Legal Memorandum*. 91, pp. 1-78.

Model Penal Code-Official Draft and Explanatory Notes – Complete Text of Mode Penal Code as Adopted at the 1962 Annual Meeting of The American Law Institute at Washington, D.C. May 24, 1962. 1985.

Neumann, U. 1996. Mistake of Law. *Israel Law Review.* 30, pp. 207-212.

Петрович, Б. А. 2008. *Российское уголовное право*. Москва.

Simmons, K. W. 2003. Should the Model Penal Code's *Mens Rea* Provisions Be Amended? *Ohio State Journal of Criminal Law*. 1:179, pp. 8-181.

Simmons, K. W. 2008. Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction. *Boston University School of Law.* 08-32, pp. 8.

Стевановић, М. 1989. *Правна заблуда у кривичном праву*, Београд.

Veresha, R. 2016. Mistake of Criminal Law and its Influence on the Classification of Crime. *International Journal of Environmental & Science Education*. 11:15, pp. 8018-8022.

Verseveld, A. 2012. *The Theory of Mistake of Law-Excusing Perpetrators of International Crimes*, The Hague.

Вуковић, Н. Одређена питања стварне и правне заблуде у кривичном праву. *Зборник радова Правног факултета у Новом Саду*. 1/2014, pp. 464.

Юрьевич, П. А. 2014. *Институт ошибки в романо-германском уголовном праве: компаративистский и теоретико-прикладной аспекты*, Краснодар.

Cheek v. United States, 498 U.S. 192, 196 (1991).

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EFFICIENCY OF LEGAL SOLUTIONS IN FIGHT AGAINST DOMESTIC VIOLENCE

Domestic violence has had a long tradition, both in Serbia and countries of the region. Owing to deep rooted patriarchal traditions, for centuries this socially pathological phenomenon has had many supporters and for a long time it was considered socially acceptable. Laws and bylaws adopted in the past decade have significantly improved the legal framework in protection of domestic violence victims. However, inefficiency of their application in practice, caused by slow and long resolution processes, and the issues of the very acts of domestic violence and custody, have led to an escalation in domestic violence. This is greatly enabled by the fact that false reports while the acts occur go unpunished, which makes it possible for real abusers to use this tactic and prolong the stress situation for the real victim, in some cases, for years.

The aim of the authors is to do a comparative analysis of laws in the region and consequences of their application, therefore defining problems that present obstacles for adopted laws and suggest new solutions.

Key words: domestic violence, false reports, custody, court proceedings

1. INTRODUCTION

A socially pathological phenomenon, domestic violence has been long present in the history of humanity. At one point in time it was considered socially acceptable and even encouraged as a type of "corrective measure". As the society developed, so did the social standards of (un)acceptable behaviour, but for this particular phenomenon, the world has needed many centuries to pass to realize it is a practice that will not become a relic of the past that easily. If nothing else, we get the impression that the amount of domestic violence occurring each year has only been increasing, although the story of human rights began a

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long time ago. On the other hand, it could simply be a case of a bigger amount of courage on the victims' part to report their abusers.

Overall, the number of domestic violence reports in Serbia is alarming, and the dark figure of crime in relation to domestic violence is presumed to be high, since this phenomenon affects all aspects of a person's life. In the 27 months since the Law on Prevention of Domestic Violence entered into force in Serbia was adopted, almost 110.000 cases were reported (Bogosav, 2019). Taking into consideration Serbia's population, this is a fairly high number of cases. According to the Ministry of Justice of Serbia, 12.332 victims of domestic violence have been registered by August 2020, and although the COVID-19 pandemic could potentially put more persons at risk, the NGOs claim that there have been no abnormalities in the number of reports during the state of emergency (Al Jazeera Balkans, 2020). Nevertheless, the ongoing pandemic still presents an aggravating factor for victims of domestic violence, not only in Serbia, but everywhere. The countries of the Western Balkans region are often seen as one entity mainly because of similar traditions and mentality, a common past and legal framework that they have shared before. In terms of family relations, a tradition that is strictly patriarchal is the basis of legal acts. Adding the COVID-19 pandemic into the equation, setbacks in the progress made, with already existing problems in battle against domestic violence, seem to be imminent. Therefore, the authors take a look at legal frameworks in some of the countries of the region, then go on to observe the problems in practice, all with a specific focus on the issues of false reports, duration of court proceedings, protective measures, penal policy, and child custody and visitation rights. The aim of the authors is to identify problems for adopted laws and suggest new solutions.

2. DOMESTIC VIOLENCE IN SERBIA

Domestic violence was first introduced as a separate crime in the Criminal Code of Serbia in 2002. It marked the beginning of the legal reform pertaining not only to domestic violence, but also gender based violence. The Family Code from 2005 also defined domestic violence and prescribed protective measures that can be issued by civil courts. Another relevant law would be the Law on Gender Equality from 2009, which also prohibited domestic violence. The Law on Prohibition of Discrimination was adopted the same year, and it, too, proscribes certain acts of violence and defines procedures to be taken by civil courts. In 2013 Serbia ratified the Istanbul Convention, taking on the task of improving and harmonizing its legislation in relation to domestic violence, discrimination and violence against women.

Since then, the normative framework has been upgraded several times pertaining to both domestic violence and acts related to it, as well as actions that should be taken by relevant institutions in these cases. A large step in that direction were amendments to the Criminal Code and the adoption of the Law on Prevention of Domestic Violence in 2016. What distinguishes Serbian Law on Prevention of Domestic Violence from those in the region, which were previously mentioned in this paper, is the fact that it supports the Criminal Code and Family Law. That means that domestic violence is primarily

considered a felony in Serbia, while violations of some protective measures could be considered misdemeanours. From the preventive perspective, defining domestic violence only as a felony leaves a clear message, which is that minimum, if any, tolerance should be shown to such acts. However, according to the Law on Public Order and Peace certain forms of physical and psychological violence could be prosecuted as misdemeanours, and consequently, according to the Law on Misdemeanours, several protection measures can be issued by misdemeanour courts.

In addition to the amendments and new laws, Serbia also adopted several procedural guidelines, which are intended to help police, prosecution, courts, social services and health institutions.

2.1 Problems in practice

Although Serbian laws have not been long in effect, they are to a great degree in harmony with international treaties and requirements posed by the EU. Nevertheless, many problems arise in practice for the lack of proper interpretation, education and training and logistical support.

A new trend that has been on the rise since the Law on Prevention of Domestic Violence entered into force in 2017 are false reports. False reports represent a clear abuse of basic human rights, taking into consideration all the possible consequences they could entail. According to one prosecutor's office in Belgrade (Prvo Osnovno Javno Tužilaštvo u Beogradu, 2018), in the year following the adoption of the Law on Prevention of Domestic violence they had more than 600 reports of domestic violence, among which false reports occurred a number of times. This is why they said it is important to carefully examine all facts, although they admitted that is much easier in cases of physical violence because medical experts can verify the claims. If the prosecution unveils false reporting, they *ex officio* indict the person in question for false reporting. However, false reports do not only hinder the prosecution but courts, as well. Judges agree with prosecutors that false reports occur because individuals wish to exploit the system, mostly during divorce proceedings, for personal vendetta, achieving advantage in custody battles and similar (The Advocates for Human Rights & the Autonomous Women's Center, 2017). False reports could result in the falsely accused person being evicted from their home, which is why judges state that they should act with particular caution when considering this protective measure. One judge even stated that approximately 30% of eviction requests are based on false reports (The Advocates for Human Rights & the Autonomous Women's Center, 2017, p. 31). With such a high percentage of false reports, it is no wonder that judges show reluctance to issue protective measure, especially eviction, which is one of the most important ones. A worrisome practice, also noted by the judges (The Advocates for Human Rights & the Autonomous Women's Center, 2017, p. 87), is that lawyers suggest their clients submit false reports so as to speed up the proceedings in their favour. Under normal circumstances, lawyers recommending/suggesting committing illegal acts, should be at least held disciplinary responsible, however, realistically, this is difficult to prove in courts where principle of material truth prevails.

False reports are not the only problem in court proceedings. In Serbia, family, criminal and misdemeanour courts decide in domestic violence cases. There are numerous problems in each of these instances, but here we will go through several common denominators. When it comes to duration of court proceedings, misdemeanour proceedings are the fastest, while criminal proceedings take the longest time. Nevertheless, in all types of proceedings delays occur for several reasons. The courts are understaffed with heavy caseloads. A significant decrease in misdemeanour case, but an increase in criminal cases since 2016 just shows that cases moved to these courts. In judges' opinion, about 1/3 of all criminal cases are domestic violence cases, which is truly a lot. Additionally, they claim that delays mostly occur because of summons. Since summons need to be personally received, they are often subject to manipulation. The accused are prone to changing home addresses or similar actions in order to evade appearing in court, while courts wait too long to use all other measures to ensure expedience of proceedings. (The Advocates for Human Rights & the Autonomous Women's Center, 2017)

Another issue is the lack of protective measures issued by all courts and the lack of monitoring if they are respected, which is the same problem as in the region. In Serbia, too, the courts tend to be lenient with sentences with an extremely low percentage of protective measures issued. More than half of the sanctions are suspended sentences, a trend that does not seem to waning, and although almost 40% of punishments constitute prison sentences, protective measures were issued in only 2-4% of cases, usually together with suspended or prison sentence (Petrušić et al., 2018, pp. 60-61). Lenient penal policy and an extremely limited amount of protective measures issued do not serve neither the preventive nor repressive purpose. Such practice only leaves more space for recidivism and, more importantly, it discourages victims from reporting domestic violence, since it seems the relevant institutions cannot provide adequate protection.

It is obvious that violence is not taken seriously enough, risk assessment is unsatisfactory, and judges are not trained well enough, particularly in cases involving psychological violence. They rely too much on reports submitted by social services, which are not binding, and aim to preserve "family". Such practice leaves the impression that the definition of family end on a purely biological note, without taking into consideration basic human rights all family members have individually. For example, since alcohol is a factor in majority of domestic violence cases, they usually tend to go for conciliation and, possibly, treatment for the perpetrator, regardless of the fact that this could prolong both physical and psychological violence, or secondary violence if children are witnesses to the violence. Lack of understanding for the victims is reflected in the practice of confrontation in family and misdemeanour courts, where courtrooms are small and without proper security. Such conditions further aggravate the stress situation of having gathered courage to report domestic violence and expose oneself to the entirety of administrative processes in order to get protection. To our findings, criminal courts do not practice confrontation, however, if the victim does not testify, they simply close the case, even though Serbian courts should decide based on the principle of material truth and could proceed with the trial *ex officio*. (The Advocates for Human Rights & Autonomous Women's Center, 2017)

In connection to the aforementioned practice of Serbian courts, namely their aim to preserve family, it appears that the basic human rights standard "in the best interest of the child" is not quite properly interpreted. The courts, and other institutions, show unsatisfactory level of ability to assess risk to the child, whether they are victims to primary or secondary abuse, or take children's opinion into consideration. In general, courts are of opinion that a child should have contact with both parents, even when that child may have witnessed violence or personally experienced it. In more than half of the cases, the courts decided that children should have "free" (31%) or "standard" (32%) visitation arrangements with abusive fathers (Ignjatović & Macanović, 2018, p. 58). Even when protective measures were issued, perpetrators found ways to evade those measures, without consequences, all because execution of protection orders is not being monitored (The Advocates for Human Rights & Autonomous Women's Center, 2017, p. 40). If the perpetrators continued committing violent acts despite protective measures, they suffered no consequences. In one case, a father retained the right to visit his children even after kidnapping his stepchild and threatening both the victim and the social worker (The Advocates for Human Rights & Autonomous Women's Center, 2017, p. 115).

Furthermore, there is no real communication in and between courts. Misdemeanour courts do not take into consideration if the accused has a criminal record, particularly in summary proceedings, while within family courts two parallel cases with same parties could conclude in clashing decisions. For example, in one case, a judge issued protective measures in domestic violence case, prohibiting the perpetrator from visiting his spouse and children, while in the other case pertaining to their divorce and child custody, another judge granted the perpetrator the right to visit his children (The Advocates for Human Rights & Autonomous Women's Center, 2017, p. 42). What further aggravates custody battles in cases of domestic violence are private prosecutions (The Advocates for Human Rights & Autonomous Women's Center, 2017, pp. 51-52). Perpetrators sue victims for violence, which results in children usually being taken by the social services and put into foster care.

In Serbia courts significantly rely on reports and recommendations of the Centre for Social Work, which even in cases where the mother was victim to domestic violence, recommend children be put into foster care, either for economic reasons or because she is seen as unable to care for her children properly, seeing as how she could not protect children from violence. On this matter, the authors agree with GREVIO (2020, p. 42) that the practice of removing children from the non-abusive parent's care should be brought to an end, since it can cause additional trauma and the foster care system does not offer a proper support system. In relation to that, relevant institutions should be more pensive when deciding on the non-abusive parent's, i.e. the victim's ability to care for their children.

3. DOMESTIC VIOLENCE IN THE REGION

Mentions of "domestic violence" appeared only in more recent history of these countries. It can be noticed that the process of implementing this phrase into national legislations has taken time in the countries of the region and has only taken more swing with bigger pressure from the European Union (EU). Although countries of the region are signatories to

international conventions calling upon member states to provide further national support in battle against domestic violence, countries of the region have become more active in this area only about 15 years ago. Overall, countries of the regions all became more proactive after signing the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, also known as the Istanbul Convention (CETS, 2011).

However, even with newly adopted laws on domestic violence and taking on different projects tackling this issue, problems still arise in practice and the overall statistics and results cannot be considered completely successful.

3.1. Bosnia and Herzegovina

This is a country with a complex organization of the state. It is constituted of two entities, Federation of Bosnia and Herzegovina and Republika Srpska, and one administrative unit of local self-government, District Brčko of Bosnia and Herzegovina. Each of these units has its own legislation applicable on their respective territories, in addition to legal acts adopted at the state level. With the adoption of the Law on Gender Equality of Bosnia and Herzegovina in 2003 the reform of the legal system began, in relation to sanctioning domestic violence. However, on the level of entities, legal reforms took individual routes.

In 2003 Federation of Bosnia and Herzegovina introduced domestic violence as a crime in Article 222 of its Criminal Code, however in Republika Srpska and District Brčko domestic violence remained at the level of offense. The Federation of Bosnia and Herzegovina went even further by adopting the Law on Protection from Domestic Violence in 2005, becoming the first entity to do so. To this day, individual laws have been amended or changed completely, but what is significant is the fact that both entities and District Brčko adopted Laws on Protection from Domestic Violence. The mentioned laws are more or less in accordance with each other, they all define domestic violence in a more detailed manner as compared to the general definition of domestic violence that can be found in international conventions, such as the Istanbul Convention. The adoption of these laws has been significant for the victims, as it was designed to provide them with protection while waiting for the criminal proceedings to come to an end. Since these proceedings often span over a lengthy period, it was a smart step on the legislators' side. Domestic violence has also been sanctioned as felony in Criminal Codes of all entities of Bosnia and Herzegovina, with latest amendments introducing harsher punishments. However, the Laws on Protection from Domestic Violence of Republika Srpska and District Brčko prescribe which acts of domestic violence are considered misdemeanours, and therefore punishable, when there are no elements of felony. Still, this could become a reason for confusion and improper application in practice. It is also interesting to mention that the Family Law of Republika Srpska does not include or prohibit domestic violence, but Family Laws of Federation of Bosnia and Herzegovina and District Brčko do.

Besides these, on a both local and state level, several strategies and action plans were adopted on the topic of domestic and gender based violence, which further reinforced the legislation in their intention to combat domestic violence.

Overall, we can agree with Mušić (2018, p.187) that the legal framework regulating domestic violence in Bosnia and Herzegovina has been harmonized with the already established international standards and requirements posed by the international community to a great extent, but it still needs more harmonization internally because, as we have already stated, the state organization of Bosnia and Herzegovina is complex to say the least.

3.1.1. Efficiency in practice

The opinion of international organizations (OSCE, 2019), NGOs (Petrić et al., 2019) and other relevant stakeholders (Udruženje žena sudija u Bosni i Hercegovini, 2012) is unified when it comes to Bosnia and Herzegovina. Although theoretically, legally to be more precise, good foundations have been set, application of these norms in practice still poses a problem.

Searching for information on false reports of domestic violence in Bosnia and Herzegovina, we were surprised not to have been able to find any. However, it seems that a greater issue lies beneath. The bigger problem are not maluses of definition of domestic violence, but rather the lack of reporting it. Even with the good normative basis, the percentage of domestic violence keeps rising, especially under the latest circumstances, which is the COVID-19 pandemic. Only during the pandemic, by May 2020, there was a 20% increase in domestic violence, according to the NGOs reports (Erjavec, 2020). Most often the violence is not reported because victims believe it to be a "private matter" and they wanted to deal with the problems themselves or with the help of a friend (OSCE, 2019), which is certainly conditioned to a degree by the lack of confidence in the police (Muftić & Cruze, 2014) and other institutions (Mušić, 2018, p. 186).

Another practical issue are the court proceedings. The complex legal system of Bosnia and Herzegovina does not make it easy for the police or the courts to initiate court proceedings on accounts for domestic violence. This problem has been the topic of many reports, academic papers, guidelines and recommendations. One of the main issues is the fact that domestic violence is often qualified as misdemeanour and not felony, which means that perpetrators are not punished as severely (OSCE, 2019, p. 74). This problem is present precisely because the laws treat domestic violence as both a misdemeanour and a felony, depending on the circumstances. However, this creates confusion within the relevant institutions, which tend to view such actions with more leniency.

Without delving further into the topic of penal policy, it is important to emphasize that protective measures are not being issued sufficiently enough. Although Laws on Protection from Domestic Violence in all entities proscribe protective measures that can be issued, the courts tend to avoid this practice. Lamentably, this bad practice has not seen much change since the adoption of relevant laws, although it was acknowledged that it should be done particularly because criminal proceedings take a long time to complete (Udruženje žena sudija u Bosni i Hercegovini, 2012, pp. 13-16). Both academia (Tulumović, 2018, p.71) and practice (Galić & Huhtanen, eds., 2014) agree that the courts are more concerned with the repressive measures than providing protection to the victims in real time. Nevertheless, protective measures should be issued to provide victims with necessary support and,

needless to say, protection from stressful situations. This is especially important at present time, with the ongoing COVID-19 pandemic, when many victims have been denied proper protection from perpetrators.

In close relation to the issue of court proceedings, is the question of custody and visitation rights. A statement from an interviewed female (OSCE, 2019, p. 60) is an example of this problem: "I was in an intense conflict with the same employee of the social welfare centre. It lasted for the entire year and a half of the divorce proceedings. I can't believe that she disparaged me because I'm blind and asked me to give up my children because I don't have money." We can notice two problems here. The first one is the duration of the divorce proceedings, and although we do not know, it is possible that protective measures were not issued in this case, which means that the victim was possibly exposed to protracted violence. Secondly, the victim's treatment by the social services is anything but non-discriminatory. According to the Alternative Report of Nongovernmental Organizations from the Bosnia and Herzegovina to GREVIO Group (Petrić et al., 2019, p. 95) in Republika Srpska officials are not properly implementing the Law on Protection from Domestic Violence by insisting on the right of the child to contact with the other parent, even in cases when the other parent was the abuser or the child was refusing to visit with them. What is more, abusive parents are encouraged to keep in contact with their children, disregarding the right of the child to be safe. Here we can see the consistency in bad practice: limited issue of protective measures and obvious disregard for victims' safety. In the mentioned Report (Petrić et al., 2019, p. 97) no available data could be found for the Federation of Bosnia and Herzegovina on the topic of custody/visitation rights, which can only lead us to the conclusion that there is not an efficient data collection system in action, but that is not the topic of this paper. Nevertheless, an example (Petrić et al., 2019, p. 98) was given stating that there have been several cases where violence continued to happen during divorce proceedings or even after them. In those cases, the father (perpetrator) kept the children with him and did not allow contact with children's mother (victim) although there were final court decisions granting custody to the mother. According to the same source, institutions are powerless in these cases, which consequentially gravely violates basic human rights.

3.2. Montenegro

The year 2003 was symbolic for Montenegro as well, which was at the time part of the state union Serbia and Montenegro. It was the year domestic violence was introduced into the Criminal Code of Montenegro as a felony. The formulation of the felony is almost the same, if not the same as in Bosnia and Herzegovina, or rather, it is in accordance with international recommendations. However, unlike Bosnia and Herzegovina, Montenegro adopted the Law on Protection from Domestic Violence only ten years ago, but unlike them they firstly defined domestic violence in the most general way, while the stipulations regarding the misdemeanour acts considered to be domestic violence are defined in the third part of the Law. The Law also defines protective measures that can be issued in cases of domestic violence. Following the adoption of the Law on Protection from Domestic Violence, Montenegro adopted a strategy that would serve as a project to create the

Protocol on Actions, Prevention of and Protection from Domestic Violence (Procedures and institutional cooperation regarding domestic violence and violence against women), which was signed in November 2011. However, as the IPSOS research stated (2017, p. 108) the Protocol is not binding, so although it offers guidelines on the interinstitutional cooperation, those solutions remain mere recommendations. Another *lex specialis* worth mentioning is the Law on Gender Equality, initially adopted in 2007 with latest amendments in 2015, since it includes domestic violence as one of the acts of gender based violence.

Action plans and strategies were created immediately following the adoption of the Law on Gender Equality and Law on Protection from Domestic Violence respectively. These have helped Montenegro stay on the good track of harmonizing its legal framework with standards imposed by the Istanbul Convention and the EU recommendations in battle against domestic violence.

All in all, it is obvious that in the past decade Montenegro has been proactive on the topic of domestic violence. The progress made in the normative aspect has been significant, yet there are still issues in practice, both due to the fact that the Protocol on Action, Prevention of and Protection from Domestic Violence is only recognized as a guideline and not an obligatory document, and that norms are not being interpreted properly (Ministarstvo pravde, 2016).

3.2.1. Efficiency in practice

Results of the IPSOS Strategic Marketing research within the program "Support to antidiscrimination and gender equality policies" (2017, p. 63) showed that the police had experience with false reports of domestic violence, mostly during divorce proceedings. The police officers' positions on reporting all types of violence differ. While some police officers believe all types of violence should be reported and investigated properly, other view reporting "one offensive SMS" or similar forms of psychological violence without proof should not be taken into consideration because it takes away the time they could spend investigating other, more serious cases. Nevertheless, the police stated that they act upon all reports of domestic violence, which can be considered good practice. A 2018 case before ombudsman (broj 223/18) is in line with the claim from the IPSOS research. Namely, the ombudsman received a complaint concerning abuse of the Law on Protection from Domestic Violence. In this case a woman reported her former husband for supposed violence based on gender.[310] Several things can be noted from this case. First of all, the Ombudsman investigated this case efficiently, coordinating with the police and the social services. Secondly, many factors were taken into consideration in this case and all relevant legislation was consulted, as should be done in cases of possible domestic violence. Finally, it was established that this might have a been a case of false reporting, which is punishable according to the Criminal Code of Montenegro, but the Ombudsman did not give his qualification since it is not his jurisdiction and neither was it truly possible to prove it.

[310] For more information read opinion of Ombudsman of Montenegro at: https://www.ombudsman.co.me/docs/1528721329_05062018-preporuka-csr.pdf.

Indeed, in borderline cases, it is usually difficult to prove that there was false reporting, but even if there have been cases where false reports were obviously such, we could not find any information on those acts being prosecuted.

The area where normative frameworks are put onto test are court proceedings. The courts are generally overloaded with work and do not have enough staff to efficiently resolve cases. It is not any different in Montenegro. In the courts' opinion (IPSOS, 2017, p.88) domestic violence cases are being solved quickly enough, though it may seem to the broader public that the proceedings last long and end in mild punishments. According to them, the public may have gotten that impression because each of these cases ought to be approached with maximum attention to detail. However, one of the problematic details in these cases is the principle of urgency of procedure. According to the Criminal Code no urgent action is required in domestic violence cases (Zeković et al., eds., 2017, p. 129), all the while it is not possible for protection measures to be issued until the final decision is made (GREVIO, 2018, p. 55). Although misdemeanour proceedings go much faster and protection measures can be issued before, during and after the proceedings, the practice shows that courts are lenient in their deciding. There is a high percentage of acquittals, fines and other alternative punishments without protective measures being issued, even though the law allows it (Zeković et al., eds., 2017, p. 129). It is obvious that here, as well, more stress is put on the repressive aspect of domestic violence cases, if we can even call it that, having in mind the previously stated, while the victims remain unprotected and obviously discouraged from future reporting. This is further supported by the fact that, although insufficiently, protective measure of removal from the residence and other premises for housing has been issued by the police, it is often not prolonged by the courts (IPSOS, 2017, p. 65) and that even when it has been issued, it cannot have the same effect without other protective measures being imposed with it (J.B.Č., 2019).

Finally, the issue of child custody in domestic violence cases in Montenegro shows that the institutions are still lacking proper procedures and more consideration for the victims. A study from 2012 (CEED, 2012, p. 16) defined a series of recommendations pertaining to children's safety in cases of domestic violence, stating that courts should be enabled to grant temporary custody to the nonviolent parent during proceedings. Among other things, the study recommends allowing visitation rights to the abusive parent in a manner that would provide maximum security for the child, particularly in cases where there is a possibility of abduction. Therefore, supervised visitations are possible, as long as they are in the best interest of the child. However, the GREVIO report (2018, p. 41) showed that in practice not enough attention was given to how witnessing violence or being the victim can affect the children's minds, and to what degree it can pose a danger to them. In addition to that, they noted that although the mechanisms exist, in majority of cases the courts did not opt for supervised visitations. On several occasions, even though they were supervised visitations, children were abducted by their fathers. To top it all off, the same report points out discrimination towards female victims/mothers, which reflects in the work of social services that give advantage to the "classic idea" of family with a male as its head. The case study from 2017 (Zeković et al., eds., 2017, p. 99-101) included a case in which daughters were returned to their abusive father, who was eventually sentenced to 6

months in prison/2 years of parole, whereby the social services were obliged to work on building family relationship between father and daughters. In another case study (Zeković et al., eds., 2017, p. 105-106) the children were left in the custody of their father who abused their mother. Due to the circumstances of the abuse, the mother lost her employment and housing, which is why the children were entrusted with their father, who denied their mother granted visitation rights. This case is an example of children witnessing violence of one parent against the other, which could mentally affect them negatively and affect their future lives.

Nevertheless, there have been examples of good practice, but they are outshined by the number of badly led court proceedings and interpretations of the basic human rights standards, and disregard for the risks to the victims. It remains to be seen what results the Strategy on Protection from Domestic Violence 2016-2020 will show at the end of this year.

3.3. Croatia

A recent addition to the EU, Croatia has battled the issue of domestic violence for almost two decades. With the adoption of Law on Protection from Domestic Violence in 2003 Croatia showed its will to deal with both domestic violence and violence based on gender. The Law on Protection from Domestic Violence has gone through changes over the years, and a new version entered into force at the very begging of this year. As is the case with its neighbours, Bosnia and Herzegovina and Montenegro, the Law on Protection from Domestic Violence defines domestic violence, sanctions domestic violence as misdemeanour and prescribes protective measures that can be issued even before the beginning of misdemeanour proceedings. Together with the Law, several rulebooks were adopted, as well. These rulebooks serve as guides in implementation of specified articles. In 2005 adopted its first Protocol on the Procedure in Cases of Domestic Violence and has been adopting new Protocols as the laws were amended. The last Protocol was adopted in 2019 and its role is to indicate how interinstitutional approach should be implemented in practice. Domestic violence is also defined as a crime in the Criminal Code of Croatia, although in a narrower sense than in the Law on Protection from Domestic Violence. Since the adoption of the first Law on Protection from Domestic Violence, Croatia has also been developing strategies in this area.

However, in 2018 a controversy arose in the Croatian society. In 2018 Croatia ratified the Istanbul Convention, but this addition to their legislation did not receive a warm welcome. Obviously, there might have been some reservations about the Convention, seeing as how it was ratified five years after they signed it, but its ratification caused massive protests supported by clerical and conservative right-winged circles (Bodiroga-Vukobrat, 2018) request a referendum on the topic of the Istanbul convention. Nevertheless, Croatian legislation needs to put more effort into harmonization now that the Istanbul Convention has been ratified.

3.3.1. Problems with efficiency in practice

Croatia, too, has been facing an increasing number of false reports. However, lack of reports and statistics in the past 10 years has made victims of false reports turn to media. That is how we, too, have been able to find out about cases of false reports in Croatia (Raić Knežević, 2020). Male victims of false reports enter a system of discrimination based on the automatic supposition that they are abusers. True to the fact, majority of perpetrators are males, yet it does not justify improper work of relevant institutions. False reports, especially if repeated, can be treated as a type of psychological and physical violence, but more often than not they go unpunished.

The Law on Protection against Domestic Violence prescribes that in all cases related to domestic violence all relevant institutions should act on principle of urgency. Still, even if the principle of urgency is respected, a larger problem lurks in the background. As per report of the Ombudsperson on Gender Equality (Pravobraniteljica za ravnopravnost spolova, 2020, pp. 90-112) courts in Croatia, too, have a mild penal policy, with a high percentage of paroles and fines. When compared to the number of cases per year, only a small number of protective measures is being issued, while the statistics include even cases where protective measure were not implemented until the end. In addition to that, the courts practice confrontation, where victims have to give their statement while looking at the offender. (Zeković et al., 2019, p. 23) This puts additional pressure on victims, who are prone to withdrawing their statements. In NGOs' experience, even 70% of female victims withdraw their statements, which results in those cases being discontinued (Marić Banje, 2018). Although the number of misdemeanour proceedings is seeing constant decrease, the number of criminally prosecuted domestic violence cases is rapidly increasing. Since 2009 the courts have seen a 70% increase in the number of criminal cases. (Zeković et al., 2019, p. 23) This only shows that the violence is escalating, and the courts are not implementing the regulations correctly, leaving victims more at risk of repeated violence.

In relation to custody and visitation rights, not much could be found, perhaps due to the lack of reports on these cases or perhaps in matters pertaining to custody and visitation rights the courts and social services are doing a proper job. However, a case in which a woman was forbidden from meeting with her child and found guilty of violence, although she herself was the victim and the child was witness to violence, should not be ignored. The police admitted there were errors in their approach to the case, which was followed by the same in court. Not all facts were taken into consideration, which shows bad practice of relevant institutions. (Pravobraniteljica za ravnopravnost spolova, 2020, pp. 116-117)

4. CONCLUSION

Both Serbia and its neighbours have come a long way in adapting their normative frameworks to the international standards on giving protection to victims of domestic and gender based violence. Still, those are simply words on a paper if not properly interpreted and implemented by relevant institutions. From our findings, we can conclude that the countries of the region share similar difficulties in applying rules prescribed by laws.

A common denominator for false reports is that they often occur during divorce proceedings as a means to get revenge on the spouse or gain advantage in custody battle. Such actions carry criminal responsibility, and on that note, both prosecution and courts should follow up with these charges and have perpetrators properly punished. False reports can cause undue prolongation of court proceedings and could be considered a type of psychological violence, since they create stress for the accused party who is put under suspicion. An increased number of false reports can also cause distrust in courts, which reports witness to. To a degree, the small number of protective measures issued could be blamed on the problem with false reports. In Serbia, this is mostly evident when deciding on eviction. However, false reports can under no circumstances be seen as sole cause of such lenient practices. All relevant institutions should realize that protective measures are necessary, particularly in combinations, in order to provide a measure of protection to the victims and show them that they can trust the law to be on their side. It is a simple equation. In addition to that, relevant institutions should not blindly try to save the institute of "family", but should prioritize, because, especially in cases of domestic violence, human beings cannot be considered a collateral for the better image of society. We believe that much, if not most attention should be put on protective measures, because the entire process of protecting victims from further violence begins with them. Besides the increase in issuance of protective measures, governments should establish a system of monitoring. Issuing protective measures and trusting that perpetrators will obey them *bona fide* could be a cardinal mistake. Therefore, a monitoring system should be provided.

As for the length of proceedings in cases of domestic violence, the courts in general state that they are taking all actions in a timely manner unless there are unpredicted circumstances. We understand that domestic violence cases imply a multi-institutional approach, but all relevant institutions should be enabled to efficiently inform other institutions involved, all on the principle of urgency and priority for these cases.

Pertaining to the issue of child custody and visitation rights, we once again point out that courts and social services should prioritize and properly implement the standard "in the best interest of the child". Yes, although children have the right to be with both of their parents, and parents have the right to see and be involved in raising their children, when one parent is violent, children are both direct and indirect victims. Their emotional state should be seriously taken into consideration, and their opinion, instead of pushing them further into a stressful situation. In addition to that, children should not be simply separated even from their non-violent parent, especially for economic reasons. Children victimized by domestic violence need a strong support system and to feel safe, while governments and community should help non-violent parents/victims stabilize themselves economically.

Creating a good response system in practice is a long and strenuous process. It requires specially educated and trained professionals, a good monitoring system and, needless to say, funding. It has come to our attention that all of the countries of the region observed in this paper are in need of more staff, which would contribute to more efficiency. However, taking into consideration that the year 2020 has been marked by the COVID-19 pandemic, it is difficult to say how much attention the governments will be willing to show to the problem of domestic violence. Nevertheless, that does not signify that relevant stakeholders should not seek assistance and continue to insist on improvements in practice.

REFERENCES

Al Jazeera Balkans, 2020. U Srbiji 11.000 slučajeva porodičnog nasilja, 15 žena ubijeno. *Al Jazeera Balkans*, 17th Aug. Available from: http://balkans.aljazeera.net/vijesti/u-srbiji-11000-slucajeva-porodicnog-nasilja-15-zena-ubijeno (31.08.2020).

Bodiroga-Vukobrat, N. 2018. *News Report: Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).* European Commission. Available from: https://www.equalitylaw.eu/downloads/4675-croatia-ratification-of-the-council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence-istanbul-convention-214-kb (26.08.2020).

Bogosav, B., 2019. JEZIVA STATISTIKA Za dve godine prijavljeno 110.000 slučajeva nasilja u porodici, ali žrtve i dalje prečesto krive sebe. *Blic*, 30th Sep. Available from: https://www.blic.rs/vesti/drustvo/jeziva-statistika-za-dve-godine-prijavljeno-110000-slucajeva-nasilja-u-porodici-ali/nvdrtcm (31.08.2020).

Broj 223/18. 2018. Zaštitnik ljudskih prava i sloboda Crne Gore. Opinion of 15th June 2018. Available from: https://www.ombudsman.co.me/docs/1528721329_05062018-preporuka-csr.pdf (23.08.2020).

CEED. 2012. *Studija o nasilju u porodici i nasilju nad ženama u Crnoj Gori.* Available from: http://www.un.org.me/Library/Gender-Equality/4%20Studija%20o%20nasilju%20u%20porodici%20i%20nasilju%20nad%20zenama%20u%20Crnoj%20Gori.pdf (23.08.2020).

CETS, 2011. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (CETS No. 210). Available from: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e (20.08.2020).

Erjavec, D., 2020. U sigurnim kućama brinu: Nasilje bi moglo rasti i nakon pandemije. *Radio Slobodna Evropa.* 27th May. Available from: https://www.slobodnaevropa.org/a/nasilje-porodica-bih-izolacija-zakoni/30637779.html (22.08.2020).

Galić N. and Huhtanen H., eds. 2014. *Priručnik: Sudska razmatranja slučajeva nasilja u porodici u BiH*. Sarajevo: DCAF.

GREVIO. 2018. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Montenegro.* Strasbourg: Council of Europe. Available from: https://rm.coe.int/grevio-report-montenegro/16808e5614 (23.08.2020).

GREVIO. 2020. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Serbia.* Strasbourg: Council of Europe. Available from: https://rm.coe.int/grevio-report-on-serbia/16809987e3 (31.08.2020).

Ignjatović, T. and Macanović, V. 2018. *Improved Legislation Failed Protection: Independent report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence.* Belgrade: Autonomous Women's Center.

IPSOS. 2017. *Nasilje u porodici i nasilje nad ženama: istraživanje*. IPSOS. Available from: http://www.un.org.me/Library/Gender-Equality/Istrazivanje%20UNDP%20o%20nasilju%20u%20porodici%20i%20nasilju%20nad%20zenama%202017.pdf (23.08.2020).

J.B.Č., 2019. Osim udaljavanja iz stana zabraniti i približavanje i uhođenje. *Radio i Televizija Crne Gore,* 27th Dec. Available from: http://www.rtcg.me/vijesti/drustvo/263763/osim-udaljavanja-iz-stana-zabraniti-i-priblizavanje-i-uhodjenje.html (23.08.2020).

Marić Banje, K., 2018. Nasilnici izmiču zakonu jer čak 70 posto žena povlači prijave, a jedna stvar bi tome mogla stati na kraj. *Slobodna Dalmacija,* 22nd Jan. Available from: https://slobodnadalmacija.hr/vijesti/hrvatska/nasilnici-izmicu-zakonu-jer-cak-70-posto-zena-povlaci-prijave-a-jedna-stvar-bi-tome-mogla-stati-na-kraj-527505 (26.08.2020).

Ministarstvo pravde. 2016. *Izvještaj o sprovođenju Zakona o zaštiti od nasilja u porodici za period 2010-2015.* Podgorica: Ministarstvo pravde Crne Gore.

Muftić L.R. and Cruze J.R. 2014. The Laws Have Changed, But What About the Police? Policing Domestic Violence in Bosnia and Herzegovina. *Violence Against Women*, 20(6), pp. 695-715. DOI: 10.1177/1077801214540539.

Mušić, S. 2018. Nasilje u porodici kroz pravni okvir u Bosni i Hercegovini. *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru,* XXVI, pp. 168-187.

OSCE. 2019. *OSCE-led survey on violence against women: Bosnia and Herzegovina*. Vienna: OSCE Secretariat. Available from: https://www.osce.org/files/f/documents/3/5/423470_1.pdf (20.08.2020).

Petrić, A. et al. 2019. *Response to Violence Against Women - Unprotected Survivors: Alternative Report of Nongovernmental Organizations from the Bosnia and Herzegovina to GREVIO Group*. Banja Luka: Foundation United Women Banja Luka. Available from: http://unitedwomenbl.org/wp-content/uploads/2020/04/Alternative-Report-of-NGO-from-the-BiH-to-GREVIO-Group.pdf (20.08.2020).

Petrušić, N. et al. 2018. *Krivično delo nasilja u porodici u sudskoj praksi: nove tendencije i izazovi.* Beograd: Misija OEBS-a u Srbiji.

Pravobraniteljica za ravnopravnost spolova. 2020. *Izvješće o radu za 2019.* Zagreb: Pravobraniteljica za ravnopravnost spolova. Available from: https://prs.hr/attachments/article/2894/IZVJESCE_O_RADU_ZA_2019_Pravobraniteljice_za_ravnopravnost_spolova.pdf (26.08.2020).

Prvo Osnovno Javno Tužilaštvo u Beogradu. 2018. Lažno prijavljivanje i lažno svedočenje kod nasilja u porodici. *Prvo Osnovno Javno Tužilaštvo u Beogradu,* 12th Sep. Available from: https://prvo.os.jt.rs/saopstenja/lazno-prijavljivanje-i-lazno-svedocenje-kod-nasilja-u-porodici/ (29.08.2020).

Raić Knežević, A., 2020. Mučna priča čovjeka koji na sudu dokazao da ga je bivša supruga maltretirala i lažno prijavljivala za zlostavljanje. *Telegram,* 4th Jan. Available from: https://www.telegram.hr/politika-kriminal/mucna-prica-covjeka-koji-na-sudu-dokazao-da-ga-je-bivsa-supruga-maltretirala-lazno-prijavljivala-za-zlostavljanje-i-branila-mu-da-vidi-sina/ (26.08.2020).

The Advocates for Human Rights & the Autonomous Women's Center. 2017. *Implementation of Serbia's Domestic Violence Legislation: A Human Rights Report.* The Advocates for Human Rights. Available from: https://www.theadvocatesforhumanrights.org/uploads/serbia_report_final.pdf (29.08.2020).

Tulumović, M. 2018. Krivično djelo nasilja u porodici u praksi općinskih sudova tuzlanskog kantona. *Zbornik radova Pravnog fakulteta u Tuzli*, IV(1), pp. 44-75.

Udruženje žena sudija u Bosni i Hercegovini. 2012. *Analiza stvarnog stanja u smislu izricanjaili neizricanja zaštitnih mjera iz Zakona o zaštiti od nasilja u porodiciFederacije Bosne i Hercegovine.* Sarajevo: Fondacija lokalne demokratije. Available from: https://www.fld.ba/upload/documents/Analiza_nasilje_USAID_JSDP_II_U%C5%BDSBIH.pdf (20.08.2020).

Zeković, B. et al. 2019. *Zaštitne mjere i mjere bezbednosti u kod kaznenih djela nasilja u porodici: Analiza međunarodnog i nacionalnog pravnog okvira i prakse* Podgorica: SOS telefon za žene i djecu žrtve nasilja Podgorica.

Zeković, B. et al., eds. 2017. *Domestic Violence in Montenegro: Theory and Practice (monitoring study).* Pogorica: SOS telephone for women and children victims of violence Podgorica.

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KEY RECRUITMENT AND SELECTION CHALLENGES IN THE CIVIL SERVICE OF MOLDOVA

The objective of the paper is to analyse the legal framework and key challenges in the recruitment and selection process in the civil service of Moldova. The effectiveness of the recruitment and selection is assessed against the standards laid out in the SIGMA Principles of Public Administration for European Neighbourhood Policy Countries and supporting Methodological Framework. The key finding of the paper is that the legal framework governing recruitment and selection is generally in line with the SIGMA standards. In spite of this, the attraction capacity of the Moldovan civil service is highly limited, as the number of candidates per vacancy is very low. The key reasons for this should, in the author's view, be sought for in the low salary levels, especially at the entry civil service positions. The author concludes that Moldovan example clearly shows that legal regulation of different HRM functions cannot be analysed in isolation, as the effectiveness of the recruitment process is closely linked with the remuneration policies. In addition, existing budget constrains and limited general labour market capacities, caused by difficult economic conditions and large waves of immigration of Moldovan population, pose additional challenges for the Moldovan civil service to be able to compete for the best and the brightest.

Key words: recruitment and selection, civil service, Moldova

1. INTRODUCTION

The area of recruitment and selection is one of the most important segments of human resources management in any organisation. If recruitment and selection is done efficiently and effectively, the organisation has a great chance to improve its human resources and enhance its organizational performance (Gamage, 2014, p. 48; Ekwoaba *at al*, 2015, p. 29).

Recruitment and selection are two closely related and somewhat opposite processes. While the recruitment is the process of attracting as many as possible prospective employees into a "pool of candidates", the selection is the process of picking up the best candidates from the pool to fill in the job (Gamage, 2014, p. 41). The recruitment process itself may

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be compared to the fishing of experienced fishermen – casting the wide net to get as many fish as possible, but then selecting only the one which makes the fisherman really proud of.

The recruitment and selection, however, are not simple and one off processes, as they are closely linked with other HRM functions. Recruitment and selection constitute initial stages of a dialogue among applicants and the organisation that shapes the employment relationship (Bratton & Gold, 1999). As applicants may have a specific view of expectations about how the company is going to treat them, the recruitment and selection provide an opportunity to clarify this view. If the expectations are not clarified at the initial stage of employment, high quality job seekers may leave the organisation and look for other options that suit their interests better (Bratton & Gold, 1999, p. 201). Furthermore, in order for any organisation to be able to attract and retain good quality personnel, the recruitment and selection necessitates to be "backed up" by a fair and competitive salary system, which would sufficiently motivate employees to join the organisation and consistently perform to their best abilities (Rabrenovic, 2009).

While many private sector organisations struggle to find the best candidates for their vacancies, recruitment and selection of the best candidates in the public sector appears to be even more challenging task. This is due to the fact that public services of the EU countries tend to involve two key principles – the principle of equality and the principle of merit (Cardona, 2006, p. 2). The principle of equality stems out of the constitutional principles that every citizen has a right to public employment, provided that he/she meets the general requirements established by law as well as the specific requirements set up in the vacancy notice. The merit principle refers to the interest of the public administration in recruiting the best available candidates for the civil service (Cardona, 2006, p. 2). In a broader sense, the merit principle can be defined as the setting up of a special public administration value system, based on professionalism, competence and integrity to pursue the public interest (Ingraham, 2006, p. 486). It represents a counterbalance to that of political loyalty, popularly known as the "patronage or the spoils system", in which public administration posts are filled solely on the basis of political connections instead of professional merit (Pusic, 1973), which can also be found in many contemporary public administration systems.

Some transitional countries face serious problems in recruitment and selection of their perspective staff (Meyer-Sahling *et al* 2016; 2019). Many countries face the problem of a significant turnover of public servants, which endangers the smooth functioning of the civil service, and requires a quick action of recruiting new staff (SIGMA, 2017, p. 24). As hiring new qualified staff and their induction can be lengthy and resource-intensive processes, the countries always try to "catch up" to fill in the key vacancies, which usually results with overburdening of the existing staff with the everyday public administration tasks (SIGMA, 2017, p. 24). This further shows the importance of having an effective recruitment and selection process in the public service.

The issue of recruitment and selection in the civil service of Moldova has up to now not attracted significant academic attention. This area has been the subject of research of international organisations, such as, for example, SIGMA/OECD, which has produced several reports on human resources management in the Moldovan civil service since the

adoption of the Civil Service Law in 2008 (SIGMA/OECD, 2011; 2015). There is, however, a lack of academic research on this important topic.

The objective of this paper is to analyse the legal framework and specific challenges faced by the Moldovan civil service in the process of recruitment and selection of its staff. In order to attain this objective, the paper is organised within three key parts. The first section of the paper examines the international legal standards regarding recruitment and selection of the public sector employees, which serve as a benchmark for assessing the respective Moldovan legal framework and its implementation. In the second, central part of the paper, the relevant provisions of the Civil Service Law and supporting secondary legislation will be examined, backed up by empirical data on the effectiveness of the application of these rules in practice. The concluding section of the paper attempts to define an explanatory framework for the lack of effectiveness of the recruitment and selection rules and provide guidance on what would be the best ways to improve the current situation.

The methodology for writing the paper included the analysis of the primary and secondary legislation regarding the HRM in the Moldovan civil service (primarily the Law 158/2008 on the Public Function and Status of Civil Servants, hereinafter: Civil Service Law, and supporting secondary legislation), official government reports and reports provided by international donors. As an additional sources of information, interviews were conducted with around 20 human resources managers in selected Moldovan ministries and agencies in Chisinau in April 2019.

2. INTERNATIONAL RECRUITMENT AND SELECTION STANDARDS IN THE PUBLIC SERVICE

The area of human resources management in the public sector is not, as such, subject to specific international standards. The way Governments around the world manage their human resources is considered to be an area of a national interest. Nevertheless, there are several general international instruments which define the best international standards in the area of HRM in the public service, including the area of recruitment and selection.

Several international instruments require the observance of the merit principle in the recruitment and selection of civil servants. For example, the UN Convention against Corruption (2003) especially emphasizes the importance of merit and transparency in the recruitment process of public servants. In the similar vein, the Council of Europe's Recommendation No. R (2000) 6 on the Status of Public Officials in Europe, stresses the need for the existence of legal framework concerning the status of public officials and recruitment and selection based on merit and fair and open competition.

Recruitment and selection in the public service is not explicitly part of the EU *acquis,* but is governed by *soft acquis*, comprising shared standards of the EU member states and affecting indirectly the development of the national law (Keune, 2009, p. 52). Though not legally binding, these standards have significant practical effects on the aspiring countries, given that the European Commission assesses their progress against such standards. To provide a more detailed elaboration of the EU Commission's human resource management

requirements, in 2014 SIGMA/OECD[311] programme prepared a document entitled "Principles of Public Administration" (SIGMA/OECD, 2014). In addition to this, a couple of years later, SIGMA developed a special set of principles for countries which fall under the European Neighbourhood Policy called "The Principles of Public Administration: A Framework for ENP Countries" (SIGMA/OECD, 2017). These Principles aim to support the national authorities, the European Commission and other donors to develop a shared understanding of what public administration reform entails and what countries could aim for with their administrative reforms (SIGMA/OECD, 2017).

Recruitment and selection of public servants is one of the areas covered in the principles, within the field of human resources management. The key SIGMA principles regarding recruitment and selection for public servants of ENP countries are presented in the table 1. below.

Table 1. SIGMA/OECD Principles of Public Administration for ENP countries – Public Service and HRM chapter – section on recruitment and selection

Principle 3: The recruitment of public servants, including those holding senior managerial positions, is based on merit and equal treatment in all its phases; the criteria for demotion and termination are explicitly stipulated by law and limit discretion.

1. The recruitment and selection process in public service, either external or internal and regardless of the category/class of public servants, is clearly based on merit, equal opportunity and competition. The public service law clearly establishes that any form of recruitment and selection not based on merit is considered legally invalid.
2. The legislation covers general criteria and detailed procedures related to recruitment and selection.
3. The recruitment and selection committees include persons with expertise and experience in assessing different sets of skills and competences of candidates for public service positions, with no political interference.
4. Protection against discrimination of persons applying for and those employed in public service positions is ensured by all administrative bodies in accordance with the principle of equal treatment. In the cases explicitly established in the law, comprehensive equitable representation is taken into account in the recruitment process.
5. The objective criteria for demotion of public servants and termination of the public service relationship are explicitly established in law.
6. Legislation related to recruitment to the public service is applied in practice.

As shown in the table, SIGMA requires that the recruitment and selection process, either external or internal and regardless of the category of public servant, is based on the principles of merit and equal opportunity, which assumes the existence of an open

[311] Having recognized the importance of well-regulated and organized state administration for compliance with membership requirements in all sector areas, in 1992 EU and OECD founded SIGMA - *Support for Improvement in Governance and Management*. This programme aims at supporting public administration reform activities of (potential) EU candidate countries. SIGMA, largely financed through EU, represents one of the main European Commission's instruments for promoting the development of public administration capacity in Central and Eastern Europe, and providing technical assistance to (potential) candidate countries.

competition for any vacancy. In order to ensure impartiality, competition procedure needs to be implemented by recruitment and selection committees, operating independently from political influence. Members of these committees should possess solid understanding of the tasks performed in the advertised position, along with the skills and knowledge required for their performance. SIGMA also underlies the necessity of the establishment of the objective criteria for demotion of the public service and termination of employment. Last, but not least, the legislation related to the recruitment procedure needs to be implemented in practice.

In order to be able to monitor the progress in achieving the benchmarks set in the Principles, SIGMA has also developed a document entitled "Methodological Framework", which provides a comprehensive monitoring framework for assessing the state of a public administration against each Principle set out in the Principles of Public Administration (SIGMA/OECD 2017a). The Framework includes a set of indicators, which attempt to define preconditions for a good public administration (good laws, policies, structures and procedures) with the special emphasis on actual implementation of legislation and its effects and outcomes in practice.

3. LEGAL FRAMEWORK AND CHALLENGES IN RECRUITMENT AND SELECTION OF CIVIL SERVANTS IN MOLDOVA

The foundations of the human resource management in the civil service in Moldova were laid by the adoption of the Civil Service Law in 2008 (Law No. 158 on Public Office and the Status of Civil Servants, Official Gazette No s. 230 - 232/ 2008). The Civil Service Law introduced modern HRM practices, such as competitive recruitment, job descriptions, performance appraisal, continuous professional development, new system of classification and disciplinary provisions.

The Civil Service Law provides a sound basis for merit-based recruitment and selection of civil servants. Article 29 of the Civil Service Law establishes that any competition should be open, based on professional merits, competence and transparency, and that there should be equal access to public positions for all citizens, which is in line with the principles of merit and equal treatment, promoted by SIGMA/OECD. The key institution in charge of the management of human resources in Moldova is the State Chancellery, while the National Training Academy is responsible for systematic civil servants training.

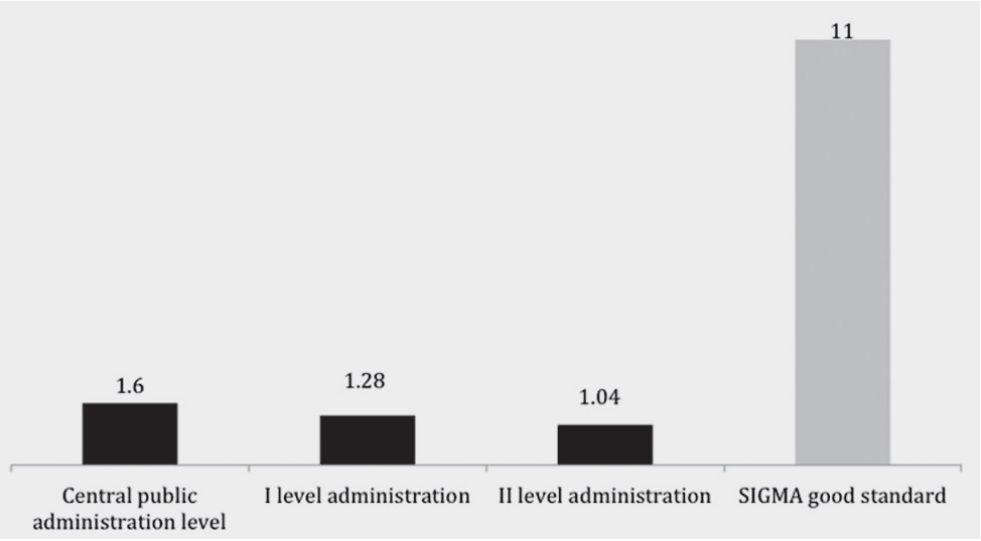
The procedure for organising a competition is laid down in the Government Decision N° 201 of 11 March 2009, which provides well-defined and detailed rules on the recruitment and selection procedure, types of selection methods (written tests and interviews), as well as the parties involved (commission, public authorities, HR unit, and candidates) and their responsibilities. The selection procedure includes examination of application documents, a written test composed of multiple tasks and an interview for all civil service positions, except for the senior managerial positions.

The regulations require that all vacancies be advertised on the government website, on the website of the public authority and in national media outlets at least 20 calendar days prior to the date of the competition (Article 7 of the Regulation on Competition Procedure),

which is in line with best international practices. There is no obligation to publish the vacancy notice in mass-media, nor the Official Gazette, only on the government platform and on the website of the authority, as well as to display it on the information panel at the public authority concerned, in a visible and publicly accessible place. The advertisement contains elements of the job description of the perspective job, but does not include the information about the remuneration.

Although the recruitment and selection procedures are legally well defined, the interviews conducted with the HR managers revealed several challenges, which start very early on in the procedure. A number of HR managers stressed that it is very difficult to attract candidates for announced vacancies and that sometimes they even have competitions where no candidates apply. Furthermore, some of them find the deadline for the application to a position of 20 days as overly long, as there is a problem with keeping the interest of the applicants in the respective vacancy. It appears that candidates who are looking for a job in the civil service, even if they have initial interest in the vacancy, loose it rather quickly, possibly after gaining information about the amount of remuneration for their perspective position.

In order to examine this issue further, we have looked at the data from the latest Civil Service Report on the functioning of Moldovan civil service for 2018, which confirm the finding that the average number of candidates per vacancy is very low. In 2018, the number of candidates per vacancy at the central public administration level was only 1.6 (State Chancellery, 2019). This number was even lower at the regional administrative level standing at 1.04 candidates per vacancy and 1.3 candidates at the lowest administrative level (State Chancellery, 2019). This is in sharp contrast to the good international practices, defined in the SIGMA Methodological Framework (SIGMA/OECD 2017a), which envisages that the number of candidates per vacancy should be higher than 10 in order to have an effective recruitment process. The comparison of the good European practice and the situation in Moldova is presented in the graph 1 below.



Graph 1. The number of candidates per vacancy in Moldova in comparison to good European practices

The question which naturally arises is what is the key reason for such a low number of candidates per vacancy? The low number of candidates per vacancy sometimes can be an indicator of ill-defined recruitment and selection procedures and the lack of trust in the fairness of the recruitment and selection system. The interviewed HR managers, however, are of the view that the low salary levels, especially at the entry level, are the main reason for disinterest of potential civil service candidates to apply for civil service jobs. This argument may be supported by the views of representatives of institutions outside of the civil service, which have financial autonomy, and which do not appear to have problems with attracting qualified candidates. In addition to this, some civil service institutions, which do not have financial autonomy, also don't have problems with attracting new staff, as they are able to award higher salary levels to their existing and perspective staff on the basis of savings made from the budget funds allocated for approved vacancies. This practice is allowed by the Law on Unified Remuneration in the Budgetary Sector (Law 270/2018 on Unified Remuneration System in the Budgetary Sector), which gives the right to civil service institutions (and other institutions in the public sector) to award lump-sum bonuses from the payroll savings. These bonuses are highly discretionary and can go up to 100% of the salary. The ability to obtain savings from vacancies may create unacceptable incentives for administrative bodies not to fill all vacant positions in order to be able to give their existing and perspective staff higher levels of remuneration and also create distortions in the fairness of the salary system.

Although salary levels are certainly one of the key reasons for a low number of candidates per vacancy, it is worth looking at other possible reasons, such as the procedure of the recruitment and selection itself. This would also allow us to assess the procedural recruitment and selection rules against the SIGMA standards.

The process of recruitment and selection is led by the competition commissions, whose work is regulated in detail by the Government Regulation No. 201 on the recruitment and selection. The competition commissions for executive and middle management positions are composed of a minimum of four and a maximum of six members, including the chair and the secretary of the commission. It is required that these 4-6 staff members have civil service status, and out of them 2-3 have to be from managing positions (Article 54 of the Government Regulation No. 201/2009). The secretary is a civil servant who is from the HR unit or who deals with human resources management issues.

Although the role of the competition commission in the recruitment and selection process is well defined by the legislation, the composition of the competition commissions does pose a risk for partiality in the recruitment and selection process, as they comprise only members of the hiring authority. This is not fully in line with the SIGMA principles, which require that the recruitment and selection committees include persons with expertise and experience in assessing different sets of skills and competences of candidates for public service positions, with no political interference.

The prescribed selection methods used during the testing process, which include both the written test and the interview, are in line with the best European practices, but their application does not appear to be fully effective in practice. The anecdotal evidence shows that the competition commissions usually use only knowledge-based questions

in written tests, which is not adequate to assess competencies, abilities and aptitudes of candidates, especially of candidates for management positions. As the Moldovan civil service should attract younger people with the ability to learn new information/processes, the whole idea of testing only knowledge during the recruitment procedure is of little help. Nevertheless, there are some good examples of testing other skills of candidates, by giving the candidates the task of drafting the text of a legal act. Conducting of the structured interview is a mandatory stage in the selection process and a chance for the commission to obtain additional information about the candidates' competencies and for the candidate to exchange the information with the commission members.

It is interesting that several HR managers complained that some candidates gave up the selection process during the interview process after their heard about their prospective remuneration, while the others stayed in the civil service only for a short period of time after their realised what their salary level was. This confirms our previous finding that the salary levels are the main obstacle in the recruitment and selection process. This is also in line with the findings of Bratton and Gold (1999) which argue that expectations about the employment should be clarified at the initial stage of employment, otherwise high quality job seekers may leave the organisation and look for other options that suit their interests better.

Finally, if we look at the criteria for demotion of civil servants and termination of employment, as part of SIGMA/OECD standards related to recruitment, we can argue that they are not fully in line with the best European practices. The reasons for dismissals are established in the Civil Service Law and are as follows: 1) when a second disciplinary sanction is applied before the first one has expired (regardless of the seriousness of the sanction); 2) when a civil servant obtains one "unsatisfactory" score at the annual performance appraisal; and 3) after an unexplained absence from work for four consecutive hours in one working day (Article 64 of the CSL). These reasons for dismissal appear to be disproportionate to the consequence they produce, and hence are not fully in line with the SIGMA principles (SIGMA/OECD, 2015, p. 53).

4. CONCLUSION

The recruitment and selection process of the civil servants in Moldova is faced with important challenges. Even though the basic prerequisites for applying the merit principle have been relatively well established through the existing legislative framework, the civil service struggles with attracting qualified candidates. This is primarily the consequence of the non-attractive remuneration package, especially for entry civil service positions.

The Moldovan case of civil service recruitment and selection clearly shows that a well defined recruitment and selection process in the legislation is not a guarantee for effective recruitment of qualified candidates to the civil service. It also confirms the earlier hypothesis that the recruitment and selection is closely related to other HRM processes, and especially remuneration system, which needs to be attractive enough to spark the interest of potential candidates to apply for a position in the civil service and keep them interested in developing the career in the civil service. To the extent that the remuneration

of civil service is unattractive and career advancement process perceived as too slow, too inflexible, or based on factors other than merit, the most-talented and ambitious candidates will most likely find alternative employment either in the country or abroad.

In order to achieve substantive improvements in the area of recruitment and selection in the current circumstances, the priority would be to address the issues of remuneration and only then enhance the quality of the recruitment and selection procedures. The logical sequence of steps would assume conducting a pay comparator survey of the salaries in the public and private sector, and aligning the salary levels of the civil servants and public servants with the employees in the private sector (to the extent possible) by amending the Law on Unified Remuneration System in the Public Sector, within the existing budget constrains. The second step would assume modernising the regulations on the recruitment and selection process. This should include, *inter alia*, changing the current structure of the competition commissions, by requiring that at least one member would be from outside of the recruiting institution. Another option would be to organise a general civil service exam (within the State Chancellery or the Public Administration Academy), which would then be followed by the interview conducting in the civil service institution. Another important step in enhancing the recruitment and selection would be introduction of the system of competency framework in the HRM system. The competency framework would provide the basis for testing not only of the knowledge, but also of the skills and aptitudes of candidates, which are essential for carrying out key duties and responsibilities of civil service jobs. Finally, it would also be important to revise the criteria for demotion and dismissal of civil servants, in order to ensure the security of their work and career development.

Lastly, the problems of recruitment and selection in the Moldovan civil service should not be looked at as isolated phenomena, as they represent just one piece of the broader puzzle of overall economic and social conditions in the country. If we look at this broader picture, we may argue that one of the key factors for low attraction of candidates in the civil service is ineffective general labour market, which is characterised by low and declining human capital, exacerbated by continuous and rising immigration of the Moldovan population abroad (World Bank, 2020). Given the current economic circumstances, aggravated by the Covid-19 pandemic, creation of a general labour market with highly educated workers may not be achievable goal in the short or even mid term. This will have an adverse effect on the efforts of the civil service to attract qualified candidates and pose additional challenges in the recruitment and selection process. For this reason, in order to improve the attractiveness of the civil service of Moldova, ensuring the adherence to the European principles of public administration will simply not be enough. There is a need to make additional efforts and develop strategic recruitment strategies, including public campaigns for attracting younger population to join the civil service, which should increase the chances of the Moldovan civil service to obtain very much needed "pool" of the "the best and the brightest".

REFERENCES

Bratton J. & Gold J, 1999. *Human Resource Management, Theory and Practice*, 2nd Edition, MacMillan business.

Cardona, F. 2006. *Recruitment in Civil Service Systems of EU Member States and in Some Candidate States*, paper presented at the seminar "Civil Service Recruitment Procedures", Vilnius, 21-22 March 2006.

Gamage, A. S. 2014. Recruitment and selection practices in manufacturing SMEs in Japan: An analysis of the link with business performance. *Ruhuna Journal of Management and Finance*, Vol. 1, No. 1, pp. 37-52.

Ekwoaba, J. O., Ikeije, U. U,. & Ufoma, N. 2015. The impact of recruitment and selection criteria on organizational performance, *Global Journal of Human Resource Management* Vol.3, No.2, pp. 22-33.

Ingraham, P. W. 2006. Building Bridges over Troubled Waters: Merit as a Guide, *Public Administration Review*, pp. 486–495.

Meyer-Sahling, J.-H. at al. 2015. *Improving the Implementation of Merit Recruitment Procedures in the Western Balkans: Analysis and Recommendations*. Danilovgrad: ReSPA Publications.

Meyer-Sahling, J.-H. at al. 2019. *Merit Recruitment in the Western Balkans: An Evaluation of Change between 2015 and 2019*, The University of Nottingham and RESPA.

Keune, M. 2009. EU Enlargement and Social Standards – Exporting the European Social Model?, in Orbie, J. Tortell L (eds.), *The European Union and the Social Dimension of Globalisation, How the EU Influences the World,* London/Routledge.

Pusic, E. 1973. *Nauka o* upravi, Zagreb/Školska knjiga.

Rabrenović, A. 2009. Civil Service Pay Reform in Southeast Europe: Creating Incentives for Performance, in M. Vintar, P Pevcin (eds.), *Contemporary Issues in Public Policy and Administrative Organization in South East Europe*, Ljubljana/University of Ljubljana, pp. 294-213.

SIGMA/OECD. 2017. *Principles of Public Administration: Framework for ENP countries*, Paris/OECD publishing.

SIGMA/OECD. 2017a. *Methodological framework for the Principles of Public Administration*, Paris/OECD publishing.

SIGMA/OECD. 2015. *Baseline Measurement Report: the Principles of Public Administration*, *Moldova 2015*, Paris/SIGMA/OECD publishing.

SIGMA/OECD. 2014. *Principles of Public Administration*, Paris/OECD publishing.

SIGMA/OECD. 2011. *Peer Review of the Civil Service Legal Framework and its Implementation since the Enactment of Law 158/2008 (Civil Service Law) and HRM Practices in the*

Moldovan Public Administration, paper prepared for the State Chancellery of Moldova.

State Chancellery of Moldova, 2019. *Report on the Functioning of the Civil Service for 2018*, available at: https://cancelaria.gov.md/sites/default/files/document/attachments/raport_anual_functie_publica_2018_0.pdf (10.9.2020).

World Bank. 2020. Moldova Economic Update, Spring 2020, available at: http://pubdocs.worldbank.org/en/466481588799156228/Moldova-Economic-Update-Spring-2020.pdf (1.9.2020)

International and domestic legal sources

The Council of Europe's Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe, adopted by the Committee of Ministers on 24 February 2000 at the 699th meeting of the Ministers' Deputies.

United Nations Convention against Corruption. 2003, Adopted by the General Assembly, by its resolution 58/4 of 31 October 2003.

Law No. 158 on Public Office and the Status of Civil Servants, of 4 July 2008 Official Gazette of the Republic of Moldova Nos. 230 - 232/2008; 462-466/12.12.18; 441-447/30.11.18; 309-320/17.08.18; 276/20.07.18; 235-244/29.06.18; 126-132/20.04.18; 7-17/12.01.18; 7-17/12.01.18; 471-472/30.12.17; 134-143/28.04.17; 478-490/30.12.16; 30-39/03.02.17; 2-8/06.01.17; 369-378/28.10.16; 256-264/12.08.16; 245-246/30.07.16; 123-127/06.05.16; 267-273/02.10.15; 82/12.04.13 27-30/08.02.13; 27-30/08.02.13; 160-164/03.08.12; 1-6/06.01.12 ; 31/22.02.11; 194-196/05.10.10;119-120/13.07.10; 117-118/09.07.10; 117-118/09.07.10;197-200/31.12.09; 187-188/18.12.09; 157/22.10.09.

Law 270/2018 on Unified Remuneration System in the Budgetary Sector, Official Gazette of the Republic of Moldova No. 441-447 of 30.11.2018.

Government Decision on Recruitment and Selection Nº 201 of 11 March 2009, Official Gazette of the Republic of Moldova Nos. 55-56/09; 238/19.

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ADMINISTRATIVE POWERS IN TERMINATING ADMINISTRATIVE SINGLE-CASE DECISIONS IN ROMANIA

The whole activity of the public administrative bodies is governed by the principle of legality. Single-case decisions are an important part of this activity. The procedure for issuing administrative decisions has to be precise and ensure the predictability of law. Nevertheless, errors may occur and situations related to an already issued administrative single-case decisions may change. The administrative bodies have to be able to straighten things by ending the effects of illegal single-case decisions or of decisions that are no longer in accordance with the law or endanger the public interest. This power must not be used in a way that violates human rights. The paper analyses the rules regarding the power of administration to terminate the effects of single-case decisions in the Romanian legal system, respectively the rules for annulment and withdrawal of such decisions. Both annulment and withdrawal of single-case decision making have different effects in accordance with the reasons for their application. As Romania has recently adopted the Administrative Code, but does not yet have yet an administrative procedure law, the analysis aims to determine how the traditional rules cope with the protection of human rights. A comparison with the legal rules provided by the administrative procedure laws in Balkan countries is presented.

Keywords: administrative decisions, nullity, withdrawal, human rights

1. INTRODUCTION

Administrative bodies carry out the executive function of the state. Their activities aim to implement the laws adopted by the Parliament and the Government Ordonnances issued by the Government, when empowered by the Parliament, and to provide public services. Organising the implementation of laws and implementing laws are processes carried out through legal decisions and activities with or without legal effect. Most of the legal decisions issued or adopted by the administrative authorities in these processes are

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single-case (individual) administrative decisions. The Administrative Code of Romania, recently approved by Government Emergency Ordinance no. 57/2019[312], mentions first, among the principles listed in Art. 6, the principle of legality. Based on this principle, the administrative authorities are allowed to terminate the effects of the single-case (individual) decisions, if they find out that they were illegally issued. In absence of a law regarding administrative procedure, Romanian legal theory has developed a series of principles and rules that guide the administration in using the power of terminating the effects of single-case (individual) administrative decisions. These rules are necessary for balancing the need for legality and the principle of legal stability and the respect of human rights, and were hence developed along with the increase in force of the last two principles aforementioned. Our previous work (Fodor, 2016) has focused on a comparison of Romanian rules in the matter with the legislation of western EU countries (Germany, Italy, The Netherlands). The present paper is looking for a comparison with the legislation of the Balkan area, which we think that it is beneficial for shaping solutions.

In the case of normative administrative decisions, the usual way of terminating their effects is abrogation, which terminates the effects of the legal acts only for the future, so no particular problems can be encountered in this area.

Our research aimed to find how the principles and rules regarding the termination of the effects of single-case (individual) administrative decisions are shaped in recent years in order to ensure a better protection of human rights and to highlight valuable codification ideas contained in the legislation of some Balkan countries. We have sought to find how the administrative procedure laws of different states regulate the annulment and revocation in terms of who has the competence to annul or revoke a decision, whether the annulment or the revocation acts have *ex nunc* or *ex tunc* effects, whether there are time limits for annulling or revoking single-case administrative decisions or whether there are special conditions that enable an administrative body to do so.

2. POSSIBLE SITUATIONS FOR TERMINATION OF THE EFFECTS OF A SINGLE-CASE (INDIVIDUAL) ADMINISTRATIVE DECISION BY AN ADMINISTRATIVE AUTHORITY IN THE ROMANIAN LAW

The termination of the effects of a single-case (individual) administrative decision may be a legal sanction in case the validity conditions for such a legal act were not met at the moment it has been issued/adopted. In order to preserve legality, the competence to terminate the effects of such an administrative decision is given to the issuing authority, as a result of an internal administrative control (Iorgovan, 2001, p. 455), to the hierarchic superior authority, as a result of a hierarchic administrative control (Fodor, 2017, pp. 233-234), or to a specialised administrative authority, as a result of a specialised control (Petrescu, 1997, p. 317). Internal, hierarchic or specialised controls may be conducted as a result of a request made by an interested party or *ex officio*. The competent administrative authorities will issue a new administrative decision for terminating the illegal previous one.

[312] Published in the Official Gazette of Romania, no: 555/2019.

The requirements for the validity of an administrative decision have been set by the doctrine and case-law, as Romania has not yet adopted a law governing administrative procedure. Generally it is accepted that, in order to be valid, the administrative decision has to fulfil the following requirements: (i) to be issued by the competent authority within the limits of its competence; (ii) to be issued in the form and following the procedure established by law; (iii) to be in concordance with the Constitution, the laws and other legal norms in force; (iv) to meet the public interest (to meet the condition of desirability, the issuing of the administrative decision to be recommendable, advisable, which is known in French literature as *l'opportunité de l'acte administratif unilatéral*) (Ionescu, 1970, pp. 250-251; Iovănaș, 1997, p. 35; Petrescu, 2004, p. 297). The third condition is shaped by the constitutional provisions referring to the international conventions Romania is a party to. According to Art. 20 of the Romanian Constitution "Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to" and "Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions". Given the fact the Romania is an EU member state, Art. 148 para. 2 of the Constitution stipulates that "the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act". Thus, the Romanian Constitution creates a "constitutional block" including the Constitution itself and the international legal acts that Art. 20 and art. 148 refer to, all with the same legal force, at the top of the hierarchy of legal norms (Popescu, 2000, pp. 262-269). This block also contains the case-law of the international courts competent to supervise the way states respect the international conventions they have adhered to, respectively the European Court of Human Rights and the Court of Justice of the European Union.

Not all the omissions in meeting the requirements or conditions for the validity of the administrative decisions attract the same rules regarding the termination of their effects. The first three conditions for validity are known as conditions for the legality of the administrative decision. These conditions have to be met when the administrative decision is issued. If one of the three requirements was not respected, the effects of the administrative decision may be terminated both by an administrative authority and by the competent courts. The fourth condition, meeting the public interest (the desirability, or the advisability of the administrative decision) can be observed at the time the single-case (individual) administrative decision is issued, or at a later date, if the premises linked to the objective of the administrative decision have changed. Only an administrative authority has the competence to terminate the effect of an administrative decision on grounds of desirability or advisability, either because the public interest in accordance with the law was not met at the moment the administrative decision was issued, or because circumstances have changed and it is no longer serving the purpose of the law. The courts have no competence in assessing whether this fourth condition was or is still met. The effect of an

administrative decision for terminating a previous one differs in accordance with the reason for termination. If the reason is noncompliance with a legality condition of validity, the effects of the administrative decision for termination of a previous single-case (individual) decision will be *ex tunc,* whenever this is possible in fact. If the reason is noncompliance with the desirability condition (*l'opportunité)*, the effects of the administrative decision for termination of a previous single-case (individual) decision will be *ex nunc*.

3. METHODS FOR TERMINATION OF THE EFFECTS OF A SINGLE-CASE (INDIVIDUAL) ADMINISTRATIVE DECISION BY AN ADMINISTRATIVE AUTHORITY IN THE ROMANIAN LAW

Administrative authorities can terminate the effects of single-case (individual) administrative decisions either by annulling or by revoking them.

The distinction between annulment and revocation is discussed at doctrinal level. Some older authors (Iovănaş, 1997, p. 253) consider that revocation of a single-case (individual) administrative decision may be decided by the administrative authorities (the issuing authority or the hierarchically superior authority) in case of a breach of any validity conditions (legality conditions or advisability condition), while the annulment may be decided by a specialised administrative authority only for breaching one of the three legality conditions for the validity of administrative decisions. This theory allows the issuing or hierarchic authorities to annul or revoke a single-case (individual) administrative decision for a breach of a legality condition of validity, without making any difference between the two possible methods. Other, more recent authors (Petrescu, 2004, pp. 323-326), consider that both revocation and annulment may be decided for breaching any validity condition of the administrative decision (legality or advisability), revocation being decided by the issuing or hierarchically superior authority. A third opinion (Santai, 2011, pp. 175-185) considers that the issuing authorities and hierarchically superior authorities may revoke a single-case (individual) decision as being illegal, unadvisable or as a sanction for certain illegal behaviours of the beneficiary, while specialised competent administrative authorities may annul such decisions if there is a breach of the legality condition of validity. In all the cases, if the single-case (individual) decisions are revoked by the issuing authority, the operation is named withdrawal.

From the dispositions of the Administrative Code, we can conclude that revocation of a single-case (individual) administrative decision can be decided by the issuing administrative authority if the decision is illegal or unadvisable (Art. 26 para. 2 shows that the Government may ask the subordinate administrative authorities to revoke decisions that are illegal or inadvisable) and by the hierarchic superior authority if the decision is illegal (Art. 245 para. 8 shows that the Government may revoke an illegal decision of a prefect). The wording of the Administrative Code also hints to the fact that the control of the advisability of an administrative decision is an exclusive prerogative of the issuing authority, the hierarchicially superior authority or any other authority being competent to verify only the legality of an administrative decision issued by another authority. This would make sense, as assessing the advisability of an administrative decision should be in connection with the competence for issuing it.

3.1. Annulment of single-case (individual) administrative decisions

In respect to the annulment of the administrative decisions in general, and hence of the single-case (individual) decisions as well, one problem discussed in the doctrine is the legal regime of the nullity in the Romanian administrative law.

Major authors in the field of administrative law define nullity as a manifestation of will aiming to directly terminate the act and eradicate its juridical effects (Iorgovan, 2001, pp. 69-70; Petrescu, 2004, p. 319). The first thing to be observed about this definition is that it does not match the definition for nullity in civil law, as it does not mention the reason for annulment of an administrative act, the extension of nullity's effects and is not referred to as a sanction. In civil law, nullity is defined as a sanction consisting in undoing, with retroactive action, of the effects of a legal act when there is a breach of the legal conditions in issuing or concluding the act.

Nullity is always discussed as one of the ways for ending the effects of an administrative act. Although the definition does not show the reasons for which an administrative act may be annulled, comments on nullity indicate that the infringement of the conditions for issuing the act may result in annulment. Thus, it has been argued that the type of nullity that may affect an administrative act depends on the seriousness of the vice breaching the legality of the act (Iorgovan, 2001, p. 70) or the validity conditions imposed for the act (Anghene, 1958, p. 174). Such comments lead to a conclusion that, in administrative law, like in civil law, the reason of nullity is linked with the moment of issuing the act, nullity being the sanction for noncompliance with the validity conditions. Express recognition of this conclusion is to be found in the statement that no matter which authority is annulling the administrative act, the reason may lay only in causes prior or concomitant with the issuing moment[313] (Iorgovan, 2001, p. 78). Recent amendments in the Law no. 554/2004[314] regarding the procedure in administrative courts suggest the same. According to Art. 8 para. 2 of this law, the administrative courts are competent to solve cases regarding: public procurement procedure conducted prior to concluding a contract, matters connected with the concluding of the contract and matters concerning the nullity of the contract. All litigious matters regarding the execution or terminating the public procurement contract (except for of nullity) are in the competence of civil courts. This supports the idea that nullity is a sanction for breaching the legal requirements during the procedure prior to the conclusion of the public procurement contract and at the moment of concluding such a contract. Any subsequent event does not constitute grounds for annulling the public procurement contract.

Other comments, however, suggest that the reason for annulling an administrative act may be subsequent to the moment of issuing the act. It has been stated that when the individual or normative administrative act would contravene, expressly or implicitly, the

[313] The reference to a moment prior to issuing the act is the consideration of the procedural formalities that might be required in order to issue an administrative act, such as an advice note or an expertise. Compliance with the requirements concerning such prior formalities is also considered a condition of validity of the administrative act, a component of the condition of complying with the issuing procedure.

[314] Published in The Official Gazette of Romania no. 1154/2004.

situation created by abrogation of a law or annulment of a normative administrative act that was the basis for issuing the individual administrative act, the former act becomes illegal and thus it is null (Ionescu, 1970, p. 282). The Project for a Romanian Code for Administrative Procedure (Anon., 2004) also mentions in article 139 paragraph (5), that the grounds for annulment of the administrative act may be prior, concomitant or subsequent to the moment of issuing/adopting the act. From the text of paragraph 6 of the same article, two subsequent reasons for annulling the act are to be determined: 1) the right/material advantage conferred by the act is used for a different purpose than the one mentioned in the act and 2) the act is issued under a condition and the beneficiary of the act fails to meet the condition, or fails to meet the condition in the provided time interval, due to own fault. However, in such situations, the act is subjected to a cancellation condition (subsequent condition) and if the condition is met (the advantage is not used for its purpose, the term is exceeded) the sanction is the resolution of the act and not its nullity.

It is true that an administrative act may become illegal for reasons subsequent to the moment of entering into force, such as the reasons described by the Project for the Romanian Code for Administrative Procedure or because the advisability condition is no longer met for reasons subsequent to the moment of entering into force. In this case the act may be simply terminated by issuing/adopting another administrative act with this purpose, without using the term "annulment". This interpretation is also consistent with the case-law of the High Court of Cassation and Justice (HCCJ), which stated that the court, acting on a request to annul the administrative decision, has the power only to examine the conformity of the decision with legal acts of a higher rank which constituted the basis of issuing the contested act, with subsequent legal events having no effects on the contested act, but only on the moment to which it stays in force (HCCJ, 2008). The ruling of the HCCJ is consistent with French law that considers only the abrogation and revocation as reasons for the ending of the effects of the administrative acts for reasons subsequent to the issuing moment; annulment is mentioned only in respect of the power of hierarchically superior authorities or administrative courts, if the conditions of validity for the administrative act have been breached (Foillard, 2009, pp. 214-221). Nullity is perceived as a sanction for breaching validity conditions (Rivero & Waline, 2004, pp. 362-363).

A difference in respect to civil law is the one regarding the extension of effects of nullity.. Although it is generally recognised that the effect of the nullity of an administrative act is retroactive (Iorgovan, 2001, p. 78; Iovănaş, 1997, p. 257), the possibility of only for the future effect of the nullity is mentioned. It is true that only legal effects of the annulled act may be undone, not the facts that occurred during the existence of the administrative act (Drăganu, 1959, p. 247) (for instance, if the act of nomination of a public servant is annulled, the person may retain the payment for the activity he performed and the duration of the work will be taken into account for determining the pension rights) (Ghimpu, 1985, p. 123); but authors in old literature (Ionescu, 1970, p. 283; Drăganu, 1959, p. 284), sustained by recent authors (Iorgovan, 2001, p. 79) (Petrescu, 2004, p. 324) consider that if the reason for the nullity lies in breaching the validity condition of the advisability of the act, the effects of the nullity will not be retroactive, but will only apply in the future. In our opinion, the sense of the notion of nullity has to be maintained constant throughout the legal system.

Therefore, the reason for annulling an administrative decision may be only a breach of a legality condition for issuing/adopting the act and the effect of the annulling decision should be retroactive, in respect of the principle *quod nullum est nullum producit effectum*.

As to the time limit, it is notable that, although there is a tight time limit for contesting a single-case (individual) administrative decision before the courts (30 days to request the withdrawal of the decision from the issuing or hierarchically superior administrative authority from the date the decision was notified to the beneficiary or from the date a third party had knowledge of the existence and content of the administrative decision, and afterwards 6 months to address the court from the date the issuing/hierarchic superior authority has rejected the withdrawal request), there is no limit for an administrative authority to annul a single-case (individual) administrative decision.

3.2. Revocation of single-case (individual) administrative decisions

Due to the considerable decision-makingpower of the administration, the possibility for it tof revoke its own decisions is generally recognized. The revoking of a single-case decision is understood as the possibility of the issuing authority to terminate it for the future or with retroactive effects. Usually revocation may occur with retroactive effect, because the single-case decision breaches the law or, with prospective effect, because the circumstances considered at the issuing moment have altered or views have changed in such a way that they are opposing to the continuance of the effects of the decision.

Exceptions from the possibility of revocation are considered the jurisdictional administrative decisions, the administrative single-case (individual) decisions that were used to obtain civil contracts (exception referred to in Art. 1 para. (6) of Law 554/2004), the administrative decisions considered as non-revocable by the law and the administrative decisions granting certain rights, which were fully executed. These exceptions do not exclude the possibility of the court to annul the decision, within the time-limit established by the law. The revocation of an unlawful single-case decision obtained by fraud is always possible (Petrescu, 2014, pp. 327-331), even if one of the situations that generally exempts the possibility of revocation is present. The revocation of an unlawful single-case (individual) administrative decision usually has a retroactive effect, while the revocation of a lawful decision will only have effect for the future. A particular situation refers to authorizations. The ones legally issued by the administrative authorities in the exercise of their discretionary power, regarding continuous activities (licenses) may be revoked. The revocation does not give the right to financial compensation, as it is presumed that the beneficiary was aware of the possibility of revocation from the very beginning; compensation may only be granted if there is a special provision of the law, if the withdrawal decision is unlawful or unreasonable (an abuse of power) (Iorgovan, 2002, pp. 90-91).

No time limit is set for the revocation of an unlawful decision.

The Project of the Code for Administrative procedure mentions that revocation (*revocarea*) dissolves the illegal administrative disposition with retroactive and prospective effect, for reasons that proceed, are concomitant or subsequent with the issuing/adopting the decision. The decision may be revoked only within the time limit for legal challenge. A

favourable decision that grants continuous advantages may be revoked only if the advantages are used for another purpose than the one they were granted for, or if the beneficiary fails to comply with a condition related to the decision or fails to comply with it within the set time limit. Jurisdictional decisions cannot be revoked, nor can other decisions according to law (Art. 141). In our opinion, the provisions of the Project in this matter are a step back from the rules applied at this moment and even further from the European vision.

A set of rules of unified Administrative Procedure for the European Union has been proposed by the European Law Institute, one of the aims of the project being the creation of model administrative procedure rules for the EU countries. The ReNEUAL Model Rules (Hofmann, et al., 2014) provide the possibility of revocation (the document uses the term *withdrawal*, but with the meaning of revocation) for both lawful and unlawful single-case decisions that adversely affect a party. The public authority may revoke an unlawful administrative decision which adversely affects a party, *ex officio* or following a request of that party, with retroactive effect, outside the time-limits for legal challenge (Section III-35). The same rules apply for the revocation of a lawful administrative decision which adversely affects a party, but with prospective effect. In both cases the public authority shall take into account the effect of the revocation on other parties and on third parties.

When a decision to revoke an unlawful decision which is beneficial to a party is considered, the public authority shall take into account the extent to which a party has a legitimate expectation that the decision was lawful and the extent to which the party has relied on it. In respect to these factors, the public authority will decide whether it will exercise the power to revoke the decision, the retroactive or prospective effect of the revocation. The revocation may be exercised *ex officio* or following a request of that party, outside the time-limits for legal challenge (Section III-36).

The public authority may revoke a lawful decision that is beneficial to a party, *ex officio*, or following a request of another party. The power of revocation in such a case may be exercised outside the time-limits for legal challenge only if it is permitted by specific law, if the party has not complied with an obligation specified in the decision or has not done so within the time-limit set for compliance or in order to prevent serious harm. In the last case, upon application, the public authority shall make good the disadvantage to the party affected, to the extent that the reliance on the continued existence of the decision merits protection. The effect of the revocation on other parties and third parties should also be considered. The effect of the revocation of a lawful decision that is beneficial to a party shall be retroactive only if it occurs within a reasonable time.

The conception of the Model Rules underlines in Book III, that the possibility to revoke a decision calls for a balancing of the interest of the public with those of the beneficiary, considering the extent to which the illegality that besets the decision is obvious, whether the beneficiary had provoked the earlier decision through false or incomplete information and the extent to which the beneficiaries undertook irreversible investments because they relied on the decision (Hofmann, et al., 2014).

4. COMPARATIVE LAW METHODS FOR TERMINATION OF THE EFFECTS OF A SINGLE-CASE (INDIVIDUAL) ADMINISTRATIVE DECISION BY AN ADMINISTRATIVE AUTHORITY IN THE LAW OF SOME BALKAN COUNTRIES

4.1. Albania

According to the Code of Administrative Procedures (CAP) adopted by Law No. 44/2015, which entered into force in 2016, abrogation, annulment and revocation are regulated as *ex officio* remedies at the disposal of the issuing administrative authority, its hierarchicially superior authority or another authority explicitly mentioned by law. Only the effect of annulment is retroactive (*ex tunc*). The Code follows the ReNEUAL Model Rules, distinguishing remedies according to the conduct of the parties. If the beneficiary party is in good faith (not being aware of or negligent), the unlawful beneficial administrative act need not be annulled but only abrogated (Koprić, et al., 2016, pp. 112-113). The legal norms try to maintain a good balance between the principle of legal certainty and the principle of legality in the activity of public administration (SIGMA, 2018, pp. 267-273). The CAP does not mention time-limits for annulment or revocation.

4.2. Bosnia and Herzegovina

According to the Law on Administrative Procedure, published in the Official Gazette of Bosnia and Herzegovina, No. 29/02, administrative decisions may be revoked under the right of supervision. Under this right, according to Art. 252 para. 1, the competent authority shall revoke a decision which is final in the administrative procedure: (i) if the decision was issued by the actually competent authority and it is not the case provided in Article 256, point 1 of the law (was issued in the matter which falls within the judicial competence or in the matter on which a decision may not be taken in the administrative procedure at all); (ii) if a valid decision was previously issued in the same matter,by which that administrative matter was resolved differently; (iii) if the decision was issued by one authority without the consent, confirmation, permission or opinion of the other authority which is required by law or other provision based on the law; (iv) if the decision was taken as a result of compulsion, extortion, blackmail, pressures or any other illicit action. Also, according to the second para. of Art. 252, a decision which is final in the administrative procedure may be revoked with *ex nunc* effects under the right of supervision, if the substantive law has obviously been violated by it. In the matters in which two or more parties with opposing interests participate, the decision may be revoked only upon the consent of interested parties.

As for the time-limit, according to Art. 253, a decision on revocation, on the basis of point 1 and 2 of para. 1 and 2 of Article 252 of this law may be issued within the period of five years and on the basis of point 3, paragraph 1 of that Article – within the period of one year from the date when the decision became final in the administrative procedure. A decision on revocation of the decision, on the basis of Art. 252, para. 1, point 4 of this law, may be issued regardless of the periods laid down in para. 3 of this Article.

Revocation with *ex nunc* effect of a valid decision is also possible with the party's consent or at the party's request. According to Art. 254, if the party acquired a right by a valid decision and the authority which issued it considers that the substantive law was incorrectly applied in it, it may revoke the decision for the purpose of its harmonisation with the law only if the party, which acquired that right on the basis of that decision, agrees to it and if the right of a third person is not violated by this. The party's consent is also required for an amendment to the valid decision that is detrimental for the party and that imposes a liability on the party.

Regarding the effect of the revocation based on Art. 254, it shall take effect only in the future.

According to Art. 255, an extraordinary revocation with *ex nunc* effect of executive decisions is possible if necessary for the purpose of eliminating a grave and imminent danger to the life and health of people, public security, public peace and order or public morality, or for the purpose of eliminating disruptions in the economy, if these could not be successfully eliminated by other means which would be less encroaching on the acquired rights. A decision may also be revoked only partially, to the extent sufficient to eliminate the danger or protect the mentioned public interest. The party who, due to the revocation of the decision, suffers damage shall have the right to claim only the compensation of the actual damage. The Court of Bosnia and Herzegovina shall be responsible to take a decision as per a request for compensation of damage.

4.3. Croatia

The general Administrative procedure Act published in the Official Gazette of Croatia no. 47/2009 contains dispositions regarding the annulment or repeal[315] of unlawful or lawful administrative decisions.

Annulment is sanctioning of unlawful decisions. According to Art. 129, a decision under which a party was conferred a right may be annulled when (i) the decision is rendered by a public law authority without jurisdiction or when the decision is rendered without the consent, approval or opinion of another public law authority required by law, (ii) a legally effective decision is rendered in the same matter, whereunder the same administrative matter is resolved in some other way. In the event of an express violation of substantive law, a decision under which a party was conferred a right may be annulled or repealed, depending on the nature of the administrative matter and the consequences arising from the annulment or repeal.

Repeal may be applied for lawful administrative decisions under which a party was conferred a right in the following situations: (i) the repeal of this decision is permitted by law, (ii) it contains an exclusion of repeal and the party failed to meet its obligation from the decision or failed to meet it in due time, (iii) this is necessary in order to prevent serious and immediate danger to the life and health of people or public safety, and this could not be done by other means which would interfere less with the attained rights; when

[315] The term "repeal" is used in the official translation of the normative act discussed. Considering the terms and effects described by the law, we can conclude that it is a case of revocation of a single-case administrative decisions.

the decision is repealed for the purpose of preventing a serious and immediate danger to the life and health of people or public safety, the party is entitled to reimbursement of real damages (Art. 130).

A public law authority shall reach a decision on the annulment or repeal of a decision *ex officio*, at the proposal of a party or an authorised state body. A decision may be annulled or repealed by the public law authority which rendered it; when the decision was rendered by a body of first instance it can be annulled or repealed by a body of second instance and when there is no body of second instance, the decision may be repealed by the body which pursuant to law supervises this body (Art. 131). According to Art. 129, an illegal decision may be annulled or repealed entirely or in part even after the expiry of the period of appeal and according to Art. 131 unlawful decisions may be annulled within two years and repealed within one year following the date of the decision's delivery to the party, in which cases the decision must be sent out from the body which reached it within this time limit.

4.4. Greece

The Administrative Procedure Code ratified by the Law no. 2690 was published in the Official Gazette of the Hellenic Republic, no. 45/1999. According to the dispositions of Art. 24 and art. 25, the issuing authority may revoke and the superior hierarchic authority or another competent authority may annul a single-case (individual) administrative decision at the request of the interested party, in order to provide the restitution of material or moral prejudice of lawful interests caused by an administrative decision. A general time-limit for an administrative appeal is not set in the Code for simple administrative appeals. Special administrative appeals may be lodged, when provided by special provisions, in which case the time-limit for such an action is the one provided by the law and has to be mentioned in the administrative decision. Generally, annulment may occur in respect of legality of the administrative decision, but the review of the administrative decision may extent to the merits of the case issues (Auby, 2014, pp. 241-242).

4.5. North Macedonia

The general Administrative Procedure act adopted in July 2015 and published in the Official Gazette of the former Yugoslav Republic of Macedonia no. 124/15, proclaims the principle of the validity of the administrative decision, which means the irrevocability of the decision by the public authority or permissibility to be annulled or amended only in cases determined by law. According to Pavlovska-Daneva & Davitkovska (2017, p. 274) these rather drastic stability measures are prescribed primarily in order to protect the beneficiary from revocation of the decision by the public authority that issued it and to prevent the party from initiating a retrial on the same subject. It is considered that this principle contains the protection of the acquired rights of the party. The theory differentiates between material and formal validity. The first refers to a ban on the public authority revoking the act, and formal validity is an obstacle for the parties to challenge the act using legal remedies.

4.6. Slovenia

According to the General Administrative Procedure Act published in the Official Gazette of the Republic of Slovenia no. 24/2009, the effects of an administrative decision may be terminated as a result of an administrative appeal or *ex officio* (Art. 260-280). The power of the administration to „remedy" *ex officio* is considered an exceptional one, due to the principle of the stability of the „acquired rights". The annulment *ab initio* of a decision is part of the supervisory right (Art. 274). This is regarded as „a tool for the line ministries (or supervisory bodies superior to those issuing the decision) to ensure legality in a certain area" and the right exists even if the law does not explicitly define the competent authority (e.g. the supervisory right over an inter-ministerial commission is held by the Government and that over the information commissioner by the National Assembly) (Koprić, et al., 2016, p. 129). The procedure can be initiated both *ex officio* and at the request of the party. The state prosecutor, the state attorney, or an inspector may also ask for the initiation of the procedure. The decision can be annulled *ab initio* within five years, or within one year from issuing in cases of violation of jurisdiction (subject matter, territorial, collective decision) or interferences with substantive finality (a different decision is issued in the same matter). The supervisory body can also annul a decision in the event of evident violation of substantive regulation.

Extraordinary annulment is possible where the execution of a given right interferes with the public interest. Extraordinary annulment is carried out by the supervisory body. The party who thus lost its legally granted right has the right to compensation.

4.7. Conclusions regarding the comparative study

A brief consideration of the legislation of the Balkan countries aforementioned shows that there are rules for terminating the effects of single-case administrative decisions, but the rules regarding the competent administrative authorities, reasons, effects of revocation or annulment are different, as are the time limits to exercise this power and the obligations of the administrative bodies to compensate the damage caused by revocation. The balance usually considered is between the principle of stability of legal relations and the principle of legality of the activity of public administration. In order to keep the balance, different types of rules concerning the reasons for revoking a single-case administrative decision and the time limit to do so are combined. For strengthening the principle of stability of legal relations, in some legal systems the revocation is considered basically inadmissible (North Macedonia) or revocation with *ex nunc* effects is considered to be the remedy if the beneficiary of the revoked decision was in good faith (Albania) or only if the party, which on the basis of that decision acquired that right, agrees to it and if the right of a third person is not violated by this (Bosnia and Herzegovina). Situations that occur after the issuing of a single-case administrative decision, such as protecting the public interest or noncomplying with the obligations linked to the issuing of administrative act may be reasons for revoking single-case administrative decisions according to the law (Albania, Bosnia and Hertzegovina, Croatia, Slovenia).

5. GENERAL CONCLUSIONS

Analysing the possibilities of the administrative bodies to terminate the effects of single-case (individual) administrative decision in the legislation of the Balkan countries aforementioned and Romania, we can say that there is an evident will of the countries to adopt legislation in accordance with democratic principles. The possibilities of the administration *ex officio* to terminate the effects of single-case (individual) administrative decisions differ significantly in the analysed legislations, from a right to do so in almost any situation (like the Romanian legislation) to an exceptional situation (the Slovenian legislation). Predictability and stability of legal relations are insured by providing a limited number of situations where the effects of unlawful or lawful decisions may be terminated by the administrative bodies. Such possibilities may be used *ex officio* or following an administrative appeal. The power of terminating the effects of an administrative decision belongs to the issuing authority or to another authority which has supervisory attributions upon the issuing body. Unlawful single-case (individual) administrative decisions are generally annulled. The termination of the effects of a single-case (individual) administrative decision may be a sanction, if the beneficiary of the decision failed to comply with the duties attached to the decision or failed to comply with them within the set time-limit. In most cases, the possibility to annul, or *ex officio* revoke a single-case (individual) administrative decision has a time-limit (years) in most cases, which, however, can exceed the time-limit for appealing the decision. A lawful single-case (individual) administrative decision may be revoked for reasons of public interest and the beneficiary is entitled to compensation in such cases.

Many of these rules are not to be found in the Romanian administrative procedure rules set out for the moment by the doctrine and case-law, such as the time limit for the *ex officio* revocation of a single-case (individual) administrative decision or the right to compensation in case of the revocation of a lawful decision. The Project for the Code of Administrative Procedure, on the other hand, provides stricter rules than the ones found in the surrounding Balkan area, such as the possibility of the administration to revoke single-case (individual) administrative decisions only on grounds related to legality and only withing the time-limit for appeal, even if the verification of the decision is done *ex officio*. Such rules, in our opinion are drifting away from the goal of aligning Romanian legislation to the European trend. However, mentioning clearly the situations when an administrative body may terminate the effects of single-case (individual) administrative decisions appears a much better solution that the one set in the ReNEUAL Model Rules where the possibility to withdraw an illegal decision should be analysed in connection with the extent to which a party has a legitimate expectation that the decision was lawful and the extent to which the party has relied on it, which may lead to insecurity in legal relations. Of course, there are many principles to balance, the general interest of maintaining only the effects of legal decisions and the stability of legal relations being only two of them. Legislation may be continuously improved in accordance with the manner the public administration respects the main rules for its conduct.

REFERENCES

Anghene, M., 1958. *Elemente de drept administrativ.* Bucharest: Editura Ştiinţifică.

Anon., 2004. Proiectul Codului de procedură administrativă. *Revista de drept public*, Issue 4, pp. 25-54.

Auby, J.-B., ed., 2014. The Grrek Administrative Procedure Code. În: *Codification of Administrative procedure.* Bruxelles: Bruylant, pp. 236-244.

Drăganu, T., 1959. *Actele de drept administrativ.* Bucharest: Editura ştiinţifică.

Fodor, E.-M., 2016. About three administrative procedure rules from a human rights perspective. *Law Review*, 20 December, 6(Special Issue), pp. 218-238. http://www.internationallawreview.eu/fisiere/pdf/Law-review_nunar_special_2017_PAGINAT_Fodor.pdf, 12.6.2020.

Fodor, E.-M., 2017. *Drept administrativ.* Cluj-Napoca: Albastra.

Foillard, P., 2009. *Droit administratif.* Orléans: Éditions Paradigme.

Ghimpu, S., 1985. *Dreptul muncii.* Bucharest: Editura didactică şi pedagogică.

HCCJ, 2008. Decision no. 205 from 22nd January 2008. In: *Jurisprudenţa Secţiei de contencios administrativ şi fiscal pe anul 2008, semestrul I.* Bucharest: Hamangiu.

Hofmann, H., Schneider, J.-P. & Ziller, J., ed., 2014. *The ReNEUAL Model Rules.* www.reneual.eu, 1.9.2020.

Ionescu, R., 1970. *Drept administrativ.* Bucharest: Editura Didactică şi Pedagogică.

Iorgovan, A., 2001. *Tratat de drept administrativ.* Bucharest: All Beck.

Iovănaş, I., 1997. *Drept administrativ.* Arad: Servo-Sat.

Koprić, I., Kovač, P., Đulabić, V. & Džinić, J., 2016. *Legal Remedies in Administrative Procedures in Western Balkans,* s.l.: Regional School of Public Administration (ReSPA), https://www.respaweb.eu/11/library, 19.7.2020.

Pavlovska-Daneva, A. & Davitkovska, E., 2017. The Macedonian General Administrative Procedure Act: Between Tradition and Modernisation. *Croatian and comparative public administration*, 17(2), pp. 263-290, https://hrcak.srce.hr/183530, 18.7.2020.

Petrescu, R.-N., 1997. *Drept administrativ.* 2 ed. Cluj-Napoca: Cordial Lex.

Petrescu, R.-N., 2004. *Drept administrativ.* Cluj-Napoca: Accent.

Popescu, C.-L., 2000. *Protecţia internaţională a drepturilor omului - surse, instituţii, proceduri.* Bucharest: All Beck.

Rivero, J. & Waline, J., 2004. *Droit administratif.* 20th ed. Paris: Dalloz.

Santai, I., 2011. *Drept administrativ şi ştiinţa administraţiei.* Sibiu: Alma Mater.

SIGMA, *Legal comentary by SIGMA on the Code of Administrative Procedure of the Republic of Albania*, 2018. http://www.sigmaweb.org/publications/Legal-Commentary-by-SIGMA-on-the-Code-of-Administrative-Procedures-of-the-Republic-of-Albania-April-2018-edition.pdf, 13.10.2020.

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JUDGMENT ENFORCEMENT IN WESTERN BALKANS

The paper wishes to analyse the similarities and the differences in judgment enforcement practices existing in the Western Balkans region (Albania, Bosnia and Herzegovina, Northern Macedonia, Montenegro, Serbia). In its first section, the paper presents alternatives in the enforcement formation stage, listing varieties in national enforcement title catalogues, as well as scrutinizing the legal nature and legal effects embodied by a writ of enforcement, or its absence. The second section deals with the enforcement implementation stage, presenting applicable enforcement assets (personal, real, or intellectual property, receivables, negotiable instruments, various ownership interests, freezing order). In addition, the paper analyses the statutory absence of the gradus executionis principle, though its reflections can still be traced in manners enforcement is implemented in the region. In its last section, the paper deals with different national enforcement agent structures. Having in mind that almost all Western Balkans jurisdictions (except Bosnia and Herzegovina) have recently introduced the French (even Napoleonic) concept of a self-employed judicial officer (huissier de justice), the paper also presents their prerogatives and connections with state administration.

Keywords: judgment enforcement, Western Balkans, writ of enforcement, means of enforcement, enforcement agent

1. INTRODUCTION

More than two decades ago, the European Court of Human Rights (ECoHR) defined 'fair and efficient enforcement' as an integral part of the human rights catalogue as specified by the famous 1950 Convention. In its flagship *Hornsby*[316]case, ECoHR found that a *right to a fair trial*, as stipulated in Art. 6 of the European Convention, would be "illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. […] Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6".[317]

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[316] *Hornsby v Greece*, 1997.

[317] *Hornsby v Greece*, 1997, point 40.

A dilemma whether a country has violated Art. 6 of the Convention only when failing to provide fair and efficient enforcement based on a court judgment, having in mind that in many jurisdictions a number of enforcement titles are not judicial in nature (e.g. bills of exchange, notarial instruments), was resolved not longer than just a year later. In the 1998 *Estima Jorge v Portugal* case, ECoHR adjudicated that an enforcement proceeding initiated by a notarial deed of mortgage, regardless of the fact that it is not judicial in nature, falls within the *right to a fair trial* requirement. The Court has specifically declared that irrespective of whether the authority to enforce takes the form of a judgment or a notarial deed, "[c]onformity with the spirit of the Convention requires that the word '*contestation*' (dispute) should not be construed too technically and that it should be given a substantive rather than a formal meaning".[318]

This approach led to the creation of a number of legal instruments dealing with enforcement within the European legal orbit, administered by its two most prominent entities: the Council of Europe and the European Union. The former went even as far as establishing its specialized body, *Commission for the efficiency of justice* (CEPEJ), whose objective is related to monitoring the efficiency enforcement procedures generatein the Council of Europe member states.

The ongoing pan-European integration processes, advanced notably by the fall of the Berlin Wall, had a further influence on cross-border enforcement on the Old Continent. It was clear that the "Four Freedoms" blueprint, one of vital EU aspirations, would be extremely difficult to achieve without creating clear legal mechanisms for cross-border enforcement within the internal market. For this reason, *acquis communautaire* at its early stages established the so-called Brussels Regime, i.e. a number of legal instruments aimed at enhancing cross-border justice within the EU.[319]

The Western Balkans region, being focused on becoming an integral part of the European Union, has been trying for a number of years to establish a legal framework that would secure fair and efficient enforcement, as defined by the Council of Europe regulations. (Albania became a CoE member in 1995, Bosnia and Herzegovina in 2002, Northern Macedonia in 1995, Montenegro in 2007 and Serbia in 2006 – the last two countries had previously been a CoE member as the State Union of Serbia and Montenegro since 3 April 2003).

Since the prevailing part of the region (except Albania) shares a common Yugoslav legal heritage (Bosnia and Herzegovina, Northern Macedonia, Montenegro and Serbia), challenges associated with the enforcement system reform were relatively common. A universal Yugoslav judgment enforcement regulation was put in practice at the beginning of 1938, based on its first consolidated *Enforcement and Security Interests Act* (Zakon o izvršenju i obezbeđenju). This Act introduced the Austrian model of court-focused enforcement on the territory of the whole state, replacing previous provincial differences.[320]

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[318] *Estima Jorge v Portugal* 1998, point 37.

[319] Brussels Regime: Brussels Convention (1968), Lugano Convention (1988), Brussels I Regulation (2001), Lugano convention (2007), Brussels I Regulation – recast (2012).

[320] The former Austrian parts of Yugoslavia (Slovenia, Dalmatia) together with Croatia (a separate kingdom within the Kingdom of Hungary) and Bosnia and Herzegovina (a condominium under joint control of Austria and Hungary) had an approximately similar court-focused enforcement, with some prerogatives of notaries in

The later (post-World War II) 1974 Yugoslav federal *Enforcement Procedure Act* upheld the practice of court-focused enforcement procedure. Following the dissolution of the country in the 1990s, newly independent former Yugoslav states initially continued with the predominantly court-focused enforcement resulting in a significant backlog of enforcement files. Correspondingly, substantial reforms of enforcement systems were carried out in almost all post-Yugoslav jurisdictions.

Albania belongs to the group of European jurisdictions that has not enacted separate enforcement legislation. Its enforcement regulations are an integral part of the Albanian Code of Civil Procedure (Sections IV and VI).[321]Enforcement implementation, similar to the earlier Soviet method, is carried out by state officers belonging to a separate enforcement structure, under the supervision of the Ministry of Justice.

At present, in almost all Western Balkans jurisdictions (except Bosnia and Herzegovina), enforcement can or must be carried out by self-employed judicial officers. With respect to the structure of Bosnia and Herzegovina, enforcement legislation in this country is enacted on sub-national levels (with separate enforcement statutes of the Republic of Srpska, the Federation of B&H, and the District of Brčko).

2. ENFORCEMENT FORMATION

2.1 Enforcement title

Enforcement procedure is initiated subject to a valid enforcement title being held by the claimant. An enforcement title can be judicial or non-judicial in origin.

Each jurisdiction based on former Yugoslav legislation shares a common subdivision of enforcement titles into two principal categories: 'enforceable instruments' (*izvršna isprava*) and 'authentic instruments' (*verodostojna isprava*). The difference between these two categories rests on dissimilarities of legal effects a possible appeal filed by a defendant (a so-called enforcement debtor) can create. Should a defendant object an enforcement procedure deriving on an authentic instrument, in many cases the court will initiate a separate litigation in order to judicially resolve the debtor-creditor relations between the parties, resulting a stay of enforcement.

A list of enforceable instruments (*izvršna isprava*) in a majority of post-Yugoslav jurisdictions can be defined to an extent as judicial in nature; namely an enforceable instrument cannot originate from the parties, but only from competent institutions (courts and related public officials, e.g. notaries, judicial officers, state and local government authorities). Enforceable instruments are judgments, court orders and court settlements, pecuniary orders issued by state public officials, notarial enforcement titles, etc.

Croatia.Enforcement in former Hungarian parts (Vojvodina, Međimurje County) was conducted by self-employed private enforcement officers established in 1871 (modelled after the Napoleonic *huissiers de justice*).In former Kingdom of Serbia and Kingdom of Montenegro enforcement procedure was implemented exclusively by the police.

[321] European jurisdictions that have maintained enforcement as chapters in their civil procedure codes include Lithuania, Luxembourg, Belgium, Greece, Bulgaria, etc.

The only exception in the region, in regard to the nature of enforceable instruments, is found in Serbia. Distinctively, since 2011 its legislation has defined a number of clearly private documents as enforceable instruments (in specie: a mortgage contract, a mortgage deed, and a certified copy of an entry from a National chattel charge register). A common criterion regarding the listed private documents is that all of them belong to the group of voluntary liens.

Authentic instruments (*verodostojna isprava*) are a selection of private documents (they originate from the parties themselves) bearing a certain level of validity with respect to the existence of an enforceable monetary claim. Authentic instruments were introduced into the Yugoslav enforcement legislation in 1974, initially as a possibility limited only to commercial transactions between businesses. The original list of authentic instruments was limited to not more than three: invoice, bill of exchange[322], and cheque.[323]

Subsequent changes in Yugoslav and national legislations of succeeding independent jurisdictions (Bosnia and Herzegovina, Northern Macedonia, Montenegro, Serbia), extended the scope of implementation possibilities authentic instruments subsume in enforcement. First of all, their applicability was expanded to all debtor-creditor relations, irrespective of whether they are commercial (B2B) or personal in nature (B2C), including even those between individuals. Also, the initial list of three statutory authentic instruments has been broadened. Bosnian and Northern Macedonian jurisdictions have not added much to the basic list, extending it only with bookkeeping records of utility companies for services provided to the general public (like water, sewage, electricity, heating, telephone and internet, public parking). The Republic of Srpska legislation has also included their National Bar Association's book debts on lawyers' membership fees.

Northern Macedonian legislation sets forth two types of authentic instruments: those which can eventually effectuate enforcement (invoice, bill of exchange, cheque, bookkeeping records of financial institutions – banks, credit unions, insurance and hire purchase corporations), and those leading to amicable debt collection (utility accounts up to a certain claim value – approximately €30 for water, sewage, telephone, cable TV, and €100 for heating and electricity).

Serbian and Montenegrin legislations have widened the initial list of authentic instruments to a much greater extent than other jurisdictions in the region. Apart from accounting tools that define utility based pecuniary liabilities used in all post-Yugoslav jurisdictions, Serbian and Montenegrin statutory lists of authentic instruments bearing legal capacity to initiate enforcement include bonds, letters of credit, bank guarantees, certified written statements issued by defendants authorising their banks to transfer funds to nominated claimants, interest rate calculations supported with evidence on principal and its maturity, certified construction specifications on final or on-going work completion, etc. Serbian legislation has enlarged this comprehensive list with three additional documents: those defining duties with respect to the National Broadcasting Corporation, attorneys' fee calculations and any public document setting forth a pecuniary

322 In this paper the term 'bill of exchange' also includes a promissory note.

323 Article 21 of the 1974 Yugoslav *Enforcement Procedure Act*.

obligation. Montenegrin legislation adds only one specific authentic instrument: statement of accounts executed (signed) by both parties (claimant and defendant).

Albanian legislation does not contain stratifications similar to that of post-Yugoslav jurisdictions in respect of its enforcement titles (enforceable vs. authentic instruments). Article 510 of the Albanian *Civil Procedure Code* (Kodi i Procedurës Civile) in seven points (a-e) sets forth its variety of enforcement titles (titujtekzekutivë). These include final decisions of civil courts containing an obligation, defining a security interest or allowing temporary enforcement, irrevocable decisions of criminal courts dealing with property rights, decisions of domestic and foreign arbitral tribunals (subject to accordance with relevant Albanian legislation on the latter), notary instruments containing monetary obligations, documents related to bank loans, bills of exchange, cheques, and similar financial instruments.

All Western Balkans legislations resort to an open ending provision stipulating that a directory of enforcement titles can be extended by any instrument defined as such by other statutes. For example, Northern Macedonian list of authentic instruments bearing legal capacity to initiate enforcement is defined in their Notaries Act. In Serbia, an additional enforceable instrument is set forth in the Employment Act (employer payroll calculation).

2.2 Writ of enforcement

Enforcement procedure in Western Balkans jurisdictions can be subdivided into two major consecutive stages: 1) enforcement formation and 2) enforcement implementation.

Enforcement formation is the initial phase of enforcement whose primary component is the issuance of a separate document – the writ of enforcement.[324] A writ of enforcement is (usually) rendered by a court, subject to examination whether the claimant requesting enforcement holds a valid enforcement title. Enforcement procedure is characterised by a somewhat particular principle of formal legality, whose major distinction is that a writ of enforcement is bound (or limited) to claims and parties already set forth in the enforcement title.

Consequently, a defendant aspiring to challenge a writ of enforcement, due to the abovementioned principle, can usually resort only to two major objections: the invalidity of the enforcement title, or the fact that the claim is premature or it has already been cleared (paid). Formerly, the second stage of enforcement (implementation) could begin only after the writ of enforcement becomes final, that is only after a possible appeal filed by the defendant has been examined by the competent court. Nowadays, Western Balkans legal systems tend to give more weight to the enforcement title itself, meaning that in a number of cases, an appeal filed by a defendant would not result in stay of enforcement. This approach led to a significant procedural advancement, that is the shift from enforcement formation to enforcement implementation became much more straightforward.

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[324] In this paper, the phrase *writ of enforcement* is used in order to denote a specific court decision found in a number of civil jurisdictions used in order to initiate an enforcement procedure (Albanian: *urdhriiekzekutimit*, Serbian: *rešenje o izvršenju*).

Post-Yugoslav jurisdictions implement a specific distinction in writs of enforcement depending whether it is rendered based on an enforceable instrument (*izvršna isprava*), or an authentic instrument (*verodostojna isprava*). In the former case, a writ of enforcement shall only contain a court order permitting the requested enforcement. In the latter, a writ of enforcement would first mandate the defendant to satisfy the claim in a statutory period of 8 days, and should a defendant fail to comply, enforcement is instituted automatically.

The most far-out regulatory change in the region in this respect has been introduced by the Northern Macedonian legislation. Enforcement initiation in that jurisdiction is not defined by a writ of enforcement (which has been omitted), but by a motion filed by a claimant supported with a valid enforceable instrument (*izvršna isprava*), resulting in an automatic outset of the enforcement implementation stage.[325]Should a claimant hold an authentic instrument (*verodostojna isprava*), it is filed with a notary who issues a payment order which, if uncontested, becomes an enforceable instrument.

Montenegrin legislation, though, has not gone so far as to abolish a separate writ of enforcement, yet nevertheless bears certain distinctiveness in respect of other Western Balkans jurisdictions. Namely, in predominant number of cases a writ of enforcement is not rendered by a court, but by a self-employed judicial officer (*javni izvršitelj*).

In the remaining Western Balkans jurisdictions, a writ of enforcement is issued only by courts, with the exception of Serbia, where self-employed judicial officers (*javni izvršitelj*) render writs of enforcement in utility related claims, and in claims against the State or its subordinate agent. In Albanian and Bosnian jurisdictions, a writ of enforcement can be rendered only by a competent court.

In Albania, a writ of enforcement is issued in only one copy (a duplicate may be made based on a special request filed by the creditor),which the claimant files with the enforcement agent. Also, a writ of enforcement shall not be rendered in respect of court fines and court fees, or court orders for taking of evidence. In these situations, enforcement is initiated when a notice of such court decision has been served to the defendant by an enforcement agent.

2.3 Available remedies and their legal effect

In a majority of post-Yugoslav jurisdictions, a defendant may challenge a writ of enforcement filing an objection (*prigovor*). An appeal (žalba) can be used only in a limited number of situations.

In Montenegro, an objection will be examined by a panel of three first-instance court judges. In general, should an objection be filed against a writ of enforcement based on an enforceable instrument (*izvršna isprava*) it does not result in stay of enforcement. If the objection is deposited against a writ of enforcement based on an authentic instrument (*verodostojna isprava*), it results in stay of enforcement (except for bills of exchange).

In Bosnian jurisdictions (the Federation of B&H, the Brčko District and the Republic of Srpska) a writ of enforcement is challenged by an objection which can be examined

[325] Similar practices can be found in other European jurisdictions as well (e.g. France).

by a first-instance court and in some cases by a court of appeal. If filed, an objection in general does not result in stay of enforcement.

In Serbia, a defendant may protest against a writ of enforcement by means of appeal (žalba) and objection (*prigovor*). An appeal is filed opposed to a writ of enforcement based on an enforceable instrument (*izvršna isprava*), and is examined by a second-instance court. If filed, an appeal does not induce stay of enforcement. An objection filed against writs of enforcement rendered upon authentic instruments (*verodostojna isprava*) result in automatic stay of enforcement (save in situations when the writ of enforcement is based on a bill of exchange). It is examined by a panel of three first-instance court judges. If not satisfied with the first-instance ruling, a defendant may oppose this decision with an appeal falling within the competence of a second-instance court.

In Northern Macedonia a defendant may oppose enforcement by means of an objection (*prigovor*) arguing that enforcement is unlawful, or that a judicial officer has committed irregularities in his actions. This atypical scope of available remedies (different from prevailing appeal-like motions) rests on the fact that Northern Macedonian legislation has omitted writs of enforcement, and a defendant may only challenge enforcement after its implementation has already commenced. The ruling of the first-instance court may be disputed by an appeal (žalba) examined by a court of appeal.

In Albania, a defendant has a statutory period of 30 days upon receiving the enforcement notice to file a separate request asserting that the enforcement title is invalid, that the duty ceased to exist or that it has been reduced (*pavlefshmëria e titullitekzekutiv*). In these cases, the court may decide to put the enforcement title aside and suspend its implementation with or without a monetary guarantee.

In situations when the enforcement title is a security interest created on behalf of a bank or another financial institution used to obtain a loan, the court may decide to order a stay of enforcement, but in these situations amonetary guarantee is mandatory, and the suspension period cannot extend 3 months.

The court examines the suspension motion within 5 days, and its decision is subject to an appeal. A court of appeal shall examine such motion within 30 days from the date of its filing in this court. A second-stage decision can also be challenged by a special appeal which has to be adjudicated upon within a statutory sixty-days period.

3. ENFORCEMENT IMPLEMENTATION

Second consecutive stage of the enforcement procedure is enforcement implementation. Commonly, this phase used to be introduced after the writ of enforcement had become final, that is when all regular appeal instances were or could be exploited. Nowadays, the majority of remedies available to defendants in enforcement do not eventuate in stay of enforcement, meaning that enforcement measures can be imposed almost simultaneously with the issuance of a writ of enforcement.

Enforcement implementation, put simply, is a group of compelling measures inflicted on a defendant (enforcement debtor), or more precisely: defendant's assets, activated in order to satisfy the claim defined in the enforcement title, considering the debtor's

unwillingness to comply voluntarily. In all of Western Balkans jurisdictions enforcement measures are somewhat complementary. They include auctioning defendant's moveable, immovable or intellectual property, ordering attachments on a defendant's income (wage, salary or pension garnishment) or other assets owed to the defendant by third parties, freezing bank accounts, or sale of defendant's securities (tradable financial assets like shares, bonds, debentures, etc.).

In all post-Yugoslav jurisdictions enforcement implementation is induced simultaneously with the issuance of the writ of enforcement whenever it is rendered based on an enforceable instrument (*izvršna isprava*). Any of the enforcement measures defined by the writ of enforcement can automatically be put into motion, and the defendant is compelled to respect them. In other words, an enforcement agent is in a position to automatically perform all the necessary enforcement steps, like seizure of defendant's movable, immovable or intellectual property, enact garnishment and attachment orders, freeze the defendant's bank accounts, etc.

In Bosnian jurisdictions (the Federation of B&H, the Brčko District and the Republic of Srpska), if performed enforcement measures result in money collection, accrued funds are not to be transferred to the claimant before the writ of enforcement becomes final.

When the writ of enforcement is based on an authentic instrument (*verodostojna isprava*) enforcement implementation is not possible before it becomes final. The only exception in this respect is enforcement based on bills of exchange when an objection or an appeal does not induce stay of enforcement.

In Northern Macedonia, having in mind that this jurisdiction has omitted the writ of enforcement, enforcement implementation is commenced when the claimant has filed his request for enforcement with the competent judicial officer (*izvršitel*).

In Albania, the enforcement implementation stage is initiated after the claimant has filed a specific request with the enforcement agent (state or self-employed) seeking enforcement implementation. To this motion, a claimant has to attach the corresponding enforcement title and the writ of enforcement. An enforcement agent has a statutory duty to commence the procedure within 15 days from the date when the request was filed. Similar legislative framework exited in Serbia from 2011 to 2016, in the initial period of the then newly introduced self-employed judicial officers. A claimant holding the writ of enforcement had to file a separate request for enforcement implementation to the judicial officer of his choice. The 2015 changes of the Serbian enforcement legislation abolished this two-fold enforcement structure.

Upon receiving a separate request from the creditor, an enforcement agent in Albania invites the debtor to satisfy the claim defined in the writ of enforcement within 5 or 10 days. If a defendant suggests payment in instalments, subject to claimant's unequivocal consent, an enforcement agent may allow such payments. If such motion was not filed by the defendant, or it was not agreed on by the claimant, after the statutory period of 5 or 10 days, enforcement implementation is initiated.

In all Western Balkans jurisdictions enforcement measures necessary for satisfying the claim can be implemented chronologically (one by one) or simultaneously more of them at once (e.g. auction of the defendant's moveable property combined with salary

garnishment). The officer in charge (judge or an enforcement agent) is required to resort to enforcement measures being most advantageous for both parties, that is, that will result in fair and efficient enforcement.

Western Balkans jurisdictions in their enforcement implementation do not use the Germanic *gradus executionis* principle in which enforcement measures are to be introduced in a pre-defined sequence (e.g. initially auctioning movables, if unsuccessful, putting attachment on receivables, and finally if both unsuccessful run public sale of immovable property). This concept can be traced to the very roots of European legal history, as far as Roman law. For example, one of eminent historical English legal documents, *Magna Carta*, in its point 9 sets forth the sovereign's promise that "Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt." Such mandatory progression in imposed enforcement measures has been set aside in a majority of European jurisdictions.

4. ENFORCEMENT OFFICIALS

Enforcement procedure in the Western Balkans is judicial in nature. The central role in enforcement is committed to civil courts. This role is predominantly visible in the enforcement formation stage, having in mind that, with the exception of Montenegro, Northern Macedonia, and to a certain extent Serbia, all of the Western Balkans jurisdictions legislate that a writ of enforcement has to be rendered by a competent court. Northern Macedonian singularity rests on the fact that their regulators have decided to omit writs of enforcement, while the Montenegrin inconsistency is found on writ of enforcement rendering prerogatives being transferred to their judicial officers (*javni izvršitelj*).

In Northern Macedonia, a special role is given to notaries whose statutory authority is to issue payment orders based on authentic instruments which, if uncontested, become enforceable instruments. Serbian judicial officers (*javni izvršitelj*) are empowered to issue writs of enforcement for utility debts and claims against the State.

Nevertheless, the enlisted dispensation of similar legal capacities between courts, notaries and judicial officers in respect of writs of enforcement do not in any way reduce the central role that a court has in enforcement. Bearing in mind that due to the already mentioned formal legality principle writs of enforcement are based on previously set debtor-creditor relations (as defined in enforcement titles), prerogatives transferred to other officials are not without clear legal justification. If uncontested, a writ of enforcement is no more than a simple verification of a legal liaison already existing between the parties, meaning that there is no dispute to resolve.

On the other hand, if challenged, the final adjudication of objections, appeals and other available remedies is entrusted to the exclusive competence of courts. Likewise, in the enforcement implementation stage, any motion filed by the parties or other participants in enforcement related to alleged irregularities in enforcement procedure are finally decided by competent courts.

Actual enforcement actions, similar to the general European practice, are never carried out by judges or magistrates, but by particular court or self-employed officials. In

all of the Western Balkans jurisdictions, with the exception of Bosnia and Herzegovina, enforcement procedures are solely or predominantly (Albania) performed by self-employed judicial officers, modelled after the Napoleonic concept of *huissiers de justice*. These legal professionals were introduced in the region in 2006 with their inauguration in Northern Macedonia. In subsequent years this judicial profession was instituted in Albania (2010), Serbia (2012) and Montenegro (2013). In all of these jurisdictions, with the exception of Albania, judicial officers are the only officials authorised to carry out enforcement measures.

In Bosnian jurisdictions, the enforcement implementation stage is still carried out exclusively by courts and their in-house personnel. This approach remains from the common former Yugoslav enforcement system, which was based on the Austrian *Gerichtsvollziehe r*concept. However, recent changes in Bosnian enforcement legislations have introduced specific 'enforcement officers by contract' (commissioned or outsourced enforcement agents) with prerogatives only in utility-based claims, and which are in a position to implement enforcement measures purely on defendant's moveable property.

5. CONCLUSION

The significance of judgment enforcement in civil law corresponds with the gravity penal sanctions bear within the criminal justice system. A probability of successful neglect of judgments, injunctions, court orders, or other enforcement titles inevitably imposes critical consequences to a given society and its economy. Though an enforcement debtor is not a thief, the very prospect of achievable disrespect regarding mature civil obligations, taken from the angle of a non-breaching party, result in somewhat similar proprietary effects.

Efficient and fair enforcement has been recognized as a vital part of *a right to a fair trial*, as defined in Art. 6 of the European Convention on Human Rights. The Council of Europe and the European Union, both separately and in cooperation, have created a number of legal instruments and mechanisms aimed at effectuating enforcement that is adequate to satisfy valid expectations of creditors while safeguarding the protective rights of debtors.

Western Balkans jurisdictions have been active in adjusting their national regulative frameworks aiming to achieve European standards in enforcement. In this respect significant changes have already been made. Abolishment of inessential appeal and objection possibilities, limited opportunities of the stay of enforcement remedy, as well as the introduction of self-employed judicial officers are some of the most striking examples.

Improvements achieved on national levels should now be advanced to the arena of cross-border enforcement. The out-of-date *exequatur* requirement, a clear symbol of a Cold War Europe, has to take its honourable place in regional legal museums. International, or supranational possibilities that have been existing in European cross-border enforcement for many years now, enacted by the Brussels Regime, should became a new legal standard in the Western Balkans as well. Instruments like 'Balkan Enforcement Order', 'Balkan Payment Order', or similar legal mechanisms drafted after their senior European siblings, can be developed quite easily.

It seems that the initial stage of such regional cross-border enforcement cooperation should be used only in commercial transactions. After a period of careful scrutiny

and implementation analysis, regional regulators would be in a position to advance implementation of such mechanisms by extending their applicability on other debtor-creditor relations.

Examples of current regional cross-border enforcement cooperation show that Europe has already gone beyond established legal channels. As an illustration, we can indicate Finland and Estonia, two neighbouring countries that have, for some time now, been exchanging public residence registers of their citizens on a weekly basis. This practice resulted in a clear possibility for authorised officials of these two jurisdictions to directly access official public information on defendants' place of residence and thus significantly reduce somewhat complicated cross-border service of documents procedure. In the modern *post-Checkpoint Charlie* world, such cooperation is not just feasible, but also extremely important.

List of references

Books, articles

Fricero, N., Payan, G., 2014, *Le droit à l'exécutionet le droit de la notification et de la signification dans la jurisprudence européenne*. Paris: UIHJ Publishing.

Isnard, J., *et al.*, 2002, *Hostiarii*, Paris :Éditions Juridiques et techiques.

Kruse, J., 2009, *Law of Seizure of Goods*, Ringwood :Hammicks Legal Publishing.

Latković, V., 2019.Javnoizvršiteljska služba – povodom pet godina rada javnih izvršitelja. *Pravnizbornik*. No. 3/2019.Pogdorica: Udruženje pravnika Crne Gore. pp. 333-348.

Latković, V., 2020.Izvršenje na nepokretnosti. *Pravni zbornik* No. 1/2020. Pogdorica: Udruženje pravnika Crne Gore. pp. 297-324.

Payan, G., 2017, *Efficasité de l'exécution des décisions de justice dans la monde*, Paris : UIHJ Publishing.

Podkonicky, J., 2014. Problematic issues of sale of seized assets of the debtor: the differences in the countries of the Balkan region. In: Parfenchikov, A., and Gureev, V., (eds.), *Modern problems of foreclosure on the debtor's property and the ways of their solution*. Moscow: Ural State University, pp. 328-331.

Račić, R., 2019. Sprovodivost stranih izvršnih naslova u Crnoj Gori. *Pravni zbornik*. No. 3/2019.Pogdorica:Udruženje pravnika Crne Gore. pp. 69-88.

Trešnjev, A., 2018. Od službenih lica do javnih izvršitelja. In: Šarkić, N., *et al.*, (eds.), *Četrdeset godina izvršnog zakonodavstva u građanskim postupcima, zbornik radova*, Beograd: Pravni fakultet Univerziteta Union / Službeni glasnik, pp. 295-310.

Uitdehaag, J. & Vincken, E. 2011.*Civil Enforcement in the Western Balkans*. Tirana: Balkans Enforcement Reform Project – BERP.

International regulative framework, case law

CEPEJ(2009)11E /17 décembre 2009; European Commission for the Efficiency of Justice (CEPEJ) – Guidelines for a better implementation of the existing Council of Europe's Recommendation on enforcement;

Enforcement of Court Decisions in Europe, European Commission for the Efficiency of Justice / CEPEJ (2008), Report prepared by the Research Team on enforcement of court decisions (University Nancy (France) / Swiss Institute of comparative law) and discussed by the CEPEJ-GT-EVAL at their 8th meeting;

European Commission on the efficiency of justice (CEPEJ), Guidelines for a better implementation of the existing Council of Europe's Recommendation on enforcement CEPEJ (2009) 11 REV;

Recommendation Rec(2003)17 of the Committee of Ministers to member states on enforcement, adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies.

*Hornsby v Greece*1997.ECtHR 19 March 1997, no. 18357/91.

Estima Jorge v Portugal 1998.ECtHR 21 April 1998, no. 24550/94.

Pini and Others v Romaina 2004. ECtHR 22 June 2004, no. 78030/01.

Western Balkans legislation

Kodii Procedurës Civilei Republikës Së Shqipërisë (*Miratuar me ligjin* No. 8116/1996, etc.).

Zakon o izvršenju i obezbeđenju (*Službeni glasnik Republike Srbije* br. 106/2015, etc.).

Zakon o javnim izvršiteljima (*Službeni list Crne Gore* br. 61/2011, etc.).

Zakon o izvršnom postupku (*Službeni glasnik Republike Srpske* br. 59/2003, etc.).

Zakon o izvršnom postupku Federacije BiH (*Službene novine Federacije BiH* br. 32/2003, etc.).

Zakon o izvršnom postupku Brčko distrikta Bosne i Hercegovine (*Službeni glasnik Brčko distrikta BiH* br. 39/2013, etc.).

Zakon za notarijatot (*Služben vesnik na Republika Makedonija* br.72/16, etc.).

Zakon za izvršuvanje (*Služben vesnik na Republika Makedonija* br. 72/16, etc.).

Zakon o izvršenju i obezbjeđenju (*Službeni list Crne Gore* br. 36/2011, etc.).

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