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PROCEDURAL ASPECTS OF EU LAW

Editors:
Dunja Duić
Tunjica Petrašević

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FOREWORD

„No man is an Iland, intire of it self; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any means death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; It tolls for thee.“

The above phrase was written by John Donne in his "Meditation XVII" in the 17th century. The phrase was mainstreamed by Ernest Hemingway in the mid-20th century when he chose to use a part of the quote for the title of his novel "For Whom the Bell Tolls". Today, more than ever, this phrase is identifiable with the idea of a united Europe. The Jean Monnet International Scientific Conference "Procedural aspects of EU law" takes place on the 60th anniversary of the European Union. Even though the Union is an elderly experienced "lady", it seems that on many levels the Union citizens and leaders need to be reminded of the importance of unity and solidarity – to never ask for whom the bell rings, because it rings for us.

These Conference Proceedings are one of the last outputs of the Jean Monnet Chair in EU Procedural Law (reg. no. 553095-EPP-1-2014-1-HR-EPPJMO-CHAIR) that was granted to the Faculty of Law Osijek three years ago. The Jean Monnet Chair is funded by the European Commission in the framework of the Erasmus+ Programme with the aim of encouraging professors, students and professionals to teach and research EU law and especially EU procedural law. Symbolically, this conference marks the end of the Jean Monnet Chair in EU Procedural Law, but also the beginning of the EU and comparative law issues and challenges series that aspires to pursue the scientific idea conceived by Jean Monnet Chair projects.

We take pride in the fact that in spite of the European identity and unity crisis, this Conference brought nearly 40 academics from EU Member States and candidate countries, and created a unique regional academic forum that emerged new ideas and debates. Common to all ideas on the numerous aspects of criminal, commercial, civil, consumer protection, and judicial system, international, family, international private, administrative and constitutional law are reconciliation, European ideas and values, and European Union law.

To close, these Conference Proceedings reflect European values of peace, democracy and solidarity that have been highlighted by the Rome Declaration issued on the 60th anniversary of the signing of the Treaty of Rome, wherein we are reminded that:

"We have united for the better. Europe is our common future."

Editors:

Dunja Duić
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Topic 1

EU criminal law and procedure

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ADVERSARIAL PRINCIPLE, THE EQUALITY OF ARMS AND CONFRONTATIONAL RIGHT – EUROPEAN COURT OF HUMAN RIGHTS RECENT JURISPRUDENCE

ABSTRACT

This paper deals with differences and similarities regarding three elements of the main criminal procedure principle, the right to a fair trial. In the jurisprudence of the European Court of Human Rights (ECHR) these three elements, the adversarial principle, the principle of equality of arms and confrontational right are often considered together. Recent ECHR jurisprudence changes the Court's approach slightly, but significantly. This paper will therefore show the Court's practice before and after its landmark decision in Schatschaschwili v. Germany, followed by Paić v. Croatia and Seton v. United Kingdom. Confrontational standards developed by the Court are very important to national laws and jurisprudence. The following presentation will show how Croatian criminal procedure and court practice changed based on the ECHR interpretation of the European Convention on Human Rights and Fundamental Freedoms. Since there is almost always room for improvement in the implementation of the right to a fair trial, this paper will draw attention to the main areas and directions of possible improvement of judicial practice.

Keywords: *adversarial principle, equality of arms, confrontational right*

1. INTRODUCTION

As a central principle of criminal procedure the right to a fair trial is defined in Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, November 4, 1950, ETS 5 (further in text: Convention). In Article 6 § 3 the Convention defines so called "minimum rights" of defense.[1] One of these minimal rights is the confrontational right enshrined in Article 6 § 3(d) of the Convention.[2]

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1 Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, p. 292.

2 „Everyone charged with a criminal offence has the following minimum rights: … (d) to examine or

The right to a fair trial is not "closed" because its content is open to judicial interpretation and the addition of certain other rights not enumerated in Article 6 of the Convention.[3] These other rights are also essential for a fair trial and are developed through the jurisprudence of the European Court of Human Rights (further in text: ECHR). Other components of the right to a fair trial, which at first sight are not visible in article 6 § 3(d) of the Convention, are: the right of access to the court, the right to the presence of the defendant at the hearing in the criminal proceedings (principle of immediacy), the privilege of self-incrimination, the right to adversarial proceedings and the right to a reasoned decision.[4]

The principle of equality of arms is the first right that the ECHR developed while interpreting the central principle of criminal proceedings i.e. the right to a fair trial.[5] The adversarial principle, confrontational right and equality of arms partially overlap and often in practice are considered together.[6] Sometimes one might not see the difference between them. Therefore, it is necessary to identify them and delineate.

2. EQUALITY OF ARMS

The term "equality of arms" corresponds to the German legal term "Waffengleichheit" that was first used in the proceedings before the European Commission of Human Rights. In its Report from November 23, 1962, the Commission referred to "Waffengleichheit" first as to "the principle of treatment on an ´equal footing´".[7] Later in the Report, the Commission expressed an opinion "that what is generally called ´equality of arms´, that is the procedural equality of the accused with the public prosecutor, is an inherent element of a ´fair trial´."[8] The notion

have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

3 Harris, D., O'Boyle, M. &Warbick, C., *Law of the European Convention of Human Rights*, Oxford University Press, New York, 2009, p. 306.

4 Mole, N., and Harby. C., *The Right to a fair Trial, A quide to the implementation of Article 6 of the European Convention on Human Rights, Human rights handbooks, No. 3*, URL=https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff49, Accessed 9 February 2017.

5 *Ibid.* p. *46,* Harris *et. al., op. cit.* note 3., p. 246.

6 See for instance Fedorova, M.I., *The Principle of Equality of Arms in International Criminal Proceedings,* URL=https://dspace.library.uu.nl/bitstream/handle/1874/257535/Fedorova.pdf?sequence=1. Accessed 9 February 2017, p. 45.

7 Applications lodged by Herbert Ofner (No. 524/59) and AloisHopfinger (No. 617/59) against Austria. The German term "Waffengleichheit" was used by lawyer who represented applicants, Mr. Hans Gürtler, Barrister-at-Law from Vienna. URL=http://hudoc.echr.coe.int/eng#{"sort":["kpdateAscending"],"languageisocode":["ENG"],"respondent":["AUT"],"kpthesaurus":["119"]}

8 *Ibid.* p. 78.

of "equality of arms" appeared later in other Commission's reports.[9] Finally, the ECHR accepts the term in *Neumeister v Austria*.[10] It is therefore considered that the equality of arms is a "concept that has been created by the European Court of Human Rights in the context of the right to a fair trial (Article 6)".[11] The ECHR uses the notion of equality of arms more or less consistently when they evaluate that segment of the fair trial.[12]

Equality of arms requires that each party in the proceedings be given a reasonable opportunity to present their views under conditions that will not put one party in a significantly inferior position to the opponent.[13] The principle exists also in proceedings before the International Criminal Tribunal for the former Yugoslavia and Rwanda where it is required that "the defendant must have the same position without the benefits that belongs to the prosecutor".[14]

Although this principle, as well as the adversarial principle, applies equally to both parties in the process, usually equality of arms means that "the defendant must not be deprived in their fundamental procedural rights in relation to the prosecutor".[15] This is even more important when we are considering systems where investigation is conducted by the prosecutor. It is without doubts that in that case there is no real equality between prosecutor and defendant. One may even argue that allowing full equality in that stage of criminal procedure would jeopardize effective investigation notably gathering of evidence and thus even preventing the possibility that the perpetrator is found guilty.[16] In that respect, the principle of equality of

9 *X v Austria* (1963) App. nº1418/61, NM v Austria (1964) App. nº 1936/63.

10 „The Court is inclined to take the view that such a procedure is contrary to the principle of "equality of arms" which the Commission, in several decisions and opinions, has rightly stated to be included in the notion of fair trial (procèséquitable) mentioned in Article 6 (1) (art. 6-1)."(1968) Application nº 1936/63.

11 Oxford Dictionary of Law, seventh edition, Oxford University press, New York, 2009 p. 202.

12 See for instance *Zhuk v. Ukraine*, (2010) App. nº 45783/05, par. 25: "The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."

13 *Ibid., p. 46,* Harris *et. al., op. cit.* note 3., p. 251. See also *Bulut v. Austria* (1996) App. No. 17358/90, *Foucher v. Francei* (1997) App. No. 22209/93, *Bobek v. Polandi* (2007) App. No. 68761/01.

14 Calvo-Goller, K., *The Trial Proceedings of the International Criminal Court*, Martinius Nijhof Publisher, Leiden/Boston, 2006, p. 46.

15 Ivičević-Karas, E., *Okrivljenikovo pravo da ispituje svjedoke optužbe u stadiju istrage kao važan aspect načela jednakosti oružja stranaka u kaznenom postupku,* Hrvatski ljetopis za kazneno pravo i praksu, vol. 14, No. 2, 2007, p. 1000. From the same author see also, *Načelo jednakosti oružja kao konstitutivni element prava na pravični postupak iz članka 6. Europske konvencije za zaštitu ljudskih prava I temeljnih sloboda*, Zbornik Pravnog fakulteta u Zagrebu, vol. 57, No. 4-5, 2007., pp. 761-788.

16 For instance, if we would allow full equality during the investigation, then we would not be able to gather evidence through special investigative measures (ie. different types of secret surveillance). That

arms represents the "functional principle that participants in criminal proceedings must have equal opportunities to influence its course and outcome", and superiority of the prosecutor must be offset by "effective defense capabilities".[17] Therefore we are seeking fair balance between parties considering criminal procedure as whole and not only one part of it.

3. ADVERSARIAL PRINCIPLE

In continental law the adversarial principle is often called the principle of contradiction. Contradiction is important, if not the most important feature of accusatorial procedure. Adversarial principle consists of the fact that all "procedural actions ... as far as the nature of the case permits, are performed in the presence of both parties who have the right and the possibility that during of the performance of these actions represent their interests and express their position".[18] In other words, each party should have an opportunity to contradict the opponent's allegations (evidence).[19] A known Latin maxim is often used to express this principle; *audituretaltera parts.*

4. CONFRONTATIONAL CLAUSE

The Confrontational right is one of defendant's minimum rights and is provided through the confrontational clause in Article 6 3(d) of the Convention.[20] Although the clause refers to "witnesses" which would suggest that confrontational rights applies only to witnesses as a personal evidence, that is not the case. Namely, the ECHR developed autonomous interpretation of the term "witness". According to the consistent Court's practice, all evidence that is used as a basis for conviction is considered as "witness" regardless of the terminology that is used in national laws.[21] In that sense, any document, victim or expert witness testimony should be

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would prevent investigation and adjudication of serious criminal offences. Therefore, one might say that "inequality" is allowed during investigation or to be more accurate that we are tolerate it for the sake of effectiveness of criminal procedure.

17 Krapac, D: *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, V. izmijenjeno I dopunjeno izdanje, Zagreb, 2012, p. 108.

18 *Ibid.*

19 Zlatarić, B. –Damaška, M., *Rječnik krivičnog prava I postupka*, Informator, Zagreb, 1966, p. 136.

20 "Everyone charged with a criminal offence has the following minimum rights…to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Almost the same wording is in Article 29 of Croatian Constitution. Similarly, the VI Amendment of United states of America Constitution provide that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."

21 *Isgrov.Italy* (1991) App. No 11339/85, *Vidalv. Belgium* (1992) App. No.12351/86, *Luca v.Italy* (2001) App. No. 33354/96., *Mathisen v. Norway* (2006), App. No. 18885/04 and 21166/04. For more de-

tested by the defense at least once during procedure, ideally during the trial since a trial is best place for confrontation.[22] It should be emphasized that a co-accused statement is also to be considered as "witness" and therefore included under the confrontation clause protection as long that statement is used for conviction.[23]

Therefore, we can conclude that the confrontational clause means the right of the defendant to effectively examine the witnesses against him/her at least once in the process. Ideally, this option should be at the trial because that is the best place and time for the confrontation. Nevertheless, it is possible that the confrontational right may be exercised at a time other than the trial.The ECHR is requires fulfillments of certain criteria which will be elaborated here further.

5. DIFFERENCES AND SIMILARITIES

Having in mind elaboration in previous chapters we might perceive differences and similarities between contradictory (adversarial) principle, equality of arms and confrontational right.

The contradiction refers "to certain actions in the procedure (filing the indictment, presentation of evidence, prosecution's argumentation)" and to those actions the defendant must have the opportunity to contradict them.[24] Equality of arms is the "right of a party that in any action or proceeding in any procedural stage mayput forward its position and the evidence under conditions that do not place him/her at a substantial disadvantage compared to the counterparty" which means that equality of arms has a wider scope of contradictions but narrower content.[25]

Regardless of that slight distinction, both principles refer "to the way arguments, documents, elements and evidence are presented before the court and to the characteristics of the procedures before the court."[26]

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tails see, Mrčela, M., *Svjedoci u kaznenom postupku, Ispitivanje svjedoka kao dokazna radnja*, Narodne novine, Zagreb, 2012, p. 143 et al.

22 *Ibid.*

23 *Ibid.* To establish whetherevidence was used for conviction, the ECHR established so called "sole or decisive" rule. According to that rule, an evidence was used for conviction if it was the only evidence for a conviction ("sole") or if it was so relevant that conviction without that evidence would not be possible ("decisive").

24 Krapac*, op. cit.* note 17., p. 108.

25 *Ibid.,* see also Mrčela, M., *Načelo kontradiktornosti u dokaznom postupku kao novo temeljno načelo hrvatskog kaznenog postupka,* Modernizacija prava, Knjiga 22, HAZU, Zagreb, 2014.

26 Silveira, J.T., *Equality of Arms as a Standard of Fair Trials,* URL=http://www.joaotiagosilveira.org/mediaRep/jts/files/Equality_of_Arms_Fair_Trial_Lithuania__15052015.pdf, Accessed 13 February 2017.

Adversarial principle and equality of arms are principles. Generally, both principles apply on toboth parties in criminal procedure. On the other hand, confrontation is only the right of the defendant, not the prosecutor. Still, the confrontational right is part of the adversarial principle.

Even though the adversarial principle and equality of arms generally refers to both parties, it is obvious that more attention is given to ensuring both principles regarding the defendant, and not to prosecutor. That is self-evident having in mind the advantage that prosecutors enjoy over the defense particularly during the investigation.[27]

6. ECHR CONFRONTATIONAL STANDARDS BEFORE *SCHATSCHASCHWILI V. GERMANY*[28]

It was already mentioned that ECHR often considers both the principles and confrontational right together. Since some of their elements overlaps, ECHR sometimes finds a breach of all three elements of minimal rights or only two of them (equality of arms and confrontational right). In some cases there is only a violation of confrontational right.

In any case, ECHR developed the confrontational standards that ought to be amplified in cases dealing with Article 6 3(d) of the Convention. They might be presented throughout these nine points.[29]

1. The term witness has autonomous meaning.Classification under national law is not relevant.[30] It includes all persons whose statements the national court used as evidence for conviction (victims, witnesses, expert witnesses) but also documents. The Prosecution witness is also a codefendant if his/hers statement was taken into account while establishing guilt.[31]
2. "Sole or decisive rule". Confrontational right has been violated if a conviction is based only on non-confronted (untested) evidence or if that evidence has

[27] Mrčela, M. – Bilušić, I., *Konfrontacijska mjerila,*Hrvatski ljetopis za kazneno pravo i praksu, Vol. 23, No. 2, 2016, p. 379.

[28] *Schatschaschwili v. Germany* (2015) App. No. 9154/10.

[29] Mrčela, *op. cit.* note 21, pp. 175 and 176.

[30] *Sibgatulin v. Russia* (2012) App. No. 1413/05, *S.N. v. Sweden* (2002) App. No. 34209/96.

[31] *Vidgen v. the Netherlands* (2012) App. No. 29353/06, *Isgrov.Italy* (1991) App. No 11339/85, *Luca v.Italy* (2001) App. No. 33354/96, *Doorson v. the Nehtherlands*(1996) App. No. 20524/92, *Trofimov v. Russia* (2009) App. No. 1111/02, *Romanov v. Russia* (2009) App. No. 41461/02).

significant influence in a way that conviction could not be possible without it. The rule is finally formulated in *Al-Khawaja and Tahery v. United Kingdom.*[32]

3. All the evidence against the defendant must normally be produced in his presence at a public hearing for the purpose of adversarial argument. Since that is not always possible, the confrontational right could be achieved earlier in the proceedings, especially if there is any indication that the witness will later be unavailable or that it would not be possible to question him/her at the trial. In any case, the defendant must have an adequate opportunity to examine witnesses against him/her during the proceedings.
4. The use of anonymous witnesses should be avoided. However, if that is not possible, their vulnerability or the vulnerability of their families should be objectively determined before a status of anonymity is granted. In addition, it is not enough to read their statements given in the pre-trial proceedings. The defense should be able to examine them without the presence of the public or with the use of technical means for transferring image and sound (not just audio). The use of police investigators as anonymous witnesses should be kept to a minimum and conviction should not be based solely or almost solely on their statements.
5. Regarding particularly vulnerable witnesses, victims of sexual offences, especially children, the need for their protection is higher, but not at the expense of the defendant's rights. The defendant should have the opportunity to examine these witnesses. The use of technical aids (audio-video recording) of that procedure is recommended. The fact that conviction is based only on the testimony of particularly vulnerable witnesses does not mean immediately that it is a violation of the right to a fair trial - what is important is that the defense had the opportunity to ask questions to the witness.
6. The trial court should be able to observe the behavior and expression of a witness in order to facilitate evaluation of their credibility. It is also important that the judge or competent person who examined the anonymous witness or leads his interrogation knows the identity of the witness. The record of that examination should contain the reasoning for the conclusion about the necessity of testifying as an anonymous witness and assessment of the credibility of his testimony. When evaluating this testimony the trial court should use excessive and elaborate caution.
7. Reading the statements of the previous examination of witnesses is not in itself a violation of the right to a fair trial. However, the national court must

[32] *Al-Khawaja and Tahery v. United Kingdom* (2011), App. No. 26766/05 and 22228/06.

take reasonable measures to ensure the presence of witnesses. Any Legal system which cannot secure the examination of witnesses which exclusively or predominantly was the grounds for conviction cannot be an alibi for violating the rights of the fairness of the proceedings.[33]

8. A conviction in which the defendant was not given the opportunity of questioning a witness against him, must include the reasons for the failure to provide that possibilities. Otherwise, it is violation of the rights of the defense.
9. Confrontational right is the right of the accused, not his duty. Waiver of right to ask questions to the witness of the prosecution and waiver of the right to propose evidence is possible. If so, there is no violation of confrontational clause and therefore neither violation of the right to a fair trial.

7. ECHR NEW APPROACH AFTER *SCHATSCHASCHWILI V. GERMANY*

The ECHR practice regarding confrontational right changed with *Schatschaschwili v. Germany.* In a 9 to 8 majority the ECHR introduced a change of assessing violation of confrontational right that was not tremendous but it was significant. Although the dissenters and even four of the concurring judges were not particularly thrilled with the majority decisions,[34]the new approach of assessing violation of confrontational right was followed by *Paić v. Croatia*[35] and *Seton v. United Kingdom.*[36]

In *Schatschaschwili*the ECHR did not depart from the previous practice which was reinforced in *Al-Khawaja and Tahery v. United Kingdom*(performing three-part test, so called "Al-Khawaya test"). The first part of the test should assess whether there was a good reason for non-attendance of the witness whose untested testimony was introduced at trial. The second part is related to the assessment of "sole or decisive rule". The third part is evaluation, "whether there were sufficient

33 *Mild and Virtanen v. Finland* (2004) App. No. 39481/98; 40227/98.

34 Judge Kjølbro wrote that "the judgment is another example of the Court's focus on the importance of the investigation stage for the preparation of the criminal proceedings (and) an example of a rather formalistic approach to the importance of procedural guarantees". Other six dissenters were milder and regretted that they were "unable to agree with the view of the majority that the applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention were violated". It is interesting to note that four judges who concur with the Court's decisions "have a reasonable fear that the clarification provided by the Court in this case … can be summarised in one single question: were the proceedings fair as a whole? This overall test is not, in our view, a step in the direction of strengthening the rights guaranteed by Article 6 (3) (d) of the Convention."

35 *Paić v. Croatia* (2016) App. No. 47082/12.

36 *Seton v. United Kingdom* (2016) App. No. 55287/10.

counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair".[37]

The order of examination should not always be the same. Since "all three steps of the test are interrelated and, taken together, serve to establish whether or not the criminal proceedings at issue have, as a whole, been fair, it may be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or unfairness of the proceedings".[38]

In *Schatschaschwili*the Grand Chamber confirmed that the absence of a good reason for non-attendance of the witness by itself does not necessarily lead to the violation of the right to a fair trial. Equally, it is not enough to asses only (non) existence of counterbalancing factors if the evidence of the absent witness was the sole or the decisive basis for conviction. The overall assessment must be also if untested evidence carried significant weight and its admission might have handicapped the defense.[39]In other words, complete "Al-Khawaya test" should be performed always even in cases where there is no good reason for nonattendance of non-confronted evidence.

It is, therefore, possible to have a breach of confrontational right that would not inevitably lead to a violation of the fairness of the process in a whole. In that case, a conviction could be based on untested evidence ("sole or decisive rule") even if there was no good reason for its non-attendance at trial but only if there were enough counterbalancing factors ("strong procedural safeguards") that would clearly show that defense handicap was not of significant weight. Hence, it would appear that counterbalancing factor test has crucial impact when assessing fairness of thewhole proceedings.

7.1 Counterbalancing factors

Since they appear to become of particular importance in assessing fairness of procedure in whole, it is necessary to point out to the ECHR practice. Of course, particularity of each case and factual situation dictates the extent and scope of the

[37] *Paić v. Croatia op. cit.* note 35, § 29.

[38] *Ibid.* § 31 which refers to

[39] *Schatschaschwiliv. Germany*, *op. cit.* note 28, § 118. Same:Seton *v. UK*, Op. cit. note 36 § 59: "The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair."

assessment. In essence and according to *Schatschaschwili v. Germany* and more precise *Paić v. Croatia*, counterbalancing factors should be evaluated in relation to following elements.

First element is trial court's approach to the untested evidence. Trial court should pay specific caution and attention in evaluating credibility of absent and untested evidence. Reasoning should be "detailed".[40]

Second element is availability and strength of further incriminating evidence. The assessment goes not only if there was corroborating evidence and what is there strength, but also did "national authorities make any serious attempt to collect further evidence".[41]

Third element is procedural measures aimed at compensating for the lack of opportunity to directly cross-examine the witness at the trial. Those measures could include but not limited to: existence of opportunity for defendant to give his version of events and whether he was afforded with possibility to dispute credibility of an absent witness whose identity was known to him.[42]

8. RECEPTION OF ECHR CONFRONTATIONAL STANDARDS IN CROATIA

The Republic of Croatia ratified Convention in 1997.The Convention has primacy over domestic law.[43] Since decision of the Constitutional Court of the Republic of Croatia may be subject to assessment before the ECHR, one might say that Convention by its legal force is even above the Croatian Constitution. However, that would not be completely accurate because Croatian Constitution is drafted

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[40] *Paić v. Croatia*, *op. cit*. note 35 § 43. In national case credibility of absent and untested witness testimony was reasoned only as "credible and truthful". ECHR find that explanation not sufficient. It should be noted that according to Croatian Criminal procedure act the reasoning of the judgment should contain "…reasons why the disputed facts found proven or unproven, producing the assessment of the credibility of contradictory evidence…" (Article 459 para. 5). Obviously, assessment that contains only two words is not enough. The reasoning should contain explanation why a testimony is "credible and truthful".

[41] *Paić v. Croatia*, *op. cit*. note 35 § 44. The use of term "national authorities" indicates that ECHR is aware of the fact that evidence collection initiative in some jurisdiction is practically only in prosecutors hands and in others court have power to introduce evidence *ex meromotu*.

[42] *Paić v. Croatia*, *op. cit*. note 35, § 45.

[43] Article 141 of CroatianConstitutionstipulates: "International treaties which have been concluded and ratified in accordance with theConstitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law."www.sabor.hr/fgs.axd?id=17074, Accessed 23 February 2017.

and is in conformity with the Convention. Besides, wording of Article 141 of the Croatian constitution suggests that Convention and Constitution have same legal force. Therefore, one might say that Convention is not above the Constitution; in effect both legal acts have same legal significance and should be applied together when evaluating fairness of procedure in the particular case.[44] Nevertheless, any discrepancy of a national law with the Convention at the same time is discrepancy with the rule of law that is stipulated in Article 3 of the Croatian Constitution.[45]

Having that in mind, it might sound strange that allocation of confrontational standards of the ECHR started only in 2006, nine years after Convention ratification, first with Constitutional Court decisions.[46]The Supreme Court of Croatia made first assessment of confrontational clause in 2009.[47]It found violation of Article 6 (3) (d) of the Convention because "the investigating judge failed to inform defendants of questioning of the victim, although he did in relation to the prosecutor, and then the trial court refused the defense's proposal for direct, additional examination of the victim at the trial, and precisely on her testimony [the trial court]based the finding of relevant facts on which the existence of a criminal responsibility of the accused has been established".[48]Interestingly, in almost completely same situation in another case the Supreme Court did not find violation

[44] In former Yugoslavia judges were not able to apply Constitution directly in particular case. Instead, they were obliged to initiate the process before the competentConstitutional Court to assess the constitutionality of a law and if they did so, they were obliged to stop the proceedings until the completion of proceedingsbefore the Constitutional Court (Article 24 Law on Courts, "Narodnenovine", Official Gazette 5/77, www.digured.hr/(active)/tab261Accessed 23 February 2017.

[45] Therefore, the ECHR jurisprudence, although is formally not source of the law, is the most important form of interpretation of Convention, and thus all the regulations that are valid under it. This follows also from the decision of the Constitutional Court, which stated "…that that the entire Croatian law must be interpreted in accordance with the legal standards created in case-law of the European Court until Croatia is a member of the Council of Europe, which means as long as the part of its judicial jurisdiction Croatia conveyed with own sovereign decision to the European Court" (U-I-448/2009).Constitutional court decisions are available on its web site https://www.usud.hr/hr/praksa-ustavnog-suda. Still, ECHR might find violation of the Convention even if a case is decided fully in conformity with national law and constitution. That suggest strongly than in fact the Convention has supremacy over national constitution.

[46] First decision where Constitutional Court mentioned confrontational clause from the Convention and from Croatian Constitution (wording is almost completely the same) is case in which confrontational right was assessed through defendant's right to introduce evidence on his behalf (U-III/444/2005 from 23 November 2006). There were two decisions following year (U-III/601/2006 from 27 September 2007 and U-III/2241/2006 from 18 October 2007); for further details see Mrčela*op. cit.* note 21, p 229 – 235. Constitutional court decisions are available on its web site https://www.usud.hr/hr/praksa-ustavnog-suda.

[47] VSRH I Kž 731/08 from 22 January 2009. All Supreme Court decisions are available on its web site http://supranova/hpcl/component/main.

[48] Ibidem.

because absent witness testimony "does not interfere nor compromise version of the defense, but it is in its conformity".[49]

Confrontational objections appear more often in Supreme Court cases. Therefore, the Court's considerations together with ECHR decisions and Constitutional court practice led to changes in the Criminal Procedure Law. Among other changes, the "sole or decisive rule" was introduced.[50]Rules for reading at trial testimony obtained earlier during process were changed. According to the Article 431 (2) it is possible during the trial to read witness or expert witness testimony that were obtained earlier even if the defense was not notified about their questioning but a conviction cannot be based solely or decisively on such testimony. In other words, witness or expert witness testimony for which the defense did not have a real and objective opportunity to question at least once during the procedure may not be the basis for conviction. Following ECHR practice, the Supreme Court extends that rule to the codefendant statements. Consequently, even if the untested defendant's statement is not explicitly stated in Article 431 (2) of Criminal Procedure Law as evidence that cannot be used for a conviction, the Court's practice extends the application of the "sole or decisive rule" in cases where the codefendant's statement serves as prosecution evidence.[51]

Since reading of the untested testimony at trial is legally allowed but basing conviction on such evidence is forbidden, one might wonder what the purpose of such trial exercise is. This is situation when a witness is present at the trial. If there is an absent witness and all legal conditions for reading such a statement during the trial are fulfilled (existence of good reason for non-attendance), sole or decisive rule will apply because in such case defense during the whole proceedings did not have a single opportunity to challenge evidence that could serve as basis for conviction. That means that conviction may not be based of previously obtained untested testimony that has been read at the trial.

But, if a witness is present at the trial, his previous statement should be read at the trial if he deviates from his previous untested testimony. The reason for such an exercise lays in one part of the adversarial principle (each party should have opportunity to contradict the opponent's evidence).The prosecution should have an opportunity to challenge the trial deviation. The ability to contradict evidence is

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49 VSRH I KŽ 1078/08 from 3 June 2009. In this case a situation was assessed in relation to principle of equality of arms but there is no doubt that evaluation included confrontational clause elements. Further detailed elaboration of particularities of this case goes beyond purposes of this paper.

50 Changes came into force on 15 December 2013 ("Narodnenovine", Official Gazette 145/13).

51 See for instance the Supreme Court decisions: I Kž 407/13 from 9 October 2013, I Kž-455/13 from 13 February 2014, IKž 505/14 from 31 March 2015.

possible only if that evidence is produced during the trial. Therefore, it is permissible at the trial to read previously obtained but untested testimony of a witness who is present at the trial. It is important to realize that further use of such a testimony depends on witness statement after he is confronted with his previous statement. "Basically, if a witness at the trial repeats content of untested testimony which contains incriminating parts, that statement at the hearing then includes charging of the defendant and may be used for a conviction because the trial examination is carried out with respect to the defendant's confrontational right. If at the trial witness "withdraws" his/her previously obtained untested statement or if at the hearing witness does not incriminate the defendant, then the earlier untested statement may not be used for conviction."[52]

The Supreme Court also developed multi part test that should always be applied when assessing alleged violation of defendant's so called minimum rights stipulated in Article 6 (3) of Convention. It embraces ECHR jurisprudence concerning procedural fairness asking to evaluate the whole process and only after analysis of complete procedure draw conclusion about (no)violation of defendant's minimum right stipulated in Article 6 (3) d of the Convention and Article 29 (2) of Croatian Constitution. If necessary, in any case such analysis should include consideration:

- Whether the accused had the opportunity to defend himself (and with a defense lawyer if necessary),
- Whether the defendant had the opportunity to challenge the credibility of prosecution evidence and oppose to their presentation, and what is a quality of the evidence on which the conviction is based including an assessment whether their acquisition or presentation cast doubt to their credibility,
- Whether the evidence has been presented in a way that ensures a fair trial, and in particular whether reasons for the rejection of the defense proposal to present evidence were given, particularly in relation to the significance of this evidence, and particularly in the case of rejection of the alibi witnesses.[53](Khan v. UK, PG and JK v. UK, Vidal v. Belgium).

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[52] VSRH I Kž 414/16 from 10 October 2016.

[53] See for instance the Supreme Court decisions: I Kž 174/14 from 8April 2014,I Kž 323/11from 23 September 2014,IKž 1005/11 from 23December 2014, I Kž 858/11, from 20 January 2015, I Kž 379/15 from 1. September 2015,Kzz 55/15 from 18 January 2016. In all those decisions the Croatian Supreme Court refered to ECHR jurisprudence in: *Asch v. Austria* (1991) App. No. 12398/86, *Sevinc v. Turkey* (2009) App. No. 26892/02, *Bykov v. Russia* (2009) App. No. 4378/02, *Lisica v. Croatia* (2010) App. No. 20100/06, *Barim v. Turkey* (2006) App. No. 47874/99, *Khan v. UK* (2000) App. No. 35394/97, *PG and JK v. UK*(2001) App. No. 44787/98, *Vidal v. Belgium*(1992) App. No. 12351/86.

9. CONCLUSIONS

The ECHR jurisprudence shows that three elements of the main principle of fairness (the adversarial principle, the principle of equality of arms and confrontational right) are often considered together. They are overlapping by the definition since defendant's confrontational right is part of adversarial principle and that equality of arms has a wider scope of contradictions but narrower content.[54]

Blending of the three elements in ECHR decisions should not be problematic as long as the Court is firm and clear about confrontational standards. However, those standards are slightly but significantly changed with *Schatschaschwili v. Germany.* Now complete "Al-Khawaya test" should be performed always even in cases where there was no good reason for nonattendance of non-confronted evidence. Consequently, in each and every case related to Article 6 (3) d, often in conjunction with Article 6 (1) of the Convention, ECHR will assess all three elements of "Al-Khawaya test"; existence of good reason for nonattendance of untested witness, sole or decisive rule and counterbalancing factors.

After such an assessment, a situation could arise where a breach of confrontational right would exist but that would not inevitably lead to a violation of the fairness of the process as a whole. If so, a conviction could be based on untested evidence even if there was no good reason for its nonattendance at trial but only if there were enough counterbalancing factors ("strong procedural safeguards") that would clearly show that the defense handicap was not of significant weight. Hence, it would appear that the counterbalancing factor test would be a corner stone when assessing fairness of the whole proceedings.

In Croatia, however, there is a stronger confrontational standard based also on ECHR jurisprudence before *Schatschaschwili v. Germany.* The sole or decisive rule is crucial in assessing defendant's confrontational right. A conviction is not possible on the basis of untested evidence.[55] Such a crystal clear rule obviously represents higher confrontational standard then one of the ECHR. Having in mind the Croatian court's well established jurisprudence in that area and the fact that higher confrontational standard serves as a stronger guarantee of defendant's right, there should be no changes in Croatian laws and consequently in court practice.

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[54] Krapac*, op. cit.*note 17., p. 108., see also Mrčela, *op. cit.* note 25.

[55] See note 50 and accompanied text.

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DIGITAL FORENSIC PROCEDURES OF EUROPEAN ANTI-FRAUD OFFICE AND PROTECTION OF PERSONAL DATA[1]

ABSTRACT

The European Anti-Fraud Office is established in order to step up the fight against fraud, corruption and other illegal activity affecting the financial interests of the European Union. In that fight essence of investigation makes a digital forensic procedure. Digital forensic procedure implies a technological inspection, acquisition, and examination of digital media or their contents using forensic equipment and software tools. The objective of digital forensic procedure is to locate, identify and collect data which may be relevant to an investigation and use it as evidence in administrative, disciplinary and judicial procedures. These operations can include acquiring personal data what may be perceived as privacy invasive. In this paper, the authors will try to analyze the legislation of European Union in this field and the European Anti-Fraud Office legislation in order to explain the conditions of use and protection of personal data.

Key words: *digital forensic procedure, European Anti-Fraud Office, investigations, privacy, protection, EU.*

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1. INTRODUCTION

The right to privacy falls into the rights of a new generation. Privacy is a fundamental right that protects the private sphere of life of an individual. The protection of the right to privacy allows the life and development of a human without arbitrary interference of the state and other parties. In recent years, there is an increasing need for protection of the right to privacy, because the development of science and technology opens up large opportunities for endangering the private sphere of a human life.[2] In this Digital Age, faster exchange of personal data, especially on-line, creates the possibility of easy access and abuse to a large number of individuals and companies. When it comes to data relating to private life they are part of the private sphere, i.e. human right to live how they want, protected from the public to some extent.[3] Therefore, the right to respect a private life limits the extent to which the individual himself brings his private life into contact with public life or in close connection with other protected interests.[4] But, sometimes it is necessary to use some data, which fall into the category of personal data, in order to carry out certain activities to satisfy public interest by both national and international institutions. One of those interests is controlling the EU budget expenditure.

The responsibility for spending of financial resources of the Union is an issue that is on the list of priorities for both its institutions and EU Member States.[5] The European Anti-Fraud Office (OLAF), based in Brussels, is established at the European Union level in order to ensure effective protection of its financial interests. It has been established in 1999, based on the Decision of the European Commission, as an independent body with power to investigate possible financial offenses that could endanger the financial interests of the European Union.[6] OLAF carries out investigations into the existence of irregularities, regardless of whether such irregularities deserve criminal or other kind of prosecution. Its jurisdiction is the prevention of irregularities relating to the expenditure of European Union funds.[7]

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2 Dimitrijević, V.; Popović, D.; Papić, T.; Petrović, V.; *Međunarodno pravo ljudskih prava*, Beogradski centar za ljudska prava, Beograd, 2007, p. 203.

3 Dimitrijević, V.; Paunović, M.; Đerić, V.; *Ljudska prava*, Beogradski centar za ljudska prava, Dosije, Beograd 1997, p. 286.

4 *Ibid.*

5 Rabrenović, A., *Odgovornost za trošenje finansijskih sredstava Evropske unije*, in: 50 godina Evropske unije, Institut za uporedno pravo, Vlada Srbije - Kancelarija za pridruživanje Evropskoj uniji, Beograd, 2007, p. 186.

6 Commission decision of 28. April 1999 establishing the European Anti Fraud Office (OLAF) (notified under document number SEC (1999) 802) 1999/352/EC, ESC, Euroatom) [1999] OJ L136/20.

7 Article 1 of Decision No 352/1999. Cited by Šuput, J., *Zaštita finansijskih interesa Evropske unije-uspostavljanje AFCOS sistema*, Pravni život, No 7-8, 2014, p. 24.

It is part of the European Commission and conducts fraud investigations in all European Union countries and within the European institutions themselves. It can also conduct investigations in non-EU countries with which it has agreements.

OLAF is not competent to fight fraud that does not concern the budget of the European Union. In other words, EU money has to be involved. The same goes for the fight against corruption: OLAF can only investigate cases where EU staff appears to be involved.[8] When OLAF control is carried out in the territory of the Member State, authorities in that territory are obliged to provide all necessary assistance to its inspectors during controls and inspections.[9] The control is done by examining the books and records, invoices, contracts, receipts, bank statements and computer databases. It includes physical verification, check of the quantity and nature of goods ordered or the quality of service, taking and checking of samples, control of completed works and investments from the European Union funds, as well as insight into the technical implementation of subsidized projects.[10] The information gathered during the control are representing a business secret, in accordance with national regulations of the country in whose territory the inspection was conducted, and may only be used for the protection of the financial interests of the Union. Materials and documentation collected in the process of inspection may be used as evidence in administrative or judicial proceedings in the territory of the State where the irregularity was detected at the expense of the financial interests of the European Union.

The European Anti-Fraud Office is not a judicial authority or law enforcement agency. The punishment of the perpetrators of any violations or criminal offenses against the financial interests of the European Union is the responsibility of the police and judicial authorities of the countries on whose territory OLAF performs its financial investigations. Accordingly OLAF collects data and submits them to relevant institutions at the national level.[11] In that way, relevant institutions are able to use the information and data that OLAF collects during its investigation.

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8 IAACA, *European Anti-Fraud Office*, URL=http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/InterGovernmentalOrganization/201202/t20120215_805457.shtml. Accessed 31 January 2017.

9 Article 4, Paragraph 1 of the Council Regulation (Euroatom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks inspections carries out by the Commission in order to protect the European Communities´ financial interests against fraud and other irregularities. Cited by Šuput, J. *op.cit.* note 7 , p. 25.

10 *Ibid.* Article 4.

11 Reljanović, M.; Ivanović, Z.; *Evropska kancelarija za borbu protiv finansijskih prestupa* in: Borba protiv korupcije, iskustva i poređenja, Ćirić, J. (ed.), Beograd, 2013, p. 113.

The European Anti-Fraud Office has the right of access under the same conditions as national administrative inspectors to all the information and documents concerning economic activities, including computer data necessary to conduct proper inspections.[12] A special kind of evidences is data on a digital media, i.e. the information contained in the digital form. They are further processed and prepared for the purpose of a possible proof of certain facts in court proceedings. However, also in a digital media you can found a large number of personal data, and that always raises the question of the efficiency of their protection, both in general and at the institutional level.

During development of the legal protection of personal data in the European Union, emerged the need for more specific protection of personal data from abuse. Legal regulations are developed gradually, and some institutions have established their own rules of procedure relating to the collection and disposal of personal data in a digital form. Under personal data we consider any information that can point to a particular person, such as name, phone number or photo. Personal data can be collected directly from individual person or from the database. Thus, the data collected may be made available to a larger number of entities and may be used for other purposes.[13] Privacy as an ethical concept and as a fundamental human right is not static. The privacy concerns and expectations of research participants are likely to evolve in the upcoming years.[14]

Although, at the level of the European Union, there are a number of regulations that provide effective mechanisms of personal data protection, certain institutions adopted internal acts for employees regulating the manner of handling in order to protect personal data. The same approach in this regard is also present at the European Anti-Fraud Office.

2. LEGAL PROTECTION OF PERSONAL DATA

The Universal Declaration on Human Rights (Universal Declaration) was the first legal document which provides protection of personal data at the international level.[15] Besides Universal Declaration, the International Covenant on Civil

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[12] Council Regulation (Euroatom, EC) No 2185/96, *op. cit.* Article 7.

[13] Nikodinovska-Stefanovska, S., *Lisbon Treaty and the Protection of Personal Data in the European Union*, in: Harmonizacija zakonodavstva Republike Srbije sa pravom Evropske unije (II), Dimitrijević, D.; Miljuš B. (ur.), Beograd, 2012, p. 717.

[14] Joly, Y.; Dyke, S.O.M.; Knoppers, B.M.; Pastinen, T., *Are Data Sharing and Privacy Protection Mutually Exclusive?*, Cell 167, Elsevier Inc, November 17, 2016, p. 1153.

[15] The Universal Declaration on Human Rights, adopted by the **UN** General Assembly on 10 December 1948, in Paris, General Assembly Resolution 217A, United Nations. Universal Declaration was pro-

and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) also has provisions for the protection of personal data.[16] According to Article 12 of the Universal Declaration no one shall be subjected to arbitrary interference with her/his privacy, family, home or correspondence, or to attacks upon her/his honor and reputation. Everyone has a protection provided by the law against such interference or attacks. The same right to protect privacy is guaranteed by Article 17 of the International Covenant on Civil and Political Rights. The European Convention on Human Rights mentions the right to respect private and family life, home and correspondence. The term implies the respect and protection of the individual against arbitrary interference with privacy by public authorities, but requires the state to actively participate in the provision of the mentioned law.[17] It is therefore necessary both at national and international level to establish effective mechanisms for prevention of a behavior that can be arbitrary interference in the private life of individuals.

Modern development of science and technology opens up previously unimagined possibilities of interference in the most intimate parts of human life.[18] One of the first documents that provide protection of personal data in digital form in the European Union is the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data from 1981.[19] It envisages the obligation

claimed as a common standard of achievements for all peoples and all nations. Text of the Declaration can be found at: URL=www.un.org/en/universal-declaration-human-rights/. Accessed 02 February 2016.

[16] The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966. That document entered into force on 23 March 1976. Law on ratification of ICCPR, Službeni list SFRJ-Međunarodni ugovori (Official Gazette SFRY-International Agreements), No 7/1971. The European Convention for the Protection of Human Rights and Fundamental Freedoms was ratified by the Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention for the Protection of human rights and Fundamental freedoms securing certain rights and freedoms that are not included in the Convention and the first Protocol thereto, Protocol No. 6 to the Convention for the protection of human rights and Fundamental freedoms concerning the abolition of the death penalty, Protocol No. 7 to the Convention for the protection of human rights and Fundamental freedoms, Protocol No. 12 to the Convention for the protection of human rights and Fundamental freedoms and Protocol No. 13 to the Convention for the protection of human rights and Fundamental freedoms concerning the abolition of the death penalty in all circumstances, Službeni list SFRJ-Međunarodni ugovori (Official Gazette SCG-International Agreements), No. 9/2003 and 5/2005.

[17] Paunović, M.; Krivokapić, B.; Krstić, I.; *Osnovi međunarodnih ljudskih prava*, Megatrend univerzitet, Beograd, 2007. p. 217.

[18] Dimitrijević *et al., op. cit.* note 2, p. 203.

[19] The Convention for the Protection of Individuals with regard to automatic processing of Personal data.

of every country to respect the rights and fundamental freedoms of every person, especially the right to privacy during the automatic processing of personal data.[20]

When it comes to the Community institutions and bodies of the European Union, the first time the protection of personal data is referred to was in Article 286 of the Treaty establishing the European Community. According to that provision, the Community is taking measures for the protection of personal data during data processing and exchanging of Community institutions and bodies.[21] The mechanisms to achieve this objective are contained in the Regulation on the protection with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data No. 45 of 2001 (hereinafter the Regulation).[22] When collecting personal data in digital form the OLAF employees are obliged to comply with the provisions of the Regulation. Given that a large number of financial data is nowadays in digital form, such data are often subject to digital forensics, which is carried out in special OLAF laboratories. Since often among the financial data can also be found personal data, they must be processed in accordance with applicable regulations of the European Union. That is why the European Anti-Fraud Office issued special instructions to be followed by employees during digital data processing.[23]

3. OLAF - COLLECTING DIGITAL EVIDENCE AND PROTECTION OF PERSONAL DATA

Since OLAF is the European Commission institution, it is required in conducting their investigations, i.e. when collecting data in digital form, to primarily obey the provisions of Regulation No 45/2001. However, this does not mean that when

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The Convention was adopted and opened for accession in Strasbourg 28.01.1981. Convention entered into force in 1985. Text of the Convention can be found at: URL=www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b37. Accessed 07 February 2016.

20 *Ibid.* Article 1.

21 The Consolidated version of the Treaty establishing the European Community [1997] OJ C340 and [2002] OJC325. Text of the Treaty can be found at: URL=www.eu-lex.europa.eu/legl-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT. Accessed 03 February 2016.

22 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, Text of the Regulation can be found at: URL=http://secure.edps.europa.eu/EDPSWEB/webday/site/my/Site/shared/Documents/EDPS/DataProt/Legislation/Reg_45-2001_EN.pdf. Accessed 04 February 2016.

23 Guidelines on Digital Forensic Procedures for OLAF Staff,15. February 2016, Text can be found at: URL=https://ec.europa.eu/anti-fraud/sites/antifraud/files/guidelines_en.pdf. Accessed 08 February 2016.

performing investigations the European Anti-Fraud Office does not apply internal rules and procedures. OLAF has the right during inspection to access all information relevant to the investigation, including digital data and databases. It is authorized to check the accounts and financial records of institutions, bodies, offices and agencies. In order to take adequate inspection measures inspectors or auditors employed by OLAF may take a copy of any document. They have the same rights in this respect, as well as national inspectors in accordance with the regulations of the country where the controls or inspections are conducted. Also, there is an obligation of the employees of the institution in which inspection is carried out to provide OLAF personnel the data necessary to carry out their activities.[24]

The data that are taken in the process of inspection, which can serve as evidence in subsequent proceedings, must be protected as a confidential data in the same manner as the data that are in similar situations provided protection at the national level. These data can not be disclosed to anyone, except the person or institution in the Member State whose function requires that such data to be used in their work. They can be used solely for the purpose of protecting the financial interests of the European Union. If irregularities are detected in the work of the institutions whose operations is being investigated, the Commission should immediately inform the competent authorities of the Member State in question. In any case it is necessary to inform the competent authorities in relation to the reported results of the inspection. The Commission has an obligation to prepare a draft report which is an integral part of the collected materials and evidence in the future to be used as evidence in a possible misdemeanor or criminal proceedings, in the same way as in the case where the materials and evidence collected by the competent national authority.[25] If the national inspectors participated in the inspection and control, they are also obliged to sign the report.[26] Bearing in mind that OLAF represents the kind of budget inspection of the European Union, it should be noted that it is also responsible for providing evidence for future legal proceedings with regard to violations of the financial interests of the Union.

When the digital evidence began to be accepted as equal to the other evidence in the court, digital forensic has developed, as part of forensic science, whose subject

[24] Council Regulation (EUROATOM, EC) No 2185/96 of 11 November 1996 concerning on the spot checks and inspections carried out by the Commission in order to protect the European Communities´ financial interests against fraud and other irregularities, Article 7., OJ L 292/96, URL=https://publications.europa.eu/en/publication-detail/-/publication/adc86f79-268e-4ac4-8ae5-85c70ade888f/language-en. Accessed 07 February 2016.

[25] The Commission is responsible for ensuring that Member States respect European Union laws.

[26] *Ibid.* Article 8.

is legal analyzes of the obtained evidence found in computer and digital media.[27] Sometimes in order to provide relevant evidence the large amount of personal data are also collected. Therefore, there are the possibilities of violations of right to privacy, not only during data collection and processing, but also in delivering these data to other relevant institutions. In order to avoid violations of right to privacy, when performing digital forensics, OLAF employees have an obligation to comply with that provision of Regulation No 45/2001 and Guidelines on Digital Forensic Procedures for OLAF Staff.

3.1. Protection and free movement of personal data

The provisions of Regulation on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data are obliged to adhere to all institutions and bodies which are established in accordance with the provisions of the Treaty establishing the European Community.[28] One such body is the European Anti-Fraud Office. It has the obligation, during digital forensic operations, to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and to allow the free exchange of such data with other EU bodies and Member States.[29] The Regulation also applies to the processing of personal data wholly or partly by automatic means (automatic data processing).[30]

Data provided by OLAF delivered to the Member States in order to carry out the responsibilities of entities on their territories can be delivered only if it is necessary to exercise the powers in the public interest, or if it is a public institution providing data to perform its obligation from its jurisdiction, or if the recipient proves that these data are really necessary and if it proves that there is no possibility to harm legally protected personnel interests of persons whose data are submitted.[31]

When institutions or bodies of the European Union, or countries that have national legislation in accordance with Directive 95/46 /EC are not in question

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27 Korać, V.; Prlja D.; Gasmi, G., *High Technology Criminal and Digital Foresics*, in: Preventing and Combating Cybercrime, Cluj_Napoca, Accent, 2016, p. 93.

28 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L008 pp. 0001 – 0022.

29 *Ibid.* Article 1.

30 *Ibid.* Article 3.

31 *Ibid.* Article 7-8.

special conditions shall be applied.[32] Under these conditions, personal data may be submitted only if the protection of personal data is provided at an adequate level, and if the submission of these data is done solely for the purpose of performing legal powers by the person requesting the information. When it comes to an adequate level of protection at the level of countries that are not members of the European Union or international organizations, they should be treated depending on the particular circumstances, such as: nature of the information that is provided, the duration of the procedure of processing such data, respect for the rule of law in the country where the information is provided on both the general and at the institutional level as well as the security measures that are taken to protect data. If it is concluded that the level of protection of personal data in the country of international institutions is not adequate, the data will not be send, and OLAF should inform about that decision the Commission and data protection officer. In this case the Commission, not OLAF, exclusively informs the third party of a refusal. Exception from that rule is only if the person, to whom the personal data are relating, give explicit consent, as well as other conditions prescribed in the Regulation. In such situations it is also necessary to inform data protection officer at EU level.[33]

The collection, processing and exchange of special categories of data such as ethnic origin, political opinions, religious or philosophical beliefs, membership in business associations or data relating to health and sex life is strictly prohibited. However, there is a possible deviation in the case of one of the exceptions set out in the Regulation. The exception is the explicit consent of the person whose personal data is processed during the investigation.[34] Any person who considers that her or his privacy rights are violated as a result of taking action by OLAF can lodge a complaint to the European data protection supervisor or to the European Ombudsman.[35]

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32 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. In accordance with mentioned Directive, Member States shall protect the fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data.

33 *Ibid.* Article 9.

34 *Ibid.* Article 10.

35 The European data protection supervisor (EDPS) in an independent supervisory authority established by the Regulation No 45/2001 devoted to protecting personal data and privacy and to promoting good practice in the EU institutions and bodies. More information about mentioned authority can be found on the website: http://secure.edps.europa.eu/EPDSWEB/edps/EDPS The European Ombudsman is an independent and impartial body that holds the EU administration to account. Mentioned body investigates complaints about maladministration in EU institutions, bodies, offices and agencies. The Ombudsman may find maladministration if an institution fails to respect fundamental rights, legal

3.2. Rights and obligations when processing personal data

When it comes to the use of personal data we saw rights and obligations of the institution and employees that collect them. But also a person whose data is used by OLAF has certain rights.

When taking personal data OLAF employee is obliged to communicate to person in question she/he identity, the purpose for which such data is collected and the name of the institutions and bodies that will be allowed to use this information. In addition, it is required that person in question should be informed when answering certain questions mandatory, and when voluntarily, as well as the consequences of failure to give answers, to be informed of the right of access to data concerning she/he personality, the right to revise these data. The person in question should also be given additional information, such as the legal basis for the collection of data, the time limit for storing the data, the right to contact at any time the supervisor for personal data protection in the European Union. Also the person from whom the personal data are collected will be given any additional information, bearing in mind the special circumstances under which the data were collected, in order to ensure protection of the right to privacy.[36]

In some cases, personal data have not been obtained from the data subject. Then it is necessary that a person who collects information at the time of taking, if a disclosure to a third party is envisaged, inform the person to whom they relate about the purpose for which they are collected, the data category, the category of recipients, the existence of the right of access or modification of data concerning data subject, as well to offer additional information concerning a legal basis for an action for which the data is collected, the time period of storing such data, the right to apply to the supervisor for the protection of personal data at the European level Union, the origin of the data (how to reach these data) unless that person is unable to disclose the information due to professional secrecy, as well as any other information that depending on the circumstances is necessary to ensure legality of such data.[37]

Also, a subject whose personal data are used in the process of digital forensics, has the right to access this information, right of correction, the right to block

rules or principles, or the principles of good administration. Any citizen or resident of the European Union or business, association, or other body with a registered office in the Union can lodge a complaint. Ombudsman only deal with complaints concerning the EU administrations. Complaint can be sumitted electronicaly or printed out and sent by post. More information about mentioned body can be found on the web-site:URL=http://www.ombudsman.europa.eu/home.faces

[36] *Ibid.* Article 11.

[37] *Ibid.* Article 12.

their use, deletion, right to request the modification and deletion of data that are communicated to a third party (unless it does not require additional efforts), and have requested that she/he identity not mentioned in the decision. However, these rights may be denied, and if necessary, take the necessary measures in order: prevention, investigation, detection and prosecution of criminal offenses, if it is an important economic or financial interest of a Member State or the European Community, by which it means a circumstance which belongs to monetary, budgetary or tax matter.[38]

When it comes to personal data which are the subject of digital forensics by experts employed in OLAF, that organization in compliance with the provisions of Regulation, is obliged to deny access unauthorized persons to computerized systems used for the processing of personal data, and to prevent unauthorized reading, copying, modification or transfer of data stored on digital media, as well as unlawful destruction, modification or deletion of data stored on digital media. Obligations of OLAF in connection with the above consists in preventing unauthorized persons to use the system for processing data, ensuring that at any time can be checked when, where and who participated in the processing of personal data, ensuring that data can only be delivered, in accordance with the relevant legal documents, to the other institutions. During transport of media in which personal data are kept, personal data can not be read, copied or erased by unauthorized persons.[39] Therefore, in accordance with the provisions of the Regulation, Guidelines on Digital Forensic Procedures for OLAF Staff provides for monitoring entry and exit of authorized persons in the laboratory for digital forensics, as well as the obligation of recording the persons involved in the processing which are authorized to access personal data. The Regulation provides for certain measures for recording any damage related to the digital media where personal data are stored, as well as measures for recording communication between persons involved in the process of personal data processing.

3.3. Data protection officer

The European Anti-Fraud Office in accordance with Article 24 of Regulation appoints officers for the protection of personal data. Data protection officer commitments are: to ensure that persons who process personal data, as well as persons whose data is processed should be made aware of their rights and obligations pertaining to them in accordance with the Regulation, to respond to requests to monitor protection of personal data at the level of the European Union, to

[38] *Ibid.* Article 20.

[39] *Ibid.* Article 21.

cooperate with supervisors to ensure the internal application of the provisions of the Regulation to lead register of activities related to data processing, to inform the manager for the protection of personal data in the European Union if certain operations pose a particular risk to the violation of privacy rights, and to ensure that data processing respect all the rights of the individuals whose personal data are subject to processing.[40]

Data suspected to contain a high level of risk in terms of potential violation of privacy rights are, for example, information with respect to whom there is a suspicion of certain criminal offenses, violations, as well as data contained in court rulings, or information on safety measures relating to the assessment of the personal qualities and abilities of a specific person. After receiving the notification data protection officer in the European Union gives its opinion and recommendations to OLAF in order to most effectively protect personal data in their processing procedure. The European Anti-Fraud Office also has an obligation to submit proof on the implementation of the recommendations to a data protection officer. Given that this is a very sensitive data and a specific situation, the person responsible for the protection of personal data at the level of OLAF is obliged to seek opinion from the data protection officer before the start of the processing of such data. Apart from these situations, it is possible that the case file contains information on a large number of people, which are not relevant to the investigation conducted by the European Anti-Fraud Office. Notification to such persons that their data are stored in the file would be too much time consuming and burden for OLAF. However, bearing in mind that these are personal data, it is essential that the person responsible for the protection of personal data seek the opinion of the data protection officer for the protection of personal data at EU level. In order to ensure in the internal level that measures necessary for the protection of personal data are conducted in accordance with Regulation 45/2001, EU issued a Guideline which defines the manner of employees in relation to personal data in the process of digital forensics.

3.4. Protection of personal data in accordance with OLAF Guidelines

Guidelines on Digital Forensic Procedures for OLAF Staff were adopted in 2016.[41] Its provisions are applied in the process of identification, collection, processing, analysis and storage of digital evidence, while their goal is to establish rules for conducting digital forensics, to ensure the integrity and quality of the

[40] *Ibid.* Article 24.

[41] *Guidelines on Digital Forensic Procedures for OLAF Staff*, European Commission, European Anti-Fraud Office, 15 February 2016.

evidence that is admissible in court proceedings. Adoption of these rules achieves two objectives. One is to provide valid evidence in eventual court proceedings, and the other is the protection of personal data from abuse. The provisions of the Guidelines defines that the digital forensics laboratory, in the framework of OLAF, should be physically separated from other rooms and equipped with means for monitoring the entry and exit of authorized persons. Also, they are required to record communication between persons who access data and those involved in data processing. A person who carries out the procedure of digital forensics before undertaking any activities informs the person whose data are subject to processing, by submitting "OLAF digital forensic operations information leaflet". In addition, it is also obliged to provide answers to questions to persons whose data are subject to processing, concerning the specific procedures of digital forensics.

In order to ensure compliance with the provisions of all relevant legislation, a person who conducts digital forensics has the obligation to draw up a written report in which will be described method, the process of collection and storage of data being processed. The same report describes possible damage incurred in connection with digital data. Also, the report should indicate the complaints related to personal data. In addition, the report should include data on all persons involved in the process of collection and processing of evidence which are the subject of digital forensics.[42] A special part of the Guidelines relates to the special protection of personal data. Accordingly, information concerning marital status and information about children can only be included in the case file if they are relevant to the investigation.[43]

During the preparation and implementation of activities that fall into digital forensics, conducted at the level of OLAF, persons employed in the mentioned institutions are required, when it comes to personal data, to comply with the provisions of Regulation No 45/2001. Guidelines on Digital Forensic Procedures for OLAF Staff were adopted to facilitate the application of these provisions. Therefore, in situations that are not defined in the Guidelines directly applicable are provisions of the aforementioned Regulation.

4. CONCLUSION

Digital Forensics by the European Anti-Fraud Office is carried out mainly for the purpose of producing evidences for court proceedings. Considering the fact that among digital data investigator can found a large number of personal data it is

[42] *Ibid*. Article 4.

[43] *Ibid*. Article 9.

important for OLAF to act in accordance with the provisions regulating the protection of privacy rights. Such provisions are prescribed by Regulation on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. However, that Regulation, in addition contains a large number of exceptions to the rules. It is therefore of a great importance, for the legality of the OLAF activities, the adequate selection of officials within the institution. Those officials are authorized to monitor the application of Regulation No 45/2001 and cooperation with supervisors for personal data protection in the European Union.

Bearing in mind that in the process of digital forensics personal data should be handled in a special way, at the level of the OLAF was adopted Guidelines on Digital Forensic Procedures for OLAF Staff. Application of the Guidelines has two objectives. One is to protect the integrity of digital data in order for these data to be used in the future as evidence by the competent authorities of the Member States. The second is to increase the effectiveness of protection of personal data at the level of institution. The special quality of the Guidelines provide measures that are prescribed, relating to the submission of the "OLAF digital forensic operations information leaflet" to a person whose data are subject to processing; the provisions on monitoring the entry and exit from the laboratory; recording communication of a person who processes data with other persons; and the obligation of drawing up reports on the method of collecting and storing data; as well as specific information on possible damage that occurs during the processing of these data; also a data on complaints submitted by authorized persons and data related to information on all persons who have been involved in the process of digital forensics. Guidelines that is compatible with the provisions of Regulation constitutes a kind of written procedures that all employees involved in the process of digital forensics are required to apply. Bearing in mind that Guidelines is a mean for effective implementation of the provisions of the Regulation on the level of the institution, its practical application oversees data protection officer at the European Anti-Fraud Office.

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FORCED MARRIAGES OF CHILDREN AS A FORM OF EXPLOITATION OF HUMAN TRAFFICKING VICTIMS*

ABSTRACT

Forced marriages of children are one of the forms of exploitation in the commission of the crime of trafficking in human beings. Children are treated as a commodity, sold to interested parties for the establishment of a family, while the children, victims of trafficking, are completely deprived of their human (children) rights, their health is impaired, they are deprived of the right to education and denied the development of their personality as well as belonging to their own family. Children who have suffered such a serious crime will cope with extremely serious consequences all of their lives. The first part of the paper covers the concept, scope and causes of this form of exploitation of children and the consequences that children need to cope with. The second part presents the international legal framework relating to the suppression of trafficking in children as well as the documents to guarantee international protection of children and their rights. Furthermore, it points out to the national legislation, principally in the field of criminal law, but also other blanket regulations which ensure the protection of children and their rights. This paper also analyses the collected data on child victims of forced marriage. In concluding remarks, listed are recommendations de lege ferenda in combating exploitation of children for the conclusion of forced and arranged marriages and other forms of exploitation of children.

Keywords: *Child trafficking, forced marriages, arranged marriages, children's rights*

1. INTRODUCTION

Forced marriages of children are increasingly common form of exploitation of human trafficking victims. It is the exploitation of a child in a way that the child is forced into a marriage with an adult or another child. This form of exploitation is expressed in many, both developed and developing nations, while the victims tend to be children of socially vulnerable groups and minorities. In our region this kind of exploitation affects a large number of members of the Roma community, the victims are both boys and girls, although there is a significantly larger number of

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girls victims of forced marriages. At the international level, documents have been passed to combat this form of trafficking in persons and in accordance with them the signatory states harmonize their national legislation, however, even despite that forced marriages of children remain a global problem. With harmonized national legal framework, it is necessary and relevant for the authorities to promptly respond and in every possible and allowed way protect the children that are being exploited in such an inhuman way. Children, victims of forced marriage, are doomed to early parenthood, deprived of education, with completely destroyed possibility of further development, sufferring enormous consequences for their entire lives. Given that this problem is largely present, it requires continuous and thorough work with the aim of effective prevention and suppression.

In order to counteract and prevent a serious violation of children's rights, each state where there is an increased practice of entering children into marriage in certain minority communities must develop successful programs to combat the problem within the community in order to *a priori* protect any potential child from the suffering and exploitation because the child's life must come first.

2. FORCED MARRIAGES OF CHILDREN

Marriage is a legally regulated community of woman and man[1] based on the free will of a man and a woman to get married, the equality of spouses and on mutual respect and mutual support. Child marriage is defined as a formal or customary union in which one or both parties are under the age of eighteen.[2] Marriage can not be concluded by a person who has not reached eighteen years of age, exceptionally court may in non-contentious proceedings allow a marriage to the person who has attained the age of sixteen years if it founds the person to be mentally and physically ready for marriage and that the marriage is in accordance with the well-being of the person.[3]

When we talk about marriages of children, we meet with different terminology. *Early marriage* means a community of two people who according to their age do not meet the legal requirements in order to be married or community where only one of the future spouses does not meet these requirements. To a person who

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1 Art.12., Family law, Official Gazette No.103/2015

2 European Roma and Travellers Forum&Romani Women Informal Platform „Phenjalipe", *Making early marriage in Roma communities a global concern*, available at: URL=https://cs.coe.int/team20/cahrom/7th%20cahrom%20plenary%20meeting/item%2004%20-%20ertf%20and%20phenjalipe%20joint%20paper%20making%20early%20marriage%20in%20roma%20communities%20a%20global%20concern.pdf. Accessed 20 February 2017.

3 Art.25. *op.cit.* note 1.

does not meet the age requirements for marriage, a child, consent must be given by another person, usually their parent or legal guardian. Therefore, the person for whom the consent is being given, is still considered a child, and here we are talking about child marriage. Therefore, early marriage is also the *child marriage*. Furthermore, given that the child is a person who is not yet 18 years old,[4] he/she is a minor, so there arises the concept of *underage marriages.*

Forced child marriages are illegal because they do not meet the legal requirements for a community that can be considered a marriage and are forced because in their conclusion there is no consent of the will. Child marriage can be a *contracted marriage* that is planned, negotiated and contracted for the children by their parents or other people who care for them or persons under whose auspices they are currently residing.

According to data published by the InternationalCenter for Research on Women (ICRW), in the developing world, one third of girls are married before the age of 18, while in 2012, 70 million women 20-24 around the world had been married before the age of 18.[5] If this trend continues, within the next ten years, 150 million girls will be married before their 18th birthday, which is on average 15 million girls each year.[6] Victims of forced marriages are prevented and deprived from all guaranteed rights, the right to freedom and dignity, the right to free movement, the right to make decisions and choices, the right to life, work and education, the right to choose one's own family and the right to health.

Poverty, lack of education, illiteracy, domestic violence, are factors that create fertile ground for the development of this form of criminal exploitation of children. Girls, victims of forced marriages, suffer greater psychological effects than boys in particular for reasons of impairment of their reproductive health. Lack of physical maturity and the unwillingness of the body for pregnancy can lead to death of girls, and according to available data, more than 50,000 girls aged 15-19 die each year during pregnancy or from the effects of pregnancy.[7]

It is difficult to predict how many children are living in forced marriage and consensual unions, while it is impossible to determine their age limit. Most child marriages are concluded in the countries of South Asia and Africa. The highest

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4 Art. 4. par. 6. A child is a person under the age of eighteen years; The Social Welfare Act, Official Gazette No.157/2013, 152/2014, 99/2015, 52/2016, 16/2017.

5 Data available at: URL=http://www.icrw.org/child-marriage-facts-and-figures/. Accessed 20 February 2017.

6 *Ibid.*

7 More in: *Early marriage child spouses*, available at: URL=https://www.unicef-irc.org/publications/pdf/digest7e.pdf. Accessed 20 February 2017.

rate of child marriages is recorded in Bangladesh where 66% of young women are married before the age of 18, while 32% enter into marriage before the age of 15.[8] The average age for marriage for girls and boys in Nepal is 6-8 years.[9]

Some communities justify the entry of children into marriage for traditional and economic reasons, facilitating the life and survival of the family, returning certain debts of one family to another, as well as pre-arranged and promised marriage between the specific future bride and groom. No tradition of a nation can be a justification or have justification for acts that destroy a young life, for acts that are contrary to the constitutionally guaranteed human rights. First of all, considering that the entry of children into marriage under 16 years of age is not allowed in most states and is a crime to cohabit with a child under 16 years old,[10] therefore, the customary law of a certain community, according to which a child under the age of 16 years of age may enter into marriage, should not be approved, but on the contrary, such behavior must be punished.

3. INTERNATIONAL LEGAL FRAMEWORK

The first and fundamental international document[11] that protects the rights of the child was the Geneva Declaration on the Rights of the Child of 1924, adopted by the League of Nations[12] which regulated the protection of a child from all forms of exploitation. The Declaration guarantees the right of the child to physical and spiritual development, the right to food, health care and social protection and the right to help in trouble. UN's Universal Declaration of Human Rights,[13] adopted and proclaimed by General Assembly Resolution 217 A (III) on December 10, 1948 ensures for children the right to freedom and equality by birth, the right to equality before the law and judicial protection and prohibits slavery,[14] torture or

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[8] According to the report of UNICEF, 01/2013, op.cit. note 2. p.8.

[9] *The Sad Hidden Plight of Child Grooms*, available at: URL=http://www.thedailybeast.com/articles/2014/09/18/the-sad-hidden-plight-of-child-grooms.html. Accessed 20 February 2017.

[10] Enabling common-law lives with a child, Art. 170. Criminal code RC, Official Gazette No. 125/2011, 144/2012,56/2015,61/2015

[11] See also: Božić V, *Combating sexual exploitation as the leading form of trafficking in persons in the function of protection of the right to life and fundamental human rights*, Pravni život, 2016, 583 1-780; pp.267-288

[12] More in: Ćubelić I, *Rights of children in international documents*, Church in the World, Vol. 29 No.4 December 1994, pp. 453-459, available at: URL=http://hrcak.srce.hr/file/80329. Accessed 20 February 2017.

[13] Universal Declaration of Human Rights, available at: URL= http://www.pariter.hr/wp-content/uploads/2014/10/opca_deklaracija_o_ljudskim-pravima.pdf. Accessed 20 February 2017.

[14] Art. 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. *Ibid.*

humiliation. The Universal Declaration explicitly states that marriage may be entered into only with the free and full consent of the intending spouses.[15]UN General Assembly in 1954 adopted the Resolution 843 (Status of women in private law: customs, ancient laws and practices affecting the human dignity of women) ordering the abolition of old customs and to ensure freedom in the choice of a spouse, the elimination of child marriages and the practice of betrothal of girls before puberty age.[16]

UN adopted the 1956 Supplement to the Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,[17] stipulating the right of women to freely enter into marriage and calling on states to clearly define a minimum age for marriage as well as to prescribe penalties for violation of applicable provisions and to take all measures to combat child exploitation. At the United Nations General Assembly in 1959 adopted was the Declaration on the Rights of the Child[18] in order to protect the position of children in the world and the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[19] with the aim of extra protection and security of the child. Under the Convention, no marriage is legitimate unless there is full and free consent of both parties while the State Party are once again called upon to determine the legal minimum age for marriage.

The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 and stipulates that engagement and the entry of a child into a marriage shall have no legal effect, and all necessary actions shall be taken, including legislation, to specify a minimum age for marriage, as well as to introduce the obligation of registration of marriages in an official registry.[20]

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15 Art.16.par.2. *Ibid.*

16 Resolution 843, available at URL=http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/843 (IX). Accessed 20 February 2017.

17 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956, available at: URL=http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx. Accessed 20 February 2017.

18 Declaration of the Rights of the Child, 1959, available at: URL=http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child/. Accessed 20 February 2017.

19 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of marriages of 10 December 1962 - (Decision on the publication of multilateral treaties to which Croatia is a party on the basis of notifications of succession, OG-MU 012/1993), Available at: URL=http://digured.srce.hr/arhiva/263/33320/www.hidra.hr/hidrarad/pobirac-upload/murh/000217.pdf. Accessed 20 February 2017.

20 Art.16.par.2. Convention on the Elimination of All Forms of Discrimination against Women, available at: URL=http://www.unmikonline.org/regulations/unmikgazette/05bosniak/BConEliminationDiscriminationWomen.pdf. Accessed 20 February 2017.

The UN General Assembly adopted the 1989 Convention on the Rights of the Child,[21] which represents the essential international document in the field of children's rights. Convention has been ratified by almost all countries of the world, and in the Republic of Croatia it has been in force since October 8, 1991. The most significant provisions relate to the shared responsibility of parents, the best interests of the child, free primary education for children, prohibiting the abuse of children, labor,[22] sexual and other exploitation. The States Parties to the Convention commit themselves to take all appropriate national, bilateral and multilateral measures to prevent the abduction, sale and trafficking of children for any purpose and in any form.[23] Each State Party to the Convention is obliged to submit regular and additional reports on the state of children's rights. It is important to mention the Beijing Declaration and Platform for Action of 1995[24] concerning the protection of women's rights, according to which States parties are invited to provide in their national legislation provisions to ensure that marriage is only entered into with the free and full consent of the intending spouses, and to prescribe the minimum legal age of consent and the minimum age for marriage and to raise the minimum age for marriage where necessary.[25]

Council of Europe Resolution 1468 on forced and child marriages[26] adopted in 2005 calls on the Member States to prescribe 18 years as the lower age for marriage. Furthermore, the resolution calls on the State parties to criminalize forced marriages in their national criminal legislation.

Istanbul Convention, Council of Europe Convention on preventing and combating violence against women and domestic violence,[27] the most far-reaching international treaty that requires states parties to criminalize or otherwise penalize domestic violence (physical, sexual, psychological or economic violence), stalking,

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21 Convention on the Rights of the Child, available at: URL=http://www.azoo.hr/images/AZOO/Ravnatelji/radni_matgerijali/Konvencija_o_pravima_djeteta.pdf. Accessed 20 February 2017.

22 See more: Božić V, *Labor exploitation as the most common form of the crime of trafficking in human beings in spite of the state border control and the labor market*, Collection of Papers, Faculty of Law Niš, 2016, pp. 335-352.

23 Art.35. *op.cit.* note 21.

24 Beijing Declaration and Platform for Action, URL=http://www.e-jednakost.org.rs/kurs/kurs/download/pekinska_deklaracija.pdfhttps://ravnopravnost.gov.hr/UserDocsImages/arhiva/images/pdf/Izvje%C5%A1%C4%87e%20Republike%20Hrvatske%20UNECE-u%20o%20provedbi%20Pekin%C5%A1ke%20deklaracije%20i%20Platforme%20za%20djelovanje%20(Peking%2015).pdf. Accessed 20 February 2017.

25 Art.234. par.e. *Ibid.*

26 Resolution 1468 (2005) Forced marriages and child marriages, available at: URL=http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17380&lang=en. Accessed 20 February 2017.

27 URL=https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046fc87. Accessed 20 February 2017.

sexual violence (rape, sexual harassment, forced marriage,[28] female genital mutilation, forced abortion and forced sterilization).

Croatia has ratified the UN Convention against Transnational Organized Crime and III of the Protocols that supplement the Convention.[29] The first protocol, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is significant in the field of human trafficking and defines the concept of trafficking. The protocol deals with various forms of exploitation, both within and outside the country and does not differ particularly for men and women but speaks about persons.[30]

Republic of Croatia adopted the Law on Ratification of the Council of Europe Convention on Action Against Trafficking in Human Beings on 27 June 2007.[31] The Convention was adopted with the intention to reinforce and develop the standards contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[32] and defines trafficking in persons as a violation of criminal law and as a violation of fundamental human rights.[33]

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28 Article 32 – Civil consequences of forced marriages
Parties shall take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.
Article 37 – Forced marriage
(1) Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.
(2) Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.
Article 59 – Residence status
(4) Parties shall take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.

29 Law on Ratification of UN CATOC, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea and Air, Official Gazette IA No. 14/2002,13/2003,11/2004.

30 More: Holmes P, *Fight Against Trafficking in Persons for the Western Balkans Region: Manual for Training of Special Investigators*, International Organization for Migration, Zagreb, 2007.

31 Law on Ratification of the Council of Europe Convention on Action Against Trafficking in Human Beings Official Gazette IA No.07/2007

32 Art. 39. Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series - No. 197.

33 More: Božić V, *Trafficking in human organs as a form of organized crime*, PhD Dissertation, University of Zagreb, Faculty of Law, 2012.
See also:Derenčinović D, *Not for sale - on the rights of victims of trafficking after the European Court of Human Rights ruling in the case Rantsev against Cyprus and Russia*, Almanac of Academy of Legal Sciences of Croatia No.1, 2010.

Directive 2011/36 / EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting victims of human trafficking, which replaces the EU Council Framework Decision on Combating Trafficking in Persons from 19 July 2002 (2002/629 / JHA), was adopted on 05 April 2011.[34] The Directive provides for stronger sanctioning of the crime of trafficking in persons and the seizure of illegally acquired assets from convicted persons for the crime of trafficking in persons.

In addition to the aforementioned legal framework, institutional framework relating to the fight against child marriages is also necessary, among which we can highlight the UN Children's Fund (UNICEF),[35] UN Population Fund (UNFPA),[36] the Committee on the Rights of the Child (CRC)[37] with 18 experts in the field protection of children's rights, then the Commission on the Status of Women (CSW), Committee on the Elimination of Discrimination Against Women (CEDAW)[38] with 23 independent experts who monitor the implementation of the Convention on the Elimination of all Forms of Discrimination Against Women. It is necessary to mention the World Health Organization (WHO)[39] that cares about the health of vulnerable groups, children and women.

It should be noted that there is quite a large number of organizations that are globally engaged in the protection of children, namely: Breakthrough, CARE, Humanium: Help the Children, Defence for Children International, Save the Children and Girls not Brides.[40]

4. NATIONAL LEGISLATION OF CROATIA

Republic of Croatia has aligned its national legislation with international instruments concerning the protection of the rights of the child to enter into marriage. Family Law stipulates an age limit of 18 years of age as the assumption of legal age for marriage, with the exception, according to which the court may in non-contentious proceedings allow marriage to a person who has attained the age of sixteen years if he/she is found to be mentally and physically ready for marriage

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34 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

35 See:URL=https://www.unicef.org/.

36 See:URL=http://www.unfpa.org/child-marriage.

37 See:URL=http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx.

38 See: URL=http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx.

39 See: URL=http://www.who.int/en/.

40 More in: Aleksić M, NVO Atina: *Child Marriages in Serbia*, Belgrade, 2015.

and that this marriage is in according to the well-being of the person.[41] Accordingly, the minimum age for marriage with the consent of the court in Republic of Croatia is 16 years.

Taking into account that a man and a woman by getting married are taking upon themselves a great responsibility and in accordance with the Convention on the Rights of the Child, according to which a child means every human being below 18 years should not be allowed to get married to persons before they gain full maturity. Furthermore, young girls by early marriage and early childbearing are exposed to possible health problems; they remain deprived of education and accordingly are condemned to economic dependence on another person, the spouse. One should consider, in accordance with the recommendations of the Committee for the elimination of discrimination against women that the minimum lower limit for marriage without exceptions should be prescribed to 18 years and to undertake activities that will inform the public about the negative impacts and consequences that an early marriage leaves on a minor and violates their human rights, especially those concerning health and education.

The Criminal Code of Croatia prescribes sanctions relating to the protection of children from coercion and illegal entry into marriage. According to the criminal law a child is a person under the age of eighteen years.[42] Forcing another person to enter into marriage is a new criminal offense in line with Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, punishable by imprisonment of six months to five years.[43] The reason to criminalize this aggravated criminal offense of coercion lies in preventive combating of forced marriages, which in some communities are still ingrained. Recruitment of a person to another country with the aim of forcing the marriage in that country is punishable by imprisonment of up to three years.[44]

An adult who does no other crime but only lives with a child under the age of sixteen, as well as a person who enables a child under sixteen years of age to cohabit with another person or leads a child to do so, and thus does not make any other criminal offense for which a more severe punishment is prescribed, commits an offense of *Enabling Extramarital Life With a Child* which carries a prison sentence

41 Art.25. *Op. cit.* note 1.

42 Art.87. par.7. CC Republic of Croatia

43 Art.169. par.1 *Ibid.*

44 Par.2. *Ibid.*

of up to three years.[45] If the crime was committed out of personal gain it is an aggravated form that is punishable by imprisonment from six months to five years.[46]

Forced marriages are criminalized by crime of *Trafficking in Human Beings* as a form of exploitation. Imprisonment for 1 to 10 years shall be inflicted on everyone who recruits, transports, transfers, harbors or receives a child, or exchanges or transfers control of a child with an aim of concluding an unauthorized or forced marriage.[47] Trafficking in children with the use of force or threat, deception, fraud, kidnapping, abuse of power or difficult position or relationship addiction, giving or receiving financial compensation or benefits to achieve the consent of a person having control over a child to conclude an unauthorized or forced marriage is an aggravated form punishable by a sentenced from three to fifteen years.[48]

It is important to note that the act of marriage with a child is a form of exploitation, and it is not necessary to determine whether the child was abused in a marriage or not.

5. RESEARCH AND ANALYSIS OF CHILDREN AS VICTIMS OF FORCED MARRIAGES

Behind the large number of child marriages lies trafficking. Forced marriages are increasingly expanding every day, and we can only surmise their dark figure. The most affected are communities where there are traditional customs of early entry into marriage as is the case in the Roma population.

Main characteristics of forced child marriages are the following:

1- The child has no right to choose his or her spouse and has no right to refuse it

2- The child for the imposed spouse usually gets a much older partner

3- The child is exposed to coercion, threats and abuse so that he/she does not leave the spouse

4- Physical abuse and violence is carried out against a child

5- The child is restricted in movement and imposed various other restrictions

45 Art.170. par.1. i 2. *Ibid.*

46 Par. 3. *Ibid.*

47 Art. 106. par.2. *Ibid.*

48 Par.3. *Ibid.*

6- The girl in a forced marriage is not entitled to a free choice about whether to have children

7-- Forced marriage realizes an exchange of economic goods over which the forced spouse has no control.

In Bosnia and Herzegovina in 2014 identified was a total of 49 potential victims of human trafficking with the purpose of labor exploitation, sexual exploitation and for the purpose of organized and forced begging and selling with the aim of concluding contractual or forced marriages as well as for the production, possession and viewing of child pornography. For the purpose of forced marriage and subsequent begging registered were 4 minor victims.[49] In Bosnia and Herzegovina children are to a large percentage exposed to human trafficking, particularly for forced begging and entering into forced marriages or child abuse via the Internet.[50]

Economically vulnerable Roma children were in 2016 subjected to forced begging and domestic servitude against their will in forced marriages.[51]

In 2015 in Croatia identified were 38 victims of human trafficking (35 citizens of the Republic of Croatia, 2 citizens of Bosnia and Herzegovina and one citizen of Hungary). In comparison to 2014 registered was an increase in the total number of victims, however, significantly reduced was the number of identified minor victims of trafficking in 2015 (4 minor victims was identified). In a large number of cases these are the so-called cases of "internal" trafficking in persons, but there are documented cases of Croatian citizens who are victims of trafficking within the EU.[52]

The Criminal Code, which entered into force on 1 January 2013 has brought an important innovation in criminalizing the offense of human trafficking. Former Art.175. "Trafficking in human beings and slavery"[53] is now regulated through two articles, Art.105. "Slavery" and Art. 106. "Trafficking in human beings." As forms of exploitation of human trafficking in the new CC incriminated are the

[49] Report on the state of human trafficking in Bosnia and Herzegovina in 2014, National Coordinator for Combating Trafficking in Human Beings, Sarajevo, April/March 2015, URL=http://msb.gov.ba/PDF/IZVJESTAJ_trgovin_%20izvjestaj_2014.pdf, Accessed 20 February 2017.

[50] *Ibid.*

[51] Report on human trafficking in 2016, Bosnia and Herzegovina - Nivo 2, available at: URL=http://photos.state.gov/libraries/sarajevo/30982/pdfs/2016%20TIP%20REPORT_BOS.pdf. Accessed 20 February 2017.

[52] More: Office for Human Rights and National Minorities: Report on the implementation of the National Plan to Combat Trafficking in Human Beings for the period from 2012 to 2015, for 2015.

[53] Criminal code RC 97, Official Gazette No. 110/1997,129/2000, 51/2000, 111/2003, 105/2004, 84/2005, 71/2006, 110/2007, 152/2008

conclusion of unauthorized or forced marriage and the use of persons in armed conflicts.

In the Republic of Serbia, we are mostly talking about children marriages contracted between adults and juveniles, mostly girls. The table below under number 2 shows the criminal charges for forced marriage.

Table 1. Criminal charges for forced marriage[54]

Year	No. of charges
2009	5
2010	4
2011	2
2012	2
Total	13

Indicators by which we can recognize a child as a potential victim of human trafficking are as follows:

- Injuries that look like the result of a physical attack,
- Signs of neglect and child abuse,
- Signs that they are subject to control of movement,
- They have no persons with which to socialize,
- They are not entered in the register of births,
- They are illegally adopted,
- They do not attend school,
- They do not have time to play, are aggressive, exhibit behavioral problems
- Constantly changing testimony,
- Are exposed to violence or threats of violence to them or their families,
- Exploited for begging, prostitution, street work,
- Poorly or not paid at all for work for working overtime,
- Falsely representing themselves in order not to reveal their status,
- They do not have personal documents,

54 Morača T, Galonja A, Jovanović S, Milanović L, *Local communities in the fight against human trafficking*, Beograd, 2013, URL=http://www.atina.org.rs/sites/default/files/Local%20communities%20publikacija.pdf. Accessed 20 February 2017

- They reside and work in the place and at the time inappropriate for the age of the child,
- Pregnancy and child abortion,
- They are found in a location that is known or is connected with trafficking,
- They do not know the language,
- They do not know their work or home address,
- In their presence instead of them someone else is talking,
- They live in poor and inhuman conditions,
- They have no health care,
- Without the right to communicate with their family and loved ones,
- They depend on third persons,
- They are in the presence of adults who are not family members or are caught alone on the street without an adult,
- They have contact with people from the criminal milieu,
- They show great resourcefulness that is not expected of the average child,
- They act and speak as per the instructions received,
- They have traumatic reactions,
- They live in a common-law marriage or forced marriage,
- They're frightened and show fear,
- They are traveling without adults or people who are not their parents,
- Very often change residence,
- As foreign nationals they have no resolved status,
- They are dressed inappropriately for age or weather conditions,
- They show signs of addiction to drugs or alcohol, and similar.

As can be seen from Table 2, most girls married between the ages of 15-19 years have been recorded in Dem. Rep. of Congo (74%), in second place was Nigeria (70%), and in third the Congo (56%). As for the boys in the same age situation is slightly different. Considerably fewer is married (1/4) compared to girls (3.4). The highest number of married are in Iraq (15%), followed by Nepal (14%) and Tsonga (12%).

Table 2: Percentage of minors aged 15-19 that are married[55]

Married Adolescents: Percentage of 15-19 year-olds married		
	boys	girls
Dem. Rep. Of Congo	5	74
Niger	4	70
Congo	12	56
Uganda	11	50
Mali	5	50
Afghanistan	9	54
Bangladesh	5	51
Nepal	14	42
Iraq	15	28
Syria	4	25
Yemen	5	24
Honduras	7	30
Cuba	7	29
Guatemala	8	24

In 2015, the FMU handled cases involving 67 'focus' countries which a victim was at risk of, or had already, been taken to in connection with a forced marriage, the five highest volume countries in 2015 were: Pakistan - 539 cases (44%), Bangladesh - 89 cases (7%), India - 75 cases (6%), Somalia - 34 cases (3%), Afghanistan - 21 cases (2%).[56]

According to research conducted, which includes representatives of social welfare centers, institutions responsible for the issues of trafficking and non-governmental organizations, the questions which are the possible indicators that the minor is the victim of human trafficking and what are the reasons why it has become a victim, obtained the answers presented in tables 3 and 4.

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55 Source: UN Population Division, Department of Economic and Social Affairs, World Marriage Patterns 2000, URL=http://www.un.org/esa/population/publications/worldmarriage/worldmarriagepatterns2000.pdf. Accessed 20 February 2017.

56 Forced Marriage Unit Statistics 2015 8 March 2016, URL=https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505827/Forced_Marriage_Unit_statistics_2015.pdf. Accessed 20 February 2017.

Table 3: Indicators suggesting that a minor is the victim of human trafficking

	Indicators suggesting that a minor is the victim of human trafficking	**%**
1	Injuries caused by violence	29
2	Children caught alone on the street without an adult	35
3	Frightened, neglected, abandoned children	49
4	Children not entered in the register of births	15
5	Children outside the education and health systems	35
6	Denied rights of the child exploitation	29
7	Residing and working in the place and at the time inappropriate for the age of the child Pregnancy and child abortion	55
8	Children are not playing with other children, showing behavior disorders	29
9	Statement and recognition of victims	15
10	Other	15

Stay and work in the place and at the time inappropriate for the age of the child, pregnancy and abortion, and frightened, neglected, abandoned children are the most important indicators that the minor is a victim of human trafficking.

Table 4: Reasons for which the minor has become a victim of human trafficking

	Reasons for which the minor has become a victim of human trafficking	**%**
1	High degree of poverty	55
2	Child neglect	49
3	Misguidance	15
4	Threat, coercion or duress	49
5	Kidnapping	15
6	Customs and traditions	70

The number one reasons why the minor had become a victim of trafficking, according to the survey, are the customs and traditions and high degree of poverty.

6. CONCLUSION

Forced marriages of children leave huge consequences on the physical and mental development of the child. The practice of early marriage, approval of parents, low education, economic dependence as well as any other reason can not and must not be an excuse for entering a child into marriage nor the life of a child out of wed-

lock. Children are not able to cope with the problems and responsibilities that include marriage, they are expected to take responsibility for their decisions, which they are not able to do. They are still children in need of parental care, and should not themselves become and be parents. Worrying is a situation where parents give their approval to a minor child to enter into marriage, and not to talk about situations where parents are the ones that lead their child into marriage. Accordingly, it is proposed *de lege ferenda* to introduce legislation under which a marriage can be entered into only with people over 18 years.

With early, forced child marriages, children's basic rights to their own choice of partner have been violated, the right to development and education, right to health, the right to free will in connection with the decision about having children and various other restrictions have been imposed on them.

Of great importance is scientific research and media coverage of the public through prevention campaigns to raise public awareness of the problem of trafficking, especially trafficking of children, as an aggravated form of the crime. Of significance is the comprehensive research in the Region on all forms of trafficking in persons, their distribution and causes. It is necessary to continuously work on the methods of identification of victims in relation to all forms of trade and modes of selection and finding the victims. Particular attention should be paid to the activities of the detection of criminal offenses of organized crime related to trafficking in persons, organized by forcing children to beg and the conclusion of forced marriages. Regional and international cooperation is crucial in the detection of criminal offenses in the area of combating trafficking in persons and victim identification.

Finally, the state must clearly define the institution of child marriage as a totally unacceptable and harmful category. Consequently, we should act preventively and take account of particular risk groups and categories to separate the concept of child marriage from any ethnic or religious community.

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3. Family law, Official Gazette No103/15
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5. Law on Ratification of the Council of Europe Convention on Action Against Trafficking in Human BeingsOfficial Gazette No 07/2007

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Topic 2

EU civil law and procedure (including commercial law and consumer protection issues)

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EU INSOLVENCY LAW- NEW RECAST REGULATION ON INSOLVENCY PROCEEDINGS

ABSTRACT

Intensive process of Europeanization and the creation of internal market significantly changed European business landscape. More and more European companies are spreading their businesses across Europe what consequently raised considerable number of issues to address, such as, law applicable to corporate activities, creditor's rights, etc. The problem is particularly complex and complicated in case of companies' bankruptcy. In „massive" bankruptcy cases with cross border elements, involving large number of creditors, companies assets in several member states, large number of employees etc., it is hard or impossible to coordinate all activities, to ensure equal treatment and equal rights to all creditors, prevent forum shopping or/and to trace, collect and sell debtor's assets.

Having in mind all that and the fact that conflicting Member States insolvency rules create uncertainty among investors, discourages cross-border investments and cause delay in restructuring, EU is taking steps in harmonizing insolvency law since early 1980's. However, the first EU Insolvency Regulation was not enacted until year 2002. The 2002 EU Insolvency Regulation sets forth a framework for cross border insolvency within the EU, especially providing rules for the international jurisdiction of a court in a Member State for opening of insolvency proceedings, the automatic recognition of these proceedings and the power of „liquidator" in the other Member State, and important choice of law provisions. After 10 years of application of 2002 Insolvency Regulation, in year 2012, the EU Commission decided that it is time to modernize EU insolvency law. As a result it came out with the proposal of the Recast Insolvency Regulation. Recast Insolvency Regulation was finally adopted by the EU Parliament and Council in June 2015 but it will enter into force in year 2017.

The new Recast Insolvency Regulation does not adopt radically different approach compared to previous Regulation not it offers revolutionary different solutions. The fundamental premise that insolvency law is a matter for each EU member state has remained. However the Recast regulation strengthens and broadens the framework of recognition and co-operation which the 2002 Insolvency regulation set up over a decade ago. In that context, paper will address processes of harmonization of EU insolvency law. It will emphasize the most important aspects of EU insolvency regime. Special attention will be given to substantive and procedural issues as regulated in the Recast Insolvency Regulation.

Keywords: *Recast Insolvency Regulation, EU insolvency law*

1. INTRODUCTION

On May 20th 2015 European Parliament and Council after lengthy and complex analysis of the strengths and weaknesses of European Insolvency law, adopted new Insolvency Regulation[1]. New Insolvency regulation will enter into force on June 26th 2017. Since that is the first comprehensive reform of EU insolvency law since the first EU Insolvency regulation entered into force in year 2002,it seems that it is an appropriate occasion to explore and reflect on achievements and weaknesses of EU insolvency law and to define the course or direction of "new" EU insolvency law.

The paper will generally focus on the legal measures and efforts undertaken on EU level to provide legal framework for dealing with cross-border bankruptcies. However, paper will also shortly reflect on international treaties and process of harmonization of insolvency law on international level particularly explaining reasons and importance of harmonization of cross border insolvency proceedings.

Furthermore, paper will provide a comprehensive overview of the rules adopted by new Recast Insolvency Regulation. Special attention will be given to the issues which are considered to be a cornerstone of reform such as (re)definition of COMI and to the other most important aspect of last EU insolvency reform.

2. GOALS, POLICY REASONS AND HARMONIZATION OF CROSS- BORDER INSOLVENCY PROCEEDINGS

With the development of international trade and economic integration, cross-border insolvency become increasingly important[2].In present time it is quite often to have a situation where a company is registered in one country, managed from another country and having subsidiaries, employees and assets spread in several other countries.

When such company becomes insolvent, that affects a great variety of stakeholder's employees, shareholders, suppliers, customer's financial lenders, pensioners and tax man[3].

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1 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 [2015] OJ L 141/19 (Further in the text: Recast Insolvency Regulation)

2 Mucciarelli,Federico,*Not Just Efficiency: Insolvency in the EU and Its Political Dimension*,European Business Law Organization Review, No. 14, 2013, p. 176.

3 Hey, Jon, *Harmonising Insolvency Law- Nice but Not Necessary*,Global Capital, May 2015., avaialble at: URL=http://www.globalcapital.com/article/rmwjf2st641x/harmonising-insolvency-law-nice-but-not-necessary, Accessed 3 February 2017.

It is possible that each country in which insolvent company has business premises or assets will have aspiration to conduct an insolvency proceedings. It may happen that under the national insolvency law, insolvency proceedings can be opened at the same time in several countries. It is also possible that a company will move assets or/and registered office from one jurisdiction to another because of more favourable insolvency regime. And finally, the problem can also arise in connection to creditor's rights, creditor's protection etc.

Therefore, in order to maximize and protect value of assets of insolvent company, prevent forum shopping, protect creditors from fraudulent insolvency practice, avoid simultaneous insolvency proceedings against same debtor in several states etc., number of states as well as leading international institutions begun to explore the possibility of harmonization of insolvency proceeding having cross-border dimension long time ago[4]. For example, already in 1933. Bankruptcy convention was applicable in five Scandinavian states[5]. But such and similar documents enacted worldwide and in Europe did not have significant local or international impact[6].

The first international piece of legislation that had major influence on harmonization of cross-border insolvency proceeding on global level was the Model Law on Cross-Border Insolvency[7]. It was accepted by the United Nations Commission on International Trade Law (UNCITRAL) in Vienna on 30 May 1997.Number of countries around the world adopted legislation based on the Model Law[8] what led to soft harmonization of cross border insolvency proceedings worldwide.

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4 Burman, Harold, *Harmonization of International Bankruptcy Law*: A United States Perspective, Fordham Law Review, vol. 64, Issue 4, 1996, p. 2544; See more: Paulus, Christoph, *Global Insolvency Law and the Role of Multinational Institutions*, Brook.J.Int'lL, Vol. 32, No.3, 2007.

5 *Ibid*., p. 2544.

6 First attempts to harmonize cross border insolvency rules we can trace back in 1889 when several Latin American states entered into the Treaty called Montevideo Treaty on Commercial International Law. This Treaty was updated in 1940's but was than ratified by Uruguay, Paraguay and Argentina. Another such document was Bustamante Code from 1928, based on the Havana Convention on Private International Law. See: Paulus, Christoph, *A Vision of the European Insolvency Law*, Norton Journal of Bankruptcy Law and Practice, Vol. 17, No. 5, 2008, p .608

7 UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL, 1997.
[a]valiable at: URL= http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html8.

8 Legislation based on the Model Law has been adopted in 41 States in a total of 43 jurisdictions. Among those countries are also several European countries, Greece, Poland, Romania,UK, Slovenia,but also U.S., Australia, Canada and Japan.
Seemore:URL=http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html, Accessed 14 February 2017.

However, with no intention to minimize importance or significance of UNCITRAL Model Law on Cross-Border Insolvency, Model Law focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law. As stated in its preamble *„it focuses on the legislative framework needed to facilitate cooperation and coordination in cross-border insolvency cases, with a view to promoting the general objectives of insolvency law such as:*

(a) Cooperation between the courts and other competent authorities of the enacting State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvency proceedings that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment“[9].

Another piece of legislation that also had worldwide impact on insolvency proceedings with cross-border dimension originates from the EU. It is the Council Regulation on Insolvency Proceedings enacted in year 2000[10] (2002 Insolvency Regulations), only three years after UNCITRAL Model Law was enacted.

But, unlike the process of harmonization of insolvency law on global level, harmonization of cross border insolvency law within the European Union took place indifferent political context and with different political background and goals.

3. EU INSOLVENCY LAW HARMONIZATION: FROM INSOLVENCY CONVENTION TO THE RECAST INSOLVENCY REGULATION

Harmonization of insolvency law on EU level has a long history. The dream of a European-wide insolvency regime goes back to the1960's[11] when European coun-

[9] UNCITRAL, Practical Guide on Cross-Border Insolvency Cooperation, United Nations, New York, 2010, p.12

[10] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160, pp. 1–18.

[11] Caneco, A., Joseph, *Insolvency Law and Attempts to Prevent Abuse and Forum Shopping in the EU*, 2016, Setton Hall University, Scholarship Paper 90, p. 5.

tries recognized the need and importance of harmonization of insolvency law for creation of the internal market[12].

It was generally accepted that orderly and effective insolvency procedure plays a critical role in fostering growth and competitiveness of European economies. Without effective procedures that are applied in a predictable manner, creditors may be unable to collect on their claims, different creditors may not be treated adequately, and level of domestic and foreign investments on internal market will decrease[13].Also, it was obvious that disparities between national laws create obstacles to cross border activities within the European Union.

Nevertheless, a process of harmonization of EU insolvency law went slowly and not too smoothly. In 1970s and subsequently in1980sEuropean Communities Commission proposed a draft for an Insolvency Convention[14]. But the draft was rejected as irrational and too complex in certain areas. Finally, after the years of various negotiations, in November 1995. Convention on Insolvency Proceeding[15] was published. Although the Convention never came into force, because it was not ratified by all EU countries[16], the Convention strongly influence future of EU insolvency law, notably the first 2002EU Insolvency Regulation.

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12 Effective and efficient functioning of cross-border insolvency proceedings is recognized as an important factor for the smooth functioning of internal market.

13 International Monetary Fund, Orderly and Effective Insolvency Procedures, Legal Department, 1999, pp 1-7.

14 Draft Convention on bankruptcy, winding –up arrangements, composition and similar proceedings, Bulletin of teh European Communities, Supplement 82, 1982 (available at:URL= http://aei.pitt.edu/5480/1/5480.pdf),
See more: Rudbordeh, Amir, Adl, *Ananalysis and hypothesis on forum shopping in insolvency law: From the European Insolvency regulation to its Recast*, < https://www.iiiglobal.org/sites/default/files/media/RUDBORDEH,%20Amir%20-%20An%20Analysis%20%26%20Hypothesis%20on%20Forum%20Shopping%20in%20Insolvency%20Law%20(EU).pdf >p. 6.; Muir, Hunter, *The Draft Bankruptcy Convention of the EEC,* International and Comparative Law Quaterly, vol. 5, No. 2, 1976, pp. 310-328.
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15 Text of the Convention is avaialble at**:** URL= http://aei.pitt.edu/2840/1/2840.pdf, Accessed 3February 2017; See also Report on the Convention on Insolvency Proceedings, EU The Council, 6500/96, 3.May1996, (so called: Virgos Report); (available at: URL=http://globalinsolvency.com/sites/all/files/insolvency_report.pdf. Accessed 6 February 2017.)

16 The text of the EU Convention on Insolvency Proceedingswas open for a signature between 23 November 1995 and 23rd May 1995. By May 23rd 1996., 14 out of 15 Member States signed the Convention.Only UK due to political controversies didn't sign Convention

Most of the content of the Insolvency Convention was taken over in the text of the 2002 Insolvency Regulation[17].So the question is, why something that was rejected just few years ago was accepted now? The answer lays in fact that Convention, as a legal instrument ,in order to be applicable on national level had to be ratified by Member States. Contrary to that, regulation is a Community law instrument which is binding and directly applicable in all Member States[18].

So, contrary to the Convention whose application was postponed until it is ratified by all Member States, 2002Insolvency Regulation entered into force in all Member States on May 31st, 2002, with the exception of Denmark[19].

2002 Insolvency Regulation had crucial impact on development of EU Insolvency Law in Europe. It sets forth a framework for cross border insolvency within EU, especially providing:

1/ rules for the international jurisdiction of a Court in a Member State for the opening of insolvency proceedings,

2/ the automatic recognition of these proceedings,

3/ the powers of liquidator in the other Member States, and

4/ important choice of law provisions[20].

Concerning the scope of application, the 2002 Insolvency Regulation primarily aimed at regulating cross–border insolvency proceedings of "European" companies. However, it has broader territorial scope. It also applies on foreign (non EU) companies, notably the US corporations having registered office out of EU, it they operate in the EU and have the economic activities in the European Union.

2002 Insolvency Regulation was inforce for more than a decade. It is generally regarded as a successful legal instrument for the recognition and for the coordination of cross-border insolvency proceedings in the EU[21]. But just as UNCITRAL Model Law on Cross- Border Insolvency, 2002 Insolvency Regulation was not enacted with intention to harmonize substantive insolvency law of EU Member

17 Wessels, Bob, *EU Regulation on Insolvency Proceedings*, INSOL, 2006 p.6., Available at: URL=http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Union%20Regulation%20on%20Insolvency%20Proceedings%20An%20Introductory%20analysis,%20Bob%20Wessels.pdf. Accessed 16 February 2017.

18 *Ibid.*, p. 6

19 *Ibid.*, p. 6

20 *Ibid.*, p. 1.

21 Report from the Commission Ont he Application of Council Regulation No 1346/2000 On Insolvency Proceedings, COM (2012) 743, 12 December 2012.

States. The fundamental premise, adopted by 2002 Insolvency Regulation was that the insolvency law is the matter for each Member State. As a result, 2000 Insolvency Regulation did not have significant effect on harmonization of national substantive laws in this field, what proved to be one of its major weaknesses[22].

Also, the economic crisis which affected European countries in period between 2009 and 2011 and which has led to increase in number of failing businesses, indicated that current insolvency regulation on EU level may not be adequate instrument for dealing with increased number of insolvency proceedings in enlarged EU. According to the data published by the European Commission, in period between 2009- 2011, an average of 200 000 firms went bankrupt per year in EU. About one-quarter of these bankruptcies have a cross –border element. 1.7 million jobs are estimated to be lost due to insolvencies every day[23].

Faced with this economic realities European Commission opened broader public consultation about possible reform of EU insolvency law. In time frame between 2011and 2014 it presented a package of measures[24]to modernize insolvency rules[25]. Final outcome of all those efforts is the enactment of new insolvency regulation, Regulation (EU) 2015/848of the European Parliament and of the Council of 20 May 2015, commonly referred as the Recast Insolvency Regulation.

As mentioned in the introduction, Recast Insolvency Regulation will enter into force in June 2017, two years after it was adopted by the European Parliament and the Council. It will replace former 2002 Insolvency Regulation.

The Commission has high expectations from this legislative reform. One of the objectives of Recast Insolvency Regulation is to shift the focus away from liquidation towards encouraging viable business to restructure at the early stage to prevent insolvency[26].

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22 See more: Wessels, Bob, *Twenty Suggestions for a Makeover of the EU Insolvency Regulation*, International Caselaw Alert, No. 12, 2006, pp. 68-73

23 Communication from the Commission to the European Parliament, the Council and The European Econimc and Social Committee, A new approach to business failure and insolvency, COM (2012) 742 final, Strasbourgh, 12 December 2012, p. 2.

24 In 2011 the European Parliament published the Report with Recommendations to the Commission on the Insolvency Proceedings (A7-0355/2011). In 2012 Commission published Communication on a New Approach to Business Failure and insolvency (COM(2012) 742 Final). In 2014 Commission published Reccomendation on a New Approach to Business Failure and Insolvency (COM 2014).

25 See: European Commission, Press release, Insolvency: Commission recommends new approach to rescue businesses and give honest enterpreneurs a second chance, Brussels, 12 March 2014.

26 Stones, Kathy, *What harmonisatio provisions have the EU Commission recomended and what is their legal status?,* LexisNexis, 19 March 2014; Avaialble at: URL=http://blogs.lexisnexis.co.uk/randi/the-challenges-of-harmonising-insolvencies-and-restructurings/). Accessed 15 February 2017.

Furthermore, it is also expected that the new Recast regulation will significantly improve efficiency and effectiveness of cross border insolvency proceedings and thus contribute to "*building solid foundations for boosting growth and jobs in Europe*[27]".

As stated in European Commission press release, "*the modernized regulation will bring:*

- ***A broadened scope:** The rules will cover a broader range of commercial and personal insolvency proceedings, such as the so-called Spanish scheme of arrangement, the Italian reorganisation plan procedure and the Finnish consumer insolvency procedures. Overall, the reform will allow 19 new national insolvency procedures to benefit from the Regulation.*
- ***Legal certainty and safeguards against bankruptcy tourism:** If a debtor relocates shortly before filing for insolvency, the court will have to carefully look into all circumstances of the case to see that the relocation is genuine and not abusive.*
- ***Interconnected insolvency registers:** Businesses, creditors and investors will have easy access to any national insolvency register European e-Justice Portal*
- ***Increased chances to rescue companies:** The new rules avoid secondary proceedings in other Member States being opened, while at the same time guaranteeing the interests of local creditors. It will be easier to restructure companies in a cross-border context.*
- ***A framework for group insolvency proceedings:** With increased efficiency for insolvency proceedings concerning different members of a group of companies, there will be greater chances of rescuing the group as a whole*"[28].

4. STRUCTURE AND THE MAIN FEATURES OF THE RECAST INSOLVENCY REGULATION

Recast Insolvency Regulation addresses different aspects of cross border insolvency proceedings[29] among which some of the most important are: criteria for opening

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27 European Commission, Press release, Justice Ministers agree on modern insolvency rules, Brussels, 4 December 2014., available at: URL=http://europa.eu/rapid/press-release_IP-14-2322_hr.htm. Accessed 15 February 2017.

28 *Ibid.*

29 Regulation is organized in seven chapters as follows: Chapter I (1-18), General provisions, Chapter II, Recognition of Insolvency Proceedings (19- 33), Chapter III (34-52), Secondary Insolvency Proceedings, Chapter IV (53-55) Provisions of Information for Creditors and Lodgment of Their Claims,

of an insolvency proceedings, management of insolvency proceedings, creditor's rights, main and secondary insolvency proceedings, rules on recognition of insolvency proceedings, insolvency proceedings of a group of companies etc. Recast Insolvency Regulation brings number of improvements and clarifications of legal concepts previously insufficiently regulated by 2002 Insolvency Regulation. In many aspects, the reform simply codifies EU Courts case law with the aim of increasing legal certainty[30]. However it is important to emphasize that the Recast Insolvency Regulation doesn't attempt to harmonize insolvency rules of EU level. In the preamble of Recast Insolvency Regulation it is stated that "*as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union*"[31].

In that sense, substantive insolvency rules of Member States still remain main source of law even in cross border insolvency proceedings. Recast Insolvency Regulation applies only to proceedings which fall within its scope as defined in the Recast Insolvency Regulation.

4.1. Proceedings within the scope of the Recast Insolvency Regulation

According to the wording of Article 1of the Recast Insolvency Regulation it applies to all collective insolvency[32] proceedings which entail the partial or total divestiture of a debtor as well as to pre-insolvency, rescue or/ and to other similar reorganization proceedings where a debtor remains in possession.

Closer examination of above rule reveals three conditions that must be fulfilled in order to apply the Recast Insolvency Regulation:

a) Firstly, proceeding must be collective. That means that all creditors may seek satisfaction only through these insolvency proceedings, as individual actions will be precluded[33].

Chapter V (56-77), Insolvency Proceedings of Members of a Group of Companies, Chapter VI (78-83), Data Protection, Chapter VII (84-92), Transitional and Final Provisions.

30 Mucciarelli, Federico, *Private International Law Rules in the Insolvency Regulation Recast: A Reform or Restatement of the Status Quo?* ECFR1, 2016, p.1. (available at: URL=https://ssrn.com/abstract=2650414 or URL=http://dx.doi.org/10.2139/ssrn.2650414. Accessed 17 January 2017)

31 Recast Insolvency Regualtion, *op. cit.* note 1, Preamble (22).

32 Collective insolvency proceedings means proceedings which include all or a significant part of a debotr's creditors, provided that, in the later case, the proceedings do not affect the claims of creditors which are not involved in them. (Article 2. of the Recast Insolvency Regulation)

33 Wessels, Bob, *op. cit.* note 17, p. 11

b) Secondly, proceedings can be opened only in connection to the debtor's insolvency and not on other grounds[34]. This doesn't mean that the debtor must be insolvent. Recast Insolvency Regulation may be applied in case when there is only likelihood of insolvency but only if the purpose of such pre-insolvency proceeding is to avoid the debtor's insolvency or the cessation of the debtor's business activities[35]. Therefore, insolvency, pre-insolvency and reorganization proceedings should fit within scope of Article 1of the Recast Insolvency Regulation.

c) Thirdly, the proceeding should entail the appointment of insolvency practitioner[36] such as for example "liquidator" and must be subject to control or supervision by the court.

All three conditions must be fulfilled cumulatively.

Concerning the scope of application of the Recast Insolvency Regulation *ratione personae,* it applies both to corporates and individuals[37].In practice this encompasses various corporate entities as well as individual entrepreneurs.

And finally, Recast Insolvency Regulation applies on all insolvency proceedings having impact on internal market and that is presumed to be when parties have their centre of main interest within a Member State of the EU. This means that the Recast Insolvency Regulation also applies to corporate entities whose place of incorporation is outside EU, but whose centre of main interests is within EU.

4.2. Lex forum concurs or the law applicable to cross border insolvency proceedings: "COMI" solution

The topic that has probably gained the greatest attention in connection to cross-border insolvency proceedings is related to law applicable to cross border insolvency proceedings[38]. When a company is doing business in several Member States and has business premises, assets and employees in every of several Member States

34 *Ibid.*, p. 11

35 Article 1 (1) par.2 of the Recast Insolvency Regulation, See also, Mucciarelli, F, *op.cit.* note 33, p. 10.

36 Notion „insolvency practitioner" cover wide range of persons differently defined in European jurisdicions. In order to be qualified as an „insolvency practitioner" one must: person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor's affairs. The persons and bodies referred to in the first subparagrap.

37 Article 3. of the Recast Insolvency Regulation.

38 See: Latella, Dario, *The COMI Concept in the Revision of the European Insolvency Regulation*, ECFR, No. 4, 2014, pp. 1-16.

it may be difficult to determine or identify which court is competent to open insolvency proceeding.

Since this creates number of problems in practice in connection to rules on publicity, forum shopping, creditors' claims etc., the issue was already dealt in 2002 Insolvency Regulation. According to the 2002 Insolvency regulation, jurisdiction of the competent court in cross –border insolvency proceedings has been determined based on so called COMI or centre of the debtor's main interest.

Recast Insolvency Regulation follows the same approach.

According to the Article 3 of the Recast Insolvency Regulation, the courts of the Member State within the territory of which the centre of the debtor's main interest (COMI) is situated shall have jurisdiction to open (so called) "main insolvency proceeding".

So in order to determine which court is competent for opening an insolvency proceedings one must first determine where the debtor's COMI or main centre of interest is.

Proper determination of COMI is extremely important. Under the principle of unity, generally adopted by EU insolvency law, it is not allowed to open or conduct multiple or parallel main proceedings over the same debtor. So when insolvency proceedings is once opened in one Member State, this proceeding will be considered the "main insolvency proceeding", and no other main insolvency proceedings can be opened in other Member State.

Although determining COMI at first glance may seem simple, determining COMI in practice is not always an easy task. In many situations it may be unclear where the COMI is. For example, if company is incorporated in UK, company's management is located in Germany and business activity (business premises) is dominantly located in Croatia, we may not be certain in which country is the centre of the debtor's main interest (COMI).Also, it may be problematic to determine COMI in situation when company transfer corporate seat from one jurisdiction to another. So the question is, where is COMI now?

From above it is clear that defining COMI is more factual than legal issue. In each and every case it should be determined which among several place of debtor's business is "central" place of business.

Recast Insolvency Regulation provides general guidelines for determining COMI. Basic presumption is that COMI is "*in the place where debtor conducts the adminis-*

tration of its interests on a regular basis and which is ascertainable by third parties"[39]. The definition evidently gives primacy to the place from which debtor in reality manages its business over the place of incorporation. The idea is to look for the "brain" of the company, not for the "mussels": the actual centre of management and supervision of the interest of the debtor (head office functions) which may not necessarily coincide with the location of the debtor's principal place of business or operations[40].

However, if debtor has several places of administration, so it is unclear which of several places is debtors main centre of interest, than for legal persons COMI is presumed to be in the place of the registered office, unless otherwise is proved[41]. For individuals, an independent business or professional activity, COMI is presumed to be in individual's principal place of business, unless otherwise proved[42].

In both mentioned cases, the presumption of COMI shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings[43]. This rule has been introduced in EU insolvency law by the Recast Insolvency Regulation, and it is aimed at preventing abusive *forum shopping*.

EU rules of free movement allow individuals as well as to companies to move their central administration from one country to another. Companies in financial troubles or faced with the imminent probability of opening insolvency proceedings tend to move corporate seat to another more favourable jurisdictions in order to prevent opening insolvency proceedings or in order to have more "friendly" insolvency regime.

The above rule does not affect the companies' right to transfer corporate seat (registered office). Any kind of such restriction would be contrary to the right on free movement. However, it is expected that introducing a minimum period of the location of the COMI will discourage abusive COMI relocation.

Recast Insolvency Regulation introduces another important rule concerning the COMI concept. According to the new rule it is a duty of the court seized with a

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39 Article 3 (1) of the Recast Insolvency Regulation.

40 Garcimartin, Francisco, *The EU Insolvency Regulation: Rules on Jurisdiction,* Available at: URL=http://www.ejtn.eu/PageFiles/6333/Rules_on_jurisdiction.pdf. Accessed 16 February 2017.

41 Article 3 (1) par. 1. of the Recast Insolvency Regulation.

42 Article 3 (1) par. 2. of the Recast Insolvency Regulation; See more: Wessels, Bob, *The Changing Landscape of Cross-border Insolvency Law in Europe*, Juridica International, Vol. 12, 2007, p.120; Mucciarelli, *op.cit*. note 32., pp. 15- 17.

43 Article 3 (1) par. 2. and par. 3. of the Recast Insolvency Regulation

request for open insolvency proceeding to examine, *ex officio* and prior to opening insolvency proceeding, whether it has jurisdiction to open insolvency proceeding[44]. It is also in obligation to specify the grounds on which the jurisdiction is based, meaning to support the presumption that the COMI is within the territory of this particular Member State.

Such decision may be challenged by debtor or any creditor before a court on grounds of international jurisdiction[45].

However, once when COMI is properly determined and when insolvency proceeding is opened in one country it is not possible to open another "main" insolvency proceeding over the same debtor in another country, nor can court of a certain Member State re-examine debtor's insolvency when a main insolvency proceeding is opened in another Member State[46]. The Recast Insolvency Regulation is based upon the principle that only singe "main insolvency proceedings" may be opened with regard to the same debtor[47].

Notwithstanding to this general rule, it is however possible to open so called secondary or territorial proceeding. There is general consensus that secondary proceedings serve mainly two purposes: 1) they protect creditors, usually local creditors, from the main proceedings, and 2) at the same time they assist and support the operation of the main insolvency proceedings[48].

4.3. Secondary insolvency proceedings versus main insolvency proceedings

Secondary proceeding is proceedings which can be opened in country in which debtor has an „establishment„ within the territory of that particular State. This would for example be the case when debtor's COMI is in Germany and its establishment is in Italy. In this case, despite the fact that debtor's COMI is in Germany, according to the Recast Regulation it is possible to open so called secondary or territorial insolvency proceeding in country of establishment. In this case, country of establishment is in Italy, thus secondary proceedings can be opened in Italy.

The general rule is that, if such proceeding is opened, the effects of the secondary proceedings shall be restricted to the debtor's assets in that territory.

[44] Article 4 (1) of the Recast Insolvency Regulation

[45] Article 5 (1) of the Recast Insolvency Regulation

[46] See: Mucciarelli, F., *op.cit.* note 32, p. 8

[47] Garcimartin, F., *op.cit.* note 40, p.8

[48] Wessels, B., *op.cit.* note 18, p. 13

Recast Insolvency Regulation distinguishes between two kinds of secondary proceedings: 1) independent territorial proceeding[49] and 2) secondary territorial proceeding.[50]

1)Independent territorial proceedings is independent of „the main proceeding". It can be opened prior the main insolvency proceedings and if no main proceeding is opened.

It must be opened prior to opening of main insolvency proceeding where:

a) Main insolvency proceeding cannot be opened because of the conditions laid down by the law of Member States or

b) the opening of territorial insolvency proceeding is requested by a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of a Member State where the opening of territorial proceeding is requested, or

c) A public authority under which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings[51].

If, and when, main proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings.

2) Secondary territorial proceeding can be opened only after the main proceedings have been opened by the competent court[52].

The opening of secondary proceedings may be requested by the insolvency practitioner in the main insolvency proceedings and any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested[53].

The law applicable to secondary insolvency proceedings shall be the law of the Member State within the territory of which the secondary insolvency proceedings are opened[54].

49 Article 3(2) of the Recast Insolvency Regulation
50 Article 3(3) and (4) of the Recast Insolvency Regulation
51 Article 4(4) of the Recast Insolvency Regulation
52 Article 3(3) and article 34 of the the Recast Insolvency Regulation
53 Article 37 (1)of the Recast Insolvency Regulation
54 Article 35 of the Recast Insolvency Regulation

Before opening secondary insolvency proceeding, a court seized of a request to open secondary proceedings must immediately notify insolvency practitioner in the main proceeding that it has seized a request and must give an opportunity to the practitioner to be heard on the request.

Practitioner (liquidator) of the "main proceedings" are granted certain rights to prevent and avoid opening of secondary proceedings, because it is generally considered that opening of secondary proceedings can" *hamper the efficient administration of the debtor's estate*"[55].

So, in order to avoid the opening of secondary proceedings, the insolvency practitioner in the main insolvency proceeding may commit to undertaking, that when distributing assets in main proceedings, he will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceeding were opened in that Member State[56].

If the insolvency practitioner does not comply with the obligations and requirements he or she shall be liable for damage to local creditors[57].

4.4. Creditor's rights and obligations as regulated by the Recast Insolvency Regulation

Although protection of creditors is just one among several insolvency proceedings objectives, protection of creditors is fairly important insolvency law issue. Problem of creditor's rights and their equal treatment, as one of basic insolvency law principle,[58] arises particularly in connection to opening a secondary insolvency proceeding. Indeed, historically, the opening of secondary proceedings was often viewed as having a destabilizing effect on main proceedings or other rescue plans, at times hindering the administration of the main proceedings and leading to increased costs with unnecessary duplicative work across borders[59].

Thus, question is, whether in such a case the interests of the creditors are secured in proper manner?

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[55] Proposal for a Regulation of the European parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM/2012/0744 final, p.2.

[56] Article 36 and article 34 of the the Recast Insolvency Regulation

[57] Article 36 (10) of the Recast Insolvency Regulation

[58] Equal treatment of creditors with similar rights is one of the main principles of modern insolvency laws.

[59] Hastings, Paul, *The New EU Regulation on Insolvency Proceedings*, June 2015, available at: URL=https://www.paulhastings.com/publications-items/details/?id=2011e669-2334-6428-811c-ff00004cbded. Accessed: 12 February 2017.

The Recast Insolvency Regulation contains large number of norms which deal with the creditor's rights in connection to secondary proceedings. Nevertheless, it also regulates other issues of direct interest to creditors such as rules on publicity, lodgement of creditors' claims, implications of opening of the proceedings to *in rem* creditors, etc.

In following sections attention will be directed towards the most relevant issues relating to creditor's as regulated by the Recast Insolvency Regulation. A special focus will be on: 1/Creditors rights in connection to secondary territorial proceedings, 2/ Right *in rem* creditors, 3/Provisions of information's for creditors and lodgement of their claims.

1/ Creditors rights in connection to secondary territorial proceedings

Right to request opening of insolvency proceedings falls in category of substantive issues regulated by the laws of Member States. When, debtor's COMI is defined and jurisdiction is determined, insolvency proceedings will continue according to the law of that particular Member State. For example, if debtor's COMI is in Italy, Italian law will be applicable law. In that sense, Recast Insolvency Regulation regularly does not decide on the issues such as who has *iusstandi in iudicio* for opening insolvency proceeding or do creditors have right to appoint insolvency practitioner, when and how distributions of assets will take place, etc. Those issues are resolved by Member State insolvency law.

However, Recast Insolvency Regulation makes an exception in connection to secondary territorial proceedings. Right to request opening of the secondary territorial proceedings is directly granted to creditors. According to the Article 3 (4) of the Recast Insolvency Regulation territorial secondary proceedings may only be opened when cumulatively two conditions are fulfilled: 1/ that secondary territorial proceedings is opened prior to the opening of main insolvency proceedings and 2 /that the opening of such proceedings is requested by a creditor whose claim arises from or in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested.

In that sense, it is important to emphasize that the secondary insolvency proceedings will not be opened *ex officio* or as a result of direct application of Member States Law.

Creditors of secondary proceedings are those who must take action in order to initiate opening of secondary territorial proceeding. The intention to this rule is to empower creditors to demand opening of the insolvency proceeding in country

of debtor's establishment because they expect that their chances to participate in distribution of debtors assets are much better within this proceedings, than within the main insolvency proceeding.

2/ Right in rem creditors

Recast Insolvency Regulation dedicates whole article to the "third parties' rights *in rem*. However, it fails to define what is a right *in rem* what may cause legal uncertainty in connection to defining *in rem* creditors and their rights. Typically right *in rem* includes, but is not limited to pledge or mortgage. Broader guidance in relation to what will constitute a right *in rem* is given in Virgos-Schmit Report[60]. From this report it appears that:

"a) a right in rem is not to be given an unreasonably wide interpretation. It should not include, for instance, rights simply reinforced by a right to claim preferential payment;

(b) in particular, a right in rem may not only be established with respect to floating charge assets but also rights which are characterized under national law as rights in rem over intangible assets or over other rights; and

(c) a right in rem basically has two characteristics: its direct and immediate relationship with the asset to which it relates, which remains linked until the debt has been satisfied (without depending upon the asset belonging to a person's estate, or on the relationship between the holder of the right in rem and another person); and the absolute nature of the location of the right to the holder". [61]

The fundamental policy concerning right *in rem*, and *in rem* creditors adopted by the Recast insolvency regulation is that the third parties' right *in rem* should be respected. The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, movable or immoveable assets[62]. Rights *in rem* have a very important function with regard to the

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60 Report on the Convention on Insolvency Proceedings, prepared by Virgos. M., Schmit, E., European Union Council, Brussels, 3 May 1996, 6500/96, p. 70.

61 Marshall, J., *The Future of the European Insolvency regulation, Article 5 (rights in rem*), available at: URL=http://www.eir-reform.eu/uploads/PDF/Jennifer_Marshall.pdf. Accessed 28 February 2017.; See also: Wessels, Bob, *Rights in rem of third parties under the EU Insolvency Regulation*, Fordham University School of Law, New York, June 2006., Available at: URL=https://www.iiiglobal.org/sites/default/files/media/1_Wessels_Rightsinrem.PDF. Accessed 9 January 2017.

62 Article 8 (1) of the Recast Insolvency Regulation.

granting of credit and obtaining capital investment[63]. They protect their holders against the risk of insolvency and the interference of third parties[64].

In line with this philosophy, Recast Insolvency Regulation grants number of rights to*in rem* creditors, in particular, i*n rem* creditors are entitled a) to dispose of assets or income from those assets, in particularly by virtue of a lien or mortgage, b) to demand assets or restitution from anyone having possession or use of them contrary to the wishes of the *in rem* creditors, and c) to use assets[65].

The protection given by Article 8 of the Recast Insolvency regulation applies where the secured assets is situated within the territory of a Member State other than the one in which insolvency proceedings are commenced.

3/ Provisions of information for creditors and lodgement of their claims

The Recast Insolvency Regulation introduces several practical novelties aimed at increasing clarity and simplifying procedure concerning lodgement of claims. Two major innovations refer to: a) the standardized procedure to file and lodge claims, and b) the reinforcement of the publicity of information relating to insolvency proceedings.

These novelties are the most welcomed since in cross border insolvency proceedings creditors come from different Member States, so the problem may arise in connection to language of the claim, timely distribution of information, unequal treatment of same type of creditors etc. In complex insolvency cases it may not be clear where to file a claim, how to file a claim, who is entitled to file a claim etc.

Concerning a right to lodge a claim, the Recast Insolvency Regulation prescribes that any foreign creditor may lodge claims in insolvency proceedings by any means of communication, which are prescribed by the law of the State of the opening of proceedings[66]. A foreign creditor may lodge its claim using the standard claim forms[67], and the claim can be lodged in any EU official language. This means that

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63 Wessels, Bob, *op.cit.* note 18, p. 19.

64 *Ibid*.

65 Article 8 (2) of the Recast Insolvency Regulation.

66 Article 53. of the Recast Insolvency Regulation

67 This standard claim form is created by the Commission, and it includes, certain specific information (including, *inter alia*, the debtor's name, contact details, bank details, the amount of the claim, and possible interest claimed) and will specify the interest rate the period of calculation and the capitalized amount of interest. When a cross-border insolvency procedure is opened under the Regulation, all the creditors have to provide the same essential information to the insolvency practitioner in order to get a clear view of the liabilities of the debtor. It also enables creditors to provide all the information necessary to protect their rights.

the claim can be written in mother tongue of creditor. Claim must be accompanied by copies of any supporting documents. Where the court, the insolvency practitioner or the debtor in possession has doubts in relations to a claim, it shall give the creditor opportunity to provide additional evidence on the existence and the amount of claim[68].

Concerning the deadline for lodging the claim, Recast Insolvency Regulation prescribes that it should be lodged within the period stipulated by the law of the State of the opening of proceedings[69]. In case of foreign creditor, the Recast Insolvency regulation prescribes that for a foreign creditors, that period shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State of the opening of proceedings.

Publication of opening of insolvency proceedings is standard practice in all Member States. But the question is how this information shall reach foreign creditors. For example, if insolvency proceedings is opened in Germany, how will foreign creditors find out about that?

The issue is dealt in the Recast Insolvency Regulation if following way. It is stated that: "*As soon as insolvency proceedings are opened in a Member State, the court of that State or insolvency practitioner appointed by the court shall immediately inform the known creditors*".[70]They shall do so by using "standard notice form".[71]

Two thing seems problematic in connection to above rule. First, what happens with other, "unknown" creditors? How will they learn about opening of insolvency proceedings? Second, it is hard to imagine that insolvency practitioner or the court will have any idea at all who may be a foreign creditor. The only creditor that they can be aware of is creditor who initiated opening of insolvency proceedings.

The Recast Insolvency Regulation contains another, more general rule that deals with this particular issue. Article 28 of the Recast Insolvency Regulation empowers the insolvency practitioner or the debtor in possession to request that the notice of the judgement opening insolvency proceedings is published in any other Member State where an establishment of the debtor is located. This seems as quite reasonable solution for the above problem.

Standard form is avaialble at: URL=*ec.europa.eu/civiljustice/.../bankruptcy_ec_en_form2.doc*

68 Article 55 (7) of the Recast Insolvency Regulation

69 Article 55 (6) of the Recast Insolvency Regulation

70 Article 54 (1) of the Recast Insolvency Regulation.

71 Article 54 (3) of the Recast Insolvency Regulation.

For the conclusion, it should be noted that in a case where one main proceedings is opened and one or several secondary territorial proceedings are opened, creditors can file their claims to any of those proceedings. Potential risk in connection to that lays in fact that they may simultaneously file claim in several states. To prevent fraudulent behaviour of such creditors, the Recast Insolvency Regulation in its text included set of norms dealing with cooperation between insolvency practitioners, communication between courts.

4.5. Other points to note: cooperation between insolvency practitioners, communication between courts

Where several insolvency proceedings concerning the same debtor are running (on main insolvency proceedings and one or more secondary proceedings), the Recast Insolvency Regulation provides for duties for different insolvency practitioners and courts involved to cooperate and communicate in various ways.

In particular, Recast Insolvency Regulation imposes obligation to cooperate to insolvency practitioners of main and secondary proceedings, unless such cooperation is not incompatible with the rules applicable to the respective proceedings.[72] Such cooperation may take any form, including to conclusion of agreements or protocols.[73]

Recast Insolvency Regulation provides details concerning forms of cooperation. It says that insolvency practitioners should communicate to each other any information which may be relevant to the proceedings, in particular any progress made in lodging and verifying claims, information aimed at rescuing or restructuring the debtor, information regarding terminating proceedings etc.[74] Furthermore, they should also communicate in order to coordinate the administration of the realization or use of debtor's assets and affairs etc.[75]

Recast Insolvency Regulation imposes cooperation to the courts too. Judges of the main and secondary proceedings should coordinate in the appointment of the insolvency practitioners, they should coordinate administration and supervision of the debtor's assets and affairs, coordinate on hearings etc.[76]

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72 Article 41(1) of the Recast Insolvency Regulation.

73 *Ibid*.

74 Article 41(2) (a) of the Recast Insolvency Regulation.

75 Article 41(2) (b) of the Recast Insolvency Regulation.

76 Article 42 of the Recast Insolvency Regulation.

Such communication could be useful, for example, in order to ensure that the judge in the main proceedings is informed of relevant developments in the secondary proceedings before deciding on further actions.

And finally, Recast Insolvency Regulation also prescribes compulsory cooperation and communication between insolvency practitioners of main and secondary proceedings with the courts of main and secondary insolvency proceedings.[77]

In order to increase transparency of cross- border insolvency proceedings, improve access to information for the relevant creditors, courts and practitioners and to prevent the opening of parallel insolvency proceedings the Recast Insolvency Regulation introduces a two new instruments- Interconnected Insolvency Registers systems and a central European database.

Interconnected Insolvency register systems shall be composed of the insolvency registers of the Member States and the EU e-justice Portal. The system shall provide a search in all the official languages of the Member States. Introduction of those registers will simplify research on cross- border insolvency proceedings and will ensure that certain standard set of essential information are published in all Member States. All Member States are in obligation to establish those registers latest by 26 June 2019[78].

4.6. Recognition of Insolvency Proceedings

Last issue that is going to be addressed in the paper is the issue of recognition of foreign insolvency proceedings and effects of such recognition. The general principle adopted by the Recast Insolvency Regulation is that any judgement opening insolvency proceedings handed down by a court of a Member State shall be recognized in all other Member States from the time it becomes effective in the state where proceedings are opened (so called automatic recognition)[79]. Automatic recognition should therefore mean that the effects attributed to the insolvency proceedings by the law of the State in which the proceedings were opened extend to all other Member States[80].Recognition requires no preliminary decision or other

[77] Article 43 of the Recast Insolvency Regulation.

[78] Rules on establishing „Insolvency Registar" (Art. 24 of the Recast Insolvency Regulation) become effective as of 26 June 2018, and rules on creation of Interconnection of Insolvency Registers (Art. 25 of the Recast Insolvency Regulation) become effective as of June 26 2019.

[79] Article 19 of the Recast Insolvency Regulation.

[80] Wessels, Bob, *op.cit.* note 18, p. 25.

formality by a court to all Member States[81]. The effects of the proceedings may not be challenged in other Member State[82].

However, a Member State may refuse to recognize foreign judgement on the opening of insolvency proceedings where the effects of such recognition would be manifestly contrary to public policy, fundamental constitutional principles or rights and liberties of individuals[83].

Once main insolvency proceedings have been opened in one Member State and automatically recognized in other Member States, the question arises in connection to the effects of such recognition. The general principle is that the judgement opening proceedings produces its effects with equal force in all Member States. This means that in any Member State the same effect are produced as under the law of the State of the opening of proceedings.[84]

The main effect of the recognition of insolvency proceedings opened in a Member State is the recognition of the appointment of the liquidator and his powers in all other Member states in connection to allocation, distribution of debtor's assets. Another effect of the recognition of insolvency proceedings opened in a Member State is inclusion of the debtor's assets in the estate regardless of the state in which they are situated. Furthermore, whole set of creditors rights are directly linked to the moment of recognition of insolvency proceedings opened in a Member State, such as lodging claim, obligation to return what has been obtained by individual creditors in secondary proceeding, after opening main insolvency proceedings etc. The law also ensures that decisions closely linked to insolvency proceedings - such as actions to set aside detrimental acts (i.e. acts that are harmful to the creditors) - are recognised in the other country.

5. CONCLUSION- IS RECAST INSOLVENCY REGULATION A STEP FORWARD TOWARDS UNIFORM EU INSOLVENCY LAW OR JUST THE *STATUS QUO?*

Recast Insolvency Regulation has not yet entered into force. However, its announcement and its adoption, almost 2 years ago, in year 2015, prompted many

[81] *Ibid.*

[82] The fact that insolvency proceedings have been opened in a Member State, and therefore, recognized throughout the EU, doesn't preclude the opening of secondary territorial proceedings in another Member State. One or several secondary territorial proceeding may be opened in country of debtor's establishment.

[83] Article 33 of the Recast Insolvency Regulation.

[84] Wessels, Bob*, op.cit.* note18, pp. 25.

discussions about the course or direction of a future of EU insolvency law. Opinions on that are quite different. While some consider that more intensive harmonization, in particularly of substantive insolvency law on EU level is not possible or feasible due to significant differences in substantive insolvency law of EU Member States, the other argue that after years of struggling with "soft" coordination of insolvency proceedings it is time to accelerate the process of convergence of insolvency law on EU level or even, "for the sake" of the internal market, to adopt uniform EU insolvency law[85].

So, the question is, which of those conflicted approaches Commission adopted in the Recast Insolvency Regulation?

A closer look reveals that the Recast Insolvency Regulation provides a sensible revision of the 2000 Insolvency Regulation. The overall impression is that the Recast Insolvency Regulation does not drastically alter the concept adopted by 2002 Insolvency Regulation.

However, it introduces number of novelties, most of them already mentioned in the paper. Some of the most prominent Recast Insolvency Regulations innovations are:

- Redefinition and clarifications of debtor's COMI
- The definition of main proceedings has been broadened to include pre-insolvency rescue proceedings
- Recast Insolvency Regulation introduced several new mechanisms in order to prevent and/or minimise the need to open secondary proceedings
- It introduces rules which enable that cross-border claims are dealt with in a more centralized manner
- Under the new regime, any creditor may challenge the decision to open main proceedings on jurisdictional grounds
- Recast Insolvency Regulation also provides for various additional amendments in connection to setting up interconnected insolvency registers, it prescribes a standardised EU wide claim form, etc.

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[85] See more: Mucciarelli, Federico, *Optimal allocation of law –making power over bankruptcy law in „federal" and „quasi-federal" systems:is there a case for harmonizing or unifying bakruptcy law in the E.U?*, Law and Economics Research Paper Series, Working Paper No11-28, New York University School of Law, September 2011.;Wessels, Bob, *The Changing Landscape of Cross-border Insolvency Law in Europe*, Juridica International, No.12, 2007, pp. 116-124.; Kilborn, Jason J., *The Personal Side of Harmonizing European Insolvency Law* (August 1, 2016). URL=https://ssrn.com/abstract=2816618 or URL=http://dx.doi.org/10.2139/ssrn.2816618. Accessed 12 March 2017.

From above it is obvious that the Recast Insolvency regulation does not provide for only „cosmetic" innovations. Proposed innovations will result with increased efficiency and effectiveness of EU cross-border insolvency proceedings. However, at the moment, and based on approach taken by the Commission in the Recast Insolvency Regulation, it seems that unification of EU insolvency Law is still not on Commission's agenda.

But, enactment of the new Recast Insolvency Regulation is not the end of Commission work in area of cross-border insolvency proceedings. Undoubtedly, European legislatures in field of cross-border insolvency proceedings on EU level will continue.

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CONSUMER BANKRUPTCY WITH A CROSS-BORDER ELEMENT IDEA, NORMS AND SOME DOUBTS

ABSTRACT

The tendency towards a harmonisation of procedural law in the European Union is increasingly stronger and gaining importance. It is achieved by reaching a consensus in overcoming differences between legal systems. The European Union is at present an alliance of 28 sovereign states aimed at establishing an area of freedom, security and justice. Moreover, that the European Union is a creation in statu nascendi is clearly visible in the current situation and the development trends of legal harmonisation in the field of international consumer insolvency law. Consumers are frequently travelling, buying abroad and entering into contracts with foreign credit institutions. As they move from one country to another and are employed in countries other than the one in which they reside, insolvency and debt relief at the cross-border/international level is becoming more widespread, and more effective regulation is a necessity.

The aim of this paper is to point out potential problems in the regulation of consumer bankruptcy with a cross-border element that may occur in the case-law of the Croatian courts. In the analysis of the institute of consumer bankruptcy with a cross-border element through the solutions of the Regulation 1346/2000 and Regulation *2015/848 (recast) we used a methodological procedure which involves the study of domestic and foreign literature, relevant legal provisions, as well as an analysis of domestic and foreign legal practices.*

We consider it important to note that the framework of this paper does not allow a detailed analysis and that we are forced to limit ourselves exclusively to some aspects of the issue at hand.

Keywords: *consumer bankruptcy, cross-border element, forum shopping, American experience.*

1. INTRODUCTION

International insolvency law found its place and has been gaining importance in the legal system of the EU in the past few decades.[1]Efforts to create a legal document that would regulate the issue of international insolvency law began in the 1960s in

* Ovaj je rad nastao uz potporu Hrvatske zaklade za znanost u okviru projekta 6558 Business and Personal Insolvency – the Ways to Overcome Excessive Indebtednes.

[1] Wessels, B., *International Insolvency Law*, Kluwer, Deventer, 2006, p. 355.

the European Economic Community and, thanks to the extraordinary efforts of the doctrine and case law, today we can say that the basic principles and rules are codified, which gives the parties of the insolvency proceedings with international element equal treatment and the possibility of realisation of their claims within the Union.[2]

From the perspective of Croatia, as one of the Member States, (consumer) insolvency law with an international element shares the same fate of the overall development of EU laws, while, at the same time, it reflects certain specific developmental characteristics. Therefore, bearing in mind the complexity of problems in this paper, we consider it important to analyse the genesis of the issue from the perspective of Croatian legislators.[3]

2. OLD BANKRUPTCY ACT AND THE PROVISIONS FOR INTERNATIONAL BANKRUPTCY

Although the need for expansion of passive bankruptcy ability on natural persons was recognised long ago, and the causes which pointed out this need did not come suddenly and unexpectedly, the whole process of implementation of consumer bankruptcy in the legal order of the Republic of Croatia from the institutional aspect was moving very slowly.[4] The adoption of the Bankruptcy Act in 1997[5] represented a radical change in how the bankruptcy proceedings were conducted. In all subsequent novels,[6] in varying degrees of success, the legislator tried to achieve functionalisation of bankruptcy law protection.[7] Although the issue of the bankruptcy law was not *terra incognita* in recent domestic legal history,[8]it should be noted that the rules of international bankruptcy are some of the youngest ones in the Croatian legal system, as they were introduced on January 1st, 1997. These provisions of international bankruptcy represented a modern and comprehensive

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2 More details in Virgos, M., Garcimartin, F., *The European Insolvency Regulation: Law and Practice,* Kluwer Law International, 2004, pp. 7-8. and Garašić, J., *Europska uredba o insolvencijskim postupcima,* Proceedings of the Faculty of Law in Rijeka, Vol. 26, No. 1, 2005, p. 260 *et seq.*

3 The subject matter was originally analysed in the paper, Bodul, D., Vuković. A., *Prilog raspravi o uvođenju potrošačkog stečaja: neka pitanja potrošačkog stečaja s međunarodnim / prekograničnim elementom*, *Hrvatska pravna revija*, no. 7/8, 2013, pp. 61-68.

4 Bodul, D., *et al., Kratka povijest potrošačkog stečaja ili još jedna nenaučena lekcija iz povijesti*, XI. Majsko savjetovanje, usluge i zaštita korisnika, Kragujevac, 2015, pp. 1067-1087.

5 Official Gazette, No. 44/96.

6 Bankruptcy Act, Official Gazette, No. 44/96, 29/99, 129/00, 123/03, 82/06, 116/10,25/12, 133/12 and 45/13 – hereinafter: old BA.

7 Bodul, D. *et al., Stečajno zakonodavstvo u tranziciji: komparativni osvrt, hrvatski izazovi i potencijalna rješenja,* Proceedings of the Faculty of Law in Split, Vol. 49, No. 3, 2012, pp. 633-661.

8 Bodul, D. *et al.,Pravno povijesni i poredbeno pravni prikaz razvoja stečajnog postupka*, Proceedings of the Faculty of Law of the University of Rijeka, Vol. 34, No. 2, 2013, pp. 911-941.

regulation of this legal matter. In regulating this demanding area, the legislator demonstrated an enviable systematic approach, placing the complex provisions of the bankruptcy proceedings with elements of internationality in Title X of the old BA, and divided them into seven sections. However, we have to be aware, as the doctrine points out, that the term "international bankruptcy" covers a much broader area than exclusively bankruptcy proceedings with international elements.[9] Therefore, Croatian legislation is one of the first that comprehensively and independently regulated the bankruptcy proceedings with an international element. In addition, one of the most important "novelties" from the reform of the bankruptcy law in 1997, compared to the earlier arrangement of the bankruptcy matter,[10] was the introduction of the institute bankruptcy proceedings on the assets of an individual debtor (sole trader and craftsman). It is difficult to say why the category of a consumer as a possible subject of bankruptcy was omitted from the old BA. However, the provisions relating to bankruptcy proceedings on the property of the individual and the provisions of international bankruptcy are some of the few provisions which were not significantly changed in all the novels of the old and even new BA.[11] This can be explained by the fact that these models of bankruptcies were rare and most of the provisions remained unpractised. *Exempli causa*, according to the legal opinion of the High Commercial Court of the Republic of Croatia, in the case of bankruptcy on the assets of a natural person who is not a sole trader or a craftsman, creditors who initiate bankruptcy can realise their legal rights by other legal means, but not through proposal for recognition of a foreign decision for opening bankruptcy proceeding with the legal effect of the opening of bankruptcy proceedings in the Republic of Croatia. Such foreign decision does not have all the prerequisites for recognition, because its recognition is contrary to the Croatian *ordre public* (Art. 311, par. 3 in conjunction with Art. 3, par. 1 of the old BA).[12] Thus, the application of the old BA in relation to bankruptcy proceedings with an international element on the property of natural per-

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[9] Hrastinski Jurčec, L., *Međunarodni stečaj u hrvatskom pravnom sustavu*, Legislation and Practice - collection of reports presented at the Regional conference on insolvency, German Organisation for Technical Cooperation (GTZ) GmbH Open Regional Fund for South East Europe – Legal Reform, Banja Luka, 2008, p. 175 *et seq.*

[10] We are referring to the Law on Forced Settlement, Bankruptcy and Liquidation, Official Gazette, No. 53/91 and 54/94.

[11] Bankruptcy Act, Official Gazette, 71/15 – hereinafter: BA.

[12] Decision of the High Commercial Court - 7770/07. Available on the website of the High Commercial Court: http://www.vtsrh.hr/index.php?page=conference&conf_id=2200&article_id=2211&lang=hr (12/11/2016). There are conflicting views, claiming that it is "... the magic word that lawyers (civilians and publicists, legislators and judges, practitioners and theorists) use when they cannot find a legal basis ...". Perović, S., *Sloboda uređivanja obveznih odnosa i javni poredak,* Proceedings of the Faculty of Law in Zagreb, Special Edition, Zagreb, 2006, p. 404.

son - consumer – has not determined the appropriate legal standards and certain interpretations related to the issue of consumer bankruptcy with international/ cross-border element will yet have to be established.

3. MEMBERSHIP IN THE EUROPEAN UNION AND THE OBLIGATIONS OF IMPLEMENTING REGULATION 1346/2000.

During a long period of time, the international effects of consumer bankruptcy law were regulated as part of international private and procedural law. By entering the EU and accepting the body of law and practice of the EU (the so-called *acquis communautaire*), the legal complexity of consumer bankruptcy with cross-border / international element imposed reasonable caution in the application of that institute. Namely, based on the principle of universality, according to which the legal effects of the bankruptcy proceedings should be recognised outside the country of its opening in the area of the European Union, the Council Regulation (EC) no. 1346/2000 of 29th of May 2000 on insolvency proceedings was adopted by the Member States, with the exception of Denmark, and it entered into force on May 31st, 2002.[13] The Regulation's rules on conflict of law replaced the rules of private international law in the field of bankruptcy law. It is not explicitly stated in its text, but only in the recital that aims to facilitate understanding and application of the text of the Regulation.[14] Two annexes (A and B) to the Regulation determine the national proceedings covered by the Regulation 1346/2000. The third Annex (C) determines the persons or bodies that act as liquidators. These Annexes form an integral part of the Regulation 1346/2000 and have been revised a few times.

In principle, for the purpose of this study, consumer bankruptcy with international element implies the bankruptcy process that is opened on the basis of primary jurisdiction - the centre of the debtor's main interests, for example, the residence of the debtor[15] and as such has a tendency to encompass the entire property of the debtor, both domestic and international. Only one main bankruptcy proceeding should be possible against the debtor.[16] Although there is no unique and

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13 Council Regulation of 29 May 2000 on Insolvency Proceedings (No 1346/2000/EC), [2000] OJ L 160, pp. 1-13) - hereinafter: Regulation 1346/2000.

14 Radović, V., *Osnovno koliziono pravilo u međunarodnom stečajnom pravu (lex foricon cursus) sa posebnim osvrtom na Uredbu o stečajnim postupcima,* Harmonius - Journal of Legal and Social Studies in South East Europe, Vol. 2, No. 1, 2013, p. 240.

15 In the Virgos-Schmit report, it is stated that in these constellations the COMI is the place of a natural person's habitual residence. Virgos, M., Schmit, E., *Report on the Convention on Insolvency Proceedings,* Annex 2 to G. Moss, I. F. Fletcher and S. Isaacs (editors), in: The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (Oxford, Oxford University Press, 2002), par. 75.

16 Legislators should take into account that there are already some unpleasant examples of court cases involving individuals in cross-border insolvency proceedings - in particular, the Stojevic case (Case No.

unambiguous definition of the centre of the debtor's main interests,[17] the law applicable for opening, conducting and concluding bankruptcy proceedings is that of a Member State on the territory of which such proceedings were initiated ("the State in which the proceedings were initiated" or *Lex fori concursus*).[18] The term special bankruptcy proceeding involves the bankruptcy process that is open on the basis of some subsidiary jurisdiction, for example, the debtor's assets, and as such encompasses only the debtor's assets in the state of opening of these proceedings. Thus, the doctrine distinguishes two types of special procedures: particular and secondary proceedings. The term particular bankruptcy proceedings involves the special bankruptcy proceeding which does not presuppose the opening and recognition of a foreign main bankruptcy proceeding and which is completely independent of that proceedings. Particular bankruptcy proceedings can be opened both before and after the opening of a foreign main bankruptcy proceeding, if the latter is not domestically recognised. The term secondary bankruptcy proceedings involves special bankruptcy proceedings which presupposes opening and the recognition of a foreign main bankruptcy proceeding and is in this sense dependent on it. However, the rule is that it is subordinate to the main bankruptcy proceedings on the basis of the rules on co-operation and coordination between these two procedures. Secondary bankruptcy proceedings can be opened only after the recognition of a foreign main bankruptcy proceeding.[19] The doctrine indicates that a number of very different terms are used for these types of procedures in literature and in various regulatory instruments of international bankruptcy / insolvency.[20]

9849 of 2002, High Court of Justice in Bankruptcy, London, 20 December 2006). In this case, Mr. Stojevic, a Croatian national of Russian descent, was declared bankrupt in two courts in succession, on 27 March 2003 in England and on 28 January 2004 in Austria, both proceedings being the main insolvency proceedings. The annulment of the Austrian Bankruptcy Order removed the conflict of jurisdiction between the two European countries, England and Austria, but in this case, the centre of the debtor's main interests within the meaning of the European Insolvency Regulation, when the bankruptcy petition was filed, was actually in Austria and not in England. It took four years to resolve this matter legally, and the situation resulted in the annulment of the English Bankruptcy Order dated 27 March 2003 under Section 282 (1) (a) of the 1986 Act. The downside of this action meant that Mr. Stojevic, who had huge debts both in Austria and in England, and no assets in either country, escaped bankruptcy altogether. Viimsalu, S., *The Over-Indebtedness Regulatory System in the Light of the Changing Economic Landscape*, Juridica International, No. XVII, 2010, p. 225.

[17] Fletcher, F. I., *Choice of Law Rules - The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, (eds. G. Moss, I. F. Fletcher, S. Isaacs), Oxford University Press, New York, 2009, p. 57.

[18] Art. 4. Regulation 1346/2000.

[19] Garašić, J. *op. cit.* note 2., p. 260 *et seq. Id., Posebni tzv. partikularni stečajni postupak u hrvatskom pravu,* Proceedings of the Faculty of Law of the University in Rijeka, Vol. 33, No. 1, 2012, p. 87 *et seq.*

[20] *Ibid.,* p. 87 *et seq.*

3.1. The application of Regulation 1346/2000 *ratione territori*

The Regulation applies only to proceedings in which the Centre of main interests (COMI) (*„Le centre des interest principaux", „Als Mittelpunkt der hauptsächlichen Interessen"),* is situated on the territory of one of the Member States. A commonality of all solutions is that they are based on the principle of opening the main insolvency proceedings with the effects in the Member State in which the centre of business interests of the debtor is located, with the possibility of opening special procedures, of local character, in other EU Member States where the debtor has assets or establishment. Therefore, the fundamental principle of the Regulation is that insolvency proceedings opened in one Member State are automatically recognised in other Member States. However, this does not preclude the court of another Member State to initiate special insolvency proceedings against the same debtor if the conditions are fulfilled.[21] In the event that the centre of interest is located outside the EU, the Regulation has no effect of direct application and each Member State may apply its own rules of private international law or international bankruptcy law. However, when in some cases there are no bilateral or other agreements, the provisions of the Regulation can serve as a guide.[22]

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21 Par. 16, Regulation 1346/2000.

22 In this regard, an interesting case is Lavie v. Ran (406 B.R. 277 (S. D. Tex. 2009), *aff 'd sub nom*. Lavie v. Ran (*In re* Ran) 607 F.3d 1017, 5th Cir. 2010) where the American court decided that the mere presumption in Section 15 of the Bankruptcy Code is not sufficient to determine the centre of the main interests of the debtor. In the previously mentioned case, insolvency administrator requested the recognition of the bankruptcy proceedings in Israel as the main insolvency proceeding. The debtor was an individual, a consumer, who had lived in the United States for ten years and was in the process of obtaining U.S. citizenship. The U.S. Supreme Court considered the decision of the Bankruptcy Court and agreed that the centre of main interests of the debtor is not Israel, but the place of his residence, in this specific case, the city of Houston. The decision of the lower court indicated that the "... statutes, cases, and interpretative materials of the European Union are also instructive. Hence, the court should consult the European Union's Convention on Insolvency Proceedings…. and the Report on the Convention on Insolvency Proceedings…" (Virgos-Schmit Report) "Bankruptcy court extensively analysed the COMI issue through an exhaustive comparison of COMI or COMI-equivalent case law in the EU, United States, and Israel" (Lavie, 406 B.R. p. 285). This Bankruptcy Court analysis found that the conditions set for the centre of main interests in each country are very similar (Lavie, 406 B.R. p. 285), and all have presumption that the centre of the main interests of the debtor is his residence (Lavie, 406 B.R. p. 285). The Israeli court has taken into account the following factors: a) the ownership of property abroad or lack of assets in Israel, b) possession of a U.S. passport and residence permit in the United States; c) a license for employment in the United States and d) the fact that the family lives abroad. This may indicate the presence or absence of strong ties with Israel. The High Court has welcomed the use of foreign legal sources of the lower court and found that such detailed analysis is uncontested and does not require any further explanation from the Higher Court (Lavie, 406 B. R. p. 285, 288). This case is interesting, because the American court applied foreign law in deciding the case of consumer bankruptcy with international element. It also points to the flexibility in determining the centre of main interests, taking into account the experience of other countries. What distinguishes the U.S. bankruptcy courts is the ability and the commitment that in the bankruptcy proceedings under Article 15 "…the court shall consider its international origin, and the need to promote an application

3.2. The application of Regulation 1346/2000 *ratione materiae*

The scope of application of Regulation 1346/2000 is also limited to certain models of bankruptcy proceedings. The Regulation is generally applicable to all collective insolvency proceedings which can result in a partial or complete sale of the debtor's assets and the appointment of a trustee.[23] The doctrine suggests that the Regulation applies to all debtors, regardless of whether they are a natural or legal person.[24] Exceptions are insolvency proceedings concerning insurance companies, credit institutions, investment firms that provide services which include access to money or securities of third parties and companies for joint ventures.[25] In the recital of the Regulation 1346/2000 it is stated that such companies are subject to special rules and that national supervisory authorities have broader powers to act.[26]

3.3. The application of Regulation 1346/2000 *ratione personae*

Although the Draft of the Regulation 1346/2000 was made with the rules of corporate bankruptcy in mind, Regulation 1346/2000 will, in principle, apply to all insolvency proceedings, whether the debtor is a natural or legal person, a trader or a private individual.[27] The question of who can be a debtor in insolvency proceedings is governed by national law.[28] It has to be stated that the legislations of EU countries vary significantly in approaches in regulating this matter, given the fact that they belong to different legal systems. In order to offer some insight into the complexity of the matter at hand, it suffices to say that Regulation 1346/2000 tried to harmonise the rules of 54 different models of bankruptcy proceedings and that there is a big difference in the scope and the application of the Regulation.[29] Depending on the perspective of the central issues posed in consumer bankruptcy, legislations are largely different. Thus, the doctrine speaks of the liberal system,

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of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions" (par. 1508. 11 U.S.C.). Using the term "shall", according to American legal theory, the court must consider foreign legal sources (a bankruptcy judge does not 'choose' to consider foreign law; the statute requires it…). See Ragan, A. C., *Comment - COMI Strikes a Discordant Note: Why U. S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, Emory Bankruptcy Developments Journal, Vol. 27, No. 1, 2010, p. 117, 142, and 159.

23 Par. 1, par. 1, Regulation 1346/2000.

24 Garašić, J., *op. cit.* note 2 ,p. 261.

25 Art. 1, par. 2, Regulation 1346/2000.

26 Recital 9, Regulation 1346/2000.

27 Recital 9 and Art. 1, Art. 2, par. 1, p. 1, Regulation 1346/2000.

28 Art. 4, par. 2(a), Regulation 1346/2000.

29 Baltić, M., *Načela evropskog stečajnog prava sa posebnim osvrtom na evropsku regulativu o stečajnim postupcima,* Revija za evropsko pravo, Vol. 5, No. 1-3, 2003, pp. 43-63.

which lays down a small number of the necessary preconditions for access to consumer bankruptcy, which, of course, results in a large number of bankruptcies (*exempli causa*, the French model of forgiveness of debt), and conservative continental systems which are burdened with a large number of conditions implying a small number of initiated bankruptcies (*exempli causa*, the German model of consumer insolvency). While Member States have different insolvency procedures for different debtors, Regulation 1346/2000 applies to procedures set forth in Annex A of the Regulation.[30] Each Member State has informed the competent authority in the EU about the procedures included in Annex A. The States have taken different views on the application of Regulation 1346/2000 on existing insolvency procedures for consumers.

The first group of countries, Belgium and the Netherlands, have decided that the Regulation 1346/2000 should be applied to their consumer bankruptcy procedures, which are listed in Annex A. (Annex A: insolvency procedures under Art. 2, p. (A): *BELGIË - BELGIQUE* (*Het faillissement / La faillite; Het gerechtelijkakkoord / Le concordstr. judiciairei De collectieveschuldenregeling / Le règlementcollectif de dettes*); *NEDERLAND* (*Het faillissement; De surséance van betalingi De schuldsaneringsregelingnatuurlijkepersonen*).

In the second group, consisting of Germany and Austria, consumer bankruptcy procedures are not explicitly mentioned in Annex A, but since they are part of insolvency regulation mentioned in Annex A, they fall within the scope of Regulation 1346/2000.

In the third group of countries, which includes France, Finland, Luxembourg and Sweden, consumer bankruptcy procedures are not mentioned in Annex A. However, since these procedures are regulated by special laws (for example, in France, discharge of consumers' debt is regulated by the Consumer Protection Act (French *Code de la Consommation*) and are not subject to the procedures specified in Annex A, there were initially some doubts about the application of Regulation 1346/2000. Nevertheless, for instance, France has already added the safeguard proceeding to the Annex A. It could also add excessive debt proceedings for consumers ("*procédures de surendettement*") insofar as such proceedings, considered by the *Cour de cassation* as real collective proceedings, have similar effects.[31]

30 Art. 2, par. 1, p. a.

31 Vallens, J.-L., *Reform of the European insolvency regulation on cross-border insolvency proceedings: A French point of view*, Revue des procédures collectives, May-June, 2010, p. 25 *et seq.*

4. IMPLEMENTATION OF THE CONSUMER BANKRUPTCY ACT AND ADOPTION OF REGULATION 2015/848

Bankruptcy proceedings on an individual's property as regulated in the old BA was the first step towards the possibility of conducting bankruptcy proceedings on the assets of all individuals and the introduction of consumer bankruptcy. The breakthrough was made on January 1st, 2016 when the Croatian legislator implemented the institute of consumer bankruptcy.[32] We can conclude that the legislator recognised, relatively late, the need to introduce the bankruptcy on the assets of all individuals, especially if one takes into account the fact that the consumer bankruptcy was first introduced in the European legal circle in Denmark ("*Gældssaneringslov*") in 1984[33] and that Italy is the last remaining Member State that failed to implement the institute of consumer bankruptcy.[34]

The rules related to the bankruptcy of consumers are primarily defined by the provisions of the CBA. Nomotechnically speaking, CBA is divided into two parts. The first part is divided into two sections which contain the basic provisions and regulation of non-judicial proceedings.[35] This part of the procedure consists in an attempt of a consumer to reach extrajudicial agreement on fulfilment of obligations with creditors. Only a failed attempt to reach an out-of-court agreement on the regulation of debt is a precondition for initiating court bankruptcy proceedings.[36] The second part of CBA is divided into eight sections which include basic procedural provisions in court proceedings, regulation of the authorities of bankruptcy proceedings, regulation of the initiation of proceedings and preliminary hearing, the opening of consumer bankruptcy proceedings and legal consequences of opening, bankruptcy mass and consumer protection, the conclusion of bankruptcy proceedings, the period of good conduct, the relief of the remaining debts and final provisions.[37] Thus, in the judicial bankruptcy proceedings, there is another possibility of reaching an agreement on the regulation of the debt, with the possibility of imposing solutions by the court through the so-called "rules against obstruction".[38] If, during the second stage of the proceedings, the creditors

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32 Consumer Bankruptcy Act, Official Gazette 100/15 – hereinafter: CBA.

33 See, Kilborn, J. J., *Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark*, International Insolvency Review, vol. 18, no. 1, 2009, p. 155.

34 See, The Bill, *Disegno di legge.* URL=http://www.senato.it/leg/16/BGT/Schede /Ddliter/testi/29935 _testi.htm. Accessed 14 December 2016.

35 Art. 1-20, CBA.

36 Art. 8-20, CBA.

37 Art. 21-81, CBA.

38 Art. 44-53, CBA.

do not accept the debt management plan of the debtor, a bankruptcy procedure is opened and a liquidation of the debtor's unexempt property follows. This happens in legal proceedings with simplified rules. Depending on the motion of the debtor, the release of the remaining debts can follow. This happens over a period not exceeding five years (the so-called period of good behaviour). Since CBA does not regulate consumer bankruptcy with an international element, *mutatis mutandis* are applied[39] provisions of the BA on international bankruptcy,[40] while for the EU, provisions of Regulation 1346/2000 are in force. From 26 June 2017 we will have a new primary source of the bankruptcy law, the Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20th,2015 on insolvency proceedings. The Regulation was published on 5th of June 2015 in the OJ of EU, entered into force 20 days after the publication and shall be applied as of 26th of June 2017.[41] The text of the EIR Recast is twice as large. It contains 89 recitals, 92 articles and four annexes (A: listing all the national names of insolvency proceedings; B: all national names of insolvency practitioners; C: listing all repealed Regulations, including Regulation 1346/2000, and D: a correlation table of the Articles of the EIR and those of the EIR Recast). The very concept of Regulation 1346/2000 is not modified in the context of the reform; a new version consists of partially known, partially revised, but also a whole series of new provisions. The new provisions of Regulation 2015/848 are primarily provisions on insolvency proceedings of a group of companies[42] and certain provisions on data protection.[43] *Summa summarum,* similar to the solution of Regulation 1346/2000, Regulation 2015/848 solves the problem of conflicts of jurisdiction by enabling main insolvency proceedings to be opened before the Court where the debtor has the centre of its main interests, and at the same time permitting that the special insolvency proceeding is commenced in another Member State where the debtor has an establishment. The effect of the special insolvency proceedings are limited to the assets located in that State.[44] Rules on international jurisdiction, based on a debtor's COMI, are further specified, including the possibility of a judicial review,[45] whilst jurisdiction for insolvency-related actions (actions which derive directly from the insolvency proceedings and are closely linked to them) is now included in the text.[46] The material scope of the recast EIR is broader than the scope of the origi-

[39] Art. 23, CBA.

[40] Art. 392-427, BA

[41] Hereinafter: Regulation 2015/848.

[42] Art. 56-77, Regulation 2015/848.

[43] Art. 78-83, Regulation 2015/848.

[44] Art. 3, par. 1, Regulation 2015/848.

[45] Art. 4 and 5, Regulation 2015/848.

[46] Art. 6, Regulation 2015/848.

nal EIR, as it extends to proceedings, among others, granting debt-relief or debt adjustment for consumers or the self-employed. In other words, when Regulation 2015/848 deals with the concept of a natural person, an individual who performs independent business or professional activity, it is presumed that the centre of their main interests is situated in the principal place of business of the individual if it is not proven otherwise. This presumption applies only if the principal place of business of the individual is not moved to another Member State within a period of three months before the proposal to initiate insolvency.[47] In the case of any other individual, it is presumed, unless proven otherwise, that the centre of their main interest is the usual place of residence of the individual. This presumption applies only if habitual residence has not been moved to another Member State within a period of six months before the proposal of initiation of insolvency.[48] Nevertheless, taking into account the lack of harmonisation in the domestic consumer bankruptcy legal regimes, there is still a proper „breeding ground" for insolvency forum shopping. The legal consequences of the main proceedings must be recognised in all Member States; a bankruptcy manager who is appointed in the main bankruptcy proceedings must be recognised and able to exercise his powers and rights in all Member States without the need for additional injunctions.[49] If and when the question arises of the bankruptcy proceedings in the territory of another Member State where the debtor has an establishment rather than the main centre of interest, this is the question of the so-called special bankruptcy proceedings.

5. CONCLUDING REMARKS

There are many questions concerning the application of consumer bankruptcy law with an international element. One of the major problems of the existing Regulation is that all of its primary objectives are aimed at protecting the rights of creditors.[50] On the other hand, consumer bankruptcy has a specific material and legal objective, which refers only to the economic rehabilitation of debtors and represents *differentia specifica* in relation to corporate bankruptcy.[51] There is an additional problem that arises from the fact that the holders of the freedom of establishment are also natural persons who are nationals of Member States. Moreover, Member States cannot condition or change the application of this rule by a bilateral agreement with another Member State as the content of the freedom of

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47 Art. 3, par. 1, p. 3, Regulation 2015/848.

48 Art. 3, par. 1, p. 4, Regulation 2015/848.

49 Art. 19, Regulation 2015/848.

50 Virgos, M., Garcimartin, F., *op. cit.* note 2, pp. 7–8.

51 Art. 2, CBA.

establishment is defined by the Treaty establishing the European Community.[52] Therefore, consumers often, before initiating the process of debt relief, change their habitual residence which can be considered abuse. For example, due to liberal approach to the process of release of the remaining debts, France became "popular" for consumers (i.e. *forum shopping*). The goal is to get faster and cheaper debt relief, which is not in the interest of creditors since it does not contribute to the preservation of the bankruptcy estate and the return of overdue debts to the creditors. On the other hand, in Germany, the debt relief is obtained after a period of good behaviour, which lasts for six years. During that period, the debtor is required to give creditors certain amounts from the debtor's unexempt property. Therefore, the system of debt relief in France, especially in the department of Haut-Rhin, Bas-Rhin and Moselle, is much more debtor-friendly. However, we should be aware that the consumers can change their residence before submitting a proposal for consumer bankruptcy for reasons unrelated to the impending insolvency. Therefore, the assessment as to whether the change of residence is abuse should be made after a consideration of the facts of each individual case. In any case, the decision of the European Court in the case *Staubitz-Schreiber*[53] is very significant. In this case a question was raised before the European Court – does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open Insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request, but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction? Specifically, it was decided according to Art. 3, par. 1 of the Regulation 1346/2000, that the Insolvency proceedings stipulates that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open these proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request, but before the proceedings are opened. Thus, at some point, an individual can only have one country as the centre of its main interests. The relevant date is the date of initiating insolvency proceedings. Therefore, the Court retains jurisdiction even if the debtor's main interests are subsequently changed in the sense that they move on to another country. The novelty of Regulation 2015/848 with regard to jurisdiction concerning an individual is that it now distinguishes between professionals and individuals/consumers with different „suspect periods".

[52] Art. 43 and 48, Treaty Establishing the European Community, Consolidated Version, [2006] OJ C 321.

[53] Case C-1/04 Susanne Staubitz-Schreiber [2006] ECR I-701.

Furthermore, a problem can arise if the Member State has not implemented the institute of consumer bankruptcy, as in the case of Italy. The doctrine states that, if it is assumed that the centre of main interests of the debtor is in a state that recognises the consumer's ability to declare bankruptcy, then the main insolvency proceedings will be opened in that State and it will be recognised in any other EU Member State, regardless of whether that Member State allows bankruptcy proceedings against these persons. The state of recognition may not invoke the protection of public order as a legal basis for refusal of recognition.[54] In the opposite situation, where the state which has an international jurisdiction to open insolvency proceedings does not recognise the bankruptcy ability of a particular person, the main bankruptcy proceedings cannot be opened. However, this does not mean that in this case an independent territorial insolvency (special - particular) proceeding cannot be opened, because there is an inability to open the main insolvency proceedings.[55]

Furthermore, in the insolvency proceedings with an international element, one of the fundamental problems is the formation of the insolvency mass since the property is located in a few countries. However, we should take into account the fact that consumers can keep unexempt assets. *Lex fori concursus* decides which assets of the debtor are, and which property is not included in the bankruptcy estate. At the practical and empirical level, the situation becomes very complex; specifically, in case of a home and privilege of a consumer to invoke the right to a home. For example, CBA follows the judicial doctrine of the Convention for the Protection of Human Rights and Fundamental Freedoms in relation to Article 8, which resulted in thousands and thousands of cases. These cases have been stopped for a whole decade at the stage of enforcing the claims of creditors on debtors' home, because it is very questionable from a social point of view. Furthermore, in practice, the consumers are obliged to co-operate with insolvency administrators. A practical problem may arise from the question of how the bankruptcy manager can find out about the existence of a property in another state, and, in the Croatian case, whether he has an incentive to do so? Although the CBA came into force, the issue of regulating the system of compensation, providing adequate incentives for the operating body of consumer bankruptcy proceedings, namely, the bankruptcy manager, has not yet been satisfactory solved.[56]

[54] Art. 19, par. 2, Regulation 2015/848.

[55] Virgós, M., *The 1995 European Community Convention on Insolvency Proceedings: An Insider's View,* Forum Internationale, No. 25, 1998, fn. 17.

[56] Bodul, D., *Novo operativno tijelo u sustavu kolektivne zaštite potrošača - povjerenik*, *Hrvatska pravna revija*, No. 1, 2017, pp. 52-60.

Thus, a common problem in international consumer insolvency proceedings is the fact that debtors often work in a country other than their country of residence. Respecting the right to freedom of movement for workers, debtors can migrate to another country during the insolvency proceedings. In such situations, the problem of the termination of the enforcement proceedings in another Member State occurs, as well as the problem of an efficient fulfilment of the debt repayment plan. An additional problem is that the debt repayment plan can last for years, and debtors will have to move during this period. By moving to another Member State, it is likely that debtors' economic circumstances will change, as well as their ability to meet their debt repayment plans. What legal consequences the relocation has on the plan of debt repayment and whether debt repayment plan can be modified, depends on the applied law, and whether there is an economic interest of a creditor to enforce their claims in the event of non-co-operation of the debtor.

Although all these situations impose caution, a new regulation has some advantages in terms of consumer-debtor relations. In particular, it offers comprehensive solutions in terms of the effects of actions in other Member States. On the one hand, it is understandable to expand its application to insolvent consumers. On the other hand, it is doubtful whether this is the most acceptable solution for the consumers. Thus, regardless of the enthusiasm that is evident in the area of legal literature, harmonisation of law in practice has proven to be a hard and slow process at the European level. Even if the EU has created and established a common market of hundreds of millions of people from different Member States, there are many differences within the EU. Therefore, the task of creating a real joint cross-border (consumer) insolvency law is a difficult one, especially in the light of the recital in which it was pointed out that cross-border insolvency proceedings should be "effective" and "urgent".

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PROTECTION OF RIGHTS OF COMPANIES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS[1]

ABSTRACT

The relation between companies and human rights is usually observed through the concept of corporate social responsibility, i.e. companies being human rights violators. However, this subject can be observed from a different angle that is gaining greater significance nowadays - the possibility for companies to protect their rights before the European court of human rights (ECtHR). The aim of this paper is to determine how the scope of human rights protection has evolved and expanded. From the basic notion of human right belonging to a human being to the idea that this term can be expanded to capture 'human rights of companies' (Emberland). Indisputably company's right to property can be protected before the ECtHR, as it is officially recognised under Protocol No. 1 of the European convention on human rights. However, the case law has gradually started to expand the scope of the Convention to other rights that were not explicitly granted to companies - first by recognising procedural rights to companies, and later by recognising rights such as right to respect for private and family life (article 8), freedom of expression (article 10) and right to just satisfaction (article 41) (so-called 'hard cases'). This expandedpersonal scope of the Convention is raising many controversies. The major concern is that granting right to companies would diminish the rights of natural persons, as companies would utilise their newfound position to avoid honouring rights of natural persons. The question is where this case law dynamics will lead us to – shall we soon be raising the issue of company's right to life. Also, there is the issue whether shareholders have right to sue in case of violation of rights of their companies.

Keywords: *human rights, companies, European convention on human rights, European court of human rights.*

1. INTRODUCTORY REMARKS

Companies are invaluable members of legal order and economy of one country. As such they operate in the web of legal norms on the national and international level. The concept of the legal personality of companies evolved from the idea that company is a mere legal fiction to the idea that it is a legal subject in full right,

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separated from its human substratum.[2] It was generally accepted they can have obligations and rights under the national law but the status of the company in the international legal framework remains ambiguous. The answer depends on which legal instrument we observe. Analysis has shown that European convention on human rights (ECHR) affords the widest scope of rights to companies.[3]

Companies' relations to human rights have mostly been linked to corporate social responsibility and grave breaches of fundamental rights of individuals.[4]Thus, the idea of corporate human rights will, at first sight, appear contradictory – an oxymoron.[5]

2. HUMAN RIGHTS OF COMPANIES – *PRO ET CONTRA*

The essential question is certainly should companies enjoy human rights and if so, under what conditions and to which extent. Theory has given arguments both in favour and against the extensive interpretation of human rights protection. Some don't deny that certain rights can apply to corporations but consider that unjustified.[6]

Reasons in favour of extending the scope of rights can be summed up as follows: affording rights to companies provides protection not only for the entity but also protects interests of natural persons and acts as a safeguard for the rule of law and democratic society.[7] Granting human rights to companies wouldn't deprive human beings of their rights but would make companies more aware of the need for human rights protection.[8]Case *Yukos v. Russia*[9] is seen as a perfect example why companies should enjoy protection – possibility to appear before ECtHR offers a

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2 Isiksel T., *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights*. URL< https://ssrn.com/abstract=2546401>. Accessed 13 April 2015, pp. 44 etc.

3 Van Kempen, P. H., *The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice?*, Pieth, M.; Ivory, R. (eds.), Corporate Criminal Liability, Netherlands, 2011, pp. 358-364.

4 Oliver, P., *Companies and Their Fundamental Rights: A Comparative Perspective*, International and Comparative Law Quarterly, Vol. 64, Issue 3, 2015, p. 663.

5 Grear, A., *Redirecting human rights: Facing the challenge of corporate legal humanity*, Hampshire, 2010, p. 1.

6 Scolnicov, A., *Lifelike and lifeless in law: Do corporations have human rights?*, University of Cambridge Faculty of Law Research Paper No. 13, 2013, URL <https://ssrn.com/abstract=2268537>. Accessed 30 September 2016, p. 6.

7 Van Kempen, *op.cit*. note 3, pp. 371, 386-387.

8 Dhooge, L. J., *Human Rights for Transnational Corporations*, J. Transnat'l L. &Pol'y, Vol. 16, 2006, pp. 205-206.

9 *OAO Neftyanaya Kompaniya Yukos v. Russia* (Just satisfaction) (2014) App. no. 14902/04.

corporation whose rights were violated by its own state an independent international venue for judicial review.[10]

Some theorists consider that corporations must enjoy certain fundamental rights that are essential to their purpose and functioning but those rights are not necessarily as extensive as those of natural persons or non-profit entities.[11]Legal persons should be offered protection under each human right that can reasonably be applied to them.[12] Some authors base their considerations on the fact that companies should enjoy protection only in a measure that is necessary to protect rights of natural persons within them.[13] Others claim the opposite –corporation has legal personality separated from its members and isn't reducible to, nor interchangeable with its human substratum for the purposes of human rights attribution.[14]

Criticism encompasses conceptual incompatibilities (human rights can only be extended to human beings), practical difficulties (overabundance of applications) and assertions that if companies refuse to accept human rights 'obligations, they should not be able to benefit from their protection.[15] The firstnegative argument is related to the human vulnerability as the underlying value of human rights law.[16] Furthermore, companies can use this new development to promote and protect their interests, regardless of the consequences for natural persons.[17] Granting rights to companies often leaves humans vulnerable and corporations protected.[18] Companies can undermine government efforts to improve of human rights protection,[19] making it harder for individuals to hold corporations accountable.[20] Extension of scope is also criticised on the grounds that corporations tend to

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10 Van den Muijsenbergh WH.; Rezai S., *Corporations and the European Convention on Human Rights*, Pac. McGeorge Global Bus. & Dev. LJ, Vol. 25, 2012, pp. 62, 68.

11 Oliver, *op. cit.*note 4,p. 695.

12 Van Kempen, *op.cit*. note 3, p. 387.

13 Ku, J. G., *The Limits of Corporate Rights Under International Law*, Chi. J. Int'l L., Vol. 12, 2011, p. 732; Scolnicov, *op. cit.* note 6, p. 17.

14 Grear, A., *Challenging corporate 'humanity': Legal disembodiment, embodiment and human rights*, Human Rights Law Review, Vol. 7, Issue 3, 2007, p. 517. Harding C.; Kohl U., *Human rights in the market place: the exploitation of rights protection by economic actors*, Routledge, 2016, p. 36. Scolnicov, *op. cit.* note 6, p. 7.

15 Van den Muijsenbergh; Rezai, *op.cit*. note 10, p. 52.

16 Grear, *op. cit.* note 14, pp. 520-521. Isiksel, pp. 52, 60. Scolnicov, *op. cit.* note 6, pp. 15-16.

17 Lafont, C., *Should We Take the "Human" Out of Human Rights? Human Dignity in a Corporate World*, URL <https://ssrn.com/abstract=2768881>. Accessed 8 October 2016, p. 19; Isiksel,*op.cit*. note 2, pp. 40, 59.

18 Scolnicov, *op. cit.* note 6, p. 9.

19 Lafont, *op.cit.* note 17, p. 20. Isiksel,*op.cit*. note 2, p. 13. Harding; Kohl, *op.cit.* note 14, p. 46.

20 Grear, *op. cit.* note 5, p. 17; Grear, *op. cit.* note 14, p. 514.

be in a much more balanced position towards public authorities.[21] This is especially true for the multinational corporations that can use their economic power to avoid responsibility.[22]Having that in mind, granting them human rights would be paradoxical.[23]They should be treated more like a State within the human rights framework - to have obligations but no rights.[24] Some authors base their criticism on the historical interpretation. Namely, during Convention drafting process companies were gradually left out and don't appear as applicants in the final version of the ECHR.[25]

3. SCOPE OF THE RIGHTS GRANTED TO COMPANIES

Despite the initial dilemma whether to grant human rights to companies, steady rise of these cases before ECtHR, shows the number of human rights that the ECtHR has deemed applicable to corporations has grown.[26] However, thesis not a result of apre-planned strategy to grant protection to corporations but of analysis of specific problems in given cases.[27]Only remains the question of the scope of rights attributed to companies.[28] We can single out several of these types of rights under ECHR:

- rights explicitly granted to companies (the right to property);
- rights granted to "everyone", where the ECtHR interpreted that the scope of the norm includes companies as well (freedom of speech, right to privacy and procedural rights);
- "derivative" rights realised through individuals that constitute the company (freedom of association and protection from discrimination);[29]

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[21] Sanchez-Graells, A., Marcos, F., *'Human Rights' Protection for Corporate Antitrust Defendants: Are We Not Going Overboard?*,University of Leicester School of Law Research Paper No. 14-04, URL<https://ssrn.com/abstract=2389715>. Accessed 13 January 2017, p. 10.

[22] Van Kempen, *op.cit.* note 3, p. 388.

[23] Harding, Kohl, *op.cit.* note 14, p. 49.

[24] *Ibid.*, p. 50.

[25] Scolnicov, *op. cit.* note 6, p. 5; Harding; Kohl, p. 32. Oposite Van den Muijsenbergh; Rezai, *op.cit.* note 10, p. 48.

[26] Lafont, p. 15. This phenomenon is named "the snowball effect". Emberland, M. *Protection Against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: The Colas Est SA v. France Approach*, Mich. J. Int'l L., Vol. 25, 2003, p. 93.

[27] Sanchez-Graells; Marcos,*op.cit.*note 21, p. 3.

[28] Oliver, *op. cit.* note 4, p. 662.

[29] Scolnicov, *op. cit.* note 6, p. 11.

- rights inextricably linked to human personality and incompatible with artificial nature of the company[30]- the right to life,[31] rights against torture and ill-treatment, prohibition of slavery, right to liberty and security and a right to marry. However, boundaries are being constantly pushed and the initial scope stretched beyond recognition.[32]

3.1. Right to property

The right to property is the only right explicitly granted to legal persons under ECHR. Having that in mind, we would only like to point to two potentially moot issues. First is the question of protection of shareholders under the ECHR. Shareholding and the rights that stem from it enjoy protection. However, the issue is whether shareholders have a standing before the Court when company's property rights have been violated.[33] The other is related to intellectual property rights that have only recently emerged as a contentious issue and that can have major implications for the future jurisprudence. They raise the issue of ECtHR's role in shaping innovation policy in Europe and striking appropriate balance between interests of corporations and humans.[34]

3.2. Procedural rights

ECHR grants protection during government investigations of law violations and, afterwards, against government decisions imposing sanctions or liability.[35] Set of procedural rights includes article 6 (fair trial), article 7 (no punishment without law), article 13 (right to an effective remedy) and article 4 of the Seventh Protocol (right not to be tried or punished twice).

It is generally accepted that there is no reason companies should be treated less favourably regarding these rights than individuals since otherwise they cannot enforce their rights.[36] However, it is still unclear whether granting procedural guarantees to a legal person is a matter of legal policy or obligation derived from the

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30 Van den Muijsenbergh; Rezai, *op.cit.* note10, p. 50.

31 Some fear that case law would eventually result in granting companies right to life which would interfere with necessary state regulation of corporations (especially registration and liquidation). Van den Muijsenbergh; Rezai, *op.cit.* note 10, pp. 51, 60; Dhooge, *op.cit.*note 8, p. 239.

32 Harding; Kohl, *op.cit.*note 14, p. 28.

33 For detailed discussion see Part 4 of the paper.

34 Helfer, L. R. *The New Innovation Frontier-Intellectual Property and the European Court of Human Rights*, Harv. Int'l LJ, Vol. 49, 2008, p. 6.

35 Sanchez-Graells; Marcos,*op.cit.*note 21, p. 8.

36 Oliver, *op. cit.*note 4, p. 678.

fundamental legal acts.[37]As Article 6 indicates, its guarantees apply both to the civil and criminal procedure.[38] Criminal procedure gives reasons for greater concern, especially in the scope of human rights of the accused legal person and the issue of representation of a legal person in criminal proceedings.[39]

The self-incrimination privilege raises the most controversies. The right aims primarily to protect the defendant against having to give evidence that has no existence outside of his/her will.[40] The content of the principle is determined by criminal legal norms and the case law of ECtHR and it encompasses verbal communication and non-verbal forms of acting. The former relates to defendant's right to remain silent, and the latter to the right of the defendant to refuse to give the incriminating evidence.[41]

Some deny this right to companies because it was primarily established to protect individuals from torture and attack on their physical integrity by the state organs.[42]Companies are far more equipped to resist state's coercion mechanisms.[43]Furthermore, granting company this privilege would undermine state's efforts to conduct an effective monitoring of company's activity, as it would discourage whistle-blowers and encourage concealment of information.[44] Others grant companies this right providing the pressure is put on those that represent the company (management or employees).[45]Whether legal persons can invoke this privilege depends on its legal foundations. If the root of the privilege is in human dignity and protection of personality, there is no legitimate reason for its extension to legal persons. On the contrary, if the privilege is seen to derive from the rule of law, then it relates to all of the defendants in criminal proceedings, including legal persons.[46]

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37 Đurđević Z., *Pravna osoba kao okrivljenik: temeljna prava i predstavljanje*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 12, Issue 2, 2005, p.740.

38 We cannot disregard competition law investigations that are considered to fall under the criminal law procedures, but it is stated that company shouldn't enjoy full benefits of the fair trial because it would diminish the effectiveness of competition law enforcement. Sanchez-Graells; Marcos, *op.cit.* note 21, p. 19.

39 Đurđević,*op.cit.* note 37, p. 740.

40 Van Kempen, *op.cit.* note 3, p. 375.

41 Đurđević,*op.cit.* note 37,p. 757.

42 Scolnicov, *op. cit.* note 6, p. 22. Oliver, *op. cit.*note 4, 685. Isiksel, *op.cit.*note 2,pp. 51-52.

43 Dhooge, *op.cit.* note 8, p. 241.

44 *Ibid.*

45 Van Kempen, *op.cit.* note 3, p. 376.

46 Đurđević,*op.cit.* note 37, p. 757.

3.3. "Hard cases"

In practice several articles of the ECHR gave rise to the disagreement between theorists regarding whether they can apply to companies at all, or on equal footing with natural persons.

3.3.1. *Right to respect for private and family life (article 8)*

Privacy in its broadest sense is the right to personal autonomy, to self-fulfilment and to develop one's personality. In the narrow sense, this notion covers "freedom from prying" by the State or third parties. Privacy in the economic sphere is considered to fall under the latter concept.[47]

Article 8 grants four rights – respect for family life, respect for private life, respect of home and correspondence. The protection under this article envelops companies, though not in respect of all the interests covered and less extensively and intensively than with respect to individuals.[48]Clearly, due to their nature companies cannot have family or private life.[49] However, the ECtHR case law suggests that they can have their home and correspondence protected under this article. The first relevant case on this matter was *Société Colas Est v France*[50]where ECtHR found that company's right to home was violated by the French authorities, who entered the premises without the consent of the management and without a judicial authorization (though under law at that time the warrant was not necessary). Even though the word "home" is primarily associated with natural persons, the Court extended its meaning to business premises, because the French text of the ECHR uses the word "domicile" that has a broader connotation than the one in the English version ("home").[51]The interpretation of the Article poses two questions. What is the rationale behind widening the scope? Is there any difference inthe scope of the protection of companies and individuals?

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[47] Oliver, P., *The protection of privacy in the economic sphere before the European Court of Justice*, Common Market Law Review, Vol. 46, 2009, p. 1443.

[48] Van Kempen, *op.cit.* note 3, p. 377.

[49] Scolnicov, *op. cit.* note 6, p. 14. To claim otherwise „would seem to stretch language beyond all reasonable limits". Oliver, *op. cit.* note 47, p. 1449.

[50] *Société Colas Est and Others v. France(2004) 39* EHRR 17.

[51] The ECHR consists of two authentic versions written in English and French that are equally binding. In this case, confronted with versions of a treaty that are equally authentic but not exactly the same, the Court opted for interpreting the Convention text in effective rather than formalistic manner. Emberland, *op. cit.* note 25, p. 88.

Interpreting the concept of “home” in this case shifted from formalistic-linguistic inquiries - whether a company can have a “home” - to a teleological inquiry - what is the purpose of Article 8’s protection of the “home”.[52] The protection of the rule of law is seen as an underlying value of the Convention.[53]Having that in mind, Article 8 should be interpreted not only as a protection of the individual, but of private activity in general (both personal and commercial) from arbitrary exercise of governmental power.[54] However, some authors acknowledge that corporations have a legitimate interest in commercial secrecy, but deny them human right of privacy.[55]

Caselaw shows that companies enjoy more limited protection under Article 8 than individuals or legal entities not involved in commercial matters, especially concerning the right to respect for one’s home.[56]It appears that the ECtHR has adopted a system under which corporate premises (offices, branches and other business premises) enjoy a lower degree of protection than the residences of individual persons[57] (two-tiered scheme of protection).[58] Namely, Article 8(2) establishes conditions under which rights of beneficiaries can be restricted – governmental actions must be prescribed by the law, conform to one of the enumerated interests and must be necessary.[59]

3.3.2. *Freedom of speech*

Freedom of expression is recognised as an essential prerequisite of the democratic political process and the development of every human being.[60] In the era of enhanced commercialisation, the perception that this freedom does not apply to the economic sphere has been challenged.[61] Discourse about freedom of expression of

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52 *Ibid.*, p. 89.

53 Van den Muijsenbergh; Rezai,*op.cit.* note 10,p. 56.

54 Dhooge, *op.cit.* note 8, p. 235; Emberland, *op. cit.* note 25, pp. 81, 90-91. Scolnicov, *op. cit.* note 6, p. 13.

55 Scolnicov, *op. cit.* note 6, p. 12.

56 Van Kempen, *op.cit.* note 3, p. 378.

57 Emberland, *op. cit.* note 25, p. 100.

58 *Ibid.*, p. 80.

59 In the case *Vinci Construction e.a. v France* (App. no. 63629/10 et 60567/10), ECtHR concluded that the actions of the authorities conformed to the first two conditions, but that conducted inspections and seizures were disproportionate to the aim pursued and thus violated Article 8 of the ECHR.

60 Macovei, M., *Freedom of expression - A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2004, URL < https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff48 >. Accessed 1 February 2017, p. 7.

61 Randall, M. H. *Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?*, Human Rights Law Review, Vol. 6, Issue 1, 2006, p. 54.

companies mostly refers to the media enterprises. As the primary transmitters of information in modern democratic societies, media may have a dual capacity - either as violators of freedom of expression or as entities exposed to the infringement of freedom of expression.[62] ECtHR's decisions show that the Article 10 protection encompasses not only the content of expressions but also the means by which they are communicated.[63]The most controversial issue regarding this phenomenon and companies is related to the nature of speech that is protected. Namely, the question is whether the pure commercial activity (i.e. an activity exclusively conducted for aims of marketing a product and for purposes of pecuniary gain), may qualify as an "expression" worthy of protection under ECHR,[64] as opposed to other forms of speech, and particularly political speech.[65] Political speech enjoys stronger protection due to its part in the preservation of pluralism of opinions in the society,[66] its role as a check on governmental power and the fact that is more susceptible to governmental censorship.[67]

ECHR provides restrictions on freedom of expression under Article 10 (2), which grants the state right to derogate the rights under circumstances which are essentially the same as in Article 8(2). Under these provisions, authorities are granted wider discretion when it comes to assessing the commercial expression. The Court has basically, depending on the content of information and ideas which are to be conveyed, established a hierarchy of values protected under Article 10 and provides different levels of protection for different categories of expression (political, commercial, artistic, academic, etc.).[68] Under this two-tiered system commercial speech is scrutinised according to a more lenient standard of review than other forms of protected speech[69] and can be imposed greater restrictions than political speech.[70] The double standard is justified on the grounds that the state has a legitimate need for control over economic activity and that economic activity is

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62 Aleksovski Đorđević S. *Article 10 of the European convention in light of the jurisprudence of the European Court of Human Rights*. FACTA UNIVERSITATIS-Law and Politics, Vol. 14, Issue 1, 2016, p. 56.

63 Van den Muijsenbergh; Rezai,*op.cit*. note 10, p. 57.

64 *Ibid*.

65 Political speech can be described as comments provided by the media and public figures on issues of public concern. Aleksovski Đorđević,*op.cit.* note 62,p. 57.

66 *Ibid*.

67 Harding, Kohl, *op.cit.*note 14, p. 207. Randall,*op.cit*. note 61, pp. 80, 84.

68 Aleksovski Đorđević*, op.cit.* note 62, p. 57.

69 Emberland, *op. cit.* note 25, p. 104; Randall, p. 63. So far, ECtHR has explored boundaries of the commercial speech in the area of advertisement, unfair competition law and broadcasting. Randall, p. 59.

70 Harding; Kohl, *op.cit.*note 14, p. 201.

remote from the essential purpose of certain ECHR provisions.[71]We can suppose that the reason can be the fear that unrestricted free speech of companies would be abused – companies would drown dissenting voices using the advantage of their economic strength.[72]

This divide is criticised on the two grounds – lack of objective reasons to differentiate between categories of speech and efforts to make the difference are often futile because of the practical difficulties that arise.[73]Special problem poses situation when it isn't (easy) to determine whether the speech is in the realm of the commercial or political sphere. If the expression is not aimed at promoting the speaker's products or services but is intended to advocate a certain cause, it is not considered to be commercial regardless of the fact it was communicated through an advertisement.[74] It is suggested to treat all categories of speech the same and to balance all the interests involved in an *ad hoc* fashion.[75]

Granting freedom of speech inevitably leads to cases when the use of this right can damage someone's reputation. This is particularly reflected in the struggle between the need for company's accountability for the sake of consumer protection and company's interest in preserving its reputation as one of its most valuable assets. On the one hand, speech critical of corporations is a key prerequisite for consumer safety.[76] Large corporations appear as powerful public actors, impacting upon people's lives, and as such should be open to the same kind of criticism as governmental bodies.[77] On the other hand, the company has a legitimate interest in preserving its reputation, which represents a valuable property interest.[78] Corporations stand to lose substantial amounts of wealth if their corporate name is tarnished.[79] Particularly, they have a legitimate need to protect themselves from rivals which try to cause harm to their business by spreading false information.[80] Damage can have far-reaching consequences, especially nowadays with the use of modern technologies. However, companies must be aware that by entering in

71 Emberland, *op. cit.* note 25, p. 106.

72 Stoll, M. L. *Corporate rights to free speech?*, Journal of Business Ethics, Vol. 58, Issue 1, 2005, p. 266.

73 Emberland, *op. cit.* note 25, p. 106.

74 Randall, *op.cit*. note 61, p. 71.

75 *Ibid.*, p. 55.

76 Jackson, D. M., *The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan*, Wm. & Mary Bill Rts. J., Vol. 9, 2000, p. 520.

77 Scolnicov A., *Supersized Speech-McLibel Comes to Strasbourg*, Cambridge LJ, Vol. 64, 2005, p. 313. Similar Jackson, note 76,p. 492.

78 Jackson, *op.cit*. note 76, p. 522.

79 *Ibid.*, p. 513.

80 Scolnicov, *op. cit.* note 77, p. 313.

the business sphere, they voluntarily accept the risks of being subjects of public debate.[81]

3.3.3. ***Just satisfaction***

In case there was a violation of rights granted under ECHR or its protocols, the ECtHR can award just satisfaction to the injured party. The award is not an automatic consequence of a finding a violation of a right but is at the discretion of the Court.[82] Just satisfaction may be afforded in respect of (a) pecuniary damage; (b) non-pecuniary damage and (c) costs and expenses.[83] The redress can be provided as a declaratory judgment establishing violation(s) of the ECHR, or as a financial award consisting of pecuniary and/or non-pecuniary damages.[84] Pecuniary damage involves the decrease of the economic wealth of a person and can be calculated by relying on market prices, whereas non-pecuniary damage does not involve a diminution of the victim's patrimony and cannot be priced on the market.[85] Although immaterial harm can never be "remedied" by money, most legal instruments(including the ECHR), foresee the possibility to award money to persons who suffered such harm.[86] Moral damages are typically afforded for injuries such as harm to reputation, psychological harm, distress, frustration, humiliation and sense of injustice.[87]

Regarding companies, the problem has arisen when the Court granted them right to non-pecuniary damage, especially the right to monetary satisfaction.[88] The first of such cases was *Comingersoll S.A. v. Portugal*.[89] This case included in the scope of potential immaterial damages for the company „uncertainty in decision-planning, disruption in the management of the company and, albeit to a lesser degree, anxiety and inconvenience caused to the members of a legal entity's management

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81 Jackson, *op.cit.* note 76, p. 514.

82 Rules of Court - Practice directions just satisfaction claims, 14 November 2016, Strasbourg, URL=< http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf>. Accessed 12 February 2017, p. 60, par. 1.

83 Rules of Court - Practice directions just satisfaction claims, p. 61, par. 6.

84 Nifosi-Sutton I., *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective*, Harv. Hum. Rts. J., Vol. 23, 2010, p. 52. Altwicker-Hàmori, S., Altwicker, T., Peters, A., Measuring Violations of Human Rights An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights, URL=< http://ssrn.com/abstract=2631404>. Accessed 12 February 2017, p. 13.

85 Altwicker-Hàmori, Altwicker, Peters, op.cit. note 84, p. 7.

86 *Ibid.*, p. 8.

87 Nifosi-Sutton, *op.cit.* note 84, p. 54.

88 This was criticised on the grounds that a pecuniary loss is the only loss a company can suffer. Harding; Kohl, *op.cit.*note 14, p. 214.

89 *Comingersoll S.A. v. Portugal* (2001) 31 EHRR 31.

team".[90] The controversy concerned the fact that the ECtHR identified immaterial damage of the directors with damages of the company itself. This caused dissension among members of the judicial team because it was incompatible with the principle of separate legal personality. Imputing the mental distress experienced by the management to the company the Court is in a sense piercing the corporate veil in reverse.[91]

4. THE "VICTIM" STATUS UNDER ECHR (ARTICLE 34)

Companies are given the right to file applications before the Court as "non-governmental organisations". However; the question is whether shareholders or other stakeholders (managers or employees) can file claims when the violation is directed against the company in which they have interests.[92] The answer is relevant not only to the company, but also has consequences for its stakeholders, for a democratic society, and the rule of law.[93] The problem arises because "victim" concept under ECHR is not clearly established but developed through court practice and is susceptible to constant evolution, which can cause increased level of legal uncertainty in the domain of human rights protection.[94]

Along-standing principle of company law is that company's rights and interests are separated from rights and interests of its shareholders and "corporate veil" can be pierced only under a limited number of circumstances. In the context of victim status, court has two options. The first is identification or lifting the corporate veil - rights of the company and the stakeholders are treated as being one and the same which means that state actions violate the human rights of the organisation

[90] In one case Court spoke of "prolonged uncertainty in the conduct of its [company's] business and feelings of helplessness and frustration". See *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (2012) GC, par. 221.

[91] Wilcox, V., A Company's Right to Non-Pecuniary Damages An Enquiry into the Practices of the European Court of Human Rights and some of its High Contracting States, URL=<https://ssc-rechtswissenschaften.univie.ac.at/fileadmin/user_upload/s_rechtswissenschaft/Doktoratsstudium_PhD/Expose1/Europarecht/A_Company_s_Right_to_Non-Pecuniary_Damages.pdf>. Accessed 7 February 2017, p. 3.

[92] The case law suggests that shareholders file these applications for several reasons: they misunderstand the meaning of „victimhood", they believe that applications submitted by several company constituents enhance the chances of admissibility, they believe they represent identical interests as those of the company, they think that they have suffered a direct violation or because the company cannot itself take care of its own affairs, or doesn't want to initiate litigation. Emberland, M., *The corporate veil in the case law of the European Court of Human Rights*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 63, 2003, p. 946 fn 8.

[93] Van Kempen, *op.cit.* note 3, p. 356.

[94] Ćorić V., *Model žrtve u svetlu novije jurisprudencije Evropskog suda za ljudska prava*, Evropsko zakonodavstvo, Issue 49-50, 2014, p. 568.

and the individual jointly. Under the second concept, the infringement against the company and the violation of the individual's rights are distinguished instead of being seen as one.[95]

The seminal case *Agrotexim v. Greece*[96] has shown that ECtHR opted for the non-identification principle as a starting point.[97] Under the Court's jurisprudence, shareholders cannot in principle be identified with their company[98] and are not regarded as "victims" unless the injury directly harms their property, or violates rights they enjoy (dividends, voting rights, or the right to a share in a company's assets after liquidation).[99] However, the ECtHR established a few narrowly interpreted exceptions to this principle: a) impossibility for the company to apply to the court and b) case when the company is a mere vehicle for shareholders' business undertakings.[100]

The current practice of the ECtHR is criticised because the Court offered no guidelines for defining the standard that it will use to determine the victim status of future applicant shareholders,[101] thus leaving them more vulnerable to government actions.[102] It is pointed that the Court should abandon its current standard and adopt a more realistic multifactor test based on the following factors: whether the shareholder's right was infringed (as opposed to harm to its monetary interests), to what extent the shareholder exercised control over the company, to what extent it was impossible for the company itself to file suit, and the severity of the harm the shareholder suffered.[103] What also remains unclear is the question whether broader interpretation (identification) should be applied only to the property rights,[104] or should have a wider scope.[105]

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95 Van Kempen, *op.cit.* note 3, p. 365.

96 *Agrotexim and others v. Greece* (1996) 21 EHRR 250.

97 Emberland, *op. cit.* note 92, pp. 950, 956.

98 *Ibid.*, p. 949.

99 Tishler, S. C. *A New Approach to Shareholder Standing before the European Court of Human Rights*, Duke J. Comp. & Int'l L., Vol. 25, 2014, p. 263-264.

100 The prevailing factors in this case shall be the degree of shareholding, holding of management positions and status as joint debtor for company loans. Other kinds of personal involvement may also suggest identification. Emberland, *op. cit.* note 92, p. 952-955.

101 Tishler*, op.cit*. note 99, p. 270.

102 *Ibid.*, p. 279.

103 *Ibid.*, p. 262-263 and 281-285.

104 Harding; Kohl, *op.cit.*note 14, p. 27.

105 Emberland, *op. cit.* note 92, p. 951.

5. CONCLUDING REMARKS

The public is gradually becoming aware that companies can be harmed by illegal acts of other constituents in the society but there is no general agreement whether they can be full beneficiaries of human rights protection under international instruments. This is especially true for multinational corporations as opposed to small enterprises that would benefit from the protection.

Unlike other instruments, ECHR provides protection of companies' rights either explicitly or through ECtHR's interpretative powers. Court develops two-tiered scheme of protection of certain rights where standards relating to rights of companies are treated differently than that of individuals (e.g. wider margin of appreciation in applying restrictions on commercial speechor laxer standards in interpretation of companies' "home").

Apart from adopting the practice to take into consideration peculiarities of company's form when granting protection under the human rights charter, it can be advocated the possibility to create a separate charter of basic corporate rights that would take into consideration their specific nature,[106] as it was applied in national laws (e.g. criminal liability).

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IMPACT OF EU INSOLVENCY REGULATION ON PROCESS OF RESOLVING DISPUTES BEFORE INTERNATIONAL COMMERCIAL ARBITRATION

ABSTRACT

The insolvency law contains summary processes for dealing with claims and protections against certain proceedings being initiated or continued. There has been some debate, as well as the recent case law, concerning the primacy of these rules over court proceedings and arbitration agreements. In the following article, we look at what the current position of Insolvency Regulation 2015/ 845 under EU law is, and we consider the relation between the arbitration and the insolvency proceedings and the impact on the arbitration agreement. Furthermore, we will discuss the differences between the EC Regulation 1346/2000 and the EU Insolvency Regulation 2015 /848.

The first part will be dedicated to how the arbitration agreement and the Regulation relate. In the past, the initiation of insolvency procedure rendered the arbitration agreement null and void in some member states. Such cases happened under the Polish and Spanish national laws. Therefore, the case Elektim v. Vivendi will be discussed as an example. Moreover, the current situation in those countries will be analyzed.

The second part of this paper analyzes the effects of the insolvency on the pending arbitration proceedings. A subject of discussion will also be the question of whether the arbitration procedure must be terminated or continued. A comparative analysis shows that some national laws provide for a compulsory termination of arbitration proceedings, while another group of countries allows for the continuation of the arbitration process.

In the third part, we will examine the amendments of the EC Regulation 1346/2000 adopted and implemented in the EU Regulation. We will try to analyze what changes there are and what their impact is on the arbitration proceedings.

In conclusion, all the arguments discussed in the paper will be summarized.

***Keywords**: arbitration agreement, arbitration proceeding, bankruptcy proceeding, EC Regulation 1346/2000, EU Insolvency Regulation 2015 /848*

1. INTRODUCTION

The initiation of bankruptcy proceedings against a legal entity produces consequences that affect not only the entity that undergoes the proceedings but also

their creditors or other persons with whom the insolvent entity has entered legal relations.[1]

For the entity that has undergone the insolvency proceeding,[2] the commencement of bankruptcy proceeding means the termination with the current way of doing business and entry into the regulated procedure which may result in complete shutdown of their legal personality.[3] The consequence of initiating bankruptcy proceedings relates to the debtor that lacks legal capacity to take action concerning their estate and to sue or to be sued in the legal proceedings regarding the estate. These rights are "transferred" to the trustee.

For creditors and other contracting parties the main question is what happens with agreements that have been executed by a bankrupt party and other duties that party has assumed. The question is more complex if there is an arbitration agreement between a creditor and debtor. The main issue in that regard is how the dispute will be resolved –either before an arbitration tribunal as per the arbitration agreement, or as the bankruptcy proceeding entails in a national court. Depending on the institution that will have jurisdiction over resolving disputes, we may have different outcomes of the proceedings.

Keeping in mind that arbitration and bankruptcy proceedings are a special type of proceedings, we may identify a number of differences and similarities. The main similarity between bankruptcy and arbitration proceedings reflects in the purpose of such proceedings. Both proceedings are intended to resolve issues relating to the assets of the debtor. However, while the arbitration settles for meeting the individual requirements of the parties involved, the bankruptcy process is aimed at settling collective or group requests, in accordance with the rules and principles

1 More about insolvency see Vasiljević, M., *Poslovno pravo*, Beograd 1999, p. 318 *et seq*; Čolović, V., *Stečajno pravo*, Banja Luka, 2010.

2 The term insolvency has a broader meaning than the term bankruptcy. The insolvency proceeding is a collective term for all situations in which an entity encounters issues with performance of assumed duties. In the language of former Yugoslav countries, the term bankruptcy translates as "stečaj", while the insolvency is "insolventnost" (non-performance of duties). To avoid a potential misunderstanding between the terms insolvency and bankruptcy in this article we will use the term bankruptcy as a proceeding used in national legal order for the situation when the debtor cannot fulfill the assumed duties. For the situation where the entity is a multinational company regulated by the regime of the EU Insolvency Regulation we will use the term insolvency. It should be noted as well that insolvency is a predominant term in international legal doctrine. The root of this term can be found in the English school of law where the term insolvency is used for a number of different proceedings that reflect the impossibility to meet the obligations. For further explanations see Sajter D.;Hudeček, L.: *Temeljni pojmovi i nazivi stečajnog prava*, URL: https://bib.irb.hr/datoteka/430868.Temeljni_pojmovi_i_nazivi_stecajnog_prava.pdf. Accessed 20 December 2016.

3 The initiation of bankruptcy proceedings does not imply that this procedure will end in bankruptcy of a person or entity. A legal entity may be reorganized in the process and continue to transact business.

that apply to bankruptcy.[4] Taking this into consideration, we should note that the principle of jurisdictional attraction is of particular importance due to the fact that the court conducting the bankruptcy proceeding attracts all other proceedings under its jurisdiction (that are) directly related to the bankruptcy proceedings. Apart from the similarities, there are also numerous differences concerning the manner in which the jurisdiction of the court running a bankruptcy proceeding or of an arbitration tribunal is established,[5] as well as differences in the main principles of insolvency and arbitration proceedings and the extent of legal protection provided in one and in another proceeding. These and other similarities and differences raise a question of the impact of bankruptcy proceedings on the arbitration as a method of private dispute resolution.

The impact of bankruptcy of a party on the arbitration proceeding brings about at least two other questions. Firstly, whether the bankruptcy of a party to the arbitration agreement affects the validity and existence of such agreement, and secondly, whether the initiation of proceedings determines the commencement of arbitration or, if the latter process is already underway, its further destiny. These are a few of the main issues we are going to discuss in this article.

2. BANKRUPTCY AND ARBITRATION AGREEMENT

Bankruptcy, as at term, is used to broadly designate the condition wherein a person's (natural person or legal entity) assets are worth less than their debts. In this condition one is unable to meet debts when they fall due.[6] Bankruptcy in a narrower sense represents a legal process governed by national insolvency laws.[7] In this article we will refer to bankruptcy in the narrow sense of the term, i.e. as insolvency proceeding initiated against and imposed upon the debtor's assets, and from that perspective we will discuss its relationship with the arbitration proceedings. In case when a bankruptcy proceeding is initiated against a legal entity holding assets in more that one country, we will resort to the term 'insolvency'.

The arbitration agreement is a prerequisite to determine the jurisdiction of an arbitral tribunal. The very effect of a valid arbitration agreement is reflected upon the establishing of jurisdiction of the arbitral tribunal which should resolve a dis-

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4 Velimirović, M., *Poslovno pravo,* Podgorica, 2000, pp. 175-177.

5 About arbitration agreement, Perović, J., *Standardne klauzule u međunarodnim privrednim ugovorima*, Beograd, 2012, pp. 187 -217; Redfren, A.; Hunter, M.; Blackaby, N.; Partaside, C.; *Law and Practice of International Commercial Arbitration,* Sweet & Maxwell, 2004, p. 5 *et seq*.

6 Rajak, H., *The Culture of Bankruptcy,* in International insolvency law, themes and perspectives, (Omar P. ed.), Ashgate, 2008, pp. 4-6.

7 *Ibid.*

pute.[8] In determining the competence of international commercial arbitration, the arbitration agreement needs to fulfill the necessary requirements governed by the New York Convention on the recognition and execution of Foreign Arbitration Awards (NYC).[9] According to the Convention "...every Contracting States shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of defined legal relationship, contractual or not, concerning a subject matter capable of settlement by arbitration".[10] The arbitration agreement has to be signed by the parties with the legal capacity to sign the arbitration agreement. In the case of bankruptcy, the arbitration agreements entered into by the debtor prior to the commencement of the bankruptcy proceedings may be attempted to be invoked against the trustee, and not against the debtor. After the commencement of the bankruptcy proceedings, the debtor is left without the capacity to sign this agreement.

As we can see from the above, it is necessary that the disputes can be subjected to arbitration for the purpose of a dispute resolution. In other words, the disputes have to be arbitrable. Arbitrable disputes are capable disputes in an objective (ratione materiae) and a subjective matter (ratione personae). Every country is free to define the arbitrability of a dispute in accordance with its own public policy considerations.[11]

In that way, the principle of party autonomy, as an underlying principle of arbitration law, is restricted or limited by the arbitrability of the dispute. Bankruptcy disputes are deemed arbitrable, if related to "non-core" issues of bankruptcy, such as a proceeding in which creditor may solicit the arbitral tribunal to determine that the creditor's claim is valid in order to register the claim in the creditor's list in the bankruptcy court, or any disputes about the value of the creditor's claim.[12] Such disputes are those arising from the contractual relationship between the parties.

Core insolvency disputes such as the declaration of bankruptcy,[13] initiation and termination of the bankruptcy proceedings, equal treatment of creditors, appoint-

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8 Lew, J., *The law applicable to the form and substance of the arbitration clause,* ICCA Congress series, No. 9, Paris, 1998, pp. 114-145.

9 Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the New York Convention, Official Journal of the Federal Republic of Yugoslavia- International treaties, No. 11/81, p. 607.

10 Art. 2 of the New York Convention

11 More about arbitrability see Vukadinović, J., *Pojam arbitralnosti u arbitražnim pravima Srbije i Hrvatske,* Aktuelna pitanja savremenog zakonodavstva, Budva, 11-15. jun 2012, pp. 235-245.

12 Yang, G., *Insolvency Proceedings and Their Effect on International Commercial Arbitration,* University og Ghent, 2013, p 7.

13 ICC award no. 9163.

ment of the trustee, verification, collection and distribution of the estate considered are non-arbitrable in most countries.[14] Core (pure) bankruptcy disputes have to be resolved in a national court of law.[15] In the national insolvency proceedings, national courts apply national insolvency law.

The situation is more complex in cross-border insolvency disputes. Cross-border disputes exist whenever the debtor has assets or creditors in more than one country. Such situations are regulated on the EU level by the EU Regulation on cross-border insolvency proceedings, which has been in effect since January 1, 2017.[16] Before we move on to analyze the provisions of this Regulation (EU Regulation), we should first discuss the provisions of the (former) EC Regulation on Insolvency Proceedings (EC Regulation)[17] and its connection to the arbitration proceedings.

Contrary to established rules of party autonomy in international arbitration, the EC Regulation, arguably, restricts the freedom of the arbitral tribunal to apply the choice of law rules chosen by the parties or that the arbitral tribunal deems are otherwise appropriate and replaces them with the mandatory choice of law rules provided for in the EC Regulation.[18] The applicable law should be the law of country where the proceeding is initiated. That law should be *lex concursus.*[19]

As a result, the effects of the insolvency of a corporation will have effect on the enforceability of the current contracts against the insolvent estate, including arbitration agreements or on pending arbitral proceeding to which it is a party, are highly related to the personal law of the corporation.[20]

The EC Regulation recognizes an exception to this rule in Article 15. According to Art. 15 of the EC Regulation "the effects of the insolvency proceedings on lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending" (*lex fori / lex arbitri*).

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14 Lazić, V., *Insolvency Proceedings and Commercial Arbitration,* Kluwer Law Internatioanl 1998, p. 154. Lazić, V.; Jarvin, S.; Magnusson, A., *International Arbitration Court Decisions,* Juris Publishing, 2008, p. 768.

15 ICC award No. 6697 (1990), *Casa v Cambior*, Rev Arb 1992, p. 135.

16 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, Official Journal of the European Union, L 141, 5 June 2015.

17 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160, pp. 0001 – 0018.

18 Robertson M., Cross Border Insolvency and International Arbitration Characterization and choice of law issues in light of Electrim SA (in bankruptcy) v. Vivendi SA, MLB thesis, Bucerius Law School, 2009.

19 Art. 4 of the EC Regulation

20 Karagianni, I., *Arbitration and Insolvency Proceedings*, International Hellenic University, 2014, p. 21.

According to these rules, the insolvency proceeding has to be run by the court in the country where the debtor has assets and applicable law should be the law of that county, except when a lawsuit is pending.

However, the question is what is the meaning of a pending lawsuit? Are arbitration proceedings covered by this term? The case *Elektrim v. Vivendi* [21] brings up this issue.

As previously mentioned, the initiation of bankruptcy proceedings does not affect the validity of the arbitration agreement in most countries.[22] In other words, most national jurisdictions consider that the arbitration agreement remains unaffected by the commencement of insolvency proceedings, though there are domestic laws providing for the exact opposite.[23]

However, there are national laws that contain provisions directly addressing the effect of bankruptcy proceedings on arbitration, such as the Article 142 of Polish Bankruptcy and Reorganization Act (PBRA).

We will discuss this matter as we examine the case *Elektrim v. Vivendi* as an example. Vivendi, a French company, and its subsidiaries initiated arbitration under the ICC Rules with the seat of arbitration in Geneva against Elektrim S.A, a Polish company. The action was first taken in 2006. In August 2007 however, Elektrim was declared bankrupt in Poland. In a separate proceeding, Elektrim claimed that the Polish law with respect to bankruptcy should apply on the arbitration. The Polish company claimed the invalidity of the arbitration agreement based on the Art. 142 and 147of the Polish Bankruptcy and Reorganization Act (PBRA), "Any arbitration clause concluded by the bankrupt shall lose its legal effect as of the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued."

The arbitral tribunal qualified the issue of a bankruptcy of the Polish party as an issue of the standing to participate in the proceeding which depended on the preliminary issue of the party's legal capacity. The tribunal held that the matter of

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21 Swiss Federal Tribunal, March 31 2009,*Vivendi v 4A*, 428/2008. Interim award of 21 July 2008. URL:http://www.swissarbitrationdecisions.com/sites/default/files/31%20mars%202009%204A%20 428%202008.pdf. Accessed 20 December 2016, and English Court of Appeal, July 9 2009, *Syska & Anor v Vivendi Universal SA & Ors*, [2009] EWCA Civ 677.
URL: http://www.lawreports.co.uk/WLRD/2009/CACiv/Syska_v_Vivendi.html. Accessed 20 December 2016.

22 Lazić, V., *Arbitration and Insolvency Proceedings: Claims of Ordinary Bankruptcy Creditors*, URL=http://www.ejcl.org/33/art33-2.html#N_1_, 17 January 2017.

23 Kroll, S., *Arbitration and Insolvency* in (Mistelis, L., Lew, J., eds), Pervasive problems in international arbitration , Alpheen aan den Rijn, 2006

legal capacity had to be taken according to general laws on conflicts of law of the Private International Law Act (PILA). This means that for a foreign legal entity, legal capacity is governed by the law at the place of incorporation.[24] In this case, the law of incorporation was the Polish law. The arbitration tribunal further held that, pursuant to that provision, Elektrim lost the capacity to be a party in the arbitration proceeding and the arbitration agreement was void.

As a consequence, the arbitration proceeding against Elektrim was abandoned. The Swiss Federal Supreme Court confirmed the award. Furthermore, in interpreting the Art. 142 of PBRA, the Court determined that any pending arbitration proceedings are to be terminated *ex lege*, even if they are at an advanced stage.[25]

On the other hand, the English perspective on the same matter is completely different.[26] In 2003, Vivendi initiated LCIA arbitration proceedings against Elektrim with the seat of arbitration in London. As mentioned above, Elektrim was declared bankrupt in August 2007 and again pleaded the Polish Bankruptcy and Reorganization Act requesting the discontinuation of the arbitration proceedings. Contrary to the Swiss Arbitral decision, the LCIA posed the question as an issue of law applicable to the effect of bankruptcy on the lawsuit pending under the Article 15 of the Insolvency Regulation and found the English law to be applicable, being "the law of the Member States in which that lawsuit is pending". The tribunal stated that the Article 15 should take precedence because it is *lex specialis* and deals more directly and pertinently with the problem at hand, whereas Article 4.2(e) is *lex generalis*. Article 4.2(e) of the EC Regulation covers all contracts (substantive agreements and procedural agreements), including arbitration agreements and contracts for reference of a dispute to arbitration. The LCIA decided that the English law governed the issues and not the Polish law, and according to the English law the arbitral tribunal had jurisdiction to arbitrate despite Elektrim's bankruptcy. The English High Court confirmed the award. The arbitral tribunal and the English High Court were based on the EU Regulation on Cross-Border Insolvency which in the Article 15 states "the effects of insolvency proceedings

[24] Art. 154, 155 PIL.

[25] Lazić, V., *Cross border Insolvency and Arbitration, Which consequences of insolvency proceedings should be given effect in arbitration*, Chapter 18, International Arbitration and International Commercial Law: Synergy, Convergence, and Evolution: Liber Amicorum Eric Bergsten, Kluwer Law International, 2011, p. 343. This finding gave rise to strong criticism in the arbitration community, with most commentators arguing that Article 142 PBRA did not affect the capacity of an insolvent Polish entity to be a party in foreign arbitral proceedings. In their view the provision pertained to the validity of the arbitration agreement, which is an issue governed exclusively by the Swiss lex arbitri.

[26] *Syska and Elektrim SA (in administration) v. Vivendi Universal SA*, High Court of Justice Queen's Bench Division Commercial Court, 2 Oct. 2008, [2008] EWHC 2155; Court of Appeal, [2009] EWCA Civ 677.

on a lawsuit pending concerning an asset or a right of which a debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending".

The English High Court confirmed that the lawsuit pending included pending arbitral proceedings and thus the arbitral tribunal had correctly applied the English law to determine the effect of Elektrim's bankruptcy on the pending arbitration. The arbitration agreements that relate to future, non pending arbitral proceedings constitute current contracts for the purposes of Art. 4.(1) of the EC Regulation and are thus governed by the *lex concursus*, while the arbitration agreements that relate to existing pending arbitration proceedings are covered by the exception in the Art. 4.2 (f) and 15 of the EU Regulation.[27]

Conclusion. These articles govern not only the validity of the arbitration clause, but further effects of bankruptcy on pending arbitration as well. Both the loss of legal effect and discontinuation of pending arbitration proceedings are effects of bankruptcy on arbitration, and as such should fall under the Article 15 of the Insolvency Regulation when the applicable law is to be determined.[28] Also, we can add that arbitration proceedings are equivalent substitutes to ordinary legal proceedings in all Member States, and there is no substantive or procedural reason justifying a different solution.

The case *Elektrim v. Vivendi* opened a major debate in arbitral theory, but this "Elektrim era" has come to an end. On January 1, 2016, the new Polish Bankruptcy Act came into force. The new law derogates from the provision under which a declaration of bankruptcy rendered an arbitration agreement entered into by an insolvent party void. According to the new law a declaration of bankruptcy will not affect ongoing arbitration, in the way that arbitration will no longer have to be discontinued and will be treated in the same way as proceedings in the state courts. However, any new arbitration proceedings will have to be conducted against the official receiver of the bankruptcy estate if the bankrupt company is the respondent, or can be initiated only by the receiver if the bankrupt company is the claimant.[29]

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27 Syska and another v. Vivendi Universal SA and others 2008, EWHC 2155, statement 11 and 71.

28 Lazic V., *The Effects of Bankruptcy on Arbitration: An Unresolved Issue of Characterization and Applicable Law*, URL=http://kluwerarbitrationblog.com/2015/09/14/the-effects-of-bankruptcy-on-arbitration-an-unresolved-issue-of-characterization-and-applicable-law/. Accessed 10 January 2017.

29 For more details see Galkowski, K., K., *Elektrim case era comes to an end,* URL http://www.lexology.com/library/detail.aspx?g=461ea330-c8dc-42ac-a196-45b5c843f69b,10 January 2017.

3. IMPACT OF BANKRUPTCY ON ARBITRATION PROCEEDING

For a party that initiated an arbitration proceeding against a company which later declared bankruptcy the question emerges as to what will happen with the ongoing arbitral proceedings. The question is whether the bankruptcy of a party in the arbitration agreement leads to suspension (interruption) of all other procedures or otherwise affects the continuation of the arbitration proceedings.

In internal disputes where the applicable law is the law of the country of the tribunal seat, the suspension of the arbitral proceedings should be applied if it is so stipulated by the national law. According to the rule of suspension which reflects the principle of jurisdictional attraction, the commencement of bankruptcy proceedings as a form of court proceeding should terminate or interrupt all other actions in order to preserve the bankruptcy estate, and all creditors of the debtor (except for the privileged creditors) put in the same position.[30] This practically means that any already initiated judicial or administrative proceedings will be terminated or that they cannot be even initiated in the first place. In this sense, for the specific moment when bankruptcy proceedings are instituted, the Serbian Bankruptcy Act provides as follows: "As soon as the legal consequences of initiation of a bankruptcy proceeding have become effective, any and all judicial proceedings against the bankrupt debtor and their assets are to be suspended, as are any and all administrative proceedings initiated at the request of the bankrupt debtor and any and all administrative and tax proceedings the matter of which is to determine the pecuniary obligations of the bankrupt debtor".[31] The rule of suspension or termination of all proceedings is applied to internal bankruptcy proceedings to such an extent that it can be considered a generally accepted rule or principle.[32] This provision usually represents a mandatory provision on the national level,[33] and it reflects the principle of territoriality.

For example, if the arbitration proceedings were not terminated by the tribunal after the declaration of bankruptcy, the court would refuse to allow enforcement of the

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30 In this regard, it is implied that special principles apply in bankruptcy proceedings: such as the principle of collective protection of creditors, the principle of equality, the principle of universality etc. Vasiljević, M., *Kompanijsko pravo*, Beograd 2012, p. 440 *et seq*, Jovanović Zattila, M. ; Čolović, V., *Stečajno pravo*, Niš, 2013, pp. 20-22.

31 Art. 88 Law on Bankruptcy Procedure, The Official Gazette of the Republic of Serbia, ("Sl. glasnik RS", br. 104/2009, 99/2011 - dr. zakon, 71/2012 - odluka US i 83/2014) No. 84/04

32 Belohlavek, A., *Impact of Insolvency of a Party on Pending Arbitration Proceedings in Czech Republic, England and Switzerland and Other Countries*, Yearbook on International Arbitration, (Roth, M; Giestlinger,M., eds.), EAP, Berlin, 2010, pp. 145-166, URL= http://ssrn.com/abstract=1721724. Accessed 10 January 2017

33 More about mandatory rules in International commercial arbitration, Vukadinović Marković, J., *Dejstvo normi neposredne primene u međunarodnoj trgovinskoj arbitraži*, Pravna riječ, 2016, pp. 139-152

rendered award. The principle of territoriality institutes a separate or independent proceeding to be pursued in each forum in which the debtor's assets are located.[34]

Namely, in contrast to the so-called internal or national bankruptcy in which national judges apply national rules of the suspension, the arbitrators and judges in cross-border insolvency are faced with the dilemma of whether they are obliged to apply the principle of universality or principle of territoriality.

Since the national bankruptcy laws are mainly based on a territorial approach,[35] there are several issues that occur when multinational enterprises go bankrupt. The essential problem is that national legal systems can be confronted by each other, considering that there is a conflict of laws between different legal systems governing the bankruptcy proceedings.[36] Furthermore, locating the centre of main interest (COMI) of the multinational company, according to which the applicable law is determined, is even more complex when a company operates through its subsidiaries in different legal regimes.[37] For international or cross-border insolvencies,[38] the issue is, however, more complex,[39] especially in cases where prior to the opening of bankruptcy of one of the parties has already initiated arbitration proceedings. In these cases, as previously, the question arises whether the arbitrators, who lead the arbitration proceedings as a private procedure and under the authority of the private contracting parties in general are obliged to take into account the application of others' national rules on suspension of the proceedings, i.e. to accept the principle of suspension.[40] If so, what constitutes the legal basis of this commitment, especially in consideration of the fact that the arbitration tribunals do not have a classic *lex fori*[41] and are not obliged to apply national provisions to open proceedings in court and to a recognized foreign proceeding?[42]

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34 Omar. P., *European Insolvency law*, (1st edn), Ashgate, 2004, p. 24.

35 *Ibid*.

36 Warner, S., *Cross Border Insolvency: The COMI Issue in the Stanford Case* p. 3-4. URL=http://www.legalhoudini.nl/images/upload/S%20Warner_Cross%20Border%20Insolvency.pdf. Accessed 15 January 2017.

37 *Ibid.*

38 Yang, G., *Insolvency Proceedings and Their Effect on International Commercial Arbitration*, p. 39. URL=http://lib.ugent.be/fulltxt/RUG01/001/892/212/RUG01-001892212_2012_0001_AC.pdf. Accessed 20 January 2017.

39 *Ibid*, p. 3.

40 *Ibid*, p. 43.

41 Kovach, B. R., A Transnational Approach to Arbitrability of Insolvency Proceedings in International Arbitration, p.56.
URL://www.iiiglobal.org/component/jdownloads/finish/391/5979.html. Accessed 20 January 2017.

42 *Ibid.*, p. 57, note 290. states that the arbitrators in numerous ICC decisions are not related to the bankruptcy process opened beyond their seats

To avoid these difficulties, in the situation where one multinational company goes bankrupt, the national court applies the principle of universality. The legal basis for such action can be found in the above-mentioned provisions of EC and EU Insolvency Regulation.

The principle of universality is a system in which all aspects of the debtor's insolvency are encompassed by a single central proceeding under one insolvency law. The universality system usually relies on international treaties or conventions as the EU Insolvency Regulation. According to Article 3, the jurisdiction to initiate a single universal proceeding should be in the state in whose territory the debtor has the centre of their main interest.[43] This centre is presumed to be the place where the office is registered, if there is no proof to the contrary. According to the preamble of the regulation, COMI should be in the place where the debtor conducts their business administration on a regular basis and therefore ascertainable by third parties.[44] Likewise, the jurisdiction to initiate a secondary proceeding should be in the state where the debtor has an establishment. The effects of the secondary proceeding are restricted to the assets situated in that territory.[45]

4. THE EUROPEAN INSOLVENCY REGULATION

The regulation on insolvency proceedings (EC) No 1346/2000, adopted by the Council of the European Union, went into force in 2002.[46] The regulation provides the first set of unified rules for the settlement of cross-border insolvency.[47] It has a binding nature and is directly applicable to the EU member states.[48] Therefore, it did not require any implementation by national legal systems.

The regulation has the following objectives: proper functioning of the internal market of EU,[49] avoiding incentives for transferring the assets from one member state to another while seeking a more favorable legal position (forum shopping),[50] improving efficiency and effectiveness in cross-border insolvency,[51] and introduc-

43 Art. 3 of the EU Insolvency Regulation

44 Recital 13 of the EU Insolvency Regulation

45 Kolmann, S., *European international insolvency law – Council regulation (EC) No. 1346/2000 on insolvency proceedings* (The European Legal Forum, 2002), p.169; URL= http://www.simons-law.com/library/pdf/e/287.pdf. Accessed 22. January 2017.

46 *Ibid.,* p. 167

47 *Ibid.*

48 Exept Denmark. More about direct effect and direct applicability see Vukadinović, R; Vukadinović Marković, J., *Uvod u institucije i pravo EU,* Kragujevac 2016, p. 137 *et seq*.

49 Recital 2 of the EC Regulation No. 1346/2000

50 *Ibid,* recital 4

51 *Ibid*, recital 8.

ing uniform rules on conflict of law rules.[52] With respect to the determination of the courts with jurisdiction, the EC Regulation distinguishes between the main proceedings (Art. 3.1),[53] and secondary proceedings (Art. 3.2).[54]

For the relationship between arbitration and insolvency proceedings the Art. 4 is important as it determines the applicable law to the insolvency proceeding. The law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are initiated.[55] The consequences of this provision are that the law of the State where the proceedings are initiated shall in particular determine the conditions for the commencement of such proceedings, how they will be run and closed. It shall determine in particular: the effects of insolvency proceedings on current contracts to which the debtor is party,[56] the effects of the insolvency proceedings brought by individual creditors, with the exception of lawsuits pending.[57] Another exception is provided under the Art. 15 and it reads: The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

As we can see, this exception applies to the aforementioned arbitration cases. As a conclusion, we can point out that the arbitration proceedings in progress should be treated as pending law suits and applicable law should be the law of the country where the proceeding is conducted.

The regulation was subject to revision ten years after enforcement, which resulted in the adoption of the Recast Regulation in 2015 (EU Regulation).[58] The aim of the revision was to improve the operation of the regulation regarding its initial aims, and its resilience in economic crisis.[59] The EU Regulation extends the scope

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52 *Ibid*, recital 23.

53 The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary.

54 Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

55 Art 4 of the EC Regulation.

56 Art. 4(e) of the EC Regulation

57 Art. 4(f) of the EC REgulation

58 Leandro, A., *The new European Insolvency Regulation,* URL=http://conflictoflaws.net/2015/the-new-european-insolvency-regulation/. Accessed 22 January 2017.

59 *Ibid.*

of the regulation to proceedings whose aim is to give the debtor a 'second chance', by promoting a rescue culture (pre-insolvency proceedings). It includes provisions regarding the insolvency proceedings of corporate groups and puts in more controls to prevent abusive forum shopping.[60] It improves the coordination between the main and secondary proceedings, by making a stronger legal framework.

The EU Regulation provides that unless otherwise stated, the law of the Member State of the opening of proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main insolvency proceedings and for local proceedings. The *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.[61] For the first time, the EU Regulation determines relationship between insolvency and arbitration proceeding, provides that "...the law applicable to the effects of insolvency proceedings on any pending lawsuit or pending arbitral proceedings concerning an asset or right which forms part of the debtor's insolvency estate should be the law of the Member State where the lawsuit is pending or where the arbitration has its seat. However, this rule should not affect national rules on recognition and enforcement of arbitral awards".[62]

Regarding jurisdiction, the EU Regulation provides that the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.[63] In accordance with the international jurisdiction, the EU Regulation provides in article 6 (1): "The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them". Article 6 (2) is important for the arbitration, and it states: "Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them

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[60] Recital 5 and 10 EU Regulation . "When the corporate's centre of main interest is shifted in the preceding 3 months, the rebuttable presumption that centre of main interest is at the registered office will not apply." See Deringer, B. F., *The recast EC Regulation on Insolvency proceedings: a welcome revision*,
URL=http://www.freshfields.com/en/global/. Accessed 22 January 2017.

[61] Recital 66 of the EU Regulation.

[62] Recital 73 of the EU regulation.

[63] Art. 3 of the EU Regulation.

is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012."

And the most important novelty of the EU Regulation refers to the effects of insolvency proceedings on arbitral proceedings. The Article 18 provides: "The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat". With this provision there is no more room for the dilemma about the law that applies to the pending arbitration proceedings.

5. CONCLUSION

Despite the fact that there are various areas in which the principles of insolvency law and arbitration law are conflicting, the commencement of bankruptcy proceeding does not affect the validity of the arbitration agreement. In the case of a cross-border insolvency proceeding, when the arbitral proceeding began before the insolvency proceeding against the debtor had, the arbitral tribunal should apply the law of the country of the seat of arbitral tribunal. In the event that the arbitration proceeding has not commenced, arbitrators shall respect the provision on general jurisdiction provided by EU Regulation.

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3. ICC award No. 6697 (1990), *Casa v Cambior*, Rev Arb 1992, p. 135.
4. Syska and another v. Vivendi Universal SA and others 2008, EWHC 2155.

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DIFFERENT LEGAL ASPECTS OF THE INTELLECTUAL PROPERTY RIGHTS

ABSTRACT

Just like every human invention, intellectual property has two sides to it, on the one hand it allows businesses to be more productive and scientists to share research data almost instantaneously, on the other hand it grants criminals an additional tool to commit crimes and get away with it. The question is how such criminal behavior can be controlled because crime is hidden behind technology and innovations. Also cyberspace offers room for the entire spectrum of transnational criminal activity. Analysis of the comparative judicial practice in connection with intellectual property is of the exceptional importance for securing intellectual property rights in the territory of EU. The states who are the leaders in innovation and creativity establish strong legal mechanisms which provide the protection of intellectual property rights. It is generally accepted that only legal use of intellectual property can bring innovation and progress to a society. In Republic of Serbia adopted laws are, to the greatest extent, harmonized with the current both regional and international standards in the field of protection of intellectual property rights. Author deals with the criminal law protection of intellectual property and the importance of intellectual property rights as activators of global streams in EU.

Keywords: *intellectual property, criminal law, piracy, digital currency.*

1. REASONS FOR IPR PROTECTION

Much has been written about the nature and meaning of IP rights but they can best be described as intangible property rights or rights in ideas. The people all over the world work daily to create a better world. They create products and services that improve the world's ability to communicate, to learn, to understand diverse cultures and beliefs, to be mobile, to live better and longer lives, to produce and consume energy efficiently and to secure food, nourishment and safety. Most of the value of this work is intangible—it lies in people's entrepreneurial spirit, their creativity, ingenuity and insistence on progress and in creating a better life for their communities and for communities around the world.

As a World Intellectual Property Organization (WIPO) publication explained:[1] "The history of the human race is a history of the application of imagination, or innovation and creativity, to an existing base of knowledge in order to solve problems. Imagination feeds progress in the arts as well as science. Intellectual property (IP) is the term that describes the ideas, inventions, technologies, artworks, music and literature that are intangible when first created, but become valuable in tangible form as products." These intangible assets, often captured as copyrights, patents, trademarks, trade secrets and other forms of "intellectual property," reflect most developed countries' advantage in the global economy.[2]

Legal protection of the intellectual property has significant importance for modern states and it has both global and national components. Global economic aspects of the IPR protection includes fulfilment of all basic principles of the multilateral conventions and adoption in the national legislation. Due to the changes in modern economy and business strategy, new legal tools of protection are introduced. [3]The profit from intellectual property infringement is a strong lure to organized criminal enterprises, which could use infringement as a revenue source to fund their unlawful activities. When consumers buy infringing products, including digital content, distributed by or benefiting organized crime, they are contributing to financing their dangerous and illegal activities.

We are facing the digital challenge on the field of the infringement of the IPR. The Internet and other technological innovations have revolutionized society and the way we can obtain information and purchase products lowering barriers to entry and creating global distribution channels, they have opened new markets and opportunities for exports of information, goods and services, including enabling small and medium sized businesses to reach consumers worldwide. These innovations have also facilitated piracy and counterfeiting on a global scale.[4]

While the costs and risks involved in product development are high, the costs of product imitation or intellectual property infringement are generally low. Once a successful book is published, it may be replicated with little effort by photocopying, commercial reprinting, or unauthorized electronic distributions. A successful

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1 *Intellectual Property: A Power Tool for Economic Growth*, WIPO Publication, No. 888, 2003, pp.10-11.

2 Farah, P. D., *Tremolada, R., Intellectual Property Rights, Human Rights and Intangible Cultural Heritage*, Journal of Intellectual Property Law, 2014, pp. 21–47.

3 Ryan, M., *Knowledge Diplomacy, Global Competition and the Politics of Intellectual Property*, Brookings Institution Press, Washington DC, 1998, p.12.

4 Horan, A.,Johnson, C., Sykes, H., *Foreign Infringement of Intellectual Property Rights: Implications for Selected U.S. Industries*, Office of Industries U.S. International Trade Commission Washington, 2005, p.21.

new software program may easily be copied by digital means and transmitted via the Internet. A drug approved by the government for marketing after extensive R&D and clinical testing by the developer may be duplicated with much less cost by others. One result of market exclusivity is that it permits the intellectual property right holder to demand higher prices.[5]

The aim of this paper is to investigate various aspects of the legal protection of intellectual property rights. Specifically, it is assumed that the intellectual property appears in different forms and as such is the subject to protection of many legal authorities. In particular, legal protection of the intellectual property is primarily provided by the right of intellectual property, which includes copyright and related rights as well as the industrial property right. A special form of the violation of intellectual property is performed by the internet and computer data usage. In a broader sense, the suppression of illegal behavior in the area of computer protection often includes the offenses that directly violate the rights protected by the intellectual property rights. The author started from the basic principles of the protection of the intellectual property rights in the international and European law and then discussed the connection between the infringement of the intellectual property rights and the criminal acts committed via Internet, in order to emphasize the uniqueness of the problem and the need to enable the protection of the intellectual property rights through the unique and broad legal protection. In this paper, different forms of violations of intellectual property rights provided with criminal legal protection by different law areas are analyzed, with particular reference to a wide array of problems concerning violations of intellectual property rights.

2. THE CONCEPT OF WILLFUL INFRINGEMENT OF IPR AND CRIMINAL SANCTIONS

The owner of a copyright has five specific rights: reproduce, prepare derivative works, distribute, perform and display. Thus, violation of any of these rights is considered trespassing into the owners "exclusive domain". Copyright law aims to balance the competing interests of both, the artists and the general public by protecting artists works and encouraging their creativity on the one hand and on the other by allowing public access to information. An intellectual property infringement occurs when an act is done which is inconsistent with the rights of a rights holder.[6]

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5 Correa, C. M., *Intellectual Property Rights, the WTO and Developing Countries,* London and New York, Zed Books Ltd., 2000, pp. 35-37.

6 Branstetter, L. G., Fishman, R., Foley, C. F., *Do Stronger Intellectual Property Rights Increase Interna-*

Intellectual property laws are territorial in scope, in that they apply only to rights which are registered within the country. This is relevant to the question of infringement. For example, an overseas company which is a patent or trade mark owner in its home country can only complain about an infringement in a foreign country if its patent or trade mark is registered in that foreign country.[7]

The situation is different in the case of copyright, which as a consequence of the importation of the Berne Convention into the TRIPS Agreement[8], is enforceable by a copyright owner in all countries which are signatories to the TRIPS Agreement.

Generally, TRIPS (1) establishes minimum standards of protection of such rights, (2) prescribes procedures and remedies to be available in member states to enforce rights, (3) makes the WTO dispute settlement mechanism available to address TRIPS-related disputes, and (4) extends basic WTO principles such as transparency, national treatment, and most favoured nation treatment to intellectual property rights.[9]Consistent with the general trade liberalization objectives of the WTO, these procedures are required to be "applied in a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse".[10]

The terms "counterfeiting" and "piracy" in relation to goods, refer to the manufacture, distribution and sale of copies of goods which have been made without the authority of the owner of the intellectual property. These goods are intended to appear to be so similar to the original as to be passed off as genuine items. This includes use of famous brands on pharmaceutical products, clothing, perfumes, and household products, not manufactured by or on behalf of the owner of the trade mark, as well as exact copies of CDs containing music or software, which are traded in a form intended to be indistinguishable to ordinary consumers from the genuine product.

In a criminal law context, intellectual property counterfeiting and piracy is defined as contraband activities which centre on the illegal production and sale of goods

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tional Technology Transfer? Empirical Evidence from US Firm-Level Panel Data, Quarterly Journal of Economics, No.121, 2004, pp. 321–349.

7 Andersen, B, *If "Intellectual Property Right is the Answer", What is the Question? Revisiting the Patent Controversies*,Economics of Innovation and New Technology, No.13, 2004, pp. 417–442.

8 The Agreement on Trade-Related Aspects of Intellectual Property Rights - TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

9 Drahos, P., *Global Property Rights in Information: The Story of TRIPS and the GATT*, Prometheus, No.11, 1995, pp. 6–19.

10 *Infringements of Designs Protected by Design Law and Copyright*, Knowledge and Awareness Building Conference, OHIM, Alicante, 18-20 November 2015, p. 21.

which are intended to pass for the real product. In this context "contraband" is goods whose importation, exportation or possession is forbidden. Dealings in contraband invariably involve smuggling, where the manufacturers and distributors of these products also seek to evade taxes on the production and wholesaling of these products.[11]

Article 61 TRIPS provides that Members shall provide for criminal procedures and penalties "to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". Among the criminal sanctions which are listed in the Article are: "imprisonment, and/ or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for fines of a corresponding gravity".

Also in appropriate cases, Article 61 TRIPS provides for "the seizure, forfeiture and destruction of the infringing goods and any materials and implements the predominant use of which has been in the commission of the offence". Article 61 TRIPS also provides for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, "in particular where they are committed willfully and on a commercial scale". A consequence of providing for "criminal procedures" in the case of certain willful infringements is that a higher standard of proof will apply than that which is required in civil proceedings. In systems of justice derived from the British model the standard will be beyond reasonable doubt. The burden of proof will usually be carried by the prosecution. Where defenses exist, the defendant will usually carry the burden of making out the defense, usually on the balance of probabilities.

Article 61 TRIPS permits the institution of criminal penalties in the case of willful infringement. As a matter of practice it is not uncommon in intellectual property disputes for a complainant to send a cease and desist notice to an alleged infringer to put them on notice that they may be infringing the complainant's intellectual property rights. This may, however, be unrealistic in cases of large-scale copyright piracy and trademark counterfeiting, particularly where the perpetrators may be involved in organized crime.[12]

A particular problem in proving the willfulness of corporate defendants is in identifying the persons whose state of mind is relevant to the culpability of the corporation. Generally speaking, a company is liable for the acts and knowledge of

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11 Archibugi, D., Filippetti, A., *The globalization of intellectual property rights: Four learned lessons and four thesis*, Journal of Global Policy, No.1, 2010, pp.137-149.

12 Jarrett, H. M., Chandler, C. G., Hagen, E., Sharrin, A., *Prosecuting Intellectual Property Crimes*, Fourth Edition, Office of Legal Education Executive Office for United States Attorneys, 2012, p.26.

persons who could be described as part of the directing mind and will of the company. These would include the board of directors, the managing director and other superior officers who carry out the functions of management and who speak for the company. The persons who are treated in law as the company are to be found by identifying those natural persons who by the memorandum and articles of association, or as the result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

The degree of willfulness or deliberation in the infringing conduct will have a bearing on the size of any pecuniary penalties which are imposed. Also relevant as a quantification factor will be the multiplicity of offences by a defendant and the recurrence of similar offences.[13]

Article 61 also refers to the deterrent effect of penalties. This will involve a consideration of 36 the capacity of the defendant to pay, the incentives for wrongdoing and the likelihood of recurrence.

3. LEGAL PROTECTION OF IPR IN THE EUROPEAN UNION

Several recent articles have focused on specific legislative initiatives from the European Commission in the field of intellectual property. In 2009, the European Observatory on Counterfeiting and Piracy was established by the European Commission, as part of its DG Internal Market and Services, to support the protection and enforcement of intellectual property rights and to help combat the growing threat of intellectual property infringements.[14]

The European Commission's aim is to prevent the infringement of intellectual property rights. The Commission is seeking stronger cooperation between authorities at all levels in the fight against intellectual property infringement. Legal instruments, such as the Directive on enforcement already exist in the EU to prevent the infringement of intellectual property rights.[15]In December 2015 the Commission published a consultation on the evaluation and modernization of the legal framework for the enforcement of IPR.

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13 Nuth, M. S., *Crime and technology – Challenges or solutions? Taking advantage of new technologies: For and against crime*, Computer Law and Security Report, No.24, 2008, pp.437– 446.

14 Cook, T., Revision *of the European Union regime on customs enforcement of intellectual property rights*, Journal of Intellectual Property Rights, No.18, 2013, pp. 485-49.

15 Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising (codified version) [2006] OJ L 376, p. 21.

The Commission sought views from all interested parties, in particular are right holders, the judiciary and legal profession, intermediaries, public authorities, consumers and civil society, on the question if the legal enforcement frame work is still fit for purpose. Also, the Commission committed to undertake a set of target edactions which aim to foster the cross-border digital economy but also aim to ensure a safe online environment for business operators and consumers.

The Directive on the enforcement of intellectual property rights such as copyright and related rights, trademarks, designs or patents was adopted in April 2004.[16]The Directive requires all EU countries to apply effective and proportionate remedies and penalties against those engaged in counterfeiting and piracy, and aims to create a level playing field for right holders in the EU. It means that all EU countries should have a similar set of measures available for right holders to defend their intellectual property rights.

Successively, Regulation 386/20122[17] entrusted the Office for Harmonization in the Internal Market (OHIM) with tasks related to the enforcement of IPR, including the setting up of the European Observatory on Infringements of Intellectual Property Rights. According to the Regulation (recital 20), the Office should facilitate and support the activities of national authorities and Union institutions relating to the enforcement of IP rights.

In the area of patents, attention remains currently focused, and is likely to continue to be so for some time to come, on the process of implementing the European Patent with unitary effect and the Unified Patent Court.[18]

In March 2013, Europol[19] Focal Point 'COPY's' mandate to investigate counterfeit products was expanded to include substandard and dangerous goods.[20]Europol's Serious Organized Crime Threat Assessment (SOCTA) 2013 identified counterfeit goods violating, health, safety and food regulations and substandard goods as a recommended priority crime area as part of the EU Policy Cycle 2014-2017.

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16 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004], OJ L 157..

17 Regulation (EU) No 386/2012 of the European Parliament and of the Council on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights [2012] OJ L 129/1.

18 Cook, T., *The progress to date with the Unitary European Patent and the Unified Patent Court for Europe*, Journal of Intellectual Property Rights, No. 18, 2013, pp. 584-588.

19 Council Decision 2009/371/JHA establishing the European Police Office (Europol) [2009] OJ L 121/37

20 Focal Points are teams formed by specialists and analysts supporting Member States operations related to specific areas of crime that are included in the above Council Decision.

Key findings of the European study "Intellectual Property Rights Intensive Industries: contribution to economic performance and employment in Europe"[21]reveal that approximately 89 % of the EU's total external trade and 39 % of total economic activity in the EU (EUR 4.7 trillion annually) is generated by IPR-intensive industries. Regarding the breadth of the problem, poor quality counterfeit clothing and accessories of luxury brands were, until recently, the most commonly observed products. However, the involvement of sophisticated networks of criminals seeking to make enormous profits has led to mass production of high quality imitations. Criminal groups are no longer purely confined to the duplication of apparel and accessories. Counterfeited goods now include all sectors, such as pharmaceuticals, electronic goods, household products, cosmetics, automotive spare parts, pesticides, food and beverages, etc. The European Commission (DG TAXUD) reports that in 2013, 25.2 % of the products detained were for daily use and would be potentially dangerous to the health and safety of consumers.

Research carried out for Situation Report on Counterfeiting in the European Union shows that the source country for over two thirds of counterfeit goods circulating in the EU is China, and that most goods – both legal and counterfeit – are produced there.[22]

Evidence suggests[23] that organized crime groups frequently use Free Trade Zones (FTZs) to tranship, label and obscure the port of origin of illegal goods. There are approximately 3 000 FTZs in 135 countries. They are "designated areas within jurisdictions in which incentives are offered to support the development of exports, foreign direct investment (FDI), and local employment. These incentives include exemptions from duty and taxes, simplified administrative procedures, and the duty free importation of raw materials, machinery, parts and equipment".[24]

Several reports analyzing FTZs highlight the lack of IT system coordination between customs administration and the FTZs administration, allowing criminals to easily re-document shipments by concealing the origin, contents and destinations of shipments.[25]According to some opinions, the development and expansion of

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21 Intellectual Property Rights Intensive Industries: contribution to economic performance and employment in the European Union, Industry-Level Analysis Report, September 2013.

22 2015 Situation Report on Counterfeiting in the European Union, Joint project between Europol and the Office for Harmonization in the Internal Market, April 2015, p.14.

23 See Jankovic, D., *Differentiation Between The Police Activities And Evidence Collection In Criminal Proceeding*, In: Thematic Conference Proceedings of International Significance, Academy of Criminalistic And Police Studies, International Scientific Conference "Archibald Reiss Days, Belgrade, 2015, pp. 247-259.

24 FATF Report, Money Laundering Vulnerabilities of Free Trade Zones, March 2010.

25 BASCAP, The role and responsibilities of FTZs, 2011.

new FTZs, in particular the Port of Tanger Med (15 km from the EU) could provide additional opportunities for OCGs to produce, manufacture, label, tranship and export counterfeit goods into the EU. Although the majority of counterfeit products in circulation in the EU are manufactured outside the EU, research has highlighted domestic EU production originating from Belgium, the Czech Republic, Spain, Italy, Poland, Portugal, and the UK.

As counterfeiters look for new ways to expand their illegal businesses, the security of business supply chains becomes increasingly important.

4. PREVIEW OF THE CASE LAW OF THE REPUBLIC OF SERBIA IN RELATION TO THE OFFENSES AGAINST INTELLECTUAL PROPERTY

Taking into account criminal offenses against intellectual property rights defined in the Criminal Code of the Republic of Serbia, it can be noted that the most frequent crime in the jurisprudence of the courts of general jurisdiction is the crime of Unauthorized Use of Copyrighted Work or other Work Protected by Similar Right, Article 199 of the Criminal Code of the Republic of Serbia. The object of the legal protection is the work of authorship or a related right.

Data obtained by examining the court records of the Basic Court in Nis[26], for the period of time2004 to 2014, show that the largest number of prosecutions for the specified criminal act were initiated in 2005, a total of 85 procedures. An interesting fact is that in 2005 the greatest number of proceedings ended with convictions, 64 of them. Even though a suspended sentence was imposed in most of the cases, in a certain number of cases the Court imposed a fine and imprisonment.

This tendency continued during the year 2006 and later, so it can be noticed that the activity of the court was almost proportional to the number of prosecuted cases. Therefore, the court, dealing according to the applied charging documents, completed almost all the procedures and cases with final judgments, whereby prison sentences, fines and suspended sentences were imposed in a stable percentage.

The important feature of the crime of the unauthorized use of the work of authorship or the objects of related rights, according to the Criminal Code of the Republic of Serbia, Article 199, is that the unauthorized use, in various ways, of a work of authorship or an object of related right simples the execution of the crime. Whereas, the author owns the copyright and has the exclusive right to authorize

[26] Court registers of criminal cases of the Basic Court in Nis, Serbia, for the years 2004 to 2014.

or prohibit the marketing of copies of his/her work, or his/her publication, performance, presentation, transmission, broadcasting, recording and reproduction.

The first and basic form of this offense exists (Article 199, paragraph 1 Criminal Code of the Republic of Serbia), if the perpetrator publishes, records, multiplies or otherwise publicly discloses, in whole or in a part, a work of authorship or an object of related rights without authorization. This includes a work of authorship, interpretation, phonogram, videogram, broadcasts, computer program or database. Therefore, the basic incrimination act is an unauthorized reproduction of the work of authorship.

The second basic form (Article 199, paragraph 2, Criminal Code of the Republic of Serbia) of this offense performs the offender who puts on the market or with the intention of putting into circulation without authorization keeps amplified or already put into circulation unauthorized copies of works of authorship, interpretations, phonograms, videograms, broadcasts, computer program or database. In this case, the basic incrimination act is an unauthorized circulation of the works of authorship.

This offense appears, in most of the charges, in the second form, which, at the same time, represents its most common form. From the point of view of the imposed court judgments and the indictments, this offense is mostly preformed in the form of an unauthorized circulation of copies of works of authorship. The object of the offense are the works of authorship, usually movies recorded on CDs which are illegally sold and exposed for sale, often at the car markets, markets and public places with a large frequency of passers-by and customers.

In some cases, the courts dealt with the unauthorized reproduction of the works of authorship without copyright on the specific works of authorship from the distributing companies. For example, the unauthorized reproduction was performed at home or at some other place and the copies were put on the market in video and DVD clubs where they were listed in special catalogues and sold at prices in a separate price list.

There is an interesting case,K.br.201/05, completed with the final judgment before the Basic Court in Nis, in which the owner of a print store at the Faculty of Philosophy in Nis was convicted for unauthorized photocopying of textbooks, written by the professors at the specific faculty, without the permission of copyright owners. The Court in this case held that photocopying of textbooks, in order to sell them and make them available to a greater number of people, represents the reproduction of copies of the works of authorship, and the fact that the defendant owned registered print shop does not relieve the guilt. Particularly, the fact that the defendant

owned registered print shop cannot be equated with the right to produce and sell the copies of textbooks, which are the works of authorship, without the authorization of the copyright holders, especially when the fact that the authors were available to the defendant and that he could provide their consent is taken into account.

The other forms of this offense as well as the other offenses against the intellectual property are not going to be discussed here since their frequency in the jurisprudence is inconsiderable. Article 199, paragraph 1 and paragraph 2Criminal Code of the Republic of Serbia defining the two forms of the offense of unauthorized use of the works of authorship or the objects of related rights stipulates that the punishment for its violation is a sentence of up to three years of imprisonment. But, if this offense was committed with the intention in acquiring illegal material benefit for himself or another person, then according to the article 199, paragraph 3. Criminal Code of the Republic of Serbia, the offender can be sentenced to imprisonment in the range of six months to five years. In all these cases, the law stipulates the mandatory imposition of security measures such as dispossession and destruction of the unauthorized copies of the works of authorship.

This has been mentioned, because the criminal policy of the courts in the Republic of Serbian determining the type and level of criminal penalties for alleged criminal offenses takes into account particular circumstances of each case, particularly the personality of the offender and the level of the infringement of the protected good, whether the offender previously committed the same offenses as well as the quantity and the extent of the infringement of the protected object.

Thus, if the offender led decent life i.e. if he was not convicted, if he was a good worker, a good father of the family, if he was honest and appreciated in the community where he lived, then these circumstances indicated the person who was not morally deviant and socially maladjusted and that the application of more lenient penalty could achieve the purpose of punishment. However, in case of recidivist, especially if it is a special recidivism i.e. the perpetrator who had previously been sentenced to a more lenient punishment for the same or similar criminal offense, it was estimated that such criminal sanctions had not achieved their purpose, therefore severe penalties, such as fine or even a prison sentence, were imposed.

The above mentioned as well as the large number of suspended sentences imply that most of the offenders had not been previously convicted, most of them were members of young population aged up to 25 years, students or unemployed persons with secondary education, family people, people who were not prone to criminal behaviour nor recidivists after imposed suspended sentences. In a few cases a greater criminal risk was detected, which was rated by taking into account

the personality of the offender and the way of the offense execution, the previous life of the offender, persistence in the offence execution as well as the seriousness of the consequences as the result of the committed offense, so the court found it necessary to impose prison sentences, which was done in a certain number of cases.

Subject of special consideration are criminal acts of organized crime, which are pending before the Special Division of the High Court in Belgrade. The verdict of the High Court in Belgrade, Special Department K.Po1 108/10 reached on 12.07.2010.drew great attention. It was mostly upheld by the Appellate Court in Belgrade Kž1 PO1 22/10 on 11.02.2011.when the final verdict was reached. Criminal proceedings were conducted against six defendants charged with the criminal offense of criminal association (Forming a Group for the Purpose of Committing Criminal Offences Article 346 of the Criminal Code of the Republic of Serbia) and with a crime of forging value tokens according to Article 226, paragraph 2 referring paragraph 1, Forging Value Tokens Article 226 of the Criminal Code of the Republic of Serbia[27]. All of them are sentenced to a compound imprisonment sentence, the first accused as the initiator of the criminal association is sentenced to the imprisonment in duration of four years, the second accused to the imprisonment in duration of three years, and the other accused are also sentenced to the imprisonment in a shorter length than the first two accused. Although, according to the Criminal Code of the Republic of Serbia a criminal offense of forging value tokens belongs to the category of crimes against the economy, this case has been stated bearing in mind that it is similar to the cases considering the protection of intellectual property rights, production of counterfeit products or their unauthorized multiplication.

In this particular case, the court found that the first accused organized a criminal group for the purpose of acquiring financial profits. The first accused as the initiator of the criminal group engaged printers the second accused and the third accused to print counterfeited value tokens[28] - a variety of revenue and excise stamps (among other Slovak revenue stamps with a nominal value of 1,000 crowns). The forth accused was engaged for the pre-press ordering and for the distribution of the counterfeited value tokens in order to be used by another person. They also printed the counterfeited value tokens in their own pressrooms and then distributed them to Hungary and other countries. The aim of this group was to acquire financial benefit since the distribution of the counterfeited value tokens provided

[27] Criminal Code, Official Gazette of the Republic of Serbia" No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012 and 104/2013.

[28] Value tokens are made on the basis of the law and their issuing means that a certain amount of money has been paid, in fact they replace the payment of that amount in Stojanović Z. *Comment on the Criminal Code*, Official Gazette, Belgrade, 2009, 550.

the financial profit, which the first accused, as the initiator of the group, was taking for himself and a part of it shared to the other members of the group according to predetermined roles.

The first accused, as the initiator of the group, as well as the other members of the criminal group were aware that both revenue stamps and excise stamps represent the value tokens and that can be printed in the authorized printing rooms only, on the ground of the specific laws and regulations of the domicile country. The Court found that the first accused, as the initiator of the crime group, and the other accused, as the members of a criminal group, were involved in the production of counterfeited value tokens i.e. revenue and excise stamps in order to be used by another person by putting them legally on the market in those countries in which the original value tokens serve as the proof of payment.

The court also found that all the accused acted with direct intent of performing the action of forging value tokens according to Article 226, paragraph 2 of the Criminal Code, as they consciously created false revenue and excise stamps that in their domicile countries serve as a proof of payment and that they were fully aware that these value tokens can be made only on the basis of the approval of the competent state authorities and special powers based on law. In addition, the intention of the accused was to transfer the counterfeited value tokens to another person as the original ones in order to achieve financial benefit.

5. PIRACY IN THE INTERNET AGE

The Internet has created boundary-less territories and has helped in evolving a unique method to share and transfer information, growth of e-commerce and in creating a global platform for all nations and its citizens. Online piracy is a major flipside to this development.[29]

Infringement of copyright on the Internet has become a common phenomenon. Infringement either can take place wilfully or through ignorance. There is a close nexus between intellectual property (IP) and the Internet and their convergence in the digital era is inevitable.[30]The IP - Internet nexus can be looked at from three perspectives – the author, the user and the service provider.[31]An author creates a

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29 Brenner, S. W., Toward *a Criminal Law for Cyberspace: A New Model of Law Enforcement?* Rutgers Computer and Technology Law Journal, No. 30, 2004, pp. 1-104.

30 Richet, J.L., From *Young Hackers to Crackers*, International Journal of Technology and Human Interaction, No. 9, 2013, pp.53-62.

31 Dörr, D., Janich, S.,*The Criminal Responsibility of Internet Service Providers in Germany*, M*ississippi Law Journal, 80* Miss. L.J. 1247, 2011, 1247-1261.

piece of work and registers it under the existing IP laws to enjoy certain benefits, but the digital world hinders the complete enjoyment of these rights. Copyright owners perceive Internet as threat to their exclusive rights due to the following reasons:(1) wide distribution is relatively simpler and quicker on the Internet; (2) anyone can distribute it to a mass audience; (3) the quality of copies is virtually indistinguishable from the original; (4) distribution is almost costless; and 4) users can easily and cheaply obtain copyright material on the Internet.[32]

Over the past years, the idea of how to reconcile intellectual property rights and the Internet technologies and platforms has become a pivotal point of all Internet governance discussions.[33]With the emergence of the Internet as a means of communication, creativity, innovation and ideas and with the increasing accessibility to information, traditional concepts of intellectual property appear increasingly antiquated and inapplicable in a space where information is democratized, people become increasingly more empowered to create exchange and distribute content and innovation and creativity proliferate.[34]Internet has spawned new forms of crimes and made old crimes easier to commit, cyber-stalking, identity theft, child pornography, fraud and scams, copyright violations, hacking and creating malicious code, the list goes on and on.[35]

The Berne Convention for the Protection of Literary and Artistic Works [36] establishes minimum rights that all countries agree to.[37]The United States of America has extended its copyright law and enacted the Digital Millennium Copyright Act (DMCA)[38] which came into force in 1998. The Act contains six exceptions to infringement including educational research, encryption research, protection of minors, reverse engineering, privacy of individuals and security testing. The

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32 Hemmige, N., *Piracy in the Internet Age*, Journal of Intellectual Property Rights, No. 18, 2013, pp 457-464.

33 Brenner, S. W., Koops, B.-J., *Approaches to cyber crime jurisdiction*, Journal of High Technology Crime, No. 15, 2004, pp. 1-46.

34 Hunton, P., *The stages of cybercrime investigations: Bridging the gap between technology examination and law enforcement investigation*, Computer Law & Security Review, 27, 2011, pp. 61-67.

35 Holt, T. J., *Exploring the Intersections of Technology, Crime and Terror*, Terrorism and Political Violence, 24(2), 2012, pp. 337-354.

36 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979.

37 Kahandawaarachchi,T., *Liability of Internet Service Providers for Third Party Online Copyright Infringement: A Study of the US and Indian Laws*, Journal of Intellectual Property Rights No. 12, 2007, pp. 553-561.

38 The Digital Millennium Copyright Act (DMCA) of 1998, US Copyright Office Summary December 1998, Pub. L. No. 105-304, 112 Stat. 2860, 1998.

DCMA added Section 512 specifically to the Copyright Act which brought forth the limitation of liability on the service providers in case of online copyright infringement and assigned rules in case of non-profit educational institutions.

Louis Vuitton successfully sued Akanoc Solutions Inc., Managed Solutions Inc. and Steven Chen[39] for "their role in hosting websites that directly infringed Louis Vuitton's trademarks and copyrights". Although the websites did not directly sell the counterfeit merchandise, they listed an email address allowing customers to initiate a transaction. Louis Vuitton was able to prove wilful intent, as they had sent the defendants 18 notices of trademark and copyright infringement. The jury awarded Louis Vuitton USD 10.5 million in statutory damages for wilful trademark infringement of the 13 trademarks against each defendant, for a total of USD 31.5 million, plus USD300 000 for statutory damages for wilful copyright infringement and infringement of 2 copyrights against each defendant, totalling USD 900 000.[40]

In United Kingdom came into force in June 2012 the Digital Economy Act of 2011[41] and covered subjects that deal with digital encroachment of intellectual property, namely, copyright infringement, television services, radio services, regulation of the same, etc. The Act with respect to copyright involves two major parties – the ISPs and copyright holders.

Despite various laws protecting IPR, it is still an enormous task to keep a check on the copyright infringers on the Internet.

5.1. The "Tomato Garden" Software Internet Piracy Case

The "Tomato Garden" is an internet piracy case in China. The "tomato garden" version software was made by the defendants Zhang Tianping, Hong Lei and Liang Chaoyong under the instruction of Sun Xianzhong.[42]

The following facts were confirmed by the Huqiu Court in the hearing. Between December 2006 and August 2008, Wanglian Ad Co and Gongruan Co, for the purpose of making profits, without Microsoft's permission, reproduced Windows

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[39] Case Nos. 10–15909, 10–16015 Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., Managed Solutions Group, Inc.,Steven Chen [2011] United States Court of Appeals, Ninth Circuit, Decided: September 09, 2011.

[40] More details of this case can be found through the publication United States Court of Appeals for the 9th Circuit case number: 10- 15909 D.C. No. 5:07-cv-03952-JW and No. 10-16015 D.C. No. 5:07-cv-03952-JW Opinion, 9 September 2011.

[41] Digital Economy Act of 2010, UK National Archive.

[42] Ma, Zhong-fa., Gao, Wei-na., *Impact of the 'Tomato Garden' Software Internet Piracy Case on Combating Copyright Infringement in China*, Journal of Intellectual Property Rights Vol 17, January 2012, pp 27-36.

XP software and made several 'tomato garden' version software on the basis of XP software with minor modifications.By ways of modifying the browser's home page, providing default search page, bundling software of other companies and so on, the defendants allowed netizens to freely download the 'tomato garden' version software with commercial plugins of many companies, including Baidu Times Network Technology (Beijing) Co Ltd (Baidu) and other information technology corporations, from the 'tomato garden' website and 'Redu' website.

The court held that the action of reproducing computer software by slightly modifying relevant procedures without permission of the copyright owners, distributing it online for other people to download with other software or plug-ins bundled together, thus receiving profits including advertisement fee, shall be regarded as 'reproducing and distributing' 'for the purpose of making profits' provided by Article 217 of Criminal Law.

After the thorough trial, the judgment was that all the defendants involved - one legal entity (Gongruan Co) and four natural persons - were to be punished to certain degree. Gongruan Co was fined RMB 8,772,861.27 Yuan, Sun Xianzhong was sentenced to fixed-term imprisonment of 3 years and 6 months with a fine of RMB 1,000,000 Yuan, Zhang Tianping was sentenced to fixed-term imprisonment of 2 years with a fine of RMB 100,000 Yuan, Hong Lei was sentenced to fixed-term imprisonment of 3 years and 6 months with a fine of RMB 1,000,000 Yuan and Liang Chaoyong was sentenced to fixed-term imprisonment of 2 years with a fine of RMB 100,000 Yuan. [43]

The Tomato Garden case was the most serious copyright infringement concerning Windows software in networks where the Business Software Alliance on behalf of Microsoft Corporation complained to the National Copyright Administration and the Ministry of Public Security and requested them to protect Microsoft's rights and interests by the way of seeking criminal liability of the infringers in China, to which had been attached so much importance in the industry of information technology.

According to an investigation made by a nongovernmental organization, 'tomato garden' version software was very popular and downloaded by 19 per cent netizens (about 10 million), and the amounts of illegal gains and number of downloaded illegal copies confirmed by Huqiu Court were huge.[44] Therefore, it may be reason-

[43] Ma *et al.*, *op. cit.* note 44, p. 28.

[44] Kecheng, L., *The principal criminals were sentenced to the prison for three and a half years*, The Oriental Morning Newspaper, 20 August 2009.

able to regard this case as the gravest networking copyright infringement and one of the most severe copyright infringements till date in China.[45]

Also significant is the fact that Microsoft proved that it had not authorized any person or company to make software modified or reproduced copies. The court ascertained that the 'tomato garden' version Windows software was a reproduction based on the core procedures of Microsoft Windows software made without authorization.

5.2. IPR and Digital Currency

The nature of digital currencies is difficult to apprehend, the underlying technology is complicated, their operations are conducted in a decentralised way, and they are almost unregulated. No-one can predict if a particular digital currency may become a direct competitor for existing currencies in the distant future, or if it might just collapse overnight.[46]

However, some danger might arise for intellectual property and payment systems, including reputational damage for systems which are not directly exposed to virtual currencies. The most problematic field is consumer protection, as there are no safety nets, such as deposit guarantee funds, available to alleviate losses.

The criminals use technological advancements to distance themselves from their illegal activities and profits through use of virtual banking and electronic money transfer systems, which allow criminals to buy, sell, and exchange counterfeit goods without any physical interaction.[47]New digital, virtual currencies, such as Bitcoin[48], add yet another layer of anonymity by allowing users to transfer value

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[45] Yi, Z., *The Judgment of first trial for 'Tomato Garden' case has developed huge alarms to copyright infringers, but the burden of protecting intellectual properties is still heavy and the road is long*, Wenhui Daily, 21 August 2009.

[46] Tu, K. V., Meredith M. W., *Rethinking Virtual Currency Regulation In The Bitcoin Age*, Washington Law Review, No. 90, 2015, pp.270-347.

[47] Bennett, D, *The Challenges Facing Computer Forensics Investigators in Obtaining Information from Mobile Devices for Use in Criminal Investigations*, Information Security Journal: A Global Perspective, No 3, 2012, pp.159-168.

[48] Bitcoin was introduced on 31 October 2008 to a cryptography mailing list, and released as open-source software in 2009. Bitcoin or cryptocurrency is a form of digital currency, created and held electronically. No one controls it. Bitcoins are not printed. Bitcoin is invented by an unidentified programmer, or group of programmers, under the name of Satoshi Nakamoto.Despite many efforts, the identity of Satoshi remains unknown to the public and it is not known whether Satoshi is a group or a person. Satoshi in Japanese means "wise" and someone has suggested that the name might be a portmanteau of four technology companies: SAmsung, TOSHIba, NAKAmichi, and MOTOrola. Others have noted that it could be a team from the National Security Agency (NSA) or an e-commerce firm.

without the collection of any personally identifiable information.[49]Regulations often fail to affect such virtual currencies due to lack of foresight by the regulation writers, creating a legal grey area. Thus, criminals can continue to capitalize on technological innovation to bolster their illegal activities.[50]

The system is peer-to-peer and transactions take place between users directly, without an intermediary.[51] Bitcoin is different from normal currencies. It can be used to buy things electronically. In that sense, it is like conventional dollars, euros, or yen, which are also traded digitally. Bitcoin's image is polarized. Some view it as a tool used by criminals to commit crimes, whereas others view it as a tool for a legal system of currency that is free from unlawful government interference.[52]

Its proponent argue that Bitcoin has many properties that could make it an ideal currency for mainstream consumers and merchants. For example, bitcoins are highly liquid, have low transaction costs, can be used to send payments quickly across the internet, and can be used to make micropayments. This new currency allowing organizations to receive donations and conduct business anonymously.[53] On the other hand, bitcoin's decentralization and peer-to-peer infrastructure allows it to be virtually immune to the risks of server raids or the loss of a central database to hackers.

However, bitcoins are like money, and money can be used for both lawful and unlawful purposes. Due to the possibility of its use for nefarious activities such as money laundering, Bitcoin's pseudonymous network negatively impacted the image of emerging virtual currency systems, and some authorities view Bitcoin solely as a platform for criminals.[54]

One of the most well-known criminal uses of Bitcoin was on the Silk Roadwebsite[55], a black-market often used to trade illicit drugs and counterfeit goods.

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[49] Krohn-Grimberghe, A., Sorge. C, *Bitcoin: Anonym Einkaufenim Internet?*University of Paderborn, Department 3 – Wirtschaftsinformatik Analytische Informationssysteme und Bl, Germany, 2012, p. .3.

[50] Bryans, D., Bitcoin *and Money Laundering: Mining for an Effective Solution*, Indiana Law Journal, No.89, 2014, pp. 441-472.

[51] Nakamoto, Satoshi, *Bitcoin: A Peer-to-Peer Electronic Cash System*, URL=https://bitcoin.org/bitcoin.pdf. Accessed 1 January 2017.

[52] Ron, G. D, Shamir, A., *Quantitative Analysis of the Full Bitcoin Transaction, Quantitative Analysis of the Full Bitcoin Transaction Graph*, Department of Computer Science and Applied Mathematics, The Weizmann Institute of Science, Israel, 2012, pp.1-19.

[53] Grinberg, Reuben, *Bitcoin: An Innovative Alternative Digital Currency*, Yale Law School, Hastings Science & Technology Law Journal, Vol. 4, 2011, pp.160-208.

[54] Kaplanov, N. M., *Nerdy Money: Bitcoin, the Private Digital Currency, and the Case Againstits Regulation*, Loyola Consumer Law Review 111, No. 25, 2012, pp.111-174.

[55] Silk Road is anonymous online "black market" goods. See: James, M., *Lost On The Silk Road: Online*

One of the most common initial questions about Bitcoin is whether the online currency is legal, given the government's monopoly on issuing legal tender.[56]Current law and regulation does not envision a technology like Bitcoin, so it exists in something of a legal grey area. This is largely the case because Bitcoin does not exactly fit existing statutory definitions of currency or other financial instruments or institutions, making it difficult to know which laws apply and how.

The legal status of digital currency varies substantially from country to country and is still undefined or changing in many of them.[57]

In October 2015, the European Court of Justice ruled that bitcoin transactions are exempt from consumption tax similarly as traditional cash. Europe's highest court ruled in response to a request by Swedish tax authorities digital (Case *Skatteverket v David Hedqvist*)[58], who had argued bitcoin transactions should not be covered by a European Union directive exempting currency transactions from value added tax (VAT).The court ruled that bitcoins should be treated as a means of payment, and as such were protected under the directive. "Those transactions are exempt from VAT under the provision concerning transactions relating to 'currency, bank notes and coins used as legal tender", the ECJ concluded.[59]

Bitcoin crimes are likely to emerge as an important significant phenomenon thereby forcing the relevant stakeholders to look at appropriate legal frameworks which can effectively regulate certain activities.

5.3. Cyber Piracy - criminal offences, competent authorities and organization and cooperation in the Republic of Serbia

The Republic of Serbia signed both the Convention and the Protocol in Helsinki on 7 April 2005, at the time of the State Union of Serbia and Montenegro, and the

Drug DistributionAnd The 'Cryptomarket', Criminology and Criminal Justice: An International Journal, 2014, pp. 351-367.

[56] He, D., Habermeier, K., Leckow, R., Haksar, V., Almeida, Y., Kashima, M., Kyriakos-Saad, N., Oura, H., SaadiSedik, T., Stetsenko, N., Verdugo-Yepes, C.,*Virtual Currencies and Beyond: Initial Considerations*, IMF Staff Team, International Monetary Fund, Monetary and Capital Markets, Legal, and Strategy and Policy Review Departments, 2016, p.16.

[57] Financial Action Task Force-FATF, *Guidance for a Risk-Based Approach to Virtual Currencies*, FATF, Paris, 2015, p.12.

[58] Case C -264/14 Skatteverket v David Hedqvist, [2015] Court of Justice of the European Union.

[59] *Bitcoin currency exchange not liable for VAT taxes: top EU court*, Reuters, 22 October 2015, URL= http://www.reuters.com/article/us-bitcoin-tax-eu-idUSKCN0SG0X920151022. Accessed 6 January 2017.

National Parliament of the Republic of Serbia ratified both documents in 2009[60] The compulsory application of the Convention commenced in August 2009.

The mentioned documents served as a legal basis for domestic laws and standards, as well as for establishing specialized state bodies to combat cybercrime in general.[61]Those laws provide civil law protection of intellectual property rights, and are in accordance with the standards and requests of the European Union and the World Trade Organization. Until recently, two aspects of the legal protection of the intellectual property – penal and administrative protection – have not been meeting requirements of the European law and TRIPS Agreement in their entirety. The most important regulations adopted and adjusted to the provisions of the Convention include: the Criminal Code[62], the Law on the Liability of Legal Entities for Criminal Offences[63], Criminal Procedure Code[64], the Law on Special Measures for the Prevention of Crimes against Sexual Freedom Involving Minors[65], the Law on Seizure and Confiscation of the Proceeds from Crime[66], and the Law on Special Authorizations for Efficient Protection of Intellectual Property[67].

Serbia has set up specialised units (high-tech crime prosecutor, police cyber unit, specialised customs unit, tax unit and tax police) aimed at enforcing the legislation in this area. The length of investigations has been shortened. It fully updated an electronic database of customs offences in the field of intellectual property rights and introduced electronic handling of requests for protection of intellectual property rights.

Along with the development of information technologies, the issue of legal regulations that can prevent and sanction cybercrime has gained significance.[68]The

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60 Act of Formal Confirmation of the Convention on Cybercrime, Official Gazette of the Republic of Serbia, No. 19/2009

61 Spasić, V., *Savremeni oblici piraterije u autorskom i srodnom pravu*, Pravni *život* 56 (513), 207, pp 293-309.

62 Criminal Code, Official Gazette of the Republic of Serbia No.85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/201, 108/2014, 94/2016.

63 Law on the Liability of Legal Entities for Criminal Offences, Official Gazette of the Republic of Serbia no.97/2008.

64 Criminal Procedure Code, Official Gazette of the Republic of Serbia No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

65 Law on Special Measures for the Prevention of Crimes against Sexual Freedom Involving Minors, Official Gazette of the Republic of Serbia No. 32/2013.

66 Law on Seizure and Confiscation of the Proceeds from Crime, Official Gazette of the Republic of Serbia" No. 32/2013

67 Law on Special Authorizations for Efficient Protection of Intellectual Property, Official Gazette of the Republic of Serbia" No. 46/2006 and 104/2009 .

68 Vida M. Vilić, *Criminal Law Protection of Personality: Implementation of Council of Europe's Convention*

Criminal Code of the Republic of Serbia regulated criminal offences regarding violation of computer data security, thus clearly contributing to a more efficient fight against cybercrime. Still, this regulatory framework did not fully embrace the deviant forms of behaviour manifested as misuse of computer technologies and computer systems (e.g. Internet harassment, unauthorized alteration of the contents published on the Internet, etc.).

Cybercrime Unit has been established within the Ministry of Interior of the Republic of Serbia: Cybercrime Unit for combating cybercrime. The Unit acts upon requests of the Special Prosecutor's Office, in accordance with the law Within the Cybercrime Unit were established also Department for Electronic Crime and Department for Combating Crime in the area Intellectual Property as organizational parts for performing duties in regard to more specific areas of cybercrime combating.

The Higher Prosecutor's Office in Belgrade has the jurisdiction for the territory of the Republic of Serbia to proceed in cybercrime matters. The Higher Prosecutor's office established special cybercrime department - Special Prosecutor's Office. The Higher Court in Belgrade shall establish a Cybercrime Department which has first-instance jurisdiction in cybercrime matters for the territory of the Republic of Serbia.

Besides criminal offences that are listed in Criminal Code of the Republic of Serbia, Law on the organization and competences of government authorities combating cybercrime[69] also regulates this legal matter and, additionally, widens the scope of criminal offences which are deemed to be cybercrime, and those are criminal offences against intellectual property, property, economy and legal instruments, where computers, computer systems, data and products thereof appear as the objects or the means of committing a criminal offence and if the number of items of copyrighted works is over 2000, or the amount of the actual damage is over 1.000.000,00 RSD, as well as criminal offences against freedoms and rights of man and citizen, sexual freedoms, public order and constitutional system and security, which can be consider, due to the manner in which they are committed or tools used, as cybercrime offences.

In Serbia the most common forms of cybercriminal are related to Internet auction sites (e-shop), abuse of credit cards, phishing and identity thefts, "Nigerian" or

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on Cybercrime No. 185 Of 2001 Into Serbian Legislative, International Scientific Conference on Ict and E-Business Related Research, Doi: 10.15308, Sinteza, 2016, pp. 66-73

69 Law on the organization and competences of government authorities combating cybercrime ,"Official Gazette of the Republic of Serbia No 61/2005 and 104/2009".

"419" scam, and the most common infringements by Internet frauds are copyrights. In the Republic of Serbia, more than half perpetrators of cybercrimes are young persons under 35 years old. The great part of perpetrators, 35.48% has technical and technological knowledge while 24.52% of them have no occupation. 58% of perpetrators are unemployed.[70]In Serbia cybercriminals are increasingly focusing on Adobe PDF and Flash files, to infect victims with malware. In addition, they use rich content applications such as Flash files to distribute malicious code. Flash-based ads on the Web, because their binary file format, enable the cybercriminals to hide their malicious code and later exploit end-user browsers to install malware. Hackers have been breaking into Facebook and MySpace and implanting malware to distribute to a victim's social network. Serbian IT professionals are already aware of this risk.

Also, Serbia has a long way to go in bringing a comprehensive legislation on the liability of ISPs in cases of copyright infringement in digital context. It is of utmost importance for a country such as Serbia with an increasing number of Internet users and thereby increasing the threat to infringing the rights of copyright holders. At the same time, Serbia is becoming digitalized and if new laws are not brought in to protect ISPs from copyright infringement by subscribers and the related aspects, it would adversely affect the ISP industry as a whole though cases regarding the same are yet to come before any court of law in Serbia. Moreover, it is also important for Serbia to update their laws regarding this aspect to be in competition with other European countries.[71]

5. CONCLUSION

The paper finds that: (1) intellectual property protection is essential to encouraging creative expression and the development of new products in a number of industries, (2) the development of intellectual property-based products is generally far more expensive than their manufacture or duplication, (3) inadequate IPR protection leaves firms and consumers vulnerable to infringement, causing them to risk their investment and reputations.

Technology is now deeply enmeshed within the fabric of society. Criminals understand that technology is a highly effective force multiplier which can be abused to enable illicit activity, and leveraged to facilitate access to a global constituency of victims living online. Our collective dependency on technology makes this threat

[70] Domazet, S., *Piraterija – "vampir" savremene privrede*, Pravo: teorija i praksa Vol. 24, No. 3/4, 2007, pp. 39-40.

[71] Milovanovic, G., Barac, N., Andjelkovic, A., *Cybercrime - A Treat for Serbian Economy*, SecuritateaInformatională, ConferinţaInternaţională, ediţia a VII-a, 15-16, 2010, pp 111-114.

extremely difficult to eliminate. The relative ease with which offenders engage in new scopes of crime, and the high gains afforded to perpetrators, ensures that motivation for recidivists remains strong.

Manifestations of crime emanating from the IPR domain are among the most formidable challenges for workers in criminal justice systems worldwide. As society evolves and technology goes forward our understanding of the origins of criminality must be continuously revised. The persistence, prevalence and seriousness of IPR and cybercrime offending demands a greater response from the international community.

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Topic 3

Judicial system of the EU

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FINANCIAL SANCTIONS AGAINST MEMBER STATES FOR INFRINGEMENT OF EU LAW

ABSTRACT

The founding treaties set out two procedures where the Court of Justice may impose financial sanctions on EU Member States which fail to comply with their obligations under EU law. The first procedure is laid down in Article 260(2) TFEU, concerning cases when a Member State has failed to comply with an earlier judgment of the Court. The second option is a new legal solution introduced by the Lisbon Treaty in Article 260(3), under which the Court may impose sanctions on a Member State that has failed to notify the Commission about the national measures for transposing a directive adopted under a legislative procedure. If the Court finds that the Commission's allegations are true, it may impose penalty payment or a lump sum. Pursuant to Article 260(2), the Court is free to determine the sanction amounts, whereas the penalty payment or lump sum imposed pursuant to Article 260(3) must not exceed the amount specified by the Commission.

Keywords: *Article 260 TFEU, Court of Justice, penalty payment, lump sum, judgment, measures transposing a directive.*

1. INTRODUCTION

The Maastricht Treaty introduced an important novelty in Article 171 by envisaging the possibility of imposing financial sanctions upon Member States which do not comply with the judgments of the Court of Justice (hereinafter: Court). The Amsterdam Treaty and the Treaty of Nice simply renumbered Article 171 of the EC Treaty into Article 228 without introducing any changes. In the Lisbon Treaty, i.e. the Treaty on the Functioning of the EU (hereinafter: TFEU), Article 228 of the EC Treaty became Article 260 of the TFEU and its content was modified in some respects.

The TFEU amended the procedure set out in the second paragraph of Article 260 (ex 228) and added a completely new paragraph 3, concerning failure to notify measures transposing a directive adopted under a legislative procedure. The TFEU kept the essence of paragraph 2 and only removed the pre-litigation stage of issuing a reasoned opinion. Thus, the rules on types of sanction for non-compliance with the judgment and the method of calculating their amounts were not amended, but the sanctioning procedure was simplified and accelerated. The new paragraph 3 provides that where a Member State has failed to fulfill its obligation to notify measures transposing a directive, the Commission may suggest to the Court, even in an action launched under Article 258 TFEU, to impose the lump sum or penalty payment on the breaching Member States. If the Court finds that the alleged infringement exists, it may impose requested sanctions, which shall not exceed the amount specified by the Commission.

The first part of this paper describes the procedure under Article 260(2), followed by examination of the scope and procedure under Article 260(3). Further on, we analyze the sanctions under paragraph 2 of Article 260 and explore the types of envisaged sanctions as well as the criteria and methods of their calculation. The last part of the paper discusses the specificity of sanctions under paragraph 3 of Article 260, as compared with the sanctions set out in paragraph 2 of that article.

2. THE PROCEDURE UNDER ARTICLE 260(2) TFEU

Similarly to Article 258 TFEU, the procedure regulated by Article 260(2) TFEU consists of the pre-litigation and a judicial phase. The pre-litigation phase involves only the Commission and the Member State which allegedly failed to enforce the judgment. If the Commission considers that the State did not take the necessary measures to enforce the judgment, it should send a letter of formal notice to the non-compliant State.[1] In that notice, the Commission must provide specific reasons for non-compliance and give the State the opportunity to submit observations and present its arguments. Generally speaking, the purpose of the pre-litigation procedure is to give the State concerned the opportunity to comply with its obligations under EU law and enable it to use the right to defend itself against the Commission's complaints.[2]

[1] In practice, prior to this formal step, the Commission and the Member State have informal negotiations, aimed at adjusting their views on the alleged failure to enforce judgments and on measures to rectify such a situation; Radivojević, Z.; Knežević-Predić, V., *Institucionalni mehanizam Evropske unije posle Lisabonskog ugovora*, Punta, Niš, 2016, p.162.

[2] Case C-456/03 *Commission v. Italy* [2005] ECLI:EU:C:2005:388, par. 36.

In the letter of formal notice, the Commission has to determine reasonable period for enforcement of the judgment.[3] It should be noted that the Commission must leave sufficient time for the Member State to enforce the judgment. Otherwise, the Commission runs the risk that the Court rejects its subsequent action.[4]

The TFEU simplified the administrative phase by abolishing the Commission's obligation to send a reasoned opinion to the defaulting State, and thus introduced the "fast-track administrative procedure".[5] This amendment notably shortened and accelerated the procedure, without significantly reducing the Member State's rights of defense.[6]

If the administrative stage is unsuccessful, Article 260(2) empowers the Commission to refer the case to the Court.[7] In the new complaint, the Commission may request the Court to declare that the Member State did not comply with the original judgment and concurrently request a lump sum or penalty to be imposed on the non-compliant State.

It should be stressed that under Article 260(2) the Commission is not obliged to bring the case to the Court. As in Article 258, the Commission enjoys full discretion in deciding whether to launch action against State which failed to obey the judgment.[8] But, if the Commission lodges an action, it must specify the amount of sanctions. Given the mandatory nature of the modal verb "must" in Article 260(2), the Commission has no discretion on this point.[9] So, the Commission shall ask for at least one type of sanction in every case.

The Court considers the procedure laid down in Article 260(2) as a "special judicial procedure for the enforcement of judgments, in other words, as a method of enforcement"[10]; consequently, all the general principles developed by the Court

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3 Wenneras, P., *Sanctions against Member States Under Article 260 TFEU: Alive, But Not Kicking?*, Common Market Law Review, Vol.49, No.1, 2012, p.148.

4 Case C-278/01 *Commission v. Spain* [2003] ECLI:EU:C:2003:635, pars. 27-31.

5 Wenneras, P. *op.cit*. note 3, p.47.

6 Arnull, A., The European Court of Justice after Lisbon, in: Trybus, M. Rabini, L. (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Elgar Publishing, Cheltenham/Northampton, 2012, p.39.

7 The Court of Justice has exclusive jurisdiction to conduct proceedings under Article 260 TFEU.

8 Unfortunately, the exercise of that discretion is not always based on the merits of the case but also on political considerations; Jack, B., *Enforcing Member States Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties*, Journal of Environmental Law, Vol. XXIII, No.1, 2011, p.79.

9 Theodossiou, A. M., *An analysis of the recent response of the Community to non-compliance with Court of Justice Judgements: Article 228 E.C.*, European Law Review, Vol. XXVII, No.1, 2002, p.29.

10 Case C-304/02 *Commission* v *France* [2005] ECLI:EU:C:2005:444, par. 92.

with regard to Article 258 should apply fully to Article 260(2).[11] First, the subject matter of dispute in the pre-litigation phase and judicial phase must be identical, meaning that "the Commission, in its application, cannot extend the subject-matter of the dispute by putting forward new complaints which were not included in the reasoned opinion[12] in which the Commission specified the points on which the Member State concerned had not complied with the judgment".[13] Second, in the action under Article 260(2), the Commission may charge the State only for failure to fulfill the obligations which the Court has declared in judgment issued on the basis of Article 258.[14] However, it should be noted that under Article 258 the Commission does not have to bring an action for each and every infringement of EU legal act, but it may join them together into a single action and ask the Court to declare that the State has breached relevant EU rules in a general and persistent manner.[15] Third, the Commission has the burden of proof and it must prove each aspect of its claim in the proceedings under Article 260(2).[16]

Acting upon the complaint, the Court has to decide whether the Member State enforced the previous judgment or failed to do so. After the Lisbon Treaty abolished the reasoned opinion, "the reference date for assessing whether there has been an infringement for the purpose of Article 260 is the date of expiry of the period prescribed in the letter of formal notice".[17] If the Courts finds that there was an infringement, it may impose financial sanctions.

3. THE SCOPE AND PROCEDURE UNDER ARTICLE 260(3) TFEU

Article 260(3) TFEU is a completely new instrument introduced by the Lisbon Treaty. It allows the Commission to seek financial sanctions earlier, at the first stage of the infringement proceedings under Article 258 TFEU, in cases involving a failure to "notify measures transposing a directive adopted under a legislative procedure".

[11] Prete, L,; Smulders, B., *The Coming of Age of Infringement Proceedings*, Common Market Law Review, Vol.47, No.1, 2010, p.49.

[12] The claims are now included in the letter of formal notice (noted by *Z. R., N. R.*).

[13] Case C-457/07 *Commission v. Portugal* [2009] ECLI:EU:C:2009:531, par.56.

[14] Case C-457/07, *op.cit.* note 13, par.47; Case C-95/12 *Commission v. Germany* [2013] ECLI:EU:C:2013:676, par.23.

[15] For example: Case C-494/01 *Commission v. Ireland* [2005] ECLI:EU:C:2005:250; Case C-135/05 *Commission v. Italy* [2007] ECLI:EU:C:2007:250; Case C-196/13 *Commission v. Italy* [2014] ECLI:EU:C:2014:2407, par. 33.

[16] Case C-197/98 *Commission v. Greece* [1999] Opinion, ECLI:EU:C:1999:597, pars. 23-24.

[17] Case C-241/11 *Commission v. Czech Republic* [2013] ECLI:EU:C:2013:423, par.23.

Current Article 260(3) is an exact replica of Article III-362(3) of the failed Treaty establishing a Constitution for Europe.[18] The background for this novelty is the persistent and widespread problem of untimely transposition of directives, which not only threatens the uniform application of EU law but has also taken a disproportionately high toll on the Commission's enforcement recourses.[19] The treat of sanction at the early stage of the infringement procedure should have a considerable preventive effect, inducing the Member States to rapidly end non-compliance with the obligation to transpose directives.[20] According to the Commission, the purpose of this new paragraph is to give a stronger incentive to Member States to transpose directives within the prescribed deadlines and thus ensure that EU legislation is genuinely effective, considering that "prompt transposition of directives is essential in safeguarding the general interests pursued by Union legislation… and protecting European citizens who enjoy individual rights under this law".[21]

However, there are several open questions concerning the function and place of the newly-created paragraph 3 of Article 260 TFEU. The first issue which should be clarified is "whether the new mechanism is meant to penalize directly the failure to transposition directive or, contrary, the non-implementation of judgments handed down by Court declaring Member States to be in breach of their obligation to notify transposition measures".[22] The wording of the new provision suggests that it only introduces the sanction mechanism which, in standard infringement proceedings, allows the Commission to seek an additional order, asking the Court to impose financial sanctions upon the defaulting Member State. The Commission seems to have accepted that interpretation,[23] a also proposed by some authors.[24] If that is so, "the new paragraph would seem a odd place to locate a mechanism to penalize failures to notify transposition measures...Such a provision essentially constitutes derogation (or variant) from Article 258 TFEU. As such, it would have been more logically placed in a new paragraph added to Article 258 TFEU".[25]

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[18] Lisbon Treaty – Comments and preparatory works for the Reform Treaty November 2009, available at URL=http:// www.lexnet.dk/law/download/treaties/Ref-2007.pdf. Accessed January 2017.

[19] Commission Communication, Application of Article 228 of the EC Treaty, SEC (2005) 1658, (hereinafter: 2005 Communication), par.20.

[20] Wenneras, P. *op.cit.* note, p.166.

[21] Commission Communication, Implementation of Article 260(3) TFEU, SEC (2010), 1371 final (hereinafter: 2010 Communication), par.7.

[22] Wahl, N.; Prete, L., *Between Certainty, Severity and Proportionality: Some Reflections on the Nature and Functioning of Article 260 (3) TFEU*, European Law Reporter, No.6, 2014, p.171.

[23] 2005 Communication, par.6.

[24] Kilbey, I.C., *The Interpretation of Article 260 TFEU (ex 228 EC)*, European Law Review, Vol.35, No.3, 2010, pp. 383-384.

[25] Wahl, Prete, *op.cit.* note 22, p.172. Some authors consider that paragraph 3 of the Article 260 essentially constitutes a revision of Article 258 TFEU; see: Raičević, N.; Đorđević, S., *The Controle of Com-*

On the other hand, there are legal scholars suggesting a different interpretation of the new Treaty provision.[26] According to their opinion, the fact that the new mechanism is found in Article 260(3) shows that it constitutes an option of the procedure under Article 260(2). In the judgment rendered pursuant to Article 258, the Court anticipates the effects of the ruling under Article 260(2) concerning the specific type of infringement covered by the new provision. This leads these authors to conclusion "that Article 260(3) TFEU lays down a mechanism for enforcing judgments, just like Article 260(2) TFEU, rather than a mechanism for immediately imposing sanctions for failure to notify transposition measures".[27]

The application of Article 260(3) depends on two conditions: first, the Member State must have failed to notify measures for transposing a directive (first condition); the directive in question must have been adopted under a legislative procedure (second, conditions).

In the first place, the new mechanism can be used by the Commission when it brings a case against a State for failure to fulfill its obligation to notify transposition measures. Yet, the precise meaning of this condition is not easy to understand. "The EU Treaties do not place Member States under any obligation to notify measures transposing directives. Such an obligation has regularly included within the final provision of each directive".[28] Most directives contain a general clause stating that the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the directive within a certain time limit and immediately inform the Commission thereof. "This includes the normative and organizational aspect of transposition, i.e. absorbing the substantive content of directive into national law and creating the legal and administrative framework necessary for its application and enforcement. Failure to notify such measures clearly falls within the scope of Article 260(3) TFEU".[29]

The next question relates to the notion of failure to notify measures transposing a directive. Does it imply "the Member States' substantive failure (that of not transposing a directive)" or "a procedural failure (that of not communicating the transposition measures to the Commission)". In any case, the latter obligation must

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pliance with the Judgments of the EU Court of Justice, in: M.Lazić, S.Knežević (ed.), *Legal, Social and Political Control in National, International and EU Law*, Collection of papers from the International Scenitific Conference, Niš, 2016, p. 276, note 7.

26 Garcia, R.A., *Lisbon and the Court of Justice of the European Union*, Working Papers on European Law and Regional Integration, WP IDEIR, No.1, 2010, p.18.

27 Wahl, Prete, *op.cit.* note 22, pp.171-174.

28 *Ibid.*, p.174.

29 Wenneras, P., *op.cit.* note 3, pp.166-167.

be "ancillary to the former, serving only to facilitate a proper verification of the fulfilment of substantive obligation".[30] On the contrary, it be possible that "financial sanction might be imposed on a Member State which actually implemented a directive, but has simply failed to notify the Commission of the implementation measures. It seems unlikely that Court would impose a sanction[31] in case of such procedural failure without analyzing the substantial obligation. In such a case, the "Court should probably consider to merely declare the failure without however imposing any sanction upon the defaulting Member State".[32]

The Commission's Communication suggests that it implies not only a total failure to notify any measures to transpose a directive but also cases of partial notification of transposition measures. The complete failure to communicate national measures is usually regarded as an indication that the State has not adopted any transposition measure at all. The instance of partial notification "might occur either where the transposition measures do not cover the whole territory of the Member State or where the notification is incomplete with respect to the transposition measures corresponding to a part of the directive".[33] The Commission contends that both such cases fall within the scope of Article 260(3).

Concurrently, it appears that Article 260(3) is not intended to apply to cases in which the Member State has *prima facie* fulfilled its obligation to notify measures for transposing a directive, but where the transposition turns out to be substantively incorrect. The Commission considers that such instances must be dealt with in ordinary infringement proceedings under Article 258 TFEU.[34]

However, "drawing a line between partial or incomplete transposition measures and the notification of incorrect transposition measures does not appear straightforward".[35] This is reflected in the Commission's Communication, which reveals the complexity awaiting "where the Member State has provided all necessary explanations on how it believes it has transposed the entire directive, the Commission may consider that the Member State has not failed to meet its obligation to notify of transposing measures, and therefore Article 260(3) does not apply".[36] Hence, it seems "that the Commission will apply some form of *bona fides* test when determining whether the infringement should be characterized as a

30 Wahl, Prete, *op.cit.* note 22, p.174.

31 Arnull, *op. cit.* note 6, pp. 39-40.

32 Wahl, Prete, *op. cit.* note 22, p.187, note 36.

33 2010 Communication, par.19.

34 *Ibid.*

35 Wenneras, *op.cit.* note 3, p.167.

36 2010 Communication, par. 19.

instance of incomplete (or partial) notification falling within the scope of Article 260(3), or as incorrect transposition to be pursued in regular infringement proceedings under Article 258 TFEU".[37]

This approach of bringing separate infringement proceedings for ipartial and incorrect transposition measures was challenged in the legal doctrine. Some authors believe that "the first condition in Article 260(3) is only satisfied in cases which concern total failure to notify any national measures transposing a directive. Where a Member State has fulfilled its duty to communicate to the Commission the transposition measures adopted, the question whether those measures constitute a complete and correct transposition is a matter to be resolved under Article 258 TFEU".[38] Thus, when a dispute arises between the Commission and a Member State "due to the sufficiency of the transposition measures" adopted, a financial sanction can be imposed only following the regular procedure.[39]

As for the second condition, the Article 260(3) is applicable with regard to failure concerning directives adopted under a legislative procedure. There is no doubt as to the types of legislatives instrument covered by this provision.

Transposition of directives which are not adopted under a legislative procedure thus falls outside the scope of Article 260(3). This Article excludes directives adopted under the Commission's delegated powers and directives implementing legislative acts without modifying the scope of their basic obligations. Such directives normally do not require any notification of transposition measures. On the other hand, "their exclusion from Article 260(3) owe to the fact that, in comparison with legislative directives, they generally have more limited impact on private or public interests".[40]

In practice, the Commission has brought twenty four claims for penalty payments in accordance with Article 260(3). Most of these claims were withdrawn after the Member States notified the relevant transposition measures prior to the Court's hearing. In fact, only one case dealing with the proposal for penalty payment has so far remained open before the Court.[41] It should be noted that these complete transpositions of directives were achieved at the very late stage of judicial procedure. Thus far, the Commission has not made proposals to the Court to impose

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37 Wenneras, *op.cit.* note 3, pp.167-168.

38 Wahl, Prete, *op. cit.* note 22, p.177.

39 Gáspár-Szilágyi, G., *What Constitutes "Failure to Notify" National Measures?*, European Public Law, Vol. Vol.19, No.2, 2013, p.287.

40 Jack, B., *Article 260 (2) TFEU: An Effective Judicial procedure for the Enforcement of Judgements?*, European Law Journal, Vol. XIX , No.3, 2013, p.407.

41 Case C-683/15, *Commission v. Poland*.

a lump sum payment, nor has the Court of Justice had the opportunity, as yet, to pronounce its judgment under Article 260(3) TFEU.[42]

4. THE SANCTIONS UNDER ARTICLE 260(2) TFEU

Article 260(2) empowers the Commission to require from the Court to impose a "lump sum or penalty payment" upon the Member State that failed to enforce a judgment. A lump sum is determined in a fixed amount of money which implies a single one-time payment. On the other hand, penalty payment is the sum of money which must be paid periodically, starting from the moment of imposing the penalty to the moment of enforcing the judgment.

Initially, the Commission required from the Court to impose penalty payment only, considering that the daily increase of sanctions would exert more pressure on the State to enforce the judgment. Consequently, in the Memorandum (1996)[43] and the Communication (1997)[44], the Commission adopted rules only for calculating the penalty payment. Until 2005, the Court had accepted the Commission's requests and imposed only penalty payment. Yet, in the case C-304/02, the Court departed from its previous practice and imposed both penalty payment and a lump sum concurrently.[45]

France and 12 intervening Member States opposed the imposition of both sanctions. They asserted that the conjunction "or" in Article 228(2) had a disjunctive meaning, and that the Court may not cumulate two sanctions. Further, they considered that the imposition of both sanctions was contrary to the principle *ne bis in idem,* which prohibits being punished twice for the same conduct. These States also argued that, in the absence of the Commission guidelines for calculation of the lump sum, imposition of such sanctions by the Court would be contrary to the principles of legal certainty and transparency.[46] he respondent Government and a number of interveners argued that the Court could not impose a sanction

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[42] Wenneras, P., *Making Effective Use of Article 260 TFEU*, 2016. Forthcoming in A. Jakab and D. Kochenov, The Enforcement of EU law and Values; available at SSRN: https://ssrn.com/abstract=2821032, p.19.

[43] Commission Memorandum on applying Article 171 of the EC treaty, OJ EC, No. C 242/6 (hereinafter: 1996 Memorandum).

[44] Commission Communication, Method of Calculating the Penalty Payments Provided For Pursuant to Article 171 of the EC Treaty, OJ EC, No. C 63/2 (hereinafter: 1997 Communications).

[45] The Court ordered France to pay €57,761,250 for each six-month period of delay and a lump sum of €20 million.

[46] Case C-304/02 02 [2004] *Commission v. France*, Opinion, ECLI:EU:C:2004:274, par.78-79.

that had not been proposed by the Commission because it would go beyond the parties' claim (*extra petita*).[47]

The Court rejected all of these arguments. It pointed out that the conjunction "or" could, linguistically, equally be understood in the cumulative and the alternative sense, and that the context and objective of Article 228(2) require that it should be understood in a cumulative sense. In the Court's opinion, simultaneous application of both penalties is not contrary to the principle *ne bis in idem* since each penalty has its own function. The Court clearly stressed that the absence of Commission guidelines for calculating a lump sum is not an obstacle for imposing this sanction, given that "the exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which, in any event, cannot bind the Court".[48] Finally, the Court dismissed the argument on acting *extra petita*, stating that "the procedure provided for in Article 228(2) EC is a special judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure", and that the imposition of sanctions "is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established".[49]

As a result of the Court's approach, the Commission supplemented its guidelines, establishing the method for calculating the lump sum.[50] Thereafter, the Commission changed its practice and now it generally requests a penalty payment and lump sum concurrently.

The Court has frequently imposed both sanctions, justifying it by their different objectives. As the Court points out, the imposition of penalty payment is intended to compel the Member State to stop breaching EU law as soon as possible, i.e. to comply with the previous judgment;[51] it is the so-called persuasive effect.[52] The aim of that penalty is to force the State to comply with the judgment by exerting economic pressures on it. In contrast, the lump sum is imposed on a State because of harmful effects of non-compliance with original judgment to public and private interests.[53] A lump sum is a dissuasive measure designed to prevent repetition of future similar infringements of EU law.[54]

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[47] *Ibid.*, par.88.

[48] *Ibid.*, pars.84-85, 94-97.

[49] *Ibid.*, par. 91.

[50] 2005 Communication.

[51] *Ibid.*, par. 81.

[52] Case C-304/02 [2004] *Commission v. France*, Opinion, ECLI:EU:C:2004:274, par.41.

[53] *Ibid.*, par. 81.

[54] Case C-121/07, *Commission v. France* [2008] ECLI:EU:C:2008:695, par.69.

The Court is not bound by the Commission's suggestions concerning sanctions. Thus, the Court may decide not to impose any sanction at all even though the Commission has requested them. This discretion arises directly from Article 260(2) which provides that the Court "may" impose a lump sum or a penalty payment, which clearly demonstrates that the Court has a discretion to finally decide whether sanctions should be imposed or not. If the Commission at any stage of the judicial proceedings considers that the imposition of the proposed sanction is not necessary, it is not the reason for cessation of the proceedings.[55] In such a case, the Court may continue the proceedings and impose sanctions.[56]

As regards the amounts of these sanctions, Article 260(2) TFEU and its predecessors only required the Commission to "specify the amount of penalty payment or a lump sum to be paid by the Member State", without any concrete criteria for determining the amounts. In the absence of Treaty guidance, the Commission filled in the gap by issuing soft-law communications in which it set out in detail how it would calculate the amount of fines which would be proposed to the Court.[57] The first guidelines were made in 1996[58] and 1997.[59] The current version was adopted in 2005,[60] which was first updated in 2010[61] and, from then onwards, it has been updated annually.[62]

In the aforementioned documents, the Commission pointed out that the calculation of the financial sanctions should be based on three fundamental criteria: a) the seriousness of the infringement; b) duration of the infringement; and c) the need to ensure that the penalty itself is a deterrent to further infringements. Besides, in the 2005 Communication, the Commission stressed that sanctions must be foreseeable and calculated respecting the principle of proportionality and principle of equal treatment of Member States.[63] If there is any risk of a repetition of the failure to comply with the judgments, financial sanctions must be set at a higher level.[64]

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55 Case C-503/04, *Commission v. Germany* [2007] ECLI:EU:C:2007:432, par.22.

56 Lenaerts, K.; Maselis, M.; Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, p. 213.

57 Kornezov, A., *Imposing the Right Amount of Sanctions under Article 260(2) TFEU: Fairness v. Predictability, or How to "Bridge the Gaps"*, Columbia Journal of European Law, Vol.20, No.3, 2014, p.284.

58 1996 Memorandum.

59 1997 Communication.

60 2005 Communication.

61 Commission Communication - Application of Article 260 of the Treaty on the Functioning of the European Union, SEC(2010) 923/3.

62 The last version was adopted in August 2016 (OJ EU, No. C 290/3).

63 Pars.6-7.

64 1996 Memorandum, par.8.

The Commission has specified the above general criteria and principles in order to establish methods for calculating the amounts of individual sanctions. In the 2005 Communication, the Commission identified specific formulas for calculating the penalty payment and the lump sum, which are similar.

The formula for calculating penalty payment payable per day is:

$$\mathbf{Dp} = (\mathbf{Bfrap} \times \mathbf{Cs} \times \mathbf{Cd}) \times \mathbf{n}$$

where: ***"Dp"*** is the daily penalty payment; ***"Bfrap"*** is the basic flat-rate amount for "penalty payment"; ***"Cs"*** is the coefficient of seriousness; ***"Cd"*** is the coefficient of duration; and ***"n"*** is the factor indicating a Member State's capacity to pay.[65]

The basic flat rate is an amount set annually by the Commission at the fixed rate applicable to all Member States. The latest flat-rate determined in 2016 is €680.

The coefficient of seriousness is determined on the basis of the gravity of infringement and it is applied on a scale between a minimum of 1 and a maximum of 20. When determining the seriousness of the infringement, the Commission takes into account two criteria: the importance of the breached rule and the consequences of the infringement to general and particular interests.[66]

The second criterion, coefficient of duration of the infringement, depends on the time elapsed between the delivery of the previous judgment (rendered under Article 258) and the date of th Court's oral hearing in the second proceeding.[67] The coefficient varies between 1 and 3, calculated at a rate of 0.1 per elapsed month. This method has a significant disadvantage because all the breaches that exceeded 29 months have a coefficient of 3, regardless of whether they lasted for 30 or 50 months.

The "n" factor is a fixed coefficient determined by the Commission in advance for each Member State. It is calculated on the basis of the Member State's gross domestic product[68] as well as the number of votes they have in the Council.[69] Hence,

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[65] 2005 Communication, par. 18.2.

[66] 2005 Communication, par.16.

[67] Case C-177/04 [2006] *Commission v. France*, ECLI:EU:C:2006:173, par.71.

[68] There is an opinion that the Commission should have used gross national product *per capita* as a more accurate reflection of a country's wealth rather than gross domestic product; Theodossiou, *op. cit.* note 9, p. 34.

[69] Some scholars criticize this solution, pointing out that taking into account the number of votes in the Council when determining factor "n" brings a political element into calculating the amount of financial sanctions for non-compliance; Jack, B., *op. cit.* note 8, p. 90. As a result of political arrangements, some Member States are either over- or under-represented in the Council in comparison to their actual population and/or economic strength. Linking the number of votes in the Council with the Member State's wealth is questionable; (Kornezov, *op. cit.* note 57*,* p. 305).

taking into account the State's ability to pay, the amount of sanctions to be paid for the identical breach may be significantly different, depending on the wealth of the defaulting State. Currently, the "n" factor is the smallest for Malta (0.35) and the highest for Germany (20.79).[70]

Finally, the total amount of penalty payment is calculated by multiplying the amount of daily penalty payment with the number of days that elapsed from the date of delivering the second judgment until the date when the Member State brings the infringement to an end.

The method of calculating the lump sum is similar to the method of calculating the penalty payment. The Commission uses the following formula:

Ls = **Bfals** x **Cs** x **n** x **dy**

where: "***Ls***" is the total amount of the lump sum payment; "***Bfals***" is the basic flat-rate amount for "lump sum payment"; "***Cs***" is the coefficient of seriousness; "*n*" is the factor indicating a Member State's capacity to pay; "***dy*"** is the number of days the infringement persists.

The total amount of the lump sum which the defaulting State has to pay is the result of multiplying the daily amount by the number of days of infringement. The daily amount for determining the lump sum is obtained by multiplying the pre-determined basic flat-rate by the coefficient of seriousness (from 1 to 20), and then by the "n" factor.

The basic flat-rate for lump sum is also predetermined annually. It is significantly lesser than the basic flat-rate for penalty payment, and it currently stands at €230. By contrast, the coefficient of seriousness of infringement and the factor "n" are the same for calculating lump sum and the penalty payment.

The coefficient of duration is not applied in the calculation of the lump sum because duration is already taken into account under the "dy" factor. Lump sum should be calculated by reference to the number of days, starting from the date of delivery of the judgment in proceedings under Article 258 until either the date of its enforcement or the date of oral hearing before Court in proceedings under Article 260(2).[71]

The Commission set out the so-called minimum lump sum for each Member State, which implies that states cannot pay below that amount, regardless of the

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70 Communication from the Commission [2016] OJ No. C 290/3.

71 Kilbey, *op. cit.* note 24, p.372.

seriousness of the infringement.[72] The purpose of fixed minimum lump sum is to prevent "purely symbolic amounts which would have no deterrent effect and could undermine, rather than strengthen, the authority of Court judgments".[73]

The Court has full discretion to decide on the type and amount of sanction. Therefore, it is not bound either by the Commission proposal on the type of sanction or by the suggested amounts. Wishing to retain full autonomy in determining the amount of penalties, the Court pointed out in the early cases that it is not bound by the Commission's proposals given in the complaint, nor by its guidelines,[74] stressing that "...the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference". In a recent judgment, the Court stated that the Commission's suggestions "are merely guidance" and are not binding for the Court.[75] Thus, the Court may impose higher or lower lump sums and penalty payments other than those suggested by the Commission. The Court noted that, when determining the penalty payment and the lump sum, it takes into consideration all the circumstances of the individual case,[76] fixing the amount so as to induce the Member State to comply with the judgment as swiftly as possible and preventing similar infringements of EU law in the future.[77]

When fixing the penalty payment, the Court considers three criteria identified by the Commission.[78] In calculating the penalty payment, in some cases the Court applied the Commission's formula but in others the Court calculated the penalty payment without reference to this formula.[79] When applying the three criteria, the Court takes into particular account the effects of the infringement on public and private interests, and the urgency of exerting pressure on the Member State to fulfill its obligations. [80]

The Court has applied the general principle of proportionality in determining the penalty payment proportionate to the specific infringement. The Court ascertained that imposition of fixed penalty payment "is neither appropriate to the cir-

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72 According the 2016 Communication, Malta may not pay less than €197.000, Croatia €699.000, and Germany €11.721.000.

73 2005 Communication, par.20.

74 Case C-387/97 *Commission v. Greece* [2000] ECLI:EU:C:2000:356, par.89.

75 Case C-533/11 *Commission v.* Belgium [2013] EU:C:2013:659, par.52.

76 *Ibid.*, pars.49, 68.

77 Case C-407/09 Commission v. Greece [2011] ECLI:EU:C:2011:196, par.29; Case C-496/09 *Commission v. Italy* [2011] ECLI:EU:C:2011:740, par.36.

78 Case C-533/11, par.69; Case C-610/10 *Commission v. Spain* [2012] ECLI:EU:C:2012:781, par.119.

79 Jack, B., *op.cit* note 40, p.409.

80 Case C-304/02, par.104; Case C-177/04, par.62; Case C-70/06 *Commission v. Portugal* [2008] ECLI:EU:C:2008:3, par.39.

cumstances nor proportionate to the breach which has been found", and acknowledged that "in order for the penalty payment to be appropriate to the particular circumstances of the case and proportionate to the breach, the amount must take account of progress made by the defendant Member State in complying with the judgment".[81] Thus, the Court held that the amount of penalty payment can be reduced by taking into account the gradual compliance with the judgment.[82]

When fixing the lump sum, the Court considers the effects of the infringement on public and private interests, duration of infringement,[83] and conduct of the Member State in the procedure initiated pursuant to Article 260(2) TFEU.[84] However, in many cases, the Court refused to apply the Commission's formula and numerical coefficients; instead, by using its broad discretionary rights, it autonomously determined the amount of the lump sum.[85] In these situations, the Court simply stated that the determined amount of sanction is appropriate to circumstances of the case, without any further explanation. The Court usually states that the sanctions are "just" or "fair" in the circumstances of the case.[86] Round figures of the lump sums in some cases show that they are not a result of mathematical operations, but rather a result of the Court's *ex aequo et bono* assessment.[87] In some cases, the Court even imposed lump sums below the minimum predetermined by the Commission.[88]

Although Article 260(2) does not explicitly recognize the Court's right to delay the application of sanctions, the Court has inherent right to act in this manner.[89] For example, using this possibility, the Court deferred the penalty payment imposed on Greece until one month after delivery of the judgment,[90] thus granting

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81 Case C-278/01, pars.49-50.

82 See Case C-496/09 *Commission v. Italy* [2011] ECLI:EU:C:2011:740.

83 Case 304/02, par.81.

84 Case C-610/10, par.141.

85 This is the correct approach of the Court because, under Article 260(2), the Commission is one of the parties in the proceedings, just like the defendant State. If the Court always accepts the Commission's methodology, it would violate the principle of equality of arms; Kornezov, *op. cit.* note 57, p.299.

86 Case C-270/11 *Commission v. Sweden* [2013] ECLI:EU:C:2013:339, par. 59; Case C-241/11, par.55; Case C-533/11, par.62; Case C-576/11 *Commission v. Luxembourg* [2013] ECLI:EU:C:2013:773, para.66.

87 Kornezov, *op. cit.* note 57, p. 294.

88 Case C-567/08 *Commission v. Greece* [2009] ECLI:EU:C:2009:342; Case C-241/11.

89 Peers, S., *Sanctions for Infringement of EU Law after the Treaty of Lisbon*, European Public Law, Vol. XVIII, No.1, 2012, p.47.

90 Case C-369/07 *Commission v. Greece* [2009] ECLI:EU:C:2009:428.

to the defaulting State a grace period to rectify the infringement and thereby avoid any penalty payment.[91]

5. SPECIFICITY OF SANCTIONS UNDER ARTICLE 260(3) TFEU

The rules on imposing sanctions contained in Article 260(2) generally apply to Article 260(3). But, the sanction envisaged in Article 260(3) differs in some aspects from the general rules contained in Article 260(2).[92]

First, unlike paragraph 2, under paragraph 3 the Commission is not obliged to propose financial sanctions. The used phrase "it may, when it deems appropriate" means that the Commission can bring a case to the Court without proposing any sanctions. The Commission has full discretion to decide whether to ask the Court to impose financial sanctions on the State which has failed to notify the measures for transposing a directive, or to use "the regular procedure" pursuant Article 258 TFEU. The Commission took the view that it would, in principle, use the procedure set out in Article 260(3) in all cases involving States' failure to notify about the taken transposition measures, but it recognised that there might be special cases in which it would not deem it appropriate to seek penalties under Article 260(3).[93]

Second, Article 260(3) provides that Court may not impose financial sanctions exceeding the amount specified by the Commission in its complaint. In other words, penalties imposed by the Court must be within the limits proposed by the Commission. Like procedure set out in Article 260(2), the Court enjoys full discretion to decide whether or not to impose a sanction, and it can refuse to levy proposed sanction(s). But, if it decides to impose sanctions, its discretion concerning their amount is limited. The Court may impose only the same or a lower amount of sanctions than the amount proposed by the Commission.

As for the amount of sanction, the Commission will use the same formula and criteria that are applicable under Article 260(2),[94] in accordance with 2005 Communication. The only difference is the starting date for calculating the duration of infringement. Under Article 260(2), the reference date is the delivery of the previous judgment, while pursuant to Article 260(3) the duration of infringement

[91] Kilbey, *op. cit.* note 24, p. 374.

[92] Wenneras, P., *op. cit.* note 42, p.18.

[93] 2010 Communication, para.17.

[94] Peers, *op. cit.* note 89, p.44.

starts from the day following the expiry of the deadline for transposition provided in the concerned directive.[95]

With regard to the aforementioned limitation, it is questionable whether the Court may impose sanction which was not proposed by the Commission. Some scholars argue that the Court "cannot impose a type of sanction that has not been requested by the Commission".[96] But, others consider that the wording of Article 260(3) does not prevent the Court from "assessing the appropriateness of imposing sanctions which the Commission has not specified".[97] Yet, it seems that the text of Article 260(3) does not allow the Court to impose a sanction that the Commission has not proposed. If the Court is not allowed to impose a higher amount of sanction than that requested by the Commission, it is even less entitled to impose the sanction that is not proposed at all.

It is indisputable that the Commission may propose both sanctions (penalty payment and a lump sum) cumulatively.[98] The Commission explicitly promulgated this approach in its 2010 Communication, stating that the wording of Article 260(3) "does not preclude the possibility of combining both types of penalties in the same judgment."[99] It came to this conclusion by using analogy with the case law on Article 260(2).[100] But, at the same time, the Commission indicated that it would normally propose only a penalty payment, hoping that this sanction will prove sufficient to achieve full notification on the transposition measures. However, the Commission reserves the possibility to seek the lump sum for instances in which this sanction is warranted by the circumstances of the case.[101] Such policy enables States to procrastinate the notification of transposition measures until imminently prior to the Court's hearing and thus escape any sanctions.[102] The practice has shown that States widely used this possibility. In 23 out of 24 proceedings under Article 260(3), Member States completed notification at the last stage of judicial proceedings and thus avoided penalties despite their delay in notification. Therefore, the Commission should amend its policy and regularly start requesting a lump sum, as it has done under Article 260(2).[103]

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[95] 2010 Communication, para.27.

[96] Wahl, Prete, *op. cit* note 22., p.185.

[97] Wenneras, *op.cit.* note 42, p.19.

[98] Wenneras, *op.cit.* note 3, p.168.

[99] 2010 Communication, par.20.

[100] Peers, *op. cit.* note 89, p.38.

[101] 2010 Communication, par.21.

[102] Wenneras, *op.cit.* note 3, p.168.

[103] Wenneras, *op.cit.* note 42, p.19.

Third, Article 260(3) gives explicit authority to the Court to determine the day when the payment obligation imposed by the judgment shall take effect. Thus, the Court has opportunity to delay the effect of its judgment. As the Commission noted, Article 260(3) "allows the Court to set the date of effect as either the day on which the judgment was handed down or a subsequent date".[104] Notably, such an option is not totally new "since the Court has inherent jurisdiction to delay the application of its Article 260(2) judgments as well".[105]

6. CONCLUDING REMARKS

The mechanism of sanctions provided in Article 260 TFEU certainly contributes to better implementation of EU law. Besides the direct pressure on the countries on which sanctions are imposed, it acts preventively to all other Member States. Improvements made by the Lisbon Treaty further contribute to achieving these effects. Removing the reasoned opinion in Article 260(2) contributes to a faster imposition of sanctions for non-compliance with judgments, whereas the new paragraph 3 speeds up and simplifies the procedure for imposing sanctions in cases of the Member States' failure to notify the Commission about the national transposition measures within the prescribed time-limits.

As for Article 260(2), the case law has mainly clarified dilemmas regarding its application. However, the method of calculating the amount of sanctions remains ambiguous. The lack of binding rules in this area leads to frequent disagreement between the Commission and the Court on this matter, which is detrimental to the legal certainty and transparency.

There is much more uncertainty concerning Article 260(3) because of the lack of case law on this matter. Yet, we may still anticipate some developments regarding its application. It is almost certain that the Commission will soon start proposing penalty payment and lump sum cumulatively under Article 260(3), just as it has done under Article 260(2), in order to preclude the Member States' delayed notification of implementation measures, which is often given in the last stage of judicial proceedings, thus enabling the States to avoid any sanctions despite being in default. It can be expected with considerable certainty that the Court will not often use the possibility of postponing the enforcement of the imposed sanctions. Finally, having regard to the linguistic interpretation of paragraph 3, the Court should not be expected to impose a sanction that has not been proposed by the Commission.

[104] 2010 Communication, par.29.

[105] Peers, *op. cit.* note 89, p.47

It should be noted that, thus far, the Commission has acted in both proceedings under Article 260, primarily taking into account the political circumstances which have been used as guidelines in deciding whether to initiate proceedings, when to lodge a complaint, and what kind of sanctions to propose. By contrast, as an independent judicial authority, the Court has managed to keep the political circumstances aside and acted solely on the basis of legal criteria.

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THE PRELIMINARY RULING PROCEDURE AND THE IDENTITY REVIEW

ABSTRACT

Constitutional identity, as enshrined in Article 4(2) TEU might theoretically open up the possibility for EU Member States to refuse fulfilling certain obligations under EU law by referencing certain, as if yet not clearly defined elements of constitutional identity. Member States' constitutional identity, which is to be respected by the EU does not appear in positive law. Having regard to multilevel constitutionalism, it may be assumed that national constitutional identity will be elaborated in dialogues between national (constitutional) courts and the Court of Justice of the European Union. Based on previous practice however, the national and European interpretations of identity differ significantly. To achieve necessary convergence, the Court of Justice and national courts must cooperate in interpreting the concept of constitutional identity. This raises the necessity of examining whether the procedural prerequisites of this cooperation are given in national and EU public law. The questions to be examined are 1) whether the preliminary ruling procedure has already been used in identity-related cases, 2) what the position of constitutional courts/supreme courts (courts engaged in constitutional interpretation) is regarding the preliminary ruling procedure and 3) whether this may be considered the appropriate procedure when applying Article 4(2) TEU or would it require modification?

Keywords: *constitutional identity, identity clause, preliminary ruling, judicial dialogue*

1. INTRODUCTION

Constitutional identity, as stipulated in Article 4 (2) TEU, require a dialogue between the CJEU and the constitutional courts of Member States. This dialogue may be the institutionalized form of preliminary ruling procedure. This paper examines the role of preliminary ruling procedure in the application of Article 4 (2) TEU. The apropos of the research is that the German constitutional court turned to the CJEU in 2014, for the first time, with a preliminary ruling request,

and its Hungarian counterparts, when finally delivered a decision on the limits of EU law in November 2016, it has not even mentioned the possibility of the application of the preliminary ruling procedure.For doing so, an overview on the preliminary ruling procedure is offered. A summary on the case law and scholarly views on constitutional identity, the role of this procedure in the European constitutional law of Member States, and its appearance in practice follows. Against this background, a rough assessment can be made regarding its suitability of being a communication channel when Article 4 (2) TEU is applied.

2. THE PRELIMINARY RULING PROCEDURE

As our paper focuses on the possible avenues of judicial dialogue in the EU *vis-à-vis* the concept of national identity, we need to briefly look at the function and characteristics of the only formalised channel of communication between the CJEU and national courts: the preliminary ruling procedure.

2.1. The preliminary ruling procedure in EU law

The preliminary ruling procedure is a crucial element of the functioning of the EU legal order. The procedure enables national courts applying EU law to ask the Court of Justice for a ruling on (a) the interpretation of the Treaties; or (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. According to Article 267 TFEU, if such a question is raised before "any court or tribunal of a Member State", that court or tribunal may request the Court to give a ruling. The national court itself may decide whether it considers that a preliminary ruling on the question is necessary to enable it to give judgment or not. The essential function of the procedure according to the Court of Justice is to prevent the occurrence of divergences in judicial decisions on questions of EU law[1] within the European Union, as this would jeopardise the aims of integration by law, and thus to ensure uniform interpretation of EU law.[2] Secondly, the procedure also serves as a possibility for reviewing secondary EU law in the light of (written or unwritten) primary EU law, and in some circumstances, international law binding on the European Union.

The importance of the procedure is unquestionable as it served as the means for the Court of Justice not only to interpret EU law, but also to develop it – the 'constitutionalisation' of the EU legal order in the Court's jurisprudence took place

1 Case 166/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1974] ECR 0033.

2 Case 283/81 Srl CILFIT and Lanificio di GavardoSpA v Ministry of Health [1982] ECR 03415

largely (though not exclusively) via preliminary rulings, especially as far as the relationship between national law and EU law is concerned.[3] It is important to note that the preliminary ruling procedure does not establish a relationship of subordination between the courts concerned: each judicial institution acts within its own jurisdiction.[4] The preliminary ruling itself is binding on the referring national court and not a mere opinion.[5] Preliminary rulings regarding the validity of secondary EU law are binding on the referring court, as the national court is bound to refrain from applying the secondary act in question as a result of a judgment of the Court declaring it to be void – the ruling is directly only addressed to the referring court, however, such a ruling "is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give."[6] National courts themselves on the other hand have no jurisdiction to declare void secondary EU law.[7] Preliminary rulings regarding the interpretation of EU law (whether primary or secondary) are also binding in the case at hand, and may further be regarded as 'quasi-precedents' and can thus be taken into account by national courts. This forms the basis of the *acteéclairé* doctrine; according to the Court, the 'authority' of a previous preliminary ruling on interpretation may even absolve the national court from the obligatory initiation of the procedure especially when the "question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."[8] The Court even extended the doctrine somewhat by stating that the need to submit references to the Court of Justice may be unnecessary where the Court has already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even if the questions at issue are not strictly identical.[9] By

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3 See e.g. Dehousse, R.: *The European Court of Justice: The Politics of Judicial Integration,* Macmillan, London, 1998, pp. 36-45 or Stone Sweet, A.: *The Judicial Construction of Europe*, Oxford University Press, Oxford, 2004, pp. 64-107.

4 As the Court of Justice has emphasized, the procedure requires „the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision." Case **16/65**Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1965] ECR 00877

5 „The purpose of a preliminary ruling by the court is to decide a question of law, and that ruling is binding on the national court (…)"Case 52/76 Luigi Benedetti v MunariF.llis.a.s [1977] ECR 00163, paragraph 21

6 Case 66/80 SpA International Chemical Corporation v Amministrazione delle finanze dello Stato [1981] ECR 01191, par. 13-19.

7 Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 04199.

8 Joined Cases 28-30/62 Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration [1963] ECR 00031.

9 Case 283/81 Srl CILFIT and Lanificio di GavardoSpA v Ministry of Health [1982] ECR 03415, par. 13-14.

doing so, the Court of Justice invited the national courts – any national court – to refer to and apply its previous rulings.

From the point of view of our more specific topic, it can be stated that as regards its characteristics and effects, the preliminary ruling procedure seems adequate to be applied in the judicial dialogue between national courts and the Court of Justice on questions of national constitutional identity: references may made to the Court of Justice regarding the validity of secondary EU law which from the point of view of the national court seems to be ultra vires and/or contrary to Article 4 (2) TEU, and on the interpretation of Article 4 (2) TEU in general, though only if it is applicable in the case at hand. But are constitutional courts supposed to initiate preliminary ruling procedures?

2.2. The preliminary ruling procedure in the practice of national constitutional courts

The question whether Constitutional Courts may or should submit references for preliminary rulings to the Court of Justice is a debated one even after more than sixty years of European integration. From the point of view of the Court of Justice, the right to submit references is tied to the concept of 'national courts': the Treaties do not specify further which courts may or may not submit references, and also does not dwell on what exactly 'court' is supposed to mean in this context. That is why the Court of Justice has developed its jurisprudence pertaining to this issue, laying down requirements which an institution needs to fulfil in order to qualify as a 'court' in the meaning of Article 267 – namely: (1) is the body is established by law; (2) is it permanent; (3) is its jurisdiction compulsory; (4) is its procedure adversarial (inter partes); (5) does it apply rules of law; (6) is it independent; and (7) does it give decisions of a judicial nature.[10]

Constitutional courts should have no trouble satisfying these criteria – what is more, they would even be considered courts against whose decisions there is no judicial remedy under national law and thus obliged to initiate preliminary ruling procedures according to Article 276 TFEU, sentence 3 – save for the requirement of deciding in an adversarial procedure.[11] This criterion is however not of an absolute nature, as the Court of Justice itself notes that the TFEU does not make preliminary references contingent upon the national proceedings in question being

[10] Summarized e.g. in Case C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH [1997] ECR I-04961. For analysis of the criteria see e.g. Kaczorowska-Ireland, A.: *European Union Law* (Fourth Edition), Routledge, Abingdon-on-Thames, 2016, pp. 398-403.

[11] For further elaboration see Claes, M., *The National Courts' Mandate in the European Constitution*. Hart Publishing, Oxford, 2006, pp. 438-451.

inter partes.[12] If we look at the Hungarian Constitutional Court for instance, it is debatable whether it would qualify as applying an adversarial procedure: before the latest reform of the HCC in 2011, it was argued that the HCC does not fulfil this criterion[13], but recent changes imply a shift from ex post abstract review of laws to the adjudication of constitutional complaints, granting remedies in individual cases where fundamental rights of a person are violated (even if the constitutional complaint procedure is not adversarial in the classic sense).[14]Furthermore, depending on the kind of competence under which the constitutional courts proceed, there may arise a question as to whether the decision to be taken by them is of a 'judicial nature' or not (e.g. in the case of an abstract review of constitutionality of a norm). Once again however the practice of the Court of Justice has been unclear about what judicial nature is supposed to mean, the Court has rather emphasized that the decision should *not* be of an administrative nature.[15]

In practice, the Court of Justice has to the best of our knowledge never refused a reference from a national constitutional court, perhaps signalling also its readiness to engage in judicial dialogue.[16]

Another question is whether constitutional courts themselves are willing to initiate preliminary ruling procedures. In general terms, such courts are less obvious actors in the procedure than national courts as they are not faced directly with individual disputes where the application and/or interpretation of EU law is the question: constitutional courts do not essentially "need" EU law to perform their tasks[17], as they are the institutional safeguards of constitutionality, interpreting their respective national constitutions and ruling on the conformity of laws or ju-

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12 See *inter alia* JCase C-210/06 Cartesio Oktatóés Szolgáltató Bt. [2008] ECR I-09641, par. 56-61.

13 See Fazekas, F., *A magyar Alkotmánybíróság viszonya a közösségi jog elsőbbségéhez egyes tagállami alkotmánybírósági felfogások tükrében*, University of Debrecen, Debrecen, 2009, pp. 341-344. The author does not however consider the non-absolute nature of the requirement of an adversarial procedure.

14 Gárdos-Orosz, F.*, Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference*, German Law Journal, Vol. 16, No. 06, 2015, p. 1575

15 Forexample, courts deciding on the allocation of a surname to a child or the registration of a company have been held not to be in a position to request a preliminary ruling reference, wheres where a court hears an appeal against such a decision, its decision will be considered to be of a judicialnature. Chalmers, D.; Davies, G.; Monti; G., *European Union Law*, Cambridge University Press, Cambridge, 2010, 154.

16 Though it was noted by Claes that perhaps the Court of Justice didn't even realize when the first ever reference from a constitutional court had reached it from Belgium, initiated by the Belgian constitutional court (which was at the time still called *Courd'arbitrage*), as neither the Advocate General nor the Court mentioned this no doubt important fact. See Claes, M., Luxembourg, *Here We Come? Constitutional Courts and the Preliminary Reference Procedure,* German Law Journal, Vol. 16, No. 6, 2015, p. 1337.

17 Stone Sweet, *op. cit.* note 3. p. 81.

dicial decisions therewith. Yet a number of constitutional courts have already initiated preliminary rulings: the Austrian, Belgian, German Lithuanian, and Spanish constitutional courts, the French *Conseil Constitutionnel* and the High Court of Ireland have all submitted such requests, whereas the approach of others (the Polish Constitutional Tribunal, the Slovak and the Czech Constitutional Courts) is less clear.[18] But if and when a request for a preliminary ruling (from whichever court) references national identity, does the Court of Justice seize the opportunity?

Notwithstanding important references to the clause, we are yet to see the identity clause elaborated upon in more general terms and in a broader context by the Court of Justice. Looking at references made by the Court of Justice to Article 4 (2) TEU, the identity clause has been expressly mentioned in nine preliminary rulings, an infringement procedure, and an action for annulment[19]before the General Court.[20] Though not explicitly, but the Court of Justice has already demonstrated its willingness to protect Member States' national identity in the Omega case[21], what is more it has effectively already placed national identity before internal market freedoms in a concrete case in its judgment in the pre-Maastricht Groener case[22] (both were preliminary rulings). It is apparent that the majority of references to Article 4 (2) until now stem from preliminary ruling cases, reinforcing the idea that this 'communication channel' between national courts and the Court of Justice has potential to serve as tool in clarifying the scope and true meaning of the identity clause. Until now the Court of Justice however mostly relied on the identity clause as a supporting or subsidiary argument. In the most recent relevant judgment for instance (Bogendorff von Wolffersdorff), the Court of Justice used the identity clause as a subsidiary argument: it held that the German prohibition on titles of nobility should be considered an element of

18 For an overview see Claes, M., *op. cit.* note 16, pp. 1331-1342.

19 CaseT-529/13 Balázs-ÁrpádIzsák and Attila Dabis v European Commission [2016] EU:T:2016:282. The application was dismissed, the appeal by the applicant is still pending before the Court of Justice (Case C-420/16 P).

20 Data extracted from the curia.eu database. The identity clause was further mentioned in a Case C-253/12 JS, a reference for a preliminary ruling by the Supreme Administrative Court of the Czech Republic, but the case was deleted from the registry as the referring Czech court withdrew its request for a preliminary ruling [see: Ordonnance du Président de la Première Chambre de la Cour (27 mars 2013), EU:C:2013:212]. A further relevant action for annulment was found to be inadmissible by the General Court [see: Order of 6 March 2012,Case T-453/10Northern Ireland Department of Agriculture and Rural Development v European Commission [2012] EU:T:2012:106.

21 Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I–9609

22 Case C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR I–3967 – as noted by Besselink, L. F.M., Case C-208/09, IlonkaSayn-Wittgenstein v. Landeshauptmann von Wien, Judgement of the Court (Second Chamber) of 22 December 2010, nyr. Common Market Law Review, Vol. 49, 2012, p. 681

the national identity of Germany in the sense of Article 4(2) TEU, which may be taken into account as an element justifying a restriction on the right to freedom of movement of persons recognised by EU law.[23] It would seem from this reasoning that national (constitutional) identity serves as an underlying rationale of justified restrictions on the fundamental freedoms guaranteed by EU law based on public policy; thus serving as one of the possible public policy exceptions. From Article 4(2) TEU itself however it seems more that public policy may be an element of national identity as such, and not vice versa. Article 4(2) TEU should be regarded as possessing independent legal significance: as shown by the wording "shall respect", Article 4(2) TEU is construed as a legal obligation of the EU, not just a statement of principle with a mere interpretative function.[24]

In our view, in order for the preliminary ruling procedure to serve as an appropriate channel[25] for formalised judicial dialogue regarding national identity, a number of puzzle pieces need to fall into place (apart from the necessary situations having to present themselves of course as the Court of Justice does not rule on hypothetical questions[26]):

- National constitutional courts need to be willing to submit questions to the Court of Justice on issues related to national constitutional identity[27];
- The Court of Justice needs to undertake a more thorough analysis of the content and limits of Article 4 (2) TEU and clarify its place and function in the legal order of the EU;
- The Court of Justice needs to be receptive in principle towards accepting the reasoning of the national constitutional courts;
- National constitutional courts need to accept preliminary rulings as authentic, final and binding interpretations of EU law without any reservations.[28]

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23 Case C-438/14 Bogendorff von Wolffersdorffv Standesamt der Stadt Karlsruhe [not yetreported], par. 64.

24 Von Bogdandy, A; Schill, S.: *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, Common Market Law Review, Vol. 48, 2011, p. 27

25 We must note also that the identity clause could have relevance in actions for annulment as well, as member states could potentially use it in their argumentation against an EU norm which is perceived as interfering with national identity – of course, states would have to formulate their reasoning to fit one of the four annulment grounds stipulated by Article 263 TFEU; it seems quite possible however to link identity protection with lack of competence, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

26 Case 104/79 Foglia v Novello[1980] ECR 00745

27 For a missed opportunity see for example Decision 22/2016. (XII. 5.)of the Hungarian Constitutional Court, reviewed below.

28 For a discussion of the dangers of the relativisation of the legal effects of a preliminary ruling see the

3. CONSTITUTIONAL DIALOGUE, IDENTITY REVIEW, AND THE PRELIMINARY RULING PROCEDURE

3.1. The German practice

The German Court took the lead in employing the identity review. It was this court which, in its OMT reference, for the first time, made an empty promise of using the identity review. It claimed in its petition (2014)[29] that even if the CJEU would consider the OMT decision in accordance with the EU law, the constitutional court could examine if it was indeed in conformity with the Grundgesetz (GG) and did not infringe its identity as it is defended by Article 79.3 GG.[30] Its reason is that, due to the German Lisbon decision, democracy, thus a constituent element of the identity of the GG would be violated if the Parliament renounced the budgetary autonomy as it 'could no longer exercise its budgetary autonomy under its own responsibility'.[31] While the constitutional court, in the Lisbon decision took the position that 'the guarantee of national constitutional identity under constitutional and under Union law go hand in hand,'[32] it emphasized their difference in its OMT reference decision. The CJEU in the Gauweiler case[33]ruled that the OMT decision of the Central Bank was issued within its competence, therefore this particular piece of legal measure was not *ultra vires*. It also noted that the decision of the CJEU in the preliminary ruling procedure is obligatory forthe Member State.[34] The decision of the CJEU was, however, not followed by the 'promised' action of the German Constitutional Court, but on the contrary: it refused a constitutional complaint that was filed against the OMT decision of the Central Bank, and it based its ruling on the Gauweiler decision.[35] If it had been the end of the judicial dialogue between the courts, it would have meant that it was the CJEU that had the final say in identity issues. Yet, the CJEU took the requirement of sincere cooperation seriously and engaged in a judicial consti-

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Opinion of Advocate General Cruz-Villalon in Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag. Opinion of Advocate General Cruz Villalón [2015] EU:C:2015:7

29 BVerfG, Jan 14. 2014, 2 BvR 2728/13, URL=https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140114_2bvr272813.html, hereinafter: OMT reference decision. See also Wendel, *op. cit.* note 11, p. 285.

30 OMT reference decision [103], Wendel, *op. cit.* note 11, p. 285.

31 OMT reference decision [102]

32 German Lisbon decision, point 5.

33 Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag [2015] EU:C:2015:7

34 Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag [2015] EU:C:2015:7, par.16; Claes, M.; Reestman, J.-H., *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, German Law Journal Vol.16, No. 4, 2015, p. 918.

35 Judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

tutional dialogue and lately, it seems that the CJEU is willing to offer an 'interpretative method' to the Members States when it comes to the application of the European Arrest Warrant (EAW). At the beginning of 2016, it was to be seen how higher courts of Member States would consider the message the German Constitutional Court had sent in its order of 15 December 2015 when it first applied the constitutional identity test.[36] In its order, the Court refused the application of the framework decision on the European Arrest Warrant. It claimed that the application in the concrete case would qualify as disrespect of the constitutional identity of Germany, more precisely, the unchangeable provision on human dignity, stemming from some Articles of the Grundgesetz (Arts. 79.3, 1.1).[37] This action generated a judicial constitutional dialogue between national courts and the CJEU. The Aranyosi and Căldăraru case (5 April 2016),[38] even though constitutional identity was not mentioned therein, can be seen as a good example. The Higher Regional Court of Bremen, Germany, was uncertain as to the execution of the two European Arrest Warrants issued by Hungary and Romania due to poor prison conditions (overcrowding in prisons) which have already been condemned by, among others, the ECtHR.[39] In its decision, in the preliminary ruling procedure, the CJEU apparently offered an alternative interpretative method or another toolkit of legal arguments. Using them would make unnecessary the activation of the national constitutional identity review because the common application of the Charter (Articles 1 and 4) and the ECHR (Article 3) may reach the same goal without jeopardizing the unity and supremacy of EU law. The preservation and respect of human dignity in conjunction with the prohibition of inhuman or degrading treatment or punishment, a right that has utmost importance in, but not exclusively, Germany, could prevail.

3.2. The Hungarian experience

According to the decision 22/2016 (XII.5) of the Constitutional Court,there are two main limits for the conferred or jointly exercised competencies, under Article E) (2): it cannot infringe the sovereignty of Hungary (sovereignty review) and the constitutional identity of Hungary which is based on the historical constitu-

[36] 2 BvR 2735/14

[37] The subject of the EAW, due to some rules of the Italian criminal proceedings, would not have right to appeal in its case as the sentence was issued in absentia.

[38] Joined Cases C-404/15 and C-659/15 PPU Aranyosiand Căldăraru v Generalstaatsanwaltschaft Bremen [2016] EU:C:2016:198

[39] Varga and Others v. Hungary, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015, Voicu v. Romania, No 22015/10; Bujorean v. Romania, No 13054/12; Mihai Laurenţiu Marin v. Romania, No 79857/12, and Constantin Aurelian Burlacu v. Romania, No 51318/12

tion (identity review).[40] The Court, through Article E) (2), based the identity review on Article 4 (2) TEU. Even though the Court holds that the constitutional identity of Hungary does not mean a list of exhaustive enumeration of values, it still mentions some of them. For example: freedoms, the division of power, the republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power, protection of nationalities that are living with us. These equal with modern and universal constitutional values and the achievement of our historical constitution on which our legal system rests. According to the Court, the protection of constitutional identity may also emerge in connection with areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, and in areas in which the linguistic, historical and cultural involvement of Hungary can be detectable.In the German Lisbon decision, which the Court reproduces without any reference, however, all these are formulated in connection with 'the political formation of the economic, cultural and social living conditions', i.e., the exercise of the state power.[41]The Court holds that the constitutional identity of Hungary is a fundamental value that has not been created but only recognized by the FL and, therefore, it cannot be renounced by an international treaty. The defense of the constitutional identity of Hungary is the task of the Constitutional Court as long as Hungary has sovereignty.

The Court confirms that 'the objects of these tests are not directly the EU law or its validity'.[42]The question emerges, then, what is the object of the review? How can the Court establish whether a piece of EU legislation infringes the sovereignty or the identity of Hungary, if it does not examine, at least to some degree, the EU law, for which it clearly does not have the competence, and there is no established institutional mechanism in place for initiating a preliminary ruling procedure? The Court has not even noticed it could use the preliminary ruling procedure in this present or any future case.[43] It is also unclear, what are the consequences of infringement.Moreover, the identity review as a legal review is settled somewhere else in the German decision.[44] It is also ambiguous what 'defense of the constitutional identity of Hungary' precisely means, because the Court has not established

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[40] Drinóczi, T.: *The Hungarian Constitutional Court on the Limits of EU Law in the Hungarian Legal System*, URL=http://www.iconnectblog.com/2016/12/the-hungarian-constitutional-court-on-the-limits-of-eu-law-in-the-hungarian-legal-system/. Accessed 9 January 2017.

[41] Point 4 of the decision of the Lisbon decision of the German Court, or its marginal note 249.

[42] Decision [56]

[43] This opportunity was only mentioned by Judge István Stumpf in his consenting opinion at paragraph [103] of the decision.

[44] Point 5 of the decision of the Lisbon decision of the German Court, or its marginal note 240.

any legal consequences of the declaration of a conflict between EU law and national law under any of the reviews and it remains silent regarding the object of the reviews as well. Furthermore, the achievements of our historical constitution are far from clear. It is still a question what steps will the Hungarian state make if its constitutional identity is endangered: continue with non-compliance to EU law, or comply with it despite its conflicting nature with the identity protected in the constitution? Ultimately, the question is whether the referral to constitutional identity provides a constitutional basis for Hungary to exit the EU.

All this will make it difficult for the EU institutions, including the CJEU, to adequately consider the idenity of Hungary under Article 4 (2). It also does not help that the preliminary ruling procedure is not mentioned in the decision and there is no legal mechanism available for the Court to use this process. Nevertheless, the 'European constitutional dialogue' is a permanent reference in the interpretation of the Court in this case. It seems as if the Court would conceive it as an obligation that must be respected, or as a strong and almost sole legal argument for justifying the reviews created in this decision instead of developing a national constitutional law based reasoning, which is supported by some comparative law oriented justifications.[45] And yet, it has not considered the possibility of the application of the preliminary ruling procedure in this or regarding any future cases.

4. CONSTITUTIONAL IDENTITY AS APPLIED IN EUROPEAN INTEGRATION: THE IDENTITY OF THE CONSTITUTION

Based on the case law, we apply the following assumption: the 'constitutional identity' in the sense of Article 4 (2) TEU means the identity of the constitution.[46]

The German Constitutional Court constantly uses the phrase 'identity of the GG'– which is defended by Article 79.3 GG – in its Lisbon decision and OMT reference

[45] It attributed high importance to the constitutional dialogue within the EU. Therefore it examines the standpoints of Member States concerning the fundamental right-reservation and ultra vires acts. Then, it lists and even quotes several case laws of the national courts (Estonia, France, Ireland, Latvia, Poland, Spain, Czech Republic, England, Wales, UK, and Germany) on the relationship between the EU law and national law. In connection with the UK Supreme Court, it says: in one of its decision, the Supreme Court of the UK – complying with the requirement of constitutional dialogue between the Member States – referred to one of the rulings of the German Constitutional Court. Again, the Court mentions that the CJEU *respects* the competences of the Member States and *considers* their constitutional needs *in the framework of the European constitutional dialogue*.

[46] German, French case law: 2 BvR 2735/14, Judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13Decision n° 2004-498 DC of July 29th 2004, para. 6.

case.[47]In France, constitutional identity refers to some individual components of the French constitution (and not that of the state) which do not have matching counterparts in EU law. In the decision on the Bioethics Act, the Constitutional Council refused to examine the question of whether or not certain provisions of this Act, which implements a directive, constitute a violation of the Constitution, including the Declaration of Human and Civil Rights of 1789 (freedom of speech). The reason was that the freedom of speech is also 'protected as a general principle of Community Law' via Article 10 of the ECHR.[48]

As for doctrinal views, Biljana Kostadinov[49] for example sees constitutional identity in Croatia as a special form of national identity which embodies the provisions on the right of the people to decide on and pass the constitution in a free and democratic procedure, i.e., decisions concerning the state structure, the state of government, and the procedure in which these decisions are passed.[50]

It is also obvious that there is a significant gap between the identity concept emerging fromthe case law of the CJEU, the identity-interpretation of the (constitutional) courts and the opinion of the scholarly literature. The reason is, on the one hand, that there are only a few cases available in which the CJEU acknowledged the invocation of constitutional identity as enshrined in Article 4 (2) TEU by a Member State. On the other hand, it should not be disregarded that, due to the different position and role of the CJEU and national (constitutional) courts, the basis, framework, and scope of their interpretation practiceabout the nature, content, subject and extent of constitutional/national identity varies. Thisis true even if the interpretation is about how and why to apply the same treaty provision,Article 4 (2) TEU. In searching for the legally relevant meaning of Article 4 (2) TEU , the national constitutional or high court considers the constituent power and reveals the features and possibilities of the constitution-amending power that is drafted in or shaped by the constitution. As a following step, it examines the challenged competences to see which of them it cannot allow being jointly exercised with others Member States or the EU because it would amount to imperiling the preservation and protection of the identity of the constitution. German constitutional court has been the only one to theorize and apply this approach. Especially in the light of the recent practice of the German constitutional court, scholarly opinions taking the position that Article 4 (2) TEU has to apper-

[47] See e.g,.BVerfG, Jan 14. 2014, 2 BvR 2728/13, URL=https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140114_2bvr272813.html, hereinafter: OMT reference decision. See also Wendel, *op. cit.* note 11, 285.

[48] Decision n° 2004-498 DC of July 29th 2004, 6.point.

[49] Kostadinov, B. *Constitutional identity Iustinianus,* Primus Law Review, Vol. 3, No. 1, 2012, p. 10.

[50] *Ibid.,* pp. 10, 17-18.

tain to the most basic elements of national identity, which comprise the form of state, the form of government and 'a little more'[51]seem to be unfounded. It is also an apparently disputable statement that the 'structure' in Article 4 (2) TEU refers to the most significant attributes, among others – beyond those mentioned – the written or unwritten nature of the constitution, the majority or proportionality structure of the electoral system and the nature of the constitutional review.[52] Nevertheless, these considerations that evolve during the constitutional development of a particular state[53] may be the basis of the legal definition of the identity of the constitution under the scope of application of Article 4 (2) TEU.[54]

The following summary can be made of the identity of the constitution.

The practice of interpretation concerning the identity of the constitution is typically integration-friendly, and the identity review barely happens. Itcan, in certain fundamental rights-related cases, be protected by a general reference to the EU legal order, even without invoking Article 4 (2) TEU. In this way, i.e., when there is a genuine judicial constitutional dialogue,[55] the constitutional identity, as expressed in Article 4 (2), does not purport to breach the absolute primacy of EU law, or at least, by a proper interpretation exercise, it can be avoided. For this, see point 3 below.

The following are needed for upholding the identity of the constitution. First, the state needs to remain a state. The state can substantively apply comptences in which the supreme power is manifested. It means that the exercise of these competences cannot be emptied. See, e.g., the German differentiation regarding the con-

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51 Di Federico, G., *Identifying constitutional identities in the case law of the Court of Justice of the European Union*, p. 47, URL=http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws9/w9-federico.pdf. Accessed 9 January 2017.

52 Lehman, W., *European democracy, constitutional identity and sovereignty* Study, July 2010. PE425.618, p.11, URL=http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425618/IPOL-AFCO_NT(2010)425618_EN.pdf. Accessed 9 January 2017.The opinion of Besselink, according to which Article 4 (2) TEU does not defend those constitutional revisions, which are not fundamental and as such cannot contribute to the definition of constitutional identity, seems also to be an evasive statement. Besselink, L., 'National and constitutional identity before and after Lisbon' *Utrecht Law Review* Vol, 6, No. 3, 2010,p. 48.

53 Jacobsohn, G. J.,*Constitutional identity*, Harvard University Press, 2010; Rosenfeld, M., *Constitutional identity*, in Rosenfeld, M. – Sajó, A.eds, *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2011.

54 Cf. Grewe, C., *Methods of identification of national constitutional identity*,in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, eds., *National constitutional identity and European integration*, Intersentia 2013, p. 45.

55 Besselink holds that there is a need for cooperation between the justices of the CJEU and the constitutional courts of the Member States to determine what constitutional identity is and what it means within the special EU law context. Besselink, *op.cit.*note 52, at p. 45.

trol and the locus of the decision-making competence of the military forces. The German constitutional court distinguishes between the deployment of the army, which is in the exclusive power of the parliament, and as such, it cannot be transferred, and the possible supranational coordination of the armed forces. The competence regarding this latter specific coordination can thus be shared.[56]Second, the state can differentiate itself from other states due to the 'constitutionalization' of its individual and unique values and principles exclusively featuring that particular state that emerged and evolved in the courses of constitutional development or constitutional interpretation. This unique identity of its constitution makes it possible for the state to find its different and distinct markers in a community which is based on common constitutional traditions, values, and principles and which the given state created or, by accepting and complying with the set minimum requirements, joined. The national identity, as the 'collective identity of the constitutional subject', which is constructed and re-constructed during constitutional development, is shown in the constitution (identity of the constitution), in the guise of, e.g., the eternity clauses, which renders a unique character for both the constitution and the state itself. These eternity clauses can be altered neither by the common exercise of competences with the EU or the Member States. Third, there are integration-proof decision-making competences among those which specify the principles and the values constituting the identity of the constitution. Invocation of them, however, due to the legal consequences they may trigger, can happen only as a last resort or as an ultima ratio. Fourth, if the Member State takes 'identity' in the sense of Article 4 (2) TEU seriously, and if interpretation cannot resolve the conflict between the national and the EU law, it should apply legal consequences. They may be, as stated by the Polish Constitutional Tribunal,[57] the following: the constitution prevails; constitutional amendment will occur; the EU law will be amended; or the Member State leaves the EU to sustain the identity of the constitution.

It may be concluded thus, that it is necessary to enable dialogue between the CJEU and the national courts, and this seems to be realizing. The decision of 22/2016 (XII. 5) of the Constitutional Court of Hungary, however, due to the lack of

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[56] Lisbon decision of Germany, [254], [255]. This view facilitates to answer the question of some scholars regarding whether national identity (from the perspective of the EU law) and constitutional identity (from the perspective of the Member States) embodies cultural or just legal considerations. The reason for raising this issue was that cultural and linguistic diversity was relocated to Article 3 TEU (see Konstadinies, T., *The constitutionalisation of national identity in EU law and its implications*, 2013, pp. 3-4, URL=http://ssrn.com/abstract=2318972, URL=http://dx.doi.org/10.2139/ssrn.2318972, URL=http://uaces.org/documents/papers/1301/konstadinides.pdf), but one cannot deny the cultural aspects when reading Article 4 (2) TEU (see Besselink, *op.cit.* note 52, pp. 41,44).

[57] Decision K 18/04, 11 May 2005.

institutional and procedural mechanisms, does not fit in. Despite the commonly detected reluctance of the constitutional courts of the Member States in relation to the use of the preliminary ruling procedure, even the German Constitutional Court turned to the CJEU in 2014, for the first time in its history, regarding the OMT program of the European Central Bank.[58] As for the others, the Belgian constitutional court used the preliminary ruling procedure for the first time, and it is the most regular user of the procedure. Other constitutional courts which have already been ready for engaging in a formal constitutional dialogue with the CJEU are the Austrian, Lithuanian, Spanish, Italian, French, and Slovenian.[59] In the Hungarian decision on the limits of the EU law, however, this possibility has not even been mentioned.

5. CONCLUSION

The actual application of the identity review by the German constitutional court has almost occurred twice. It is interesting to see that it asked in its OMT reference decision whether a legal measure of an EU institution was ultra vires, but it, due to the CJEU decision, did not deliver any identity review but complied with and applied this preliminary ruling. However, when the Court refused the execution of the EAW because it infringed the constitutional identity of the GG, it did not implement a decision of a Member State that was based on EU law. Since the AranyosiandCăldăraru case, for similar cases and to achieve the same scope, another approach has been available. It is based more on the EU law and its principles and endangers its unity less, as compared to the constitutional law oriented, thus Member State-based reasoning with respect to identity. Against this background, we can observe that, as of today, it seems that 'constitutional identity review' in the case law of the CJEU has a somewhat marginal role while it has a more fundamental mission in the jurisprudence of the national courts. The invocation of constitutional identity against the application of EU legislation, however, is still a theoretical one, as it has only been Germany which actually applied this test and refused the execution of an EAW. It has not remained unnoted by the CJEU which, within the framework of the judicial constitutional dialogue, offered an alternative legal approach towards the protection of human dignity and related prohibitions.

Nevertheless a procedural issue with the preliminary ruling procedure as a channel of judicial dialogue may be raised: following the request for a ruling, the national

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[58] Thiele, A.,*Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, German Law Journal Vol. 15, No. 2, 2015, p. 241

[59] See Claes, M., *op.cit.* note 16, pp. 1331, 1337-1339.

court does not take part in the procedure in any form; the member state of the court is represented by the Government in the procedure, thus the judicial dialogue can easily turn into more of a monologue.[60] A recent request by the Italian constitutional court[61]brings to mind a further possibility, however: requesting the clarification of a CJEU judgment. According to Article 43 of the Statute of the Court[62], if the meaning or scope of a judgment is in doubt, the Court of Justice will provide it on application by any party or any institution of the EU establishing an interest therein.[63] This possibility could serve a further tool of communication between the courts – perhaps even as a last resort before applying any national constitutional identity-defence mechanism by a Member State constitutional court.[64]

The not always clear criteria applied by the Court of Justice regarding the definition of national courts as bodies entitled to submit preliminary ruling references perhaps also needs reconsideration in light of the growing willingness of constitutional courts to initiate such procedures. As we have seen, some of the criteria are somewhat malleable anyway, and Article 267 TFEU does not define 'courts' in a binding way, so the adjustment of the relevant practice to clearly include constitutional courts as possible initiators seems manageable and not explicitly contrary to earlier case law.

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60 Claes, M., *op. cit.* note 16, p. 1342.

61 Pollicino, O.; Bassini, M., *When cooperation means request for clarification, or better for "revisitation" – The Italian Constitutional Court request for a preliminary ruling in the Taricco case*. https://blogs.eui.eu/constitutionalism-politics-working-group/2017/01/29/cooperation-means-request-clarification-better-revisitation-italian-constitutional-court-request-preliminary-ruling-taricco-case/. Accessed 01 February 2017.

62 Protocol No 3 on the Statute of the Court of Justice of the European Union.

63 Such an application for interpretation must be made within two years after the date of delivery of the judgment or service of the order. The Court gives its decision after having given the parties anopportunity to submit their observations and after hearing the Advocate General. See Article 158 of the Rules of Procedure [Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L265, 29.9.2012), as amended on 18 June 2013 (OJ L173, 26.6.2013, p.65) and on 19 July 2016 (OJ L 217,12.8.2016, p.69).]

64 See Pollicino, O.; Bassini, M., *op. cit.* note 61.

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PROCEDURES REGARDING NATIONAL IDENTITY CLAUSE IN THE NATIONAL CONSTITUTIONAL COURT'S AND THE CJEU'S CASE-LAW

ABSTRACT

Besides the evolution of the concept of national identity through the work of scholars, a new era in the conceptualization of this concept came with the Lisbon Treaty and its so-called ''national identity clause" or the famous Article 4(2) TEU. Since Article 4(2) TEU does not determine the national identity of Member States, in order to determine it, our starting point should be its constitution, or, more precisely, certain principles of its constitution or a set of core values, principles and rules. A second important phase in this sense is the relevant constitutional court's case law. In this context, particularly important role play decisions regarding the relationship between the law of the European Union and domestic constitutional law. The German Federal Constitutional Court has developed the most elaborate jurisprudence on constitutional identity. This German approach has inspired the positions adopted by some other constitutional courts, and very possible will be aslo inspiration for future Croatian Constitutional Court position in this context. As it arises from the analysis of the CJEU's case-law, although it seems that Article 4(2) TEU offers a trap door to Member States to escape some of their EU law obligations, the overall picture is far from being so simple.

Keywords: *national identity, constitutional identity, constitutional court, Court of Justice of the European Union*

1. INTRODUCTION

Although the idea of national identity is far from being new,[1] it is well known that especially in the last few years ''national identity" is really *á la mode*.[2] And yet,

[1] Moreover, constitutional theorizing about i*dentity* has really deep historical roots. As G. J. Jacobsohn emphasises, ''In Book III of *The Politics* Aristotle asked, ''On what principle ought we to say that a State has retained its identity, or, conversely, that it has lost its identity and become a different State?" His answer requires that we distinguish the physical identity of a state from its real identity, Thus, 'The identity of a polis is not constituted by its walls.' Instead, it is constituted by it constitution, which for Aristotle refers to the particular distribution of the offices in a polis – what the moderns imply by sovereign authority – as well as the specific end toward which the community aspires." Jacobsohn, G. J., *Constitutional Identity*, Harvard University Press, Cambridge, Massachusetts, London, England, 2010, p. 7.

[2] Claes, M., *National Identity: Trump Card or Up for Negotiation*, in: A. Saiz Arnaiz, C. Alcoberro Llivina

despite its history and significance, there is no agreement what ''national identity'' means or refers to. As a consequence, many questions still have no clear answers and remain quite unclear, such as: ''What exactly is national identity?'', ''What does 'identity' means?'', ''Who is allowed to identify national identity?'', or ''Is there a difference between *national* and *constitutional* identity?''.

Albeit the scope and meaning of the national identity seem quite unclear and undetermined, academic literature has been all over the notion of national identity, especially after the Lisbon Treaty, which entered into force in December 2009, incorporated the so-called ''national identity clause'' in Article 4(2) TEU and after the famous German Constitutional Court decision on the Lisbon Treaty of 30 June 2009.

According to Rideau, currently only three Member States of the European Union do explicitly endorse *constitutional* identity: Germany, France and Poland, the notion is implied in Spain, Italy, Hungary and the Czech Republic, while this concept is blurred or absent in the remaining Member States.[3] One of this ''remaining Member States'' is Republic of Croatia.

2. WHAT IS ACTUALLY ''NATIONAL IDENTITY''?

Starting with the point that national identity is a concept far from being new and yet far from being clear, we may also add that is a concept far from being simple. We could also say that it is closely linked to terms ''*identity*'' or ''*constitutional identity*'', so close that it is ''common to use indiscriminately the terms ''national identity'' and ''constitutional identity'', because both refer to the same thing, constitution or domestic law.''[4]

The concept of *national* or *constitutional* identity has been addressed by many constitutional lawyers, scholars, students. According to Rosenfeld, one of the leading American experts in the field, constitutional identity is ''an essentially contested concept as there is no agreement over what it means or refers to. Conceptions of constitutional identity range from focus on the actual features and provisions of a constitution – for example, does it establish a presidential or parliamentary system, a unitary or federal state – to the relation between the constitution and the culture

(eds.)., National Constitutional Identity and European Integration, Intersentia, Cambridge – Antwerp – Portland, 2013, p. 109.

[3] Rideau, J., *The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model'*, in: A. Saiz Arnaiz, C. Alcoberro Llivina (eds.)., National Constitutional Identity and European Integration *op.cit.* note 2, p. 243.

[4] Flores Amaiquema, J. A., *National Constitutional Identity in the European Union and the Principle of Primacy*, LL.M. Final Thesis in Natural Resources and International Environmental Law, 2015, p. 77.

in which it operates, and to the relation between the identity of the constitution and other relevant identities, such as national, religious, or ideological identity."[5]

In elaborating the idea of constitutional identity, Marti writes about several meanings of the idea of constitutional identity: the identity of a constitutional text, the identity of a constitutional practice and tradition, the identity of the core values and principles of a constitution, the identity of the constitutional subject, the national identity, the (non-necessarily-national) identity of a political community, the religious, ethnic and cultural identity of the whole society or of some subgroups in the society, etc. [6] Marti writes that all this different meanings can be restated to a basic distinction between two different ideas of constitutional identity: the identity of the constitution and the identity of the people.[7] Additionally, Marti points out that ''the elements of the constitutional identity of a particular country are so fundamental that they should be specially preserved and protected from change. And that it is why they are often entrenched within the constitution itself."[8]

Smerdel writes that the core of the concept refers to certain principles of the national constitutions and that it can refer to different notions of ''identity": to what which essentially makes the constitution (and the state it governs) into what it is, and to what in which a constitution (and the states it governs) is different from some other constitutions. It might also mean the limits of the community authority over the legal system of a Member State and in particular its constitution.[9]

Constitutional identity, according to Núňez Poblete, ''expresses some sort of meta-constitution, understood as a set of norms or pre-constitutional principles that define the meaning of other constitutional norms, eventually coinciding, at a textual level, with other norms of different political communities."[10]

Besides the evolution of the concept of national identity through the work of scholars, a new era in the conceptualization of this concept came with the Lisbon Treaty and its so-called ''national identity clause" or the famous Article 4(2) TEU.

[5] Rosenfled, M., *Constitutional Identity,* in: M. Rosenfeld and A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, Oxford, 2012, p. 756.

[6] Luis Marti, J., *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in: A. Saiz Arnaiz, C. Alcoberro Llivina (eds.)., National Constitutional Identity and European Integration, Intersentia, Cambridge – Antwerp – Portland, 2013, p. 19.

[7] *Ibid.*

[8] *Ibid.*, p. 20.

[9] Smerdel, B., In *Quest of a Doctrine: Croatian Constitutional Identity in the European Union*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 64, No.4, 2014, p. 515.

[10] Quoted from: J. A. Flores Amaiquema *op.cit.* note. 4, p. 27.

Having in mind that the obligation that exist for the EU to respect national identity of its Member States has its history *before* Article 4(2) TEU – namely, in Article F(1) of the Maastricht Treaty (''The Union shall respect the national identities of its Member States, whose systems of government are founded on the principle of democracy.'"[11]), and then in Article 6(3) of the Amsterdam Treaty (''The Union shall respect the national identities of its Member States."[12]) – we could say that Article 4(2) TEU is quite longer and more descriptive than its predecessors. Namely, Article 4(2) provides: ''The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and loal self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."[13]

The link between national identity clause and the ''fundamental political and constitutional structures", is the reason why we may say that this distances the notion of national identity in Article 4(2) TEU from cultural, historical or linguistic criteria and turns to the content of national constitutional orders.[14] In our view, this is the reason why we may understand the Article 4(2) TEU as *national – repectively constitutional identity* clause. This corresponds with the understanding of national identity introduced since 1970s by national constitutional courts who use national identity as constitutional, not cultural concept.[15]

Additionally, since earlier versions of the identity clause were not subject to the jurisdiction of the CJEU, this implies a great difference when it comes to comparing it to Lisbon Treaty which ''institutionally increases the importance of the identity clause and further develops its content".[16]

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11 Treaty on European Union, available on: URL=http://europa.eu/eu-law/decision_making/treaties/pdf/treaty_on:european_union/treaty_on_european_union_en.pdf

12 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, URL=http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf

13 Consolidated version of the Treaty on European Union, URL=http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN

14 Von Bogdandy, A., Schill S., *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, Common Market Law Review, Vol. 48, 2011, p. 1427.

15 *Ibid.*

16 *Ibid.*, p. 1422.

Since Article 4(2) TEU does not determine the national identity of Member States, there have been some controversies about such questions as to *what* the Union should respect, what this ''identity" *precisely* consist of, and *who* decides on the identity of Member States. However, Von Bogdandy and Schill write that although Article 4(2) TEU does not determine the national identity of Member States, ''it establishes, by referring to 'fundamental political and constitutional structures, including regional and local self-government', criteria for the elements and self-understandings that may be protected under Article 4(2) TEU. EU law therefore sets up criteria that can be of relevance for the notion of national identity under Article 4(2) TEU. Thus, only elements somehow enshrined in national constitutions or in domestic constitutional processes can be relevant for Article 4(2) TEU."[17]

Without any doubt, this revised identity clause could be seen through the prism of a new era in the conceptualisation of the relationship between EU law and national law.[18] According to Von Bogdany and Schill, it can help to reconceptualize the relationship between EU law and national constitutional law and ''guide the way to a more nuanced understanding beyond the categorical position of the ECJ on the one side, which supports the doctrine of absolute primacy of EU law even over the constitutional law of Member States, and that of most domestic constitutional courts on the other, which largely follow a doctrine of relative primacy in accepting the primacy of EU law subject to certain constitutional limits."[19]

3. DETERMINATION OF THE NATIONAL, RESPECTIVELY CONSTITUTIONAL IDENTITY

Since Article 4(2) TEU does not determine the national, respectively constitutional identity of Member States, we could say that there is no specific rule to follow to determine it. Accordingly, we could also say that of particular importance for determining the content of national constitutional identity are (relevant) constitutional provisions, (relevant) national constitutional court's case law and (relevant) CJEU's case law.

3.1.1 Relevant constitutional provisions

In order to determine the content of constitutional identity of some Member State, our starting point should be its constitution, or, more precisely, certain

[17] *Ibid.*, p. 1430.

[18] Claes, M., *op.cit* note 2, p. 121.

[19] Von Bogdany, A., Schild, S., *op. cit.* note 14, p. 1418.

principles of its constitution or a set of core values, principles and rules. Almost all Member States of the EU enjoy a written Constitution, with the exception of the UK. Of course, not every constitutional element can be considered as part of the constitutional identity within the meaning of Article 4(2) TEU. This is why it is important to pay attention on constitutional provisions that prevent the legislature from making certain constitutional changes or that subject constitutional amendments to a specifically difficult procedure.[20]

In its writing on methods of identification of national constitutional identity, Grewe writes that there are principally three conceptions of constitutional amendments in European countries: (1) the substantial or material conception of the revision, that establishes a true hierarchy within the Constitution and that means that some provisions are excluded from any possibility of amendment (such as Article 79 paragraph 3 of the German Basic Law[21] or Article 288 of the Portuguese Constitution[22])[23]; (2) the procedural conception, that refers to a differentiation within the Constitution of two ways to amend the constitution, the total and the partial revision (such as the case with the three Baltic States, where the areas subjected to a total revision comprehend the first Chapter of the Constitution, in addition to the amendment provisions), and (3) the formal conception, that ignores any differentiation within the Constitution, so there is only one procedure for constitutional amendments and no provision is excluded from possible modification, and this is why in the framework of this conception is not possible to

[20] *Ibid.,* p. 1432.

[21] Article 79 paragrapf 3 of the German Basic Law: ''Amendment to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles lais down in Article 1 and 20 shall be inadmissible.”

[22] Article 288 of the Portuguesse Constitution: ''Constitutional revision laws shall respect: a. National independence and the unity of the state; b. The republican form of government; c. The separation between church and state; d. Citizens’ rights, freedoms and guarantees; e. The rights of workers, workers’ committees and trade unions; f. The coexistence of the public, private and cooperative and social sectors in relation to the ownership of the means of production; g. The requirement for economic plans, which shall exist within the framework of a mixed economy; h. The elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage; and the proportional representation system; i. Plural expression and political organisation, including political parties, and the right to democratic opposition; j. The separation and interdependence of the bodies that exercise sovereign power; l. The subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission; m. The independence of the courts; n. The autonomy of local authorities; o. The political and administrative autonomy of the Azores and Madeira archipelagos.

[23] Beside Germany and Portugal, six other Member States of the EU prohibit certain amendments: Cyprus, the Czech Republic, France, Greece, Italy and Romania.

draw any conclusion relating to the core of the Constitution (such as the case of Croatia[24]).[25]

In general, we may say that the principles that are constitutionally protected belong to the following categories: the protection of basic principles of State organization, State sovereignty and the principle of democracy, State symbols, State aims, the protection of human dignity, fundamental rights and the principle of law.[26]

Additionally, in order to define constitutional core, it is important to examine the introductory provisions of Member States' constitutions. Although the length and the style of preambles are quite varied, we may say that preambles have two principal functions. While the firts one consists of situating the Constitution in its time, the second one is interesting for the determination of constitutional identity because it consists of evoking the essence or the core of the Constitution.[27] The content of the ''introductory part" of the Constitution – whether or not have been provided with a special title such as Preamble, General Principles, Fundamental Principles, or Historical Foundations in Croatian case – contains two different provisions: the first refer to the constitutive elements of the State in a large sense (institutional or ''sovereigntist" content) and the second address the constitutionalism (constitutionalist or substantive content).[28]

If we choose to analyze the Constitution of the Republic of Croatia,[29] which was adopted on 21 December 1990 and it has been repeatedly amended and adapted to the exigencies of the time (in 1997, 2000, 2001, 2010 and 2013), we may firstly say that, of course, not every constitutional element can be considered as part of the constitutional identity within the meaning of Article 4(2) TEU. This is why it is important to pay attention on constitutional provisions that prevent the legislature from making certain constitutional changes or that subject constitutional amendments to a specifically difficult procedure. In this sense, it is important to note that Croatian Constitution is not one of those which contain prohibition of changing some of the constitutional norms. Consequently, this is why in the

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24 Beside Croatia, ten other Member States of the EU are implicated: Belgium, the Netherlands, Luxemburg, Denmark, Finland, Sweden, Irelan, Hungary, Slovakia and Slovenia.

25 Grewe, C., *Methods of Identifications of National Constitutional Identity*, in: A. Saiz Arnaiz, C. Alcoberro Llivina (eds.)., National Constitutional Identity and European Integration*, op.cit.* note 2, pp. 40-44.

26 Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1432.

27 Grewe, C.*, op.cit.* note 25, p. 44.

28 *Ibid.,* p. 45.

29 The Consitution of the Republic of Croatia - Ustav Republike Hrvatske, Oficial Gazette nos. 56/90, 135/97, 113/00, 28/01, 76/10, 85/10 – consolidated text, 5/14 – Decision by the Constitutional Court of the Republic of Croatia

framework of this formal conception is not possible to draw any conclusion relating to the core of the Constitution. However, we agree with Kostadinov who strongly believe that nothing prevents us from finding this ''eternal clause" in the text of the Constitution. Here we share the opinion of Prof. Constance Grewe who stressed that ''nothing prevents us from finding the boundaries in the text, even if they are not explicitly deemed inviolable, and nothing prevents constitutional judges to change their jurisprudence and to declare themselves entitled to protecting constitutional identity, even in the case of constitutional changes. Even if some legal system does not go as far as to determine the inviolable core of its Constitution, it will try to protect it because it represents its identity."[30]

In this sense, we believe that constitutional identity of Croatia is determined in the constitutional text, more precisely – in three constitutional provisions and in Historical Foundations of the Constitution.

Firstly, at the beginning of constitutional text, Article 1 defines the Republic of Croatia as a unitary and indivisible democratic and social state, while Article 3 establishes the highest values of the constitutional order of the Republic of Croatia, as the grounds for the interpretation of the entire constitutional text as well as its institutional provisions. The list of eleven highest values – freedom, equal rights, national equality, equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and democratic multiparty system – certainly represents the list of fundamental constitutional principles which have priority over all other constitutional norms.[31]

Secondly, we stress Article 17 paragraphs 3 of the Constitution which stipulates that °*Not even in the case of an immediate threat to the existence of the State may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition of torture, cruel or degrading treatment or punishment, on the legal definitions of punishable offences and punishments, or on freedom of thought, conscience and religion*." According to Kostadinov, exactly this compliance with the prohibition to limit the application of law, even in the cases of immediate threat to the existence of the State from Article 17, paragraph 3 of the Constitution, logically and theologically necessarily involves the inviolable

30 Constance Grewe, lecture on 22eme Cours Internationale de Justice Constitutionnelle Hiérarchie entre druits fondamentaux, Université Paul-Cézanne Aix-Marseille III, 8 and 9 September 2010, quoted from: Kostadinov, B., *Constitutional Identity*, Iustinianius Primus Law Review, Vol. 3:1, 2012, p. 16, URL=http://law-review.mk/pdf/04/biljana%20kostadinov.pdf

31 Smerdel, B., *Ustavnost izmjena Ustavnog zakona o pravima manjina (NN 80/2010) i Zakona o izboru zastupnika (NN 145/2010),* Političke analize, No. 8, 2011, p. 68.

constitutional ban to annual those rights, and therefore the constitutional identity of the Republic of Croatia. This prohibition to limit the application and thus the annulment of the obligation to respect human dignity, the essence of the rule of law's principles and the free democratic order is unalterable as a norm of Croatian Constitution.[32] Since human rights can be limited by law in ordinary conditions (according to Article 16 of the Constitution[33]) and in extraordinary conditions (according to Article 17 paragraphs 1 and 2[34]), this constitutional exemption via Article 17 paragraph 3 could be seen as the *inviolable essence* of the Constitution, or the *material core* of the Constitution, which is directed towards the protection of constitutional identity.

And finally, we stress the importance of the Historical Foundations of the Constitution, or its preamble, which has great (primarily) historical, but also symbolic and political, significance. In the context of constitutional identity, we point out that its part on national sovereignty which states that ''...*the Republic of Croatia is hereby founded and shall develop as a sovereign and democratic state in which equality, freedoms and human rights are guaranteed and ensured, and their economic and cultural progress and social welfare promoted*." This provision has served out as one of the most important grounds and guidelines for the interpretation of individual constitutional provisions and the Constitution as a whole.[35]

3.2. Relevant national constitutional courts' case law

As a starting point in determination of the content of constitutional identity, the constitutional provisions only give a first indications. A second important phase in this sense is the relevant constitutional court's case law. In this context, particularly

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[32] Kostadinov, B., *op.cit.* note 30, p 17.

[33] Acording to Article 16 of the Constitution, freedoms and rights may only be restricted by law in order to protect freedoms and rights of others, public order, public morality and health. Any restriction of freedoms and rights shall be proportional to the nature of the necessity for restriction in each individual case.

[34] Article 17 paragraph 1 of the Constitution stipulates that individual constitutionally-guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster. Such curtailment shall be decided upon by the Croatian Parliament by a two-thirds majority of all representatives or, if the Croatian Parliament is unable to convene, by the President of the Republic, at the proposal of the Government and upon the counter-signature of the Prime Minister. According to Article 17 paragraph 2, the extent of such restrictions must be adequate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, national or social origin.

[35] Smerdel, B., *The constitutional order of the Republic of Croatia on the twentieth anniversary of the ''Christmas Constitution". The Constitution as a political and legal act*, in: The Constitution of the Republic of Croatia, Novi informator, Zagreb, 2010, p. 95.

important role play decisions regarding the relationship between the law of the European Union and domestic constitutional law.[36]

According to Rideau, currently only three Member States of the European Union do explicitly endorse constitutional identity: Germany, France and Poland, the notion is implied in Spain, Italy, Hungary and the Czech Republic, while this concept is blurred or absent in the remaining Member States.[37]

The beginnings of the development of the notion of constitutional identity in the constitutional courts' case-law of respective Member States can be traced back to 1970s. The German Federal Constitutional Court has developed the most elaborate jurisprudence on constitutional identity. It referred to the concept of constitutional identity for the first time in its 1974 *Solange I*[38] decision and then later in a follow up judgment *Solange II* (1986). Whereas in the two Solange judgments the German Federal Constitutional Court had concentrated on the guarantees for the protection of fundamental rights in the Euro- pean (Economic) Community, in its 1993 *Maastricht* judgment it shifted its attention to institutional guarantees regarding the conferral of sovereign competences and the democratic legitimacy of EU action.[39] The famous *Lisbon* judgement on the compatibility of the Treaty of Lisbon with the German Basic Law of 30 June 2009 ''proceeded with great impetus to the concretisation of the Constitution's identity on which some positions adopted by the Court have relied until now".[40] The Federal Constitutional Court reviewed whether the inviolable core content of the constitutional identity of the Basic Law (pursuant to Article 23.1 third sentence) in conjunction with Article 79.3 of the Basic Law is respected. In this context, the Court held the following: ''The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area. The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20

36 Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1433.

37 See note 3.

38 BverfGE, Judgement of 29 May 1974

39 Kiiver, P., *The Lisbon Judgement of the German Constitutional Court: A Court-Ordered Strenghtening of the National Legislature in the EU*, European Law Journal, Vol. 16, No. 5, 2010, p. 580.

40 Rideau, J., *op.cit.* note 3, p. 246.

of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect."[41] In this case the German Federal Constitutional Court explicitly made reference to Article 4(2) TEU and considered that Germany's constitutional identity ''was defined by the so-called 'eternity clause' in Article 79(3) of the German Constitution",[42] which, as mentioned previously, prevents the legislature from making certain changes to the German Basic Law. Additionally, it is important to note that besides the principles laid down in Articles 1 and 20 of the German Basic Law (in particular human dignity, democracy, rule of law, federalism), the Court mentioned eight further fields that are particularly relevant to constitutional identity: (1) citizenship, (2) the civil and the military monopoly on the use of force, (3) revenue and expenditure including external financing, (4) deprivation of liberty in the administration of criminal law or placement in an institution, (5) cultural issues, (6) the shaping circumstances concerning family and education, (7) the ordering of the freedom of opinion, press and of association, and (8) the dealing with the profession of faith or ideology.[43]

This German approach has inspired the positions adopted by some other constitutional courts. The French Constitutional Council, for example, started to use the concept of constitutional identity in its decision of 27 July 2006,[44] when it reviewed the constitutionality of the Act pertaining to copyright and related rights in the information society and decided that ''the transposition of a Directive cannot run counter to an rule or principle inherent to the constitutional identity of France, except when the onstituting power consents thereto."

With decision 1146/1988,[45] the Italian Constitutional Court explicitly dealt with the problem of the existence of some supreme principles excluded from constitutional revision. It explicitly determined that ''the Italian Constitution contains some supreme principles that cannot be subverted or changed in their essential content neither by constitutional laws of revision nor by constitutional laws. These

[41] BverfGE, Judgement of 30 June 2009, 2 BvE 2/08, at 240, URL=http://www.bverfg.de/e/es2009 0630_2bve.00008en.html

[42] Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1438.

[43] López Bofill, H. *What is not Constitutional Pluralism in the EU*, in: A. Saiz Arnaiz, C. Alcoberro Llivina (eds.)., *National* Constitutional Identity and European Integration*, op.cit.* note 2, p. 229.

[44] Decision No. 2006-540 DC of 27 July 2006, URL=http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006_540dc.pdf

[45] Decision of Italian Constitutional Court No. 2006-540 DC dated July 27th 2006, URL=http:// http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006_540dc.pdf

principles are explicitly provided by the Constitution as absolute limits to power of constitutional revision, as the republican form of government (Art 139 of the Constitution) as well as the principles which, although not expressly mentioned among those not subject to the constitutional revision process, belong to the values upon which the Italian Constitution is founded."

The Spanish Constitutional Court in its Declaration 1/2004[46] addresses the issue of the compatibility of the Spanish Constitution of 1978 and the Treaty of the European Union. The limits to the integration process were summarised as follows: ''These material limits, which are not expressly included in the constitutional provision (Article 93), but which implicitly derive from the Constitution and from the essential meaning of the precept itself, are understood as respect for the sovereignty of the State, our basic constitutional structures and the system of fundamental principles and values established in our Constitution, in which fundamental rights acquire their own substantive nature". According to P. Pérez Tremps, thies brief formula provides the basis for ascertaining the content and scope of constitutional identity as defined by the Constitutional Court.[47] In this sense, writes Pérez Tremps, constitutional identity includes a safeguard for the State itself, which encompasses two formally different contents: the essential elements of the State and the essential elements of the Constitution.[48]

The Polish Constitutional Court in its 24 November 2010 decision on the constitutionality of the Lisbon Treaty,[49] ''manifestly inspired by the German model to which it moreover openly refers",[50] manifested its will to defend constitutional identity. The Constitutional Court shared the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on. Therefore, ''constitutional identity is a concept which determines the scope of "excluding – from the competence to confer competences – the matters which constitute (...) 'the heart of the matter', i.e. are fundamental to the basis of the political system of a given state" , the conferral of which would not be possible pursuant to Article

46 Tribunal Constitutional 13.12.2004, Declaration 1/2004, available in English on URL=http://www.tribunalconstitutional.es/es/jurisprudentia/restrad/Paginas/DTC122004en.aspx

47 Pérez Tremps, P., *National Identity in Spanish Constitutional Court Case-law*, in: A. Saiz Arnaiz, C. Alcoberro Llivina (eds.)., National Constitutional Identity and European Integration, *op.cit.* note 4, p. 270.

48 *Ibid.*

49 Constitutional Court, Judgement of 24 November 2010 – Ref. No. K 32/09 (Constitutionality of the Lisbon Treaty), available on: URL=http://www.tribunal.gov.pl/eng/summaries/documents/K_32_09_EN.pdf

50 Rideau, J., *op.cit.* note 3, p. 252.

90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle 203 of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences." Thus, ''the guarantee of preserving the constitutional identity of the Republic of Poland has been Article 90 of the Constitution and the limits of conferral of competences specified therein."

The Hungarian Constitutional Court in its 20 July 2010 decision on the constitutionality of the Act of promulgation of the Lisbon Treaty,[51] interpreted the relevant articles of the Constitution on sovereignty, democracy, rule of law and European cooperation. According to the Court, the so-called European clause cannot be interpreted in a way that would deprive the clauses on sovereignty and rule of law of their substance. The Court referred however to its former jurisprudence on the free limitation of the exercise of attributes of sovereignty by the holder of the sovereignty, i.e. in fact by the legislator. The Constitutional Court emphasized that material and procedural rules were duly observed during the adoption of the Act of promulgation and the Parliament gave its consent to the content of the Lisbon Treaty on its free will. To summarize, ''the Constitutional Court came to the conclusion that even if the reforms of the Lisbon Treaty were of paramount importance, they did not change the situation that Hungary maintains and enjoys her independence, her rule of law character and her sovereignty. Consequently, the application was rejected in all its elements."

The position of the Czech Constitutional Court on the constitutional identity is present in its decisions *Lisbon I* and *Lisbon II.* In its 2008 *Lisbon I* decision,[52] the Constitutional Court examined a petition from the Senate of the Parliament of the Czech Republic, seeking review of whether the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community is consistent with the constitutional order of the Czech Republic. As regards the

[51] Constitutional Court, 20 July 2010, Decision 143/2010. (VII. 14.) AB of the Constitutional Court of the Republic of Hungary on the constitutionality of the Act on promulgation of the Lisbon Treaty, Press release in English, available on URL=http://www.mkab.hu/admin/data/file/797_143_2010.pdf

[52] Constitutional Court, 2008/11/26 – Pl. US 19/08: Treaty of Lisbon, available on URL=http://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-I

sixth group of the Senate's objections (the Senate questioned whether Art. 2 of the TEU is consistent with Art. 1 par. 1 and Art. 2 par. 1 of the Constitution (the principle of the sovereignty of the people), ''the Constitutional Court stated that the values mentioned in Art. 2 and 7 of the TEU are fundamentally consistent with the values on which the material core of the Czech constitution rests (cf. Art. 1 par. 1, Art. 5, Art. 6 of the Constitution, Art. 1, Art. 2 par. 1, Art. 3, Chapter Four of the CFRF). Therefore, in this regard as well the Treaty of Lisbon is consistent with the untouchable principles protected by the Czech constitutional order. Insofar as the Senate relies on state sovereignty in this regard, the Constitutional Court stated that in a modern, democratic state, governed by the rule of law, state sovereignty is not an aim in and of itself, in isolation, but is a means for fulfilling the fundamental values on which the construction of a constitutional state governed by the rule of law, stands. Therefore, the Constitutional Court summarized that the Treaty of Lisbon changes nothing on the fundamental concept of current European integration, and that, even after the entry into force of the Treaty of Lisbon, the Union would remain a unique organization of an international law character." Accordingly, we may say that the Czech Constitutional Court considered the rule of law (Article 1(1) of the Constitution, free competition among political parties (Article 5 of the Constitution), the principle of non-discrimination (and protection of national minorities (Art 2 and 3 of the Charter of Fundamental Rights and Basic Freedoms) as part of the constitutional core. A year later, in its 3 November 2009 *Lisbon II* decision,[53] the Constitutional Court examined a petition from a group of senators of the Senate of the Parliament of the Czech Republic for review of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community for conformity with the constitutional order. The Constitutional Court did not consider itself authorised to establish material limits to the transfer of competences: ''However, the Constitutional Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine "substantive limits to the transfer of powers", as the petitioners request. It points out that it already stated, in judgment Pl. ÚS 19/08, that "These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion." Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have actually been made on the political level. For the same reasons, the Constitutional Court does not feel authorised to formulate in advance, in an abstract

[53] Constitutional Court, 2009/11/03 – Pl. US 29/09: Treaty of Lisbon II, available on URL=http://www.usoud.cz/en/decision/20091103-pl-us-2909-treaty-of-lisbon-ii-1.

context, what is the precise content of Article 1(1) of the Constitution, as requested by the petitioners, supported by the president, who welcomes the attempt "in a final list to define the elements of the 'material core' of the constitutional order, or more precisely, of a sovereign democratic state governed by the rule of law", and states (in agreement with the petitioners) that this could "limit future self-serving definition of these elements based on cases being adjudicated at the time."

This brief overview of national constitutional courts case-law demonstrates following: first, the German Federal Constitutional Court has developed the most elaborate jurisprudence on the constitutional identity and the judgements of this Court seem to serve as a reference point for other constitutional courts in Europe; second, this is the reason why – despite some differences in the jurisprudence of national constitutional courts – we may see a ''remarkable overall convergence",[54] and third, most of these constitutional courts have developed certain constitutional limits with regard to the protection of the statehood, the protection of the form of government and of the central principles of State organization, the protection of democracy, of the rule of law and, of course, of fundamental rights.[55]

With regard to the Republic of Croatia, in the case law of the Constitutional Court of the Republic of Croatia reference to constitutional identity has appeared and discussed only recently. First reference of the Croatian Constitutional Court to constitutional identity can be found in its Decision U-I-3597/2010 et al., from July 2011,[56] where the Court states that the constitutional identity of the Republic of Croatia is determined in paragraph 2 of the Historical Foundations of the Constitution: ''*…the Republic of Croatia is established as the national state of the Croatian people and the state of the members of national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrian, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Turks, Vlachs, Albanians and others, who are its citizens, who are guaranteed equality with citizens of the Croatian nationality and the realisation of national rights in accordance with the democratic norms of the UN and the lands of the free world*." This principle of equality of members of national minorities with citizens of the Croatian nationality as a part of Croatian constitutional

[54] Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1433.

[55] *Ibid.*, p. 1440.

[56] Decision of the Constitutional Court of the Republic of Croatia, Nos. U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011, U-I-994/2011, Zagreb, 29 July 2011, point 30.1, availabe on: URL=http:// http://sljeme.usud.hr/usud/praksWen.nsf/e540ceb6cd1e4ec0c1257de1004aa1f3/477e6dbf66aeaa69c1257e5f003d81f8/$FILE/U-I-3597-2010.pdf. In this case proceedings have been instituted to review conformity with the Constitution and Article 1 of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities.

identity was certainly a first step towards the Croatian theory of constitutional identity.

A second important step has been made two years later in the framework of Constitutional Court Communication on the citizen's constitutional referendum on the definition of marriage.[57] This Communication was issued on the occacion of the citizens' initiative "In the Name of the Family" (*U ime obitelji*) of mid 2013 requesting the calling of a national referendum to amend the Constitution of the Republic of Croatia whereby the definition of marriage as a living union between a man and a woman would be introduced into the Constitution.[58] In the case of the referendum on the definition of marriage, voting was conducted and a decision rendered in the Croatian Parliament to dismiss the proposal for the Croatian Parliament to act on Article 95 of the Constitutional Act on the Constitutional Court of the Republic of Croatia[59] (acording to which at the request of the Croatian Parliament, the Constitutional Court shall, in the case when ten percent of the total number of voters in the Republic of Croatia request calling a referendum, establish whether the question of the referendum is in accordance with the Constitution and whether the requirements in Article 8 paragraphs 1-3 of the Constitution of the Republic of Croatia for calling a referendum have been met) and file a request with the Constitutional Court on those two questions. By rendering a decision to dismiss the proposal for the Croatian Parliament to act on Article 95 of the Constitutional Act, the Croatian Parliament expressed its legal will that it deemed the content of the referendum question on the definition of marriage to be in conformity with the Constitution and confirmed that the constitutional requirements had been met to call a referendum on that question. However, pursuant to Article 125.9 of the Constitution and Article 2.1 in conjunction with Article 87.2 of the Constitutional Act, the Constitutional Court has the general constitutional task to guarantee respect of the Constitution and to oversee the conformity of a national referendum with the Constitution, right up to the formal conclusion of the referendum procedure. Accordingly, after the Croatian Parliament had rendered a decision to call a national referendum on the basis of a citizens' constitutional initiative, and it had not prior to that acted

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57 Constitutional Court, Communication on the citizens's constitutional referendum on the definition of marriage, No. SuS-1/2013, Zagreb, 14 November 2013,
availabe on: URL=http:// sljeme.usud.hr/usud/prakswen.nsf/.../$FILE/SuS-1-2013.doc.

58 The national referendum was requested by 683,948 voters, that is more than 10 percent of the total number of voters in the Republic of Croatia, At its session held on 8 November 2013, the Croatian Parliament adopted the Decision to call a national referendum, which was published in the Official Gazette no. 134 of 9 November 2013, and came into force on the day it was adopted.

59 Constitutional Act on the Constitutional Court of the Republic of Croatia, consolidated text, Official Gazette No. 49/02.

on Article 95.1 of the Constitutional Act, the Constitutional Court's general supervisory authority over the conformity with the Constitution of a referendum called in this way does not ceased. However, out of respect for the constitutional role of the Croatian Parliament as the highest legislative and representative body in the state, the Constitutional Court believed that it is only permissible to make use of its general supervisory authorities in that situation as an exception, when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity that it threatens to destroy the structural characteristics of the Croatian constitutional state, that is, its *constitutional identity*, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). The primary protection of those values does not exclude the authority of the framer of the Constitution to expressly exclude some other question from the circle of permitted referendum questions (point 5 of the Communication).

It is interesting that other Constitutional Courts' reflections on constitutional identity can be found in some other cases connected with the citizen-initiated referendum.

In this context, also in 2013 the citizens' initiative ''Headquarters for the Defence of Croatian Vukovar" (*°Stožer za obranu hrvatskog Vukovara*") succeeded in collecting the necessary number of signatures for the referendum to amend the Constitutional Act on the Right of National Minorities.[60] More precisely, the aim was to change minority language rights in the sense that existed provision (Article 12 of the Consitutional Act) ''equal official use of the language and script used by members of a national minority shall be realised in the area of a unit of local self-government when members of an individual national minority comprise *at least one third* of the population of such unit" change to ''*at least one half*" of the population of such unit. At the request of the Croatian Parliament, the Constitutional Court decided in its Decision U-VIIR-4640/2014[61] that the referendum question was constitutionally inadmissible. For us is interesting point 13.1 of the respective Decision, which states that ''Article 12.2 of the Constitution should be understood as a public law expression of the particular importance which the Constitution gives to the language and script of national minorities, these universal and permanent values which define the identity of the Croatian constitutional state." Exactly this declaration - that the respect for minority languages makes part

[60] Constitutional Act on the Rights of National Minorities, Official Gazette nos. 155/02, 47/10 – decision by the Constitutional Court of the Republic of Croatia, 80/10 and 93/11 - decision by the Constitutional Court of the Republic of Croatia

[61] Decision of the Constitutional Court, No U-VIIR-4640/2014, Zagreb, 12 August 2014

of the Croatian constitutional identity – was one of the most prominent features of this case.

In 2014, two more citizens' initiative by several trade unions (the first one demanded a referendum on preventing the outsourcing of non-core services in the public sector, while the second one demanded a referendum against the monetisation of the Croatian motorways) also succeeded in collecting the necessary number of signatures, but the Constitutional Court decided that respective referendums questions were (also) constitutionally inadmissible. In first case concerning the outsourcing,[62] the Court has repeated its statement from point 5 of the Communication on the citizen's constitutional referendum on the definition of marriage and stated that whith regard to the revision of the Constitution, it is the obligation of the Constitional Court to permit referendum ''*when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity that it threatens to destroy the structural characteristics of the Croatian constitutional state, that is, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution)*" (point 34.4.). In second case concerning the monetisation of Croatian motorways,[63] the Court declared that constitutional principle from Article 49 paragraph 1 of the Constitution, which states that entrepreneurial and market freedom shall be the basis of the economic system of the Republic of Croatia, and which must be seen together with the Article 3 of the Constitution, is especially linked to the conception of constitutionally guaranteed fundamental rights which builds *the identity of Croatian constitutional state* (poin 43.1.).

To sum up: in the case law of the Constitutional Court of the Republic of Croatia reference to constitutional identity has appeared and discussed only recently and the Court has defined following parts of the Croatian constitutional identity: first, Article 1 and Article 3 of the Constitution (the highest values of the constitutional order of the Republic of Croatia); second, constitutionally guaranteed fundamental rights, including respect for minority languages and entrepreneurial and market freedom, and third, the Historical Foundation of the Constitution, especially its paragraph 2 on equality of national minorities with citizens of the Croatian nationality.

On the other hand, as to the identity clause and as to the subsidiarity of the EU law in Croatian legal order in general, there is still no relevant case-law of the Croatian Constitutional Court. However, according to the former President of

62 Decision of the Constitutional Court, No. U-VIIR-1159/2015, Zagreb, 8 April 2015

63 Decision of the Constitutional Court, No. U-VIIR-1158/2015, Zagreb, 21 April 2015

the Croatian Constitutional Court Jasna Omejec, it is reasonable to presume that the relevant legal standpoints of the German Federal Constitutional Court will be carefully considered by the Croatian Constitutional Court in the coming period. This is primarily related to the ''standpoints of the German BVerfG that is obliged to intervene if a measure under EU law were to represent a clear or structurally significant *ultra vires* act, or if it were detrimental to Germany's constitutional identity as protected under Article 79.3 of the Basic Law, including the minimum standard of protection of fundamental rights demanded by the Basic Law."[64]

Consequently, the Croatian Constitutional Court will, in the coming period, have to define the fundamental meaning of the subsidiarity of the EU law in the Croatian constitutional order and also clearly define its constitutional identity. This has not been done to date. Concerning the constitutional basis of Croatian Constitutions' supremacy over EU law, it would not be hard to construe it by an objective interpretation – there is Article 2 of the Constitution (''The sovereignty of the Republic of Croatia is inalienable, indivisible and non-transferable"), Article 3 of the Constitution (the highest values of the constitutional order) and Article 5 of the Constitution (''In the Republic of Croatia laws shall conform to the Constitution, and other rules and regulations shall conform to the Constitution and law"). The EU derives its democratic legitimacy in Croatia within the meaning of Articles 143-146 of the Constitution (''European Union Law") in connection with Article 1 of the Constitution (''The Republic of Croatia is a unitary and indivisible democratic and social state. Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens. The people shall exercise this power through the election of representatives and through direct decision making"). Therefore, according to Omejec, ''the Constitutional Court could see itself as being obliged to monitor at least those actions that arbitrarily exceed the limits of the EU programme of integration, that is, the constitutional powers transferred to the EU, and, if necessary, to find such legal acts to be inapplicable in Croatia."[65] Until now the Constitutional Court has issued only one general legal standpoint concerning EU law. Namely, in the mentioned 2015 Decision on the monetization of Croatia motorways, the Court first established that a proposed Act on Amendments to the Roads Act was not in conformity with the Constitution and subsequently concluded that it was necessary to further review the conformity of referendum question with EU law in substance ''because the Constitution by its own legal force has supremacy over EU law" (point 60.).

[64] Omejec, J., *Study on European Constitutional Courts as the Courts of Human Rights. Assessment, challenges, perspectives*, Zagreb, 2016, p. 26, URL=http:// bib.irb.hr/datoteka/796420.OMEJEC_-_European_Constitutional_Courts_as_the_Courts_of_Human_Rights.pdf

[65] *Ibid.*, p. 27.

Having all this in mind, we strongly hope that Croatian Constitutional Court will actively participate in European constitutional pluralism exactly via constitutional protection of Croatian constitutional identity.

3.3. Relevant case-law of the Court of Justice of the European Union

Although the CJEU made a reference to the notion of national identity even *before* the Lisbon Treaty (for example, the notion of national identity was mentioned in several opinions of advocates general,[66] but in all of these cases '' reference was to the protection of the national *cultural* identity of the relevant States rather than to the more political form of it"[67]), the case *Sayn-Wittgenstein*[68] was the first that cited Article 4(2) TEU in relationship with primary law (in this case Article 21 TFEU) and national law (in this case Law on the Abolition of the Nobility). The case concerned the question whether the decision of Austrian authorities to change the surname of Austrian citizen residing in Germany (on the ground of the Law on the Abolition of the Nobility) from ''Fürstin von Sayn-Wittgenstein" (''Princess of Sayn-Wittgenstein) into ''Sayn-Wittgenstein" was in breach of Article 21 TFEU. While the Austrian Government has pointed out that ''the provisions at issue in the main proceedings are intended to protect the constitutional identity of the Republic of Austria. The Law on the abolition of the nobility, even if it is not an element of the republican principle which underlies the Federal Constitutional Law, constitutes a fundamental decision in favour of the formal equality of treatment of all citizens before the law", the ECJ found that ''the refusal, by the

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66 For example, Advocate General Maduro was one of the first to remark pre-Lisbon in *Spain v. Eurojust* (2005) and later in *Michinaki* case (2008). In *Spain v. Eurojust*, Maduro informs that ''In a Union intended to be an area of freedom, security and justice, in which it is sought to establish a society characterised by pluralism, respect for linguistic diversity is of fundamental importance. That is an aspect of the respect which the Union owes, in the terms of Article 6(3) EU, to the national identities of the Member States" and that ''language is not merely a functional means of social communication. It is an essential attribute of personal identity and, at the same time, a fundamental component of national identity." (Opinion of Advocate General Poiares Maduro delievered on 16 December 2004, available on: URL=http://curia.europa.eu/juris/showPdf.jsf?docid=49769&doclang=EN). In *Michinaki* case, Advocate General Maduro points that ''even in cases that fall within their scope, the provisions on freedom of movement do not replace domestic law as the relevant normative framework for the assessment of conflicts between private actors. Instead, Member States are free to regulate private conduct as long as they respect the boundaries set by Community law." (Opinion of Advocate General Poiares Maduro delievered on 23 May 2007, available on: URL=http://curia.europa.eu/juris/showPdf.jsf?docid=62533&doclang=en). We may see that in the first mentioned case it is stated that respect to national identity can be employed on grounds on nationality, while in the second as a means of derogating from EU free movement provisions.

67 Claes, M., *op.cit.* note 2, p. 130.

68 Case C-208/09 Sayn-Wittgenstein [2010] ECLI:EU:C:2010:806, availabe on: URL=http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0208&lang1=en&type=TXT&ancre=

authorities of a Member State, to recognise all the elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law cannot be regarded as a measure unjustifiably undermining the freedom to move and reside enjoyed by citizens of the Union." The ECJ held that measures which restrict a fundamental freedom may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures. The ECJ also accepted that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law. In this context, the Court has interpreted the constitutional background of the Law in questions as an element of Austria's public policy and stressed that ''the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions". Finally, in order to clarify the concept of public policy as a justification for restrictions of fundamental freedoms guaranteed in the EU law, the ECJ also pointed out that ''in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic." As emphasized by Von Bogdany and Schill, this case helps to clarify the understanding of Article 4(2) TEU in following ways: ''First, the ECJ noted the connection between the concept of national identity and the constitutional background of the interests that Austria's measures protected. Second, the ECJ held that the status of the State as a republic formed part of national identity, thus intensifying the nexus between national identity and fundamental constitutional principles. Finally, the Court embedded the respect for national identity in the present proceedings into its general jurisprudence on the relationship between fundamental freedoms and fundamental rights."[69]

Explicit mention of Article 4(2) TEU has been also made in case *Malgožata Runevič-Vardyn*,[70] that concerned a Lithuanian national (first applicant), member of the Polish minority (with Polish forename ''Małgorzata" and surname ''Runiewicz"),

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[69] Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1425.

[70] Case C-391/09, Malgožata Runevič-Vardy [2011] ECLI:EU:C:2011:291, available on: URL=http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0391&lang1=en&type=TXT&ancre=

married to a Polish national (second applicant) who complained, after the refusal of the Vilnius Civil Registry Division to change her forename and surname, as they appear on her birth certificate, namely ''Malgožata Runevič", to be changed to ''Małgorzata Runiewicz", that there had been discrimination on the grounds of race and invoked the enforcement of Article 21 TFEU and the Directive 2000/43. According to the Lithuanian Law, entries on certificates of civil status must be made in Lithuanian. Forenames, surnames and place names must be written in accordance with the rules of the Lithuanian language. (Article 3.282 of the Civil Code) and this rule has been confirmed by the Lithuanian Constitutional Court – this Court declared that a person's forename and surname had to be entered on a passport in accordance with the rules governing the spelling of the official national language in order not to undermine the constitutional status of that language. In this case the ECJ states that ''it is legitimate for a Member State to ensure that the official national language is protected in order to safeguard national unity and preserve social cohesion. The Lithuanian Government stresses, in particular, that the Lithuanian language constitutes a constitutional asset which preserves the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities." We may see that the Court has expressly relied on Article 4(2) TEU and affirmed that the EU should respect national identity of its Member States, which includes protection of a State's official national language. The Court also stressed that this objective pursued by national rules constitutes, in principle, ''a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law. Measures which restrict a fundamental freedom, such as that provided for in Article 21 TFEU, may, however, be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures."

Another interesting case concerning Article 4(2) TEU is case *O'Brien*,[71] concerning the refusal of the Ministry of Justice to pay Mr. O'Brien (Queen's Council and former Crown Court recorder) a retirement pension calculated pro rata temporis on the retirement pension payable to a full-time judge taking retirement at age 65 which has performed the same work. In this case some important questions were raised: first, who define the concept of workers who have on employment contract

[71] Case C-393/10, O'Brien [2012] ECLI:EU:C:2012:110, available on: URL=http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0393&lang1=en&type=TXT&ancre=

or an employment relationship and who determine whether judges fall within that concept – and here the ECJ emphasized that '' it is for the Member States to define the concept of 'workers who have an employment contract or an employment relationship' in Clause 2.1 of the Framework Agreement on part-time work and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81 and that framework agreement. An exclusion from that protection may be permitted only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, within the category of workers", and second, if according to national law, judges fall within the concept of ''workers who have an employment contract or an employment relationship" in Clause 2.1 of the Framework Agreement on part-time work, whether the latter must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from discriminating between full- and part-time judges, or between different kinds of part-time judges - the ECJ answered that the Framework Agreement on part-time work must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine. The ECJ also argued on the argument of Latvian Government (intervening in the case) that the application of European Union law to the judiciary has the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU. The Court held that the application, with respect to part-time judges remunerated on a daily fee-paid basis, of Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity, but merely aims to extend to those judges the scope of the principle of equal treatment, which constitutes one of the objectives of those acts, and to protect them against discrimination as compared with full-time workers. Accordingly, in this case we have seen that Article 4(2) TEU can be used by by various actors, not only by the parties in the proceeding, but also by the intervening parties.

As it arises from the above analysis of the CJEU's case-law, although it seems that Article 4(2) TEU offers a trap door to Member States to escape some of their EU law obligations, the overall picture is far from being so simple. It is obvious that Member States should be allowed some kind of discretion to develop the concept of constitutional identity, especially because, as it was stressed is *Sayn-Wittgenstein*, ''the specific circumstances which may justify recourse to the concept of public

policy may vary from one Member State to another and from one era to another". However, the Court has repeatedly noted that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions.

4. CONCLUSION

Besides the evolution of the concept of national identity through the work of scholars, a new era in the conceptualization of this concept came with the Lisbon Treaty and its so-called ''national identity clause" or the famous Article 4(2) TEU. Having in mind that the obligation that exist for the EU to respect national identity of its Member States have its history *before* Article 4(2) TEU, we could say that Article 4(2) TEU is quite longer and more descriptive than its predecessors. Namely, Article 4(2) provides: ''The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and loal self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

Since Article 4(2) TEU does not determine the national identity of Member States, we could say that there is no specific rule to follow to determine it. Accordingly, we could also say that of particular importance for determining the content of constitutional identity are (relevant) constitutional provisions, (relevant) national constitutional court's case law and (relevant) ECJ's case law.

In order to determine the content of constitutional identity of some Member State, our starting point should be its constitution, or, more precisely, certain principles of its constitution or a set of core values, principles and rules. In general, we may say that the principles that are constitutionally protected belong to the following categories: the protection of basic principles of State organization, State sovereignty and the principle of democracy, State symbols, State aims, the protection of human dignity, fundamental rights and the principle of law.

As a starting point in determination of the content of constitutional identity, the constitutional provisions only give a first indications. A second important phase in this sense is the relevant constitutional court's case law. In this context, particularly important role play decisions regarding the relationship between the law of the European Union and domestic constitutional law. The German Federal Consti-

tutional Court has developed the most elaborate jurisprudence on constitutional identity. This German approach has inspired the positions adopted by some other constitutional courts, and very possible will be also inspiration for future Croatian Constitutional Court position in this context.

As it arises from the analysis of the CJEU's case-law, although it seems that Article 4(2) TEU offers a trap door to Member States to escape some of their EU law obligations, the overall picture is far from being so simple. It is obvious that Member States should be allowed some kind of discretion to develop the concept of constitutional identity, especially because, as it was stressed is *Sayn-Wittgenstein*, ''the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another". However, the Court has repeatedly noted that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions.

In order to determine Croatian constitutional identity, our starting point was the Constitution of the Republic of Croatia. Having in mind that Croatian Constitution is not one of those which contain prohibition of changing some of the constitutional norms, and this is why in the framework of this formal conception is not possible to draw any conclusion relating to the core of the Constitution, we stress that constitutional identity of Croatia is determined in the constitutional text, more precisely – in three constitutional provisions and in Historical Foundations of the Constitution. Firstly, we stress Article 17 paragraph 3 of the Constitution which stipulates that *"Not even in the case of an immediate threat to the existence of the State may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition of torture, cruel or degrading treatment or punishment, on the legal definitions of punishable offences and punishments, or on freedom of thought, conscience and religion*." Secondly, at the beginning of constitutional text, Article 3 establishes the highest values of the constitutional order of the Republic of Croatia, as the grounds for the interpretation of the entire constitutional text as well as its institutional provisions. And finally, we stress the importance of the Historical Foundations of the Constitution, or its preamble, which has great (primarily) historical, but also symbolic and political, significance.

On the other hand, in the case law of the Constitutional Court of the Republic of Croatia reference to constitutional identity has appeared and discussed only recently. The Court has defined following parts of the Croatian constitutional identity: first, Article 1 and Article 3 of the Constitution (the highest values of the constitutional order of the Republic of Croatia); second, constitutionally guaranteed

fundamental rights, including respect for minority languages and entrepreneurial and market freedom, and third, the Historical Foundation of the Constitution, especially its paragraph 2 on equality of national minorities with citizens of the Croatian nationality.

As to the identity clause and as to the subsidiarity of the EU law in Croatian legal order in general, there is still no relevant case-law of the Croatian Constitutional Court. However, according to the former President of the Croatian Constitutional Court Jasna Omejec, it is reasonable to presume that the relevant legal standpoints of the German Federal Constitutional Court, including on constitutional identity issue, will be carefully considered by the Croatian Constitutional Court in the coming period.

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THE UNIFIED PATENT COURT – A NEW JUDICIAL BODY FOR THE SETTLEMNT OF PATENT DISPUTES WITHIN THE EUROPEAN UNION

ABSTRACT

The Unified Patent Court is established by the Agreement on Unified Patent Court, signed in February 2013 by twenty five EU Member States. The Agreement will enter into force after the ratification of thirteen Member States, including France, Germany and United Kingdom. The Unified Patent Court is a judicial body for the settlement of disputes relating to the European Patents and European Patents with unitary effect. European patent means a patent granted under the provisions of the European Patent Convention (EPC), which does not benefit from unitary effect by the virtue of Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection. European patent with unitary effect means a patent granted under the provisions of the EPC which benefits from unitary effect by the virtue of Regulation (EU) No 1257/2012. Taking into consideration a number of attempts to create a unified patent protection system within the EU, the first part of the article represents an overview to the history of establishment of the unified patent litigation system. The second part analyses legal bases, sources of law and structure of the Unified Patent Court. The special attention is devoted to the relation between the Unified Patent Court and the European Court of Justice. In the third part, the author examines challenges that will face the users of the new court for the settlement of disputes relating to the European Patents and European Patents with unitary effect.

Keywords: *Unified Patent Court, European patent, unitary patent, European Union, European Court of Justice.*

1. INTRODUCTION

In Europe, patent protection currently can be obtained in three ways: first, trough national patent offices which grant national patents based on the national patent law valid for the respective national territory; second, by the European Patent Office, which grants European patents based on the European Patent Convention

(EPC);[1] and third, on the base of Patent Cooperation Treaty under which only the procedure of examination of patentability of inventions is centralized, while the patents are indeed granted by national patent offices (Patent Cooperation Treaty is open not only to European countries, but also to the other countries outside the Europe and because of that it is not a subject of our interest in this paper).[2]

Under the EPC, the contracting states transfer their sovereign right to examine a patent application and to grant a patent with effect for their territory to an intergovernmental organization, the European Patent Organization (EPO).[3] So, with one single application, patent protection can be obtained in all EPO Member States. But, once a European patent is granted by the European Patent Office for all Member States, it has to be validated in each EPO Member State for which protection is being sought. As regards translation requirements, renewal fees and enforcement national laws are to be applied.

Therefore, Europe has a well-functioning and successful centralized application and granting procedure for all EPO Member States, but the European patent is not a unitary title. After granting, the European patent breaks down into a bundle of national patents, each governed by the national law of the Member State Country designed by the patent owner. The lack of a unitary post-grant procedure represents a substantial drawback of the EPO system. This has been criticized since the creation of the EPO.[4]

As a consequence, the terms of the exclusive rights, which they confer upon their owner, are determinate by the various national laws. It is to remedy this territorially fragmented and more or less diverse protection that, since about half century, the European Union attempts to establish an autonomous system of unitary patent protection of its own design, but has failed to achieve it whichever way it chose.[5]

In its paper, issued in 2007, the European Commission states that actions for infringement, invalidity counterclaim or revocation for the 'bundled' European patent are still subject to national laws and procedures. The existing system har-

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1 The European Patent Convention [2016] OJ EPO 6/2016.

2 Patent Cooperation Treaty, URL=http://www.wipo.int/pct/en/texts/articles/atoc.htm. Accessed 10 February 2017.

3 European Patent Office, URL=http://www.epo.org. Accessed 10 February 2017.

4 Hilto, R., Jager, T., Lamping, M., Ullrich H., *Comments of the Max Planck Institute for Intellectual Property, Competition and Tax law on the 2009 Commission Proposal for the Establishment of a Unified Patent Judiciary*, International Review of Intellectual Property and Competition Law, No. 7, 2009, p. 817.

5 Ullrich, H., *Harmonizing Patent Law: the Untamable Union Patent*, Max Planck Institute for Intellectual Property and Competition Law Research Paper, No. 12-03, 2012, p.1.

bours the danger of multiple patent litigations, which weakens the patent system in Europe and fragments the single market for patents in Europe. This has serious consequences for European competitiveness facing challenges from the US, Japan and emerging economic powers such as China.[6]

The major shortcomings of the existing European patent system are related to translation and publication costs, renewal fees, administrative complexity, legal uncertainty, etc.[7] All those characteristics can be summarized under two major drawbacks: the costs and the enforcement of the European patent.

On one hand, the EPO Member States aware of the high costs caused by validation requirements after a European patent entered into the national phase negotiated the so-called London Agreement in 2000.[8] The contracting states agree to waive the requirements for translation of European patents in a way that patent applications are to be only in one of the EPO's three languages (English, French or German). However, the patent claims are still published in all three languages. It is also provided the right to demand that a patent owner provide translations in an official national language for a conflicting patent in case of a legal litigation remains unchanged by the Agreement. The London Agreement has significantly contributed to reducing the translation costs in the contracting states.

On the other hand, as regards the enforcement of European patents, neither unified regulations nor a single jurisdiction for patent disputes dealing with issues which go beyond the borders of an EPO Member State exist. Any infringement, invalidity counterclaim or revocation regarding a European patent may well be subject to multiple and diverse national laws and procedures. It may also involve costly translation requirements as each national court has its own official court language(s). Claimants and defendants risk costly, long term, multiple litigations in multiple EPO Member States regarding the same patent issue.[9]

This fragmentation of patent litigation involves the possibility of substantive patent law being applied and interpreted differently when enforcing a patent. As a

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6 Communication from the Commission to the European Parliament and the Council, Enhancing the Patent System in Europe [2007] 165 Final.

7 Machek, N. How *Unitary' is the Unitary Patent?* URL=https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407357. Accessed 9 February 2017.

8 Agreement on the Application of the Article 65 of the Convention on the Grant of European Patents (London Agreement) [2001] OJ EPO 12/01.

9 Addor, F., Mund, C., *A Patent Court for Europe– What's at stake for users?* URL=https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236470&rec=1&srcabs=2117835&alg=1&pos=10. Accessed 6 February 2017.

result, it is possible to have contradicting case law within national patent courts which might undermine the value of the European patent.

The way the European patent system is set up makes a danger of multiple patent litigation and costly procedure. So, there were a number of attempts to create a unified patent protection system within the EU. One cannot understand the unitary patent package as it is shaped today without a brief look back on its history. Thus the first part of the article represents an overview to those attempts that preceded the singing of the Agreement on the Unified Patent Court. The legal bases, sources of law and structure of the Unified Patent Court are analyzed in the second part of the article, while the third part is devoted to the challenges that will face the users of the new court for the settlement of patent disputes in Europe.

2. THE HISTORY OF ESTABLISHMENT OF THE UNIFIED PATENT LITIGATION SYSTEM IN EUROPE

The current European patent system is dangerous in the way that multiple patent litigations may occur and procedures become very costly. Taking into consideration all possible negative consequences of this system on the competitiveness of the European innovation area, there were several attempts for establishing a reliable, cost-efficient patent litigation system that is highly effective and offers legal certainty for the territories of all EPO Member States.

2.1. The European Patent Litigation Agreement

In 1999 the French government called an intergovernmental conference of the ECP contracting states to discuss the shortcomings of the EPO system and possible solutions. On that occasion a Working Party on Litigation was set up with a task to present a draft optional protocol to the EPC which would commit signatory EPO States to an integrated judicial system, including uniform rules of procedure and a common court of appeal. That protocol was supposed to define the terms under which a common judicial entity could be established for any litigation relating to validity and infringement of European patents.

In the following years the EPO Working Party on Litigation drew up the Draft European Patent Litigation Agreement (EPLA). It was provided the establishment of a new international organization, independent from the EPO, composed of two bodies: a European Patent Court and an Administrative Committee. The Court would comprise court of first instance with a central division and various

regional ones. As regard s Administrative Committee, the representatives of all contracting states would be presented in it.[10]

According to the ELPA, the European Patent Court would be competent only for litigations concerning the infringement and validity of European patents effective in the territory of the contracting state. As regards the language of the proceedings of the European Patent Court, EPO's language regime (with English, French and German as official languages of the proceedings) would be applied.

When it comes to the application of the Community law (in particular, the Brussels Convention[11] and the Council Regulation 44/2001[12]), the European Patent Court could request the European Court of Justice (hereinafter: ECJ) to issue preliminary ruling. That preliminary ruling would be binding for the European Patent Court as pertaining to decisions with the effect in an EU Member State.

The ELPA was the first substantial approach towards a unified patent litigation system in Europe. It was drafted as an optional protocol, which means that it would be open for accession by all EPO Member States.

Users groups from industry, legal professions and patent judges have strongly supported the ELPA because the ELPA would be able to meet users' needs for an efficient court delivering fast, high quality first instance decisions at an affordable price. Additionally, the ELPA was expected to significantly reduce the number of cases and provide more legal certainty.[13]

However, in December 2005, the EPO Working Party on Litigation ceased its work. Namely, the European Commission announced its intention to engage in dialogue in order to ensure a sound IPR framework in EU. Despite the Commission's declaration that the ELPA was "a promising route towards a more unitary jurisdiction", it highlighted some institutional obstacles in the document. Introduction of the legal basis for the establishment of a Community patent jurisdiction in the Treaties[14] and the adoption of Directive 2004/48/EC[15] transfer the competence for establishing a unitary patent litigation system for the EU to the

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[10] Ćeranić, J., *O upostavljanju jedinstvenog postupka rešavanja patentnih sporova u Evropi*, Pravo i privreda, 7-9/2014, pp. 74-75.

[11] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59.

[12] Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L012.

[13] Addor, Mund, *op.cit.* note 9.

[14] Articles 229a and 225a TEC (Nice).

[15] Directive 2004/48/EC on the Enforcement of Intellectual Property Rights [2004] OJ L195/16.

European Commission. Furthermore, with the adoption of Council regulation on a Community patent, Member States would no longer have the right to act individually or even collectively to undertake obligations with non-Member Countries which affect those rules. Therefore, the EPO Working Party on Litigation decided to suspend the work in view of the parallel work of the EU in this field.

In spite of its lack of success, ELPA was important for the shift it brought about EU discussions. ELPA highlighted the importance of designing a judiciary for patent enforcement, so that this issue moved from a mere side issue to becoming a core focus. Accordingly, ELPA set a number of facts straight that formed the basis for the way ahead afterwards: ELPA showed that the EPO system urgently required a more effective litigation structure to better exploit the economic value and legal potential of EPO patents.[16]

2.2. The European and EU Patent Court

In December 2009, the EU agreed on the establishment of the unified litigation system. The draft agreement also included jurisdiction over the new EU patent. Because of the double competence of a new judiciary body (for European patents and future EU patents), the EU did not choose the regular legislative procedure of issuing an EU regulation to establish a new patent judiciary in Europe. It establishment was based on an international treaty according to Art. 218 of the Treaty on the Functioning of the EU. Since the proposed European and EU Patent Court (EEUPC) was to deal exclusively with disputes of European patents as well as future EU patents, the agreement was open not only to EU but to all EPO Member States.

As regards the institutional structure of the EEUPC, it was quite similar to the ELPA. However, there was one crucial difference – the exclusive jurisdiction for infringement and nullity actions over future EU patents. For that reason it was necessary to ensure the primacy of EU law by introducing preliminary rulings of the ECJ on the interpretation of the Treaty and the validity or interpretation of acts of EU institutions. Moreover, the ECJ's decisions would be binding on the EEUPC. So, it was not clear whether non-EU Members would have been obliged to accept the binding effects. And even had that been the case, whether they would have even accepted and joined the EEUPC under this condition, since they had not been involved in the drawing up of the EEUPC.

[16] Jaeger, T., *What's in the Unitary Patent package?,* Max Planck Institute for Innovation and Competition Research Paper No. 14-08, 2014, p. 5.

Despite the obligation for non-EU Members to comply with the ECJ's decisions and the dubiousness of acceptance, the EEUPC was a promising proposal to develop a pan-European patent litigation system with 27 EU Member States[17] as well as the 11 non-EU EPO Member States. It would have successfully eliminated some of the shortcomings that users of the patent system still have to face in Europe. The EEUPC would have brought lower costs, greater effectiveness and enhanced legal certainty through an integrated, two-level judicial system for patent litigations related to infringement and validity of European and EU patents, and with uniform rules of procedure and a common Court of Appeal.[18]

Nevertheless, with the EEUPC, not all concerns regarding the fragmentation of the patent litigation system in Europe were dismissed. The obligation to comply with the EU law as well as the unpredictable political will by interested non-EU EPO Member States in accepting the primacy of EU law when accessing the EEUPC could lead to the situation in which a patent owner or a third party involved in a patent conflict could still be confronted with the multiple patent litigations.

The EEUPC, as an international agreement, provided the establishment of an international court outside the legal EU framework. This court had exclusive jurisdiction to deal with infringement and revocation of EU patents. But the question regarding the compatibility of the EEUPC with the EU Treaties was open recently after the signing of the Agreement.

Thus, on 24 April 2009, the Council of the EU requested an opinion by the ECJ regarding the compatibility of the mentioned agreement with the EU law. On March 2011, the ECJ issued Opinion 1/09, finding that the EEUPC was not compatible with the EU Treaties. The ECJ based its opinion on the following considerations:[19]

- Under the current agreement, the EEUPC is an institution which is outside the institutional and judicial framework of the EU with a distinct legal personality under national law;
- The draft agreement confers on the EEUPC exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of patents. To that extent, the courts of the EU Member States are divested of that jurisdiction;

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[17] By that time, the Republic of Croatia was not a Member State of the EU.

[18] Addor, Mund, *op. cit.* note 9.

[19] EJC Opinion 1/09, *Draft Agreement on the Creation of a European and Community Patent Court* [2011].

- The creation of the EEUPC would deprive national courts the power of, as the case may be, the obligation to refer questions to the ECJ for a preliminary ruling in the field of patents;
- The EEUPC has, unlike other international judicial systems on which the ECJ has ruled in the past, the duty to interpret and apply not only the envisaged international agreement, but also provisions of European Union law;
- If a decision of the EEUPC were to be in breach of EU law, it could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States.

The ECJ observed that the agreement would alter the essential character of powers conferred on the institutions of the EU and EU Member States, powers which are indispensable to the preservation of the very nature of EU law. In consequence, the ECJ concluded that the envisaged agreement on the creation of the EEUPC was not compatible with the provisions of EU law.

3. THE UNIFIED PATENT COURT

After the Opinion 1/09 of the European Court of Justice, the Council started to revise the Agreement on the creation of the EEUPC according to the considerations of the Court. In 2011 the European Commission presented a solution for a unified patent litigation system in response to Opinion 1/09 and a large majority of Member States endorsed it. It was agreed that a Unified Patent Court (UPC) should be established by an agreement creating a jurisdiction common to EU Member States only.[20]

The question of compatibility of a new unified patent litigation system with the EU law was raised once again in October 2012. Namely, a group of professors of law and lawyers launched an initiative, considering necessary to draw attention to the situation of a project for European Court System, specifically for patents. In that initiative they expressed the opinion that the compliance of the new patent litigation system with the provisions of the EU law should be reexamined.[21]

In their initiative they stated that the system would be the result of a treaty to be agreed between the majority of EU Member States. The aim of the treaty, at that time still at the draft stage, was to create a new court of an international nature

[20] Unified Patent Court, URL=https://www.unified-patent-court.org/. Accessed 10 February 2017.

[21] *Motion on the project on European Patent Court by Law professors and lawyers,* URL=http://www.unitary-patent.eu/content/motion-project-european-patent-court-law-professors-and-lawyers. Accessed 9 February 2017.

to give rulings on the validity and infringement of European patents and future unitary patents. The jurisdiction of this proposed court would take precedence over that of national courts.

On 8 March 2011, the ECJ gave a negative opinion on the draft treaty submitted by the Council. It declared this draft incompatible with the European Union Treaty and the Treaty on the Functioning of the European Union. Thereafter the draft treaty was amended with particular regard to the objections made by the Court. Nevertheless, serious doubts had been expressed on the conformity of the new draft with these objections.

In the main these doubts arise from the fact that the draft deprives the national courts of their own jurisdiction on those matters under consideration, hence depriving those taking legal action (companies) from being judged by them while, according to the Court, the European Union judicial system is founded upon joint cooperation between EU and national courts.[22]

It is also interesting to mention that the opinion of the Legal Department of the Council was sought on the compatibility of the modified draft with that of the Court. Public access to the complete wording of this opinion has been prohibited. If this opinion concluded that the modified project conformed to the Treaties, it was not apparent why the content was inaccessible to the public. The secrecy reinforced the doubts expressed beforehand and elsewhere.

Despite the great impact of this initiative in public, its initiators did not achieve what they pleaded for.[23]

Shortly after, in December 2012 the European parliament and the Council adopted the unitary patent package consisted of three components: two regulations (Regulation (EU) No 1257/2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection[24] and Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection with regard to the applicable translation agreements[25]) and the Agreement on a Unified Patent Court.[26]

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22 *Ibid.*

23 Ćeranić, J., *Jedinstveni patentni sud – novi pravosudni organ za rešavanje sporova u vezi sa evropskim i unitarnim patentom*, Strani pravni život, No. 3/2013, 2013, pp. 124-125.

24 Regulation (EU) No 1257/2012 of the European parliament and of the Council implementing enhanced cooperation in the area of the creation of the unitary patent protection [2012] OJ L361.

25 Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection with regard to the applicable translation agreements [2012] OJ L361.

26 The Agreement on a Unified Patent Court, URL=https://www.unified-patent-court.org/sites/default/

3.1. Legal basis

In contrast to the ELPA and the EEUPC, a new patent litigation system is based on an international treaty among EU Member States only: the Agreement on a Unified Patent Court (UPC) and the Draft Statue. According to the Agreement the UPC will have exclusive jurisdiction in respect to infringement or revocation actions over both European patents and future unitary patents – European patents with unitary effect. The exclusive competence is however subject to exceptions during the transitional period. The UPC's rulings will have effect in the territory of those Contracting Member States having ratified the UPC Agreement at the given time. The UPC will not have any competence with regard to national patents.

The UPC Agreement is open to accession by any Member State of the EU. Namely, the Agreement is also open for EU Member States which do not participate in the enhanced cooperation in the field of patent protection (i.e. and Spain). At the same time, it is not be open to the accession for EU Member States that are EPO members (such as Switzerland, Turkey or Norway). As a result, decisions by the UPC regarding unitary patents will only be binding on the EU Member States participating in the enhanced cooperation while decisions regarding 'classic' European patents will only be binding on contracting Member States of the UPC.[27]

The Agreement on a UPC was concluded on 19 February 2013. Up to date, the Agreement was signed by all EU Member States, except: Spain, Poland and Croatia. Even though negotiated under the ambit of the Council, the Agreement was concluded outside of the EU legal framework and therefore would be organizationally separated and essentially independent from both the national and the European Union's judicial system.[28]

It is provided that this agreement shall enter into force on 1 January 2014 or on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place or on the first day of the fourth month after the date of entry into force the amendments to

files/upc-agreement.pdf. Accessed 10 February 2017 (UPC Agreement).

27 Addor, Mund, *op. cit.* note 9.

28 Ćeranić, J. *Unitarni patent*, Institut za uporedno pravo, Pravni fakultet Univerziteta u Banjoj Luci, Beograd 2015, pp.63-65.

the Regulation (EU) No 1215/2012 concerning its relationship with this Agreement, whichever is the latest.[29]

3.2. The Primacy of Union Law, Liability and Responsibility of the contracting Member States

The agreement includes a new chapter on the Primacy of Union Law, Liability and Responsibility of the contracting Member States. This chapter was introduced in order to take account of the ECJ's negative Opinion 1/09, in which it stated that the creation of the European and Community patent Court was incompatible with the EU law if – while applying EU law – it was outside of the EU's legal order. Thus important amendments have been introduced in the UPC Agreement. According to the Agreement the Court shall apply Union law in its entirety and shall respect the primacy.[30] Therefore, the Agreement addresses the recognition of the absolute primacy of EU law and the contracting Member State's obligation to ensure that the UPC complies with EU law.

The Agreement also contains provisions for preliminary rulings by the ECJ which are binding on the UPC and for the rules governing the responsibilities of the contracting states. As a court common to the contracting Member States and as a part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with the Article 267 TFEU in particular. Decisions of the ECJ shall be binding on the Court.[31]

As regards liability for damages in the case of infringement of EU law, it is provided that contracting Member States are jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal, in accordance with Union law concerning non-contractual liability of Member States for damage caused by their national courts breaching Union law.[32]

The Agreement on UPC will be supplemented by separate Rules of procedure (RoP), which will lay down the details of the procedure for the UPC. Work on a preliminary draft for the RoP started in 2009.

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[29] Art. 89 UPC Agreement.

[30] Art. 20 UPC Agreement.

[31] Art. 21 UPC Agreement,.

[32] Art. 22 UPC Agreement.

3.3. Sources of law

The sources of law applied by the UPC are precisely enumerated by the Agreement. It is provided that the Court shall base its decisions on:[33]

- Union law, including Regulation (EU) No 1257/2012 and Regulation (EU) No 1260/2012;
- The Agreement on UPC;
- The EPC;
- Other international agreements applicable to the patents and binding on all the contracting Member States; and
- National laws.

3.4. Structure

The Agreement on the UPC provides the institutional structure of the UPC. The Court shall comprise a Court of the First Instance, a Court of Appeal and a Registry.[34]

The Court of First Instance shall comprise a central division as well as local and regional divisions.[35]

The central division shall have its seat in Paris, with sections in London and Munich.[36]Section in London[37] shall deal with human necessities and chemistry, including pharmaceuticals, while Munich section shall deal with mechanical engineering. The central division in Paris shall deal with cases concerning performing operations; transporting, textiles, fixed constructions, physics and electricity.

A local division shall be set up in a contracting Member State upon its request in accordance with a Statue. A contracting Member State hosting a local division shall designate its seat.[38] The Agreement also provides a possibility of establishing

33 Art. 24 UPC Agreement,.

34 Art. 6(1) UPC Agreement,.

35 Art. 7(1) UPC Agreement.

36 Art. 7(2) UPC Agreement.

37 The Brexit has also influenced the Unitary Patent System. It is to be seen whether the United Kingdom would ratify the Agreement. And even if a way is found to keep the United Kingdom in the Unitary Patent System after the Brexit, it is questionable whether London can keep its seat as a of a central division of UPC. Milan is often mentioned as a possible solution for the seat of a central division of UPC (the European Patent Office in 2015 granted 2476 patents to Italian patentees, ranking Italy in 3rd position in the European Union after Germany and France and before the United Kingdom).

38 Art. 7(3) UPC Agreement

additional local divisions. An additional local division shall be set up in a contracting Member State upon its request for every one hundred patent cases per calendar year that have been commenced in that contracting Member State during three successive years prior to or subsequent to the date of entry into force of this Agreement. The number of local divisions in one contracting Member State shall not exceed four.[39]Given that in Germany there is a sufficiently high case count, it is likely that altogether four local divisions will be set up, seated in Dusseldorf, Mannheim, Hamburg and Munich.[40]According to the Agreement any panel of a local division in a contracting Member State where, during a period of three successive years prior or subsequent to the entry into force of this Agreement, less than fifty patent cases per calendar year on average have been commenced shall sit in a composition of one legally qualified judge who is a national of the contracting Member State hosting the local division concerned and two legally qualified judges who are not nationals of the contracting Member State concerned and are allocated from the Pool of judges.[41] For local divisions that deal more than fifty patent cases per calendar year, it is provided that the panel comprises two national judges and one foreign judge. This third judge shall serve at the local division on a long term basis, where this is necessary for the efficient functioning of divisions with a high work load.[42]

A regional division shall be set up for two or more contracting Member States, upon their request in accordance with the Statue. Such contracting Member State shall designate the seat of the division concerned. The regional division may hear cases in multiple locations.[43]The Agreement does not list which countries are going to set up local or regional divisions. The first of such regional divisions was however considered by Scandinavian countries: Denmark, Sweden and Finland. The panels of regional divisions will comprise two judges from participating Member States that are hosting the division and a third judge from another Member State.[44]

The Court of Appeal, located in Luxembourg, shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States and two technically qualified judges with qualifications and experience in the field of technology concerned.[45]

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39 Art. 7(4) UPC Agreement.

40 Machek,*op. cit.* note 7.

41 Art. 8(2) UPC Agreement.

42 Art. 8(3) UPC Agreement.

43 Art. 7(5) UPC Agreement.

44 Art. 8(4) UPC Agreement.

45 Art. 9(1) UPC Agreement.

The Registry shall be set up at the seat of the Court of Appeal, i.e. in Luxembourg.[46]The training centre for the judges shall be in Budapest and the Patent Arbitration and Mediation Centre shall be divided between Lisbon and Ljubljana.

3.5. The entry into force of the UPC Agreement

The Preparatory Committee is composed of all the Signatory States to the Unified Patent Court Agreement. All these states undertook to establish the new court and the Preparatory Committee's function is to oversee the various work streams. There are five major work streams which will constitute the work which needs to be completed. These are: legal framework, financial aspects, information technology, facilities, and human resources and training.

The Preparatory Committee will exist until the Court is established. Currently this is expected to last two years and during this time it will have its own Rules by which it is governed.

The Preparatory Committee is now working under the assumption that the Provisional Application Phase will start end of spring 2017, presumably in May, and that the Agreement on the UP can enter into force and the Court become operational in December 2017.

4. CHALLENGES OF A NEW PATENT LITIGATION SYSTEM

The long-term objective of effective patent protection and a final goal of a unified patent litigation system in Europe is to remedy the drawbacks of the European patent system in the long run, and to meet users needs. However, there are some believes that a new patent litigation system is not addressing the current drawbacks of the European patent successfully or in a suitable way because it only partially covers the European territory. Significant players within the innovation market, such as Switzerland and Spain or growing players like Turkey are kept on the side. Instead of creating a pan-European patent system, the UPC would ultimately perpetuate fragmentation of patent litigation. Such a situation would not be for the benefit of the innovative industry in Europe.[47]

Therefore the question is which challenges would face the users of the unitary patent protection system if UPC, as it is provided by Agreement, remains exclusively

[46] Art. 10(1) UPC Agreement.

[47] Addor, Mund, *op. cit.* note 9.

a court for the EU Member States? And what would happen if the Agreement is amended in a way that it becomes open for all EPO Member States?

4.1. UPC –only EU Member States

If the UPC remains a court only for the EU Member States, the consequences are different when it comes to European patent and European patent with unitary effect – unitary patent.

In the first case, national courts of the EPO Members outside the EU would remain competent for patent disputes regarding European patent. Therefore, neither would they have to respect the primacy of EU law nor would the UPC's decisions be binding on these national courts. In the other words, there is no conflict of law.

In the second case, the jurisdiction of the UPC over the unitary patent would bring much more legal certainty in patent litigation for all system users seeking patent protection in the area of the enhanced cooperation. In this case, the UPC clearly carries significant advantages for businesses in Europe in terms of reduced costs, simplified procedures and enhanced legal certainty.

However, the lack of legal certainty would remain an essential obstacle for 'classic' European patents which have been validated in non-EU EPO Member State (i.e. Switzerland, Turkey or Norway) or country not participating in the enhanced cooperation (i.e. Spain). The situation will be worse if these countries do not have special national courts with the legal and technical expertise needed to deal with a complex patent litigation in due time and with acceptable costs. Equipping EPO Member States with effective and reliable national patent courts within their jurisdiction is a big step towards legal certainty. However, owners of European patents with effect in these countries still face the disadvantages of an un-harmonized EPO patent landscape.[48] In the other words, fragmentation will be a crucial feature of the European patent landscape, if the IPC remains a court only for EU Member States.

4.2. UPC – all EPO Member States

It is interesting to examine what would happen if a step forward is taken in a way that non-EU Members were to be invited and wished to sign the UPC Agreement? There are, at least, four questions to be answered.

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48 *Ibid.*

First, when it comes to European patents, taking into consideration the binding effect of the UPC's decisions, the national courts outside the EU would have to respect the jurisdiction of the UPC. Since some national patent laws in non-EU countries are different from EU law, the binding effect of the UPC's decisions would lead to an indirect harmonization of the patent law in Europe.

Second, keeping in mind that non-EU EPO Member States had not been involved in setting up of the UPC, would they be politically willing to access the UPC and its institutional framework?

Third, when it comes to judges from non-EU EPO Member States, could they participate in the UPC (and under what conditions in terms of immunities or privileges)? Another issue is whether non-EU EPO Member States would be allowed to build up additional regional courts of first instance.

And forth, as regards financing, how much would non-EU EPO Member States have to contribute to the costs of the UPC if participating in this new judiciary?

5. CONCLUSIONS

The decision of the EU Member States to create a unitary patent and a Unified Patent Court is undoubtedly a step forward to improving patent protection in Europe. The intention was to create a solution that fits the EU in terms of institutional structure and political feasibility. But such an approach resulted in fragmentation of the European patent landscape. Namely, a common patent litigation system for all countries participating in the European patent area was not created. System users are the ones that would have to swallow the bitter pill of this fragmentation, which implies forum shopping, patent torpedoes and legal uncertainty for European patents.[49]

However, the system provided by the UPC Agreement is undoubtedly a step forward. It will not be a unified court for all European countries, but still it will be a single court for 25 EU Member States. Furthermore, the UPC Agreement brings the European bundle patent a large step closer to becoming a self-contained system of protection, and therefore, reinforces its position vis-à-vis the European Union's own patent system.[50]

The way things stand today, it seems that in foreseeable future the UPC Agreement will enter into force (December 2017). Anyway, at the moment, when uni-

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49 *Ibid.*

50 Ullrich, H., *Select within the System: the European Patent with Unitary Effect,* Max Planck Institute for Intellectual Property and Competition Law Research Paper, No. 12-11, 2012, pp. 22-23.

tary patent protection has not been implemented yet, it is premature to evaluate whether a new unitary patent and the UPC will contribute to the competitiveness of the EU industry by providing more effective and less expensive patent protection in Europe. The time will show whether this new patent litigation system can satisfy the needs of the users.

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THE NON-CONTRACTUAL LIABILITY OF THE EU – CASE STUDY OF *ŠUMELJ* CASE

ABSTRACT

The EU is in obligation to cover the damage to member states and individuals on behalf of the institution that caused it. There is contractual and non-contractual liability of the EU. The aim of this paper is to discuss the non-contractual liability of the EU with special reference to joint liability of the EU and member states. In that sense, we will discuss the case "Šumelj and Others v Commission", which is the first Croatian case before the Court of Justice of the European Union (CJEU). The action was brought before the General Court on 20 October 2013. The applicants claimed that the Commission had breached its obligation to monitor the implementation of the Treaty concerning the accession of the Republic of Croatia to the European Union, under Article 36 to the Act of Accession. The General Court recently issued a negative decision. The applicants lodged an appeal to the Court of Justice but the Court confirmed General Court's decision So, we analyse the judgment of the General Court.

Keywords *: "Šumelj and Others v. EU", CJEU, non-contractual liability*

1. INTRODUCTION

The EU is in obligation to cover the damage caused to member states and individuals, on behalf of the institution that caused it. There is contractual and non-contractual liability of the EU. The aim of this paper is to discuss the non-contractual liability of the EU with special reference to joint liability of the EU and member states. In that sense, we will analyse the case Šumelj *and Others v Commission*.[1]

The paper is divided into four parts. Following the introductory first part, the second part will describe non-contractual liability of the EU for damage and review

[1] See case: T-546/13 - *Šumelj and Others v Commission* [2016] ECLI:EU:T:2016:107.

the relevant Articles 340(2) TFEU and 268 TFEU. In terms of substantive conditions of liability, Article 340(2) refers to general principles common to the laws of member states. Seeing as how Treaty itself does not define the conditions, it is at the discretion of the CJEU to define them through case law. The second part of the paper will thus analyse the above two Treaty articles, but also the relevant case law of the CJEU to answer the following questions: who has active legal standing (*locus standi*) to bring an action; who is the action brought against; within what time limit; what constitutes a claim; which court is the action brought before; what are the conditions of liability for damage, with particular focus on the legal concept of the so-called *joint liability*. We will also reflect on the interrelation of this action and actions for annulment and actions for failure to act.[2]

The third part of the paper is divided into three sections. Section 3.1 outlines the facts of the case that lead to bringing both the actions for damage before national courts and to bringing the action for damage before the General Court pursuant to Article 340(2) TFEU. In section 3.2, we considered it necessary to describe the proceedings before the national courts. In section 3.3 we analyse the decision of the General Court. Even though a complaint was lodged against the decision of the General Court to the Court of Justice, the latter rejected the complaint and confirmed the findings of the General Court. We will thus analyse only the decision of the General Court and point to the contradictions in the decision itself.

Lastly, the final, fourth part of the paper, will give concluding remarks and suggest possible further legal steps.

2. NON-CONTRACTUAL LIABILITY FOR DAMAGE

It is necessary to distinguish between contractual and non-contractual liability of the Union for damage. Article 340(1) TFEU governs contractual liability for damage that is regulated by the law applicable to the concerned contract.[3] The discussion on contractual liability will be omitted given that the subject of our interest is non-contractual liability, as stipulated under Article 340(2):

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[2] This paper is partly based on a chapter of the book *Postupci pred Sudom EU*. See: Petrašević, T., *Postupci pred sudom* EU in Ljubanović, B. et al. Procesno-pravni aspekti prava EU, Faculty of Law in Osijek, Osijek, 2016. The research was complemented by the contribution of the co-author Mato Krmek, who was a representative in the case T-546/13 – Šumelj *and Others v Commission*.

[3] For more on contractual liability of the EU see: Hartley, T.C, *Foundation of EC Law*, Pravni fakultet Sveučilišta u Rijeci, 2012. (version translated in Croatian), pp. 443-447, Petrašević, T., *op.cit.*, note 2, p. 54 and Barents, R.; *Remedies and Procedures before the EU Courts* (Bresese, Helen E., ed.), Walters Kluwer, 2012., pp. 324-325.

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by its institutions or by its servants in the performance of their duties.

The above article should be read in conjunction with Article 268 TFEU:

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Below we will analyse the two articles, but also the relevant case law of the CJEU to answer to the following questions: who has active legal standing (*locus standi*) to bring an action; who is the action brought against; within what time limit; what constitutes a claim; which court is the action brought before; what are the conditions of liability for damage, with particular focus on the legal concept of the so-called *joint liability*. We will also reflect on the interrelation of this action and actions for annulment and actions for failure to act.

As regards active legal standing, an action may be brought by member states and natural and legal persons. It should be noted that the disputes between civil servants of the EU and the EU itself (i.e. its institutions), including the issue of compensation for damage, are regulated under the separate Article 270 TFEU and are under first-instance jurisdiction of the Civil Service Tribunal.[4] Civil servants thus do not have active legal standing under Article 268 TFEU.[5]

Passive legal standing is that of the Union, i.e. of the institution that is ascribed with the conduct that caused the liability of the EU for damage. If a joint act is involved (e.g. of the Council of the EU and the Parliament), they are jointly (co-) liable.[6] Passive legal standing should be distinguished from the power (i.e. right) of representation of EU before the courts. As regards representation before EU courts, the Union is regularly represented by the Commission. If the damage was caused by the European Central Bank (ECB), pursuant to Article 340(3) TFEU, the action is then brought directly against the ECB and not the EU.[7] Interestingly,

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[4] The reform of the CJEU that foresees the abolition of the Civil Service Tribunal is ongoing. See: Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union [2015] OJ L 341, pp. 14–17, par. 9.

[5] Petrašević, *op.cit.*note 2, p. 54.

[6] *Ibid.*, p. 55.See also: Hartley, *op.cit.* note 3, p. 451.

[7] Art. 340(3) TFEU: '*Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by it or by its servants in the performance of their duties."*

the time limits for bringing actions are not defined under the Treaty itself, so that the relevant provision here is that of Article 46 to the Statute of the CJEU stating that the right of action expires after a period of five years from the occurrence of adverse events giving rise to such action.[8]

The action is brought against a respective institution of the EU for compensation of damages caused by unlawful conduct or failure to act. Thus, the damage may arise from unlawful conduct or failure to act.

Article 256 TFEU implicitly provides that the competent court for actions of individuals (natural and legal persons) is the General Court, and for the actions of member states the Court of Justice.[9]

Whereas earlier prevalent understanding was that actions for damage compensation had to be based on a previously established violation that gave rise to an action for annulment or for failure to act, the position adopted by the Court of Justice today is that it involves an independent action. Such action in fact represents a supplement to the mechanism of protection of the individual that allows him to bring such an action and have legal standing therefor even if he did not have legal standing for an action for annulment of an act of the EU or an action for failure to act.[10] Of course, this leaves room for manipulation in the sense that individuals might bring such actions in cases where they could not prove active legal standing that gave rise to the action for annulment or action for failure to act, or when they failed to bring an action in the strict statutory period of two months.

As regards the criteria (conditions) of liability, the Treaty (Article 340) refers to general principles of rights common to the legal systems of member states. This gave a considerable freedom to the CJEU to define the conditions of liability. According to settled case law for liability of the Union for damage, several cumulative conditions are required. Primarily, the conduct of the institution must be illegal. Further, the damage to an individual must exist and there must be a causal link.[11] Where one of the conditions is absent, the CJEU will not examine the

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8 Petrašević, T.*, op. cit.* note 2, p. 54.. See also: Hartley,*op.cit.* note 3, p. 451.

9 See: Art. 256 TFEU. See: Petrašević, *op.cit.* note 2, p. 55.

10 See: Petrašević, *op. cit.* note 2, p. 54 and Meškić, Z., Samardžić, D., *Pravo Evropske unije I*, GIZ, Sarajevo, 2012, p. 444.

11 Regarding the criteria of liability see the following cases: *Oleifici Mediterranei v EEC,26/81* [1982] ECLI:EU:C:1982:318, par. 16. and T-383/00 *Beamglow v Parliament and Others* [2005] ECLI:EU:T:2005:453, par. 95. See also a more recent case T-309/10 *Christoph Klein v Commission* [2011] ECLI:EU:T:2011:262(not yet published) and appeal C-120/14 *P Klein v Commission* [2014] ECLI:EU:T:2014:19.

remaining conditions.[12] The CJEU is also not obliged to examine the existence of the conditions in a specific order.[13]

Of particular interest to us is the so-called *concurrent liability* or *joint liability* of the EU and one or more member states that exists where the EU had not taken adequate measures to prevent violation of the EU law by the national authorities of a member state. This thesis was developed by the CJEU in the case *Lütticke*.[14] In this paper, we are most interested in cases of inadequate supervision of the Commission over the proper application of the EU law at a national level.[15]

In terms of joint liability, it is important to note that it is not possible to bring a single/joint action against the EU and a member state before the same court, since the national court has jurisdiction over determining the liability of the state and the CJEU the liability of the EU. It is thus necessary to bring two separate actions. The position of the CJEU is that the applicant would first have to exhaust the legal remedies available in national law. This however does not exclude simultaneously bringing actions to the national court and the EU courts.[16] In our particular case Šumelj *and Others v Commission* (T-546/13), the applicants used that very possibility and brought an action for damages before the CJEU (concretely to General Court) and not the national judiciary, for the reason that they deemed the General Court would decide the case faster and – more importantly – be impartial therein. The only proceedings that the applicants initiated before national courts were those before the Constitutional Court in which they challenged the constitutionality of laws that terminated their service, but nothing related to compensation for damages.[17]

As regards the liability of the Union for damage, the key question is that of discretion enjoyed by the respective/liable institution. The CJEU has a different approach depending on whether the respective body did or did not have discretion in their actions. Where one institution had reduced discretion or none at all, the very violation of the EU law can suffice for determining the existence of a

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[12] See case; C-146/91, *KYDEP v Council and Commission*[1994] ECLI:EU:C:1994:329, par. 81 and T-170/00 *Förde-Reederei v Council and Commission* [2002] ECLI:EU:T:2002:34, par. 37.

[13] See *case:* C-257/98*Lucaccioni v Commission* [1999]ECLI:EU:C:1999:402 , par. 13.

[14] See case: Joined cases 31/62 and 33/62*Milchwerke Heinz Wöhrmann & Sohn KG and Alfons Lütticke GmbH v Commission of the EEC* [1962] ECLI:EU:C:1962:49.

[15] See: Kawczyńska, M., *Concurrent Liability of the EU and member states*, URL=http://eulaw.pl/data/documents/M.-Kawczynska_CONCURRENT-LIABILITY-OF-THE-EUROPEAN-UNION.pdf. Accessed 1. Febraury 2017,

[16] See: Barents, R., *op. cit.*, note 3, pp. 334-335.

[17] Please note that the public bailiffs (71 of them) were not unified and not all chose to bring an action to the General Court; those who did, did not have the same legal representative.

sufficiently flagrant violation.[18] Where the body did have discretion, the decisive factor is whether the EU institution manifestly and gravely disregarded the limits of its discretion.[19] It was precisely the first Croatian case before the CJEU (T-546/13 *Ante Šumelj and Others v European Commission*) that raised the question of whether the Commission overstepped the limits of its powers. We will analyse the case in more detail below, but we would first like to point out that the CJEU in the case *Kampffemeyer*[20] already commented on the discretion enjoyed by the Commission. Where a body has no discretion, the very failure to act or failure to fulfil obligations is sufficient to give rise to liability for damage.

Key to determining liability of the Union, regardless of whether discretion was enjoyed or not, is the existence of the criterion of "a sufficiently flagrant violation."[21]

The fact that the Commission adopted a formal measure for approving a national measure or conduct contrary to EU law goes in favour of the individual/the injured party. But, to avoid the injured party being insufficiently or excessively compensated by the national court and the CJEU, the rule is that the CJEU will not decide on the application until the national court delivers its final decision of on the amount of damage. The position of the CJEU is to wait for the decision of the national court on compensation. Thus, in accordance with the decision of the CJEU in the case *Kampffmeyer*[22], clearly the EU can be liable for damage (together with the member state) if it authorized a measure of national authorities that is contrary to EU law. We believe that this is analogous to the situation in the case *Šumelj and Others v European Commission* as analysed below.

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[18] In case Schöppenstedt the CJEU developed the test for establishing non-conractual liability which uis further extended and explained in case Bergaderm. See: and C-352/98 P - *Bergaderm and Goupil v Commission* [2000]ECLI:EU:C:2000:361, par. 43 and 44.In Bergaderm, the Court of Justice equilized the conditions under which Union institutions incur liability with conditions for liability of Member States. See more in: Mlinarić, M., *Sufficiently Serious Breach Requirement for Obtaining Reparation of Damages in Union Law*, diploma paper, Pravni fakultet Zagreb, 2016, p. 14-16. More about flagrant violations/serious breach see: Craig, P., De Burca, G., *EU Law, Text, Cases and Materials*, Fourth edition, Oxford, 2011., pp.561-563.

[19] See case: C-282/05 *P Holcim (Deutschland) AG v Commission of the European Communities* [2007] ECLI:EU:C:2007:226 and T-28/03 - *Holcim (Deutschland) v Commission*,

[20] See case: *Firma E. Kampffmeyer and Others v Commission of the EEC* [2005]ECLI:EU:T:2005:139, Joined cases 5, 7 and 13 to 24-66 [1967] ECLI:EU:C:1967:31.

[21] Petrašević, *op.cit.*, note 2, p. 56.

[22] *Op.cit.*, note 20.

3. ANALYSES OF CASE T-546/13 - ŠUMELJ AND OTHERS V. COMMISSION

3.1. Background of the Case

With their action brought to the General Court on 20 October 2013, the applicants sought that the General Court deliver an order to the EU to cover damage (material and non-material) to Mr. Šumelj and other applicants, which they suffered on the basis of non-contractual liability of the EU in accordance with Article 340(2) TFEU. They argued that the European Commission had breached its obligation to monitor the implementation of the Treaty concerning the accession of the Republic of Croatia to the EU under Article 36 of the Act of Accession (Annex VII, par. 1)regarding the introduction of the public bailiff service in the legal system of the Republic of Croatia.

The background of the case is as follows. As part of accession negotiations (Chapter 23: Judiciary and Fundamental Rights), the Republic of Croatia undertook the obligation to reform its judiciary. To this end, in December 2010 the Croatian Parliament adopted the *2011-2015 Judicial Reform Strategy"*.[23] To improve the enforcement system, a new legislative framework had been adopted. A number of acts were passed, but the key is the Public Bailiffs Act[24] that was passed in November 2010 and was expected to enter into force on 1 January 2012. The said Act provided for the transfer of enforcement powers from the courts to the public bailiffs. The applicants passed the public bailiff exam and the Minister of Justice appointed them to the function of public bailiffs. These bailiffs had legitimate expectations of commencing their new duties beginning of 2012. In the meantime, the Accession Treaty[25] was signed on 9 December 2011. In its Article 36, the Act of Accession, which forms an integral part of the Treaty of Accession, provides for the monitoring by the Commission of the commitments undertaken by the Republic of Croatia during the accession negotiations, including the obligation to establish a public bailiff service and to establish all conditions necessary for the full implementation of that service. However, the exact opposite happened. On 22 December 2011, the Croatian Parliament postponed the entry into force of the disputed Act until 1 July 2012 and then until 15 October 2012. Following this, on 15 October 2012 the Croatian Government proposed the Act Repealing the Public Bailiffs Act and abolished the public bailiff service. This decision was taken

23 See: The Judicial Reform Strategy 2011-2015 (OG 145/10).

24 See: Public Bailiffs Act (OG 139/10).

25 See: Treaty of Accession between the member states of the European Union and the Republic of Croatia [2012] OJ L 112.

without reasonable explanation and without proposals for compensation and by stating *tacit* approval of the Commission.

The position held by the applicants (and supported by the authors)is the fact that one of the conditions for closing "Chapter 23" was the introduction of public bailiffs in the legal system of the Republic of Croatia.

Furthermore, another important fact is that in September 2012, Mr Šumelj (as the main applicant in this case) sent a letter to the Commission, in which he invited the Commission to take necessary measures to warn the Croatian Government of their failure to meet obligations under the Accession Treaty.[26] Therefore, the Commission was called upon to act, but the letter did not produce an adequate response of the Commission. Given that the facts came into occurrence prior to formal accession, the Commission could not bring an action against the member state for violation of EU law before the CJEU, but we do hold that the Commission might and should have warned the Croatian Government of not fulfilling its obligations.

The General Court accepted the action and two years later found that the Commission (i.e. EU) was not liable for any damage.[27] The applicants lodged an appeal, but on 1 February 2017 the Court of Justice dismissed the appeal as unfounded.

We are truly surprised by the decision of the Court of Justice as we expected that the Court would examine the case in more detail than the General Court.[28] Given that the Court of Justice only confirmed the findings of the General Court, we will analyse the decision of the General Court. But we consider it necessary to first state what is (and had been) happening before the national courts.

3.2. Proceedings before National Courts

After the Public Bailiffs Act was repealed, Ante Šumelj applied for constitutional review of several acts: the Enforcement Act, the Act Repealing the Public Bailiffs Act and the Act Repealing the Public Bailiff Fees Act. By its ruling of 23 April 2012, the Constitutional Court dismissed the application for constitutional review, but acknowledged the violation of legitimate expectations of 71 persons appointed public bailiffs by the Minister of Justice under the Public Bailiffs Act, as

[26] Letter is mentioned in par. 20 of the judgment in case Šumelj, infra n. 27.

[27] Judgment of the General Court of 26 February 2016. Please note that the General Court joined cases T-546/13, T-108/14 and T-109/14 and issued a joint decision.

[28] See: Order of 1st February 2017, C-239/16 P Šumelj *and Others v Commission* [2017] ECLI:EU:C: 2017:91.

well as their right to redress in a lump sum net amount of 18,000.00 HRK.[29] The said amount is certainly disproportionate to the damage they suffered. However, the Constitutional Court said that "*the redress does not affect the general right of each person appointed public bailiff to seek in court proceedings damages incurred pursuant to the general rules of the law on obligations. The redress shall not be included in the calculation of that possible court indemnity*."[30]

Importantly, the Constitutional Court further stated that this was a case of violation of the acquis.[31]

As a result, public bailiffs brought individual applications for damages incurred to national courts. These proceedings are pending. To our knowledge, thus far only one court requested data for the purposes of a financial expertise by the Ministry of Justice. There is however an interim judgment of the court in Varaždin that established liability of the Republic of Croatia for damage, but did not decide on amount of damages.[32] Presumably, the national court waited for the decision of the Luxembourg courts.

In the particular case ''Šumelj", the applicants decided to bring the action for damages to the General Court first.

3.3. Commentary on the Decision of the General Court

Below we will give a critical review of the decision of the General Court and point out discrepancies and contradictions.

First, the General Court claimed that it did not find any provisions in EU law establishing liability of the Commission: "*The applicants have therefore failed to establish that the Commission had caused them to have a legitimate expectation and had thus, by its failure to act, breached the principle of protection of legitimate expectations.*"[33] The General Court further concluded that there was no wrongful

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29 Ruling of the Constitutional Court of the Republic of Croatia No. U-I-5612/2011 and others of 23 January 2013.

30 *Ibid.*, part III.

31 *Ibid.*, par. 22.

32 An action brought by Marko Lapaine, claiming damages of 1.6 mil HRK from the state. In addition to damages, Lapaine is claiming annuity until his retirement on the grounds of loss of expected profit. In anticipation of commencement of his public bailiff duties, Lapaine deregistered from the Bar Association, but has not been allowed re-admission to the Association to this day. The proceedings are pending before the Supreme Court and the authors are not familiar with the status thereof. See: URL=http://www.vecernji.hr/hrvatska/javni-ovrsitelj-dobio-tuzbu-drzavu-cekaju-milijunske-odstete-923880. Accessed 1 March 2017.

33 *Ibid.*, par. 77.

omission by the Commission as one of the three conditions of liability for damage.[34] Consequently, there is no liability of the EU for damage.[35]

We agree that the Commission did not directly create any legitimate expectations for applicants, but the Croatian Government, i.e. the Croatian Parliament did by adopting the Public Bailiffs Act. The violation was undoubtedly committed by the Croatian Government, but the Commission turned a blind eye to this omission. The question is: why? Had there really been a tacit agreement between the Government and the Commission?

In our view, this case is a classic example of joint liability of the EU and a member state. Firstly, the Croatian Government undoubtedly committed a violation and the Commission approved it. The joint liability of the Commission is twofold. On the one hand, the Commission did not take adequate steps to prevent a breach of EU law by national authorities. In this regard, the breach was constituted by tacit consent of the Commission.[36] On the other hand, the Commission adopted a more formal measure – the Final report, thereby approving the illegal national action. It is thus clear that the Commission legitimized the unlawful conduct of the Croatian Government both by failing to take adequate action as well as by issuing a positive report on the fulfilment of all obligations in negotiations, which was the basis for signing the Treaty of Accession..

Secondly, not only did the General Court not acknowledge the legitimate expectations of the public bailiffs and establish liability of the Commission for damage, but it also aggravated their legal position in the proceedings before the national courts. We will explain our viewpoint. As previously, mentioned,(parallel) proceedings for damages are pending before national courts. In its decision, the Constitutional Court concluded that there had been a violation of legitimate expectations under the *acquis*, or in other words – that a violation of the rights under EU law existed. In par. 51, the General Court states the following: *"Commitment 1 therefore does not give rise to any obligation for the Croatian authorities to establish the office of Public Bailiff."*[37] The General Court thus very clearly concludes that there

[34] See par. 77: *"It follows from all of the foregoing that the Commission cannot be criticised for any wrongful omission."*

[35] See par. 78: *"It follows that one of the three cumulative conditions of EU liability is not satisfied and that the present actions must therefore be dismissed, without there being any need to examine the other conditions that must be satisfied in order for such liability to be incurred."*

[36] As already noted, the fact that the Commission could not initiate proceedings due to a violation of EU law goes in its favour.

[37] Under Annex VII to the Act of Accession, entitled 'Specific commitments undertaken by the Republic of Croatia' in the accession negotiations (referred to in Article 36(1), second subparagraph, of the Act of Accession)", Commitment I provides: "*To continue to ensure effective implementation of its Judicial*

has been no violation by the national authorities. The Croatian Government could use this as defence in the proceedings before the national court and claim that the General Court itself concluded that there had been no violation (as confirmed by the Court of Justice on appeal). In our opinion, the General Court overstepped the limits of its jurisdiction, because it was asked to determine whether the EU had been obliged to compensate damage, and not to decide on the liability of the member state, which it would be authorized to do only in the context of an action under Article 258 TFEU (the so-called *infringement procedure*).

Thirdly, in the pending national proceedings, the competent court could refer a preliminary question on interpretation of relevant provisions of the Act of Accession.[38] This begs the question: in confirming the decision of the General Court by dismissing the application, had the Court of Justice pre judged its decision on the preliminary question?

Fourthly, a particularly controversial issue in the case was whether the Commission had discretionary power to "interfere with" the contractual provisions of the Act of Accession(to authorize reinstating of agreed special obligations to the judicial enforcement system) and what degree of discretion it enjoyed. If the Commission did have the said discretionary power (which does not follow from any of the provisions of the Accession Treaty or any of the provisions of EU law), was it obliged to take into account the EU values and violation of a higher principle of law (legal certainty, legitimate expectations), its obligations under the Accession Treaty, the provisions of the Charter of Fundamental Rights and Articles 2, 13 and 17 TEU?

In our view, the Commission as the "guardian of the Treaty" should have and was allowed to act only within the limits of the powers as conferred to it under the Treaties, to enjoy the discretion only in negotiations (which ceased upon conclusion of the Accession Treaty). But even if the Commission (contrary to Article 26 of the Vienna Convention) did have the discretion to negotiate with Croatia amendments to the Accession Treaty (as concluded with member states of the EU), the liability for damage caused to the public bailiffs would still exist given the "sufficiently grave violation of higher principles of law for the protection of individuals."

Reform Strategy and Action Plan." See par. 2 of judgment in Joined cases Šumelj *and Others v Commission* T-546/13, T-108/14 and T-109/14, *op.cit.* note 26.

38 We found this possible because in its nature the Act of Accession is an international treaty and Court of Justice has jurisdiction to interpret international treaties in the course of preliminary ruling procedure.For more about preliminary ruling procedure in general see: Petrašević T., *Prethodni postupak pred Sudom EU*, Pravni fakultet u Osijeku, Gradska tiskara d.d., Osijek, 2014.

Fifthly, it remains unclear why the CJEU (both General court and Court of Justice) gave perfunctory or no answers to one of the most important questions. Namely, Article 36 to the Act of Accession as an integral part of the Treaty of Accession of the Republic of Croatia to the European Union indisputably provides for obligation of the Commission to monitor all commitments undertaken by Croatia in the accession negotiations, including those which must be achieved before or by the date of accession and to focus such monitoring in particular on commitments undertaken by Croatia in the area of the judiciary and fundamental rights (Annex VII). As an integral part of its regular monitoring and report tables preceding the accession of Croatia, the Commission issued six-month assessments of the commitments undertaken by Croatia in these areas. In the proceedings before the General Court, the Commission did not present any serious/valid reasons to Croatia that would underlie the Commission's approval to change the agreed special commitments (a legal concept of extrajudicial enforcement that was not given the opportunity to prove its effectiveness) by introducing a judicial enforcement system, seeing as how the introduction of public bailiffs was one of the reasons for closing Chapter 23, whereon the Commission insisted and which it financed within the IPA 2010 "Improvement of the Enforcement system in the Republic of Croatia." Thus, the key and manifest violation of contractual obligations was by no means explained, much less sanctioned by the CJEU.

We will point at the contradictions in the decision of the General Court below.

In par. 57 of its decision, the view of the General Court is as follows: *''It therefore does not follow from any of the commitments in Annex VII to the Act of Accession on which the applicants rely that the Republic of Croatia was under an obligation to establish the profession of public bailiff, or that the Commission was under any obligation to have recourse, on that basis, to the means of action provided for in Article 36 of the Act of Accession in order to prevent the repeal of the Public Bailiffs Act."*

Yet in par. 52, the General Court (directly contrary to the views of par. 47 to 51 and par. 57) concludes: ''*It cannot be inferred, however, that the Croatian authorities, including those in place as a result of a new political majority, as was the case of the authorities who postponed and then repealed the Public Bailiffs Act, had unlimited discretion to amend the Judicial Reform Strategy 2011-2015 and the 2010 Action Plan. In view of the provisions of the Act of Accession, in particular Article 36 and Annex VII, those authorities were required to comply not only with commitment 1 but also with all the other commitments referred to in that annex, including commitments 2, 3, 6 and 9, on which the applicants rely."*

Thus, par. 57 reads as the Croatian Government not having had an obligation to establish the profession of public bailiff, whereas in par. 52 the General Court states that the very same authorities did not have discretion to change the "Strategy" and that they were obliged to comply with their commitments, primarily Commitment I. It is unclear to us what the General Court implied by that. The vagueness of the decisions of the CJEU in general has already been pointed out by some authors such as Hartely.[39]

Moreover, in par. 47 to 51 of its decision, the General Court – contrary to fundamental principles of law in our view – states that Commitment [40] is not aimed at a specific judicial reform strategy and action plan that were in force at the time of conclusion of negotiations up to abolishing of the act governing the public bailiff service. This was explained by the fact that the Commission identified in several later documents a different judicial reform strategy and action plan that no longer provided for public bailiffs. The General Court thus did not acknowledge the fact that the applicants were appointed as public bailiffs at the time of closing of Chapter 23, i.e. upon adoption of the Judiciary Reform, part of which were the public bailiffs. We gather that, precisely by conclusion of negotiations and the Treaty of Accession of Croatia to the EU; bearing in mind Article 26 to the Vienna Convention,[41] the applicants did have legitimate expectations in terms of the commencement of their chosen profession.

Lastly, the General Court in par. 55 states that the applicants do not indicate any specific violation other than breach of the principle of protection of legitimate expectations, even though they did refer to the principle of non-discrimination, the violation of the right to labour and invoked legal security throughout the entire proceedings.

4. CONCLUDING REMARKS

Given the facts of the case Šumelj and Others v the Commission as presented herein, it must have seemed more than logical to bring two actions – one before the national court against the Republic of Croatia and one before the General Court against the Commission (i.e. the EU). Albeit the applicants did not explicitly indicate joint liability in their application, it can be inferred indirectly. What

[39] See:Hartley, T.C, *op.cit.* note 3, p. 58. For more details on the reasoning of the decisions of the CJEU, see: Beck, G., *The legal reasoning of the Court of Justice*, Hart Publishing, Oxford and Portland, 2012.

[40] *Op. cit.* note 26.

[41] Article 26 refers to the principle of *pacta sunt servanda*.

the General Court could have done is stay the proceedings pending the decision of the national court, but instead it examined the merits.

The applicants based the action for damages on the provisions of Article 340(2) TFEU from which it clearly follows that in terms of non-contractual liability, the Union is obliged, in accordance with general principles of rights common to the legal systems of member states, to make good any damage caused by its institutions or by its servants in the performance of their duties. Thus, bearing in mind the previously cited provision, it emerges unequivocally that the EU, and not the member states, is liable for any damage caused by its institutions, i.e. that no distinction is made between damage caused to nationals of a member state of the EU and damage caused to nationals of a non-EU country. The above finding is logical when keeping in mind that the EU respects and promotes legal values; it would therefore be inconceivable for the EU to discriminate against persons based on the principle of holding a nationality of a member state of the European Union, i.e. for the liability for damage to be borne only toward nationals of member states of the EU. It is the very sense of the provision of Article 340(2) TFEU that the EU bear any damage in terms of non-contractual liability, and toward all, without exception, whom the damage was caused to as a result of unlawful or wrongful conduct of its body (in this particular case the Commission), provided that it meets the remaining conditions of liability for damage.

There was a founded concern that the General Court might dismiss the application *rationae temporis*, and such decision would find a foothold in the case law. Such was the position of the General Court in the case *Ynos***.**[42] It involved a preliminary question of a Hungarian court that was rejected by the CJEU because the case was out of scope *rationae temporis.* The CJEU gave a very brief decision stating inadmissibility because the facts of the case in the main proceedings preceded Hungary's accession to the EU.[43] In view of the above, the General Court did the right thing and granted the application.

Our conclusion is that the "breach" was constituted by the Croatian Government by abolishing the institution of public bailiffs and that the Commission legitimized this by not taking adequate measures and by issuing a positive report on the

[42] See case: C-302/04*Ynos kft v János Varga* [2006] ECLI:EU:C:2006:9.

[43] Petrašević, T., *Implementation of Preliminary Ruling Procedure in the legal systems of New member states and experiences for future member states as Croatia*, in Cross-border and EU legal issues: Hungary - Croatia / Drinoczi, T., Takacs, T. (eds.) Osijek-Pecs: Faculty of Law, Josip Juraj Strossmayer University; Pecs: Faculty of Law, University of Pecs, 2011, p. 558. For detailed analysis of case and critique on the CJEU see: Horvàthy, B., *After the First Lessons and Experiences – Cases Concerning Hungary before ECJ (2004-2007), 49* Acta Juridica Hungarica, No. 1, 2008, p. 93.

fulfilment of all obligations, based on which the Republic of Croatia signed the Association Agreement. Their joint liability undoubtedly exists.

We believe that the decisions of the General Court and the Court of Justice (on appeal) do not contribute to strengthening of the protection of the rights of the individual, but rather the opposite. Croatian citizens had greater expectations from the accession to the EU. They expected more "justice" and a stronger discipline of the "country." The CJEU not only did not award damage compensation, but also potentially aggravated their legal position in the proceedings before national courts, for the reasons explained above. But after the negative decisions of the European courts it only remains to wait for decision of national court(s).

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Topic 4

EU individual and institutional procedures

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APPLYING THE BURDEN OF PROOF RULES IN GENDER DISCRIMINATION CASES: THE CROATIAN EXPERIENCE

ABSTRACT

All EU anti-discrimination directives contain basically identical provision on the burden of proof in anti-discrimination cases: Member States are to take the necessary measures, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because of the principle of equal treatment has not been applied to them establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. The wording of the two main anti-discrimination laws in Croatia, the Anti-Discrimination Act and the Gender Equality Act, on the burden of proof slightly differs, which may lead to inconsistent interpretation. The aim of this article is to explore the current Croatian gender discrimination case law concerning the application of the burden of proof rules and to investigate whether the required standard has been correctly applied in practice, as well as whether further legislative amendments are needed.

Keywords*: burden of proof, EU anti-discrimination law, gender equality, Anti-Discrimination Act, Gender Equality Act*

1. INTRODUCTION

In the Croatian civil procedure law, it seems that the burden of proof rules are marginalized. In general, each party is obliged to provide facts and present evidence on which his or her claim is based or to refute the statements and evidence of his or her opponent.[1]In other words, to win the case, claimant will have to provide enough evidence to prove his/her claim. To repudiate the claim, respondent will have to provide enough evidence to the contrary. The court shall decide, at its discretion, which facts it will find proved, after conscientious and careful as-

[1] Article 219(1) Civil Procedure Act (*Zakon o parničnom postupku*), Official Gazette No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14. This obligation falls upon both parties, and includes the duty to present facts on which their request is based (*onus proferendi*), as well as the duty to present evidence substantiating those facts (*onus probandi*). See Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2014, p. 498.

sessment of all the evidence presented individually and as a whole and taking into consideration the results of the entire proceedings.[2]

That is why the obligation to provide facts and present evidence is considered not as an obligation towards the court or the opposing party, but as a specific obligation towards oneself – an obligation which enables the party to succeed in litigation.[3]

Lawyers tend to intuitively recognize the burden of proof rules as the rules determining which party has to prove what facts in order to succeed in litigation ('subjective burden of proof').[4]But the burden of proof rules may also refer to the method the court is obliged to follow in order to prevail the situation of uncertainty about the facts ('objective burden of proof').[5]The latter understanding seems to prevail in the Croatian civil procedure law.

The main provision regarding the burden of proof in the Civil Procedure Act is contained in its Article 221.a:[6]if the court cannot establish a fact with certainty on the basis of the evidence proposed, it shall rule on the existence of the fact applying the burden of proof rule. Specific burden of proof provisions are to be found in legislation governing certain fields of law.[7]In order to resort to the burden of proof rules and reach a conclusion on the existence of certain facts, two requirements have to be met: 1. all evidence has been presented; and 2. based on the evidence presented, the court cannot establish a decisive fact with certainty.[8]In other words, this provision becomes applicable and relevant only at the end of evidentiary proceedings, as an instrument to overcome uncertainty about relevant facts. According to Dika, the standard of 'certainty' as to the existence of a fact means that there is no reasonable doubt in the regularity of the court's conclusion about its

[2] Article 8 Civil Procedure Act.

[3] Triva, Dika, *op. cit.* note 1, p. 498.

[4] Uzelac, A., *Teret dokazivanja*, doktorska disertacija, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 1998, p. 70.

[5] *Ibid*, p. 69; Triva, Dika, *op. cit.* note 1, p. 499.

[6] Article 221.a was inserted into the Civil Procedure Act of 1976 in 1990 (Službeni list SFRJ No. 27/90 of 16 May 1990). See more on the reasons for introducing this provision in Uzelac, *op. cit.* note 4, p. 278 -279. The purpose of this provision is basically to instruct the judge how to proceed when he/she is not certain as to the existence of a decisive fact, taking into account all evidence presented and the margin of appreciation in the decision-making process. The allegation of the party which is not substantiated with sufficient evidence cannot be taken as true. It is based on the maxim *idem est non esse aut non probari* (not to be proved and not to exist is the same). Triva, Dika, *op. cit.* note 1, p. 499. This boils down to the objective understanding of the burden of proof rules.

[7] For example, Article 135 Labour Act (*Zakon o radu*; Official Gazette No. 93/14) regulates the burden of proof in labour disputes.

[8] Supreme Court of the Republic of Croatia, Rev-1276/2007, Judgement of 4 June 2008.

(non)existence.[9] The standard of 'probability', on the other hand, requires a lower degree of the court's conviction and is therefore an exception for rendering a decision on the merits.[10] This consideration is particularly important when assessing the burden of proof rules (and consequently, the shifting of the burden of proof) in anti-discrimination cases.

2. SHIFTING THE BURDEN OF PROOF: ANTI-DISCRIMINATION CASES

Without going further into the theoretical considerations regarding the burden of proof,[11] it is safe to say that the Croatian courts are not normally (too) (pre)occupied with the role and significance of the burden of proof rules. However, when it comes to anti-discrimination law, the burden of proof rules play a pivotal role and have to be adequately applied from the outset of the proceedings. Croatian anti-discrimination legislation is based on and implements the EU anti-discrimination law.[12] All of the main equal treatment directives contain a standard clause on burden of proof in anti-discrimination cases.[13] Member States have to take adequate

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9 Dika, M., *Sudska zaštita u diskriminacijskim stvarima*, in Crnić, I. *et al.*(eds.), *Primjena anti-diskriminacijskog prava u praksi*, Centar za mirovne studije, Zagreb, 2011, pp. 69-95, p. 84.

10 *Ibid*, p. 84.

11 Primarily concerning the legal nature and different theoretical conceptions of the burden of proof in continental and Anglo-Saxon legal theory, as well as differentiation of burden of proof as the burden of persuasion or burden of production of evidence, among other. For the most comprehensive and in-depth account of the burden of proof rules in the Croatian legal theory in comparative perspective see Uzelac, *op. cit.* note 4. See also Triva, Dika, *op. cit.* note 1, pp. 498-501.

12 Primarily Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23 (Gender 'Recast' Directive), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22 (Race Directive), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16 (Framework Directive) and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37 (Goods and Services Directive). For the sake of simplicity, this paper will refer to all four directives collectively as "EU anti-discrimination directives", without prejudice to other directives and instruments forming the corpus of EU anti-discrimination law.

13 The standard clause reads as follows: "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment." See Article 19(1) of the Gender 'Recast' Directive, Article 10(1) of the Race Directive; Article 9(1) of the Goods and Services Directive and Article 10(1) of the Framework Directive.

measures to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, *facts from which it may be presumed* that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. In other words, the burden of proof in discrimination cases is shifted, but not completely reversed. The claimant is still required to establish the facts from which it may be presumed that direct or indirect discrimination occurred. Theoretically, this shift is justified by the need to assist the persons claiming to be the victims of discrimination in court proceedings.[14] After all, to use the words of Advocate General Mengozzi, "discrimination has the reputation of being particularly hard to substantiate".[15]

From the wording of the burden of proof clause in EU anti-discrimination directives, it is evident that only a *prima facie* evidence of discrimination is needed to shift the burden to the opposing party. *Prima facie* evidence (known as *Anscheinsbeweis* in German legal theory) is a legal standard which has not been known or applied in the Croatian legal theory and practice.[16] Uzelac identifies *prima facie* evidence in the German legal theory as a concept adjacent to the burden of proof, but excluded from its field by the dominant theory, because it does not require a *non liquet*situation.[17]To put it more simply, *prima facie* evidence is oriented towards the standard of probability. Its function is precisely to avoid *non liquet* situations,[18]i.e. to allow the judge to draw conclusions from the facts which are taken as probable, based on experience. On the other hand, the burden of proof in its objective understanding cannot be triggered without the *non liquet* situation. *Prima facie* evidence involves the creation of a preliminary standpoint on the existence of discrimination, based on typical developments, which, according to the rules of experience, refer to a causal connection with the discriminatory behaviour or liability for such behaviour.[19] The facts will therefore have to show, objectively and in line with the typical life experience, predominant probability that less favourable treatment occurred

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14 See e.g. Ellis, E.; Watson, P., *EU Anti-Discrimination Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 157; Potočnjak, Ž.; Grgurev, I.; Grgić, A., *Dokazivanje prima facie diskriminacije*, in: Uzelac, A.; Garašić, J.; Maganić, A. (eds.) *Liber Amicorum Mihajlo Dika*, Pravni fakultet u Zagrebu, Zagreb, 2013, pp. 323-347.

15 Opinion of Advocate General Mengozzi in Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] EU:C:2012:8, par. 1.

16 Dika, *op. cit.* note 9, pp. 85-86.

17 Uzelac, *op. cit.* note 4, p. 59. *Non liquet* refers to a situation in which a judge cannot establish a certainty of a fact even after presentation of all the evidence.

18 Uzelac, *op. cit.* note 4, p. 60.

19 Dika, *op. cit.* note 9, p. 86.

because of discrimination.[20]By lowering the required standard for presentation of evidence, the task of the party bearing the (initial) burden of proof is facilitated.[21]

Let us transfer these theoretical considerations to the practice and reality of anti-discrimination case-law.

3. EU ANTI-DISCRIMINATION CASE-LAW

The Court of Justice of the EU (hereinafter: CJEU or the Court) has interpreted the burden of proof clause in EU anti-discrimination directives basically in line with the theory of *prima facie* evidence.[22]This is evident even from the early case-law which precedes the explicit introduction of the burden of proof clause in the EU anti-discrimination legislation.[23] In case *Danfoss*,[24]where the claim was about gender pay discrimination, the initial burden of proof was on claimants to prove

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20 Similarly recent German jurisprudence, see e.g. BAG, Judgement of 17 August 2010, 9 AZR 839/08; BAG, Judgement of 17 December 2009, 8 AZR 670/08: "Dies ist der Fall, wenn die vorgetragenen Tatsachen aus objektiver Sicht nach allgemeiner Lebenserfahrung mit überwiegender Wahrscheinlichkeit darauf schließen lassen, dass die Benachteiligung wegen der Behinderung erfolgte." It is not about whether a certain allegation is 'true', but whether it is 'suspected true'.

21 Dika, *op. cit.* note 9, p. 86.

22 Accordingly, all EU anti-discrimination directives refer to *prima facie* evidence as a prerequisite for shifting the burden of proof in their recitals. Compare e.g. Gender 'Recast' Directive, Preamble, Recital 30: "The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is *prima facie* case of discrimination…" It is interesting to note, however, that the official Croatian translations of the four EU anti-discrimination directives, contain four very different translations of the same part of the sentence "…when there is *prima facie* evidence…" used in the recitals. For example, in the Race Directive (OJ Special Edition in Croatian, Chapter 20 Volume 001, p. 19 – 23) the Croatian translation is "…*u slučaju pretpostavke postojanja diskriminacije*…", in the Goods and Services Directive (OJ Special Edition in Croatian, Chapter 05 Volume 001 p. 101-107), the Croatian translation is "…*ako se radi o očitom slučaju diskriminacije*…", in the Framework Directive (OJ Special Edition in Croatian, Chapter 05 Volume 001, p. 69 – 75) it reads „…*kod očite diskriminacije*…" and in the Gender Recast Directive (OJ Special Edition in Croatian, Chapter 05 Volume 001, p. 246-259) „…*u slučajevima gdje postoji pretpostavka diskriminacije*…". One does not have to be a language purist to note this striking inconsistency, which is not just completely unnecessary and frustrating, but can also lead to false conclusions. This is especially true for the translation of prima facie case evidence as "*očita diskriminacija*" (Eng. 'obvious discrimination'), because it may lead to conclusion that only direct discrimination is caught by the burden of proof rules.

23 The first directive specifically dedicated to the burden of proof was the Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, [1998] OJ L 14/6. This Directive was repealed with effect from 15 August 2009 by virtue of Directive 2006/54 (Gender 'Recast' Directive), but the identical wording of its provision on the burden of proof (Article 4(1) Directive 97/80) is kept in all EU anti-discrimination directives in force.

24 Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] EU:C:1989:383.

that a relatively large proportion of women received lower remuneration than men. 'Thanks' to a complete lack of transparency of the pay system, claimants were unable to prove their assertion with certainty, but this was enough for the court to conclude that the burden of proof has shifted to employer/respondent to show that there was no discrimination.[25]In *Enderby*,[26] claimants established a *prima facie* case by showing that speech therapists, predominantly female, were paid less by the British NHS system (National Health Service) than pharmacists, a predominately male profession. This relatively clear occupational segregation along gender lines allowed the burden of proof to be shifted to the respondent.[27] On the other hand, in a line of cases concerning a pay disparity between part-time and full-time employees, the court held that there is no *prima facie* case, unless it is first established that there is different treatment for part-time and full-time employees, and that this difference affects considerably workers of one sex only.[28]

Other cases pre-dating the explicit burden of proof clauses in the EU anti-discrimination directives concerned primarily equal pay cases, but the principles established therein were later extended to all other aspects of sex discrimination.[29]Therefore, the burden of proof clause was formulated and established in accordance with the principles developed in case-law. The rationale behind the Court's interpretation is found in the principle of effectiveness: the need to guarantee the alleged victims of discrimination effective means of enforcing the principle of equal treatment before the national courts.

Subsequent case-law offers further important guidelines for the interpretation of the burden of proof rules. An important segment of the judgement in case *Brunnhofer*[30] is devoted to the interpretation of the burden of proof. The Court

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[25] "In those circumstances, […] the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that this practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than for men." *Danfoss*, par. 16.

[26] Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] EU:C:1993:859.

[27] "[…] at least where two jobs in question are of equal value and the statistics describing that situation are valid". *Enderby*, para. 16.

[28] See, e.g. Joined Cases C-399/92, 409/92, 34/93, 50/93 and 78/93 *Stadt Lengerich v Angelika Helmig and others* [1994] EU:C:1994:415, par. 23; Case C-297/93, *Rita Grau-Hupka v Stadtgemeinde Bremen* [1994] EU:C:1994:406; see also, Ellis, Watson, *op. cit.* note 14, pp. 160-161.

[29] *Ibid*, p. 161; see also Joined Cases C-63/91 and 64/91 *Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer* [1992] EU:C:1992:329; and Case C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal* [1993] EU:C:1993:907.

[30] Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] EU:C:2001:358; par. 51-62.

highlights the importance of providing *prima facie* evidence on 'comparability' of work performed by a female and male worker: "If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a *prima facie* case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay."[31]Comparability is therefore an important issue in equal pay cases. However, where a job classification system exists and the length of service criterion is applied, employer does not have to justify recourse to that criterion, because it is considered to be appropriate to attain the legitimate objective of rewarding experience of the worker.[32] Therefore, it is the worker who will have to provide evidence capable of raising serious doubts in that regard – length of service criterion cannot serve as *prima facie* evidence of discrimination.

In more recent cases *Meister*[33] and *Kelly*,[34] the Court addressed the difficult issue of access to information, as the lack of relevant data can seriously undermine the claimant's attempt to show even the probability that discrimination occurred. In *Meister*, a job applicant claimed discrimination on grounds of sex, age and ethnicity, her application for the same job having been rejected twice within a relatively short time period, without even being invited for an interview. In *Kelly*, a male applicant claimed that he was discriminated on grounds of sex, his application for a master's degree course having been rejected in the selection process. In both cases, claimants sought access to information about successful applicants, because otherwise they had nothing but their allegations. In both cases the Court clearly stated that the burden of proof clause does not create an entitlement to disclosure of documents or access to information. However, the refusal of disclosure or refusal to grant access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.[35] Otherwise the provisions on the burden of proof might be rendered completely ineffective and their objective compromised.

Statistical evidence plays a particularly important role in proving *prima facie* case of indirect discrimination.[36]

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[31] *Brunnhofer*, para. 60.

[32] See Case C-17/05 *B. F. Cadman v Health & Safety Executive* [2006] EU:C:2006:633, par. 38 and *Danfoss*, par. 24-25.

[33] Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] EU:C:2012:217.

[34] Case C-104/10 *Patrick Kelly v National University of Ireland (University College, Dublin)* [2011] EU:C:2011:506.

[35] *Kelly*, para. 34; *Meister*, para. 47.

[36] See, e.g. Case C-171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989]

Case-law concerning racial discrimination also contains important pointers as to the shifting of the burden of proof. Thus, a homophobic statement by a third party (majority shareholder of a football club) may shift the burden of proof on the club to prove that it does not have a discriminatory recruitment policy.[37] Even where there is no actual individual person claiming less favourable treatment, employer's statement that he will not employ persons of a certain ethnic origin presents a *prima facie* evidence of discriminatory recruitment policy.[38]

4. CROATIAN LEGISLATION AND CASE LAW

So, what have we learned from the EU anti-discrimination case law? Croatia has implemented the EU anti-discrimination directives as part of its obligations during the process of accession to the EU primarily through the general Anti-Discrimination Act and through the Gender Equality Act.[39]

EU:C:1989:328; Case C-184/89 *Helga Nimz v Freie und Hansestadt Hamburg* [1991] EU:C:1991:50; Case C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg* [1990] EU:C:1990:265; Case C-343/92 *M. A. De Weerd, née Roks, and others* [1994] EU:C:1994:71; Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados* [2005] EU:C:2005:141; Joined Cases C-4/02 and C-5/02 *Hilde Schönheit v Stadt Frankfurt am Main and others* [2003] EU:C:2003:583. See also *Handbook on European non-discrimination law*, European Union Agency for Fundamental Rights, 2010, URL=http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf, p. 129-133. Accessed 15 February 2017.

[37] Case C-81/12 *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării* [2013] EU:C:2013:275.

[38] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] EU:C:2008:397. One has to draw a parallel here to a recent Croatian case, in which a member of the Executive Board of the Croatian Football Association publicly declared that "gays could never play in his national football team". It was only in the revision procedure that the Supreme Court of the Republic of Croatia reversed all previous judgements of lower and appellate courts, which found that the statement was not discriminatory because it represented merely a value judgement by a person who is not in a position to have any influence on the choice of players in a national football team, and that there was no less favourable treatment. The judgement in the revision proceedings determined the statement as discriminatory on grounds of sexual orientation. There was no mention of the burden of proof, because there was never any dispute as to whether and what the respondent actually said and whether any less favourable treatment actually occurred, but the Supreme Court's reasoning relies heavily on the *Feryn* judgement (mistakenly identified by the Supreme Court as the judgement of the European Court of Human Rights). Supreme Court of the Republic of Croatia, Rev-300/13, Judgement of 17 June 2015.

[39] Anti-Discrimination Act (*Zakon o suzbijanju diskriminacije*) entered into force on 1 January 2009 (Official Gazette No. 85/08 and 112/12; hereinafter: ADA). The first Gender Equality Act, which entered into force on 30 July 2003, was repealed for reasons of procedural deficiencies in its adoption by the Decision of the Constitutional Court (U-I-2696/2003 of 16 January 2008) with effect from 15 July 2008, when it was replaced by the Gender Equality Act (*Zakon o ravnopravnosti spolova*) currently in force (Official Gazette No. 82/08; hereinafter: GEA). The Gender Equality Act specifically aims at protection and promotion of gender equality as a fundamental value of the Croatian constitutional order and defines and regulates methods of protection against discrimination based on sex, while also

4.1. Burden of proof in the Anti-Discrimination Act

The main horizontal legislative instrument in Croatia regulating equal treatment and protection against discrimination based on 21 discriminatory grounds is the Anti-Discrimination Act. Under Article 20 ADA, if a party in court or other proceedings claims that his/her right to equal treatment has been violated, he/she shall make it probable[40] that discrimination has taken place. In that case, it shall be for the respondent to prove that there has been no discrimination.[41] Therefore, the required standard or degree of conviction is that of probability, not certainty that the discrimination occurred. The claimant has to prove the probability of facts, on which the right to equal treatment and its violation depend. These facts need not to be proven with the degree of certainty normally required from the party who bears the burden of proof.[42]Presenting *prima facie* evidence of discrimination triggers the shifting of the burden of proof: the respondent has to prove the contrary with sufficient degree of certainty. Failing this, it is considered that the right to equal treatment was violated.[43]

The 2012 Supreme court judgement in a high-profile case contributed to the interpretation of this standard in practice. Whereas the lower court found no evidence of discrimination and dismissed the claim as unfounded, the Supreme court correctly applied the required standard of probability. The case, namely, involved a statement of a then President of the Croatian Football Association that homosexual football players will not play in a national football team as long as he was the president of the national football association and that only "healthy" people play football. Several associations representing the interests of persons of homosexual orientation filed a claim against him for discrimination (representative action). Whereas the first-instance county court found that the claim was unfounded, the Supreme court in appellate procedure was of the opinion that *prima facie* evidence of discrimination exists. It concluded that the purposive meaning of that statement was self-evident: humiliation and degradation of that category of persons.

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creating equal opportunities for men and women (Article 1 GEA). The Anti-Discrimination Act is a horizontal, 'umbrella' act in the field of prohibition of discrimination and creation of equal opportunities, and includes an exhaustive list of 21 prohibited discriminatory grounds (sex, race, ethnic origin, skin colour, language, religion, political or other opinion, national or social origin, property, trade union membership, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity and expression and sexual orientation; Article 1(1) ADA).

40 Cro. '…*dužna je učiniti vjerojatnim*"

41 Article 20 ADA.

42 Dika, *op. cit.* note 9, p. 85; Uzelac, A., *Postupak pred sudom*, in: Šimonović Einwalter, T. (ed.) Vodič uz zakon o suzbijanju diskriminacije, Ured za ljudska prava Republike Hrvatske, Zagreb, 2009, pp. 93-105, p. 101.

43 Supreme Court of the Republic of Croatia, Gž-25/11 of 28 February 2012.

In such case, it was for the respondent to prove that he did not discriminate that category of persons, which he failed to do.[44]The Supreme court ordered the respondent's apology to be published together with the complete text of the judgement in daily newspapers, so hopefully this standard will in the future be applied by lower courts as well.

Therefore, the two conditions for satisfying *prima facie* evidence of either direct or indirect discriminations are that the claimants have to establish existence of a comparable situation and existence of a disadvantage.[45] In a case involving a claim of unequal treatment based on age and union membership, the County Court in Bjelovar interpreted Article 20(1) ADA, stating that a party claiming discrimination does not have to prove it with a degree of certainty, but that it suffices to make it probable that discrimination occurred. "The standard of probability presumes that the party claiming discrimination has to prove that he/she is treated less favourably and that it is possible that the less favourable treatment is the result of direct or indirect discrimination based on the grounds established in Article 1(1) ADA."[46] The claimant established that he is the Union representative and that his employment contract was not transferred to the new employer (an outcome he desired), but he did not make it plausible that he was treated less favourably on the ground of either Union membership or age. Apparently, the claimant here failed to establish the existence of a comparable situation (one of the employees whose contracts were transferred was even older than him; furthermore, he was not very assertive or active Union member). However, the courts rarely ever elaborate their reasoning by systematically analysing the presented facts in this manner, and mostly just cite the relevant burden of proof provision and presented evidence in one sentence. It is therefore extremely hard to conclude what eventually tipped or did not tip the balance of probabilities. Furthermore, the decisions of lower courts are rarely published and accessible, their reasoning is only available indirectly and in a very limited manner through the published Supreme court decisions.

For example, in one Supreme Court judgement it is stated that the first-instance court carried out relevant evidence after claimant presented facts and evidence which made it probable that discrimination occurred and respondent presented facts and evidence to the contrary, and concluded that there was no discrimination.[47]However, it is not clear from the presented order of facts how the

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[44] Compare this to the Supreme Court case Rev-300/13, described in note 38 above.

[45] Farkas, L., How to present a discrimination claim: Handbook on seeking remedies under the EU non-discrimination directives, URL=http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 52-53. Accessed 15 February 2017.

[46] County Court in Bjelovar, Gž-458/2012, Judgement of 3 May 2012.

[47] Supreme Court of the Republic of Croatia, Revr-498/2014, Judgement of 13 May 2014.

first-instance court determined *prima facie* evidence of discrimination. It seems that the claimant substantiated his claim initially by claiming that he was transferred to a lower paid position because of his nationality. If this was the case indeed, then the standard for shifting the burden of proof was interpreted too lightly.

4.2. Burden of proof in the Gender Equality Act

Pursuant to Article 30(4) GEA a party claiming that his/her right has been violated has to present facts which justify suspicion that discriminatory behaviour has occurred;[48] the burden of proof then shifts to the opposing party who has to prove that there has been no discrimination. The syntagm 'shall present facts which justify suspicion' is a literal translation from Croatian, but also the one which describes the most accurately the meaning of this provision. Available unofficial translations of the Croatian GEA into English use the syntagm 'shall present facts from which it may be presumed',[49]probably to accommodate the wording of the burden of proof clause from the EU anti-discrimination directives. In our opinion, the latter translation of the Croatian text is not quite suitable, because 'to justify suspicion' and 'to presume' do not convey the same meaning or standard of proof.

The wording of the burden of proof provision in the GEA was probably influenced by the identical wording contained in the provision on the shifting of the burden of proof from the old Labour Act 1995, at the time when anti-discrimination provisions were contained in the labour act.[50]

Analysing the above provisions of the ADA and GEA, Potočnjak, Grgurev and Grgić do not consider that the Croatian legislation places heavier burden on the claimant in proving *prima facie* discrimination than envisaged in the EU anti-dis-

[48] Cro. '...*dužna je iznijeti* činjenice *koje opravdavaju sumnju*...'

[49] See e.g. translation available on the web site of the Office for Gender Equality of the Republic of Croatia: URL=https://ravnopravnost.gov.hr/UserDocsImages/dokumenti/Letak_Zakon%20o%20ravnopravnosti%20spolova%20engl.pdf. Accessed 15 February 2017.

[50] Old Labour Act of 1995 (Official Gazette No. 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, 30/04 and 137/04 – consolidated version), Article 2d (inserted by the Act on Amendments to the Labour Act in 2003, Official Gazette No. 114/03 – valid from 2003 to 2010): „If a person seeking employment or employee in case of a dispute presents facts which justify suspicion that employer acted contrary to Article 2 of this Act, employer has the burden of proof to prove that there has been no discrimination i.e. that he acted in accordance with Article 2a of this Act." Compare Dika, *op. cit.* note 9, p. 76, who states that the burden of proof provision in the GEA is "oddly" construed and repeats the same mistake from the old Labour Act.

crimination directives, despite the different wording.[51] However, they draw attention to the fact that Article 20(1) ADA uses the wording the Croatian legal system is familiar with, whereas the wording used in Article 30(4) GEA is unknown in the Croatian civil procedure law.[52]

This is debatable, because, as already mentioned the burden of proof provision in the GEA echoes the provision from the previous Labour Act of 1995, which is no longer in force. In fact, since there is no available case-law on interpretation of the burden of proof clause in the GEA, the case-law analysed here includes mostly the interpretation of the burden of proof clause from the old Labour Act of 1995. For example, in a case involving a claim of sexual harassment at work, the claimant was required to present facts which 'justify suspicion' that the employer was acting contrary to the prohibition of discrimination.[53] The court found that this standard was satisfied because the claimant provided a letter from a third party (a telecom operator) confirming her allegations that she was exposed to obscene and vulgar phone calls of sexual content at her workplace, a service which was not agreed either between her and her employer, nor between the employer and the telecom operator. The court concluded that the burden of proof that there was no discrimination was shifted to respondent.

Is the standard of 'justifying suspicion' from the GEA equal to 'probability' from the ADA?Dika argues that this wording can be interpreted to mean that it is sufficient for the alleged victim of discrimination to present facts, which, in themselves, if true, would raise the suspicion that discriminatory behaviour occurred, which is an even lighter burden than proving the probability.[54]So, unlike the ADA, the GEA would not require any link to typical rules of experience, so that a mere allegation of discrimination by claimant would be enough to shift the burden of proof to the respondent.

According to the available case-law, however, there is no fear that the Croatian courts might take this provision too lightly. Quite the opposite, the real danger lies in the possibility of excessively stringent application of the standard for the shifting of the burden of proof, so that the claimants will practically have to prove that discrimination occurred right from the outset.[55]Part of the 'blame' here lies not just on the courts, but also on the parties and their legal representatives, who

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[51] Potočnjak, Grgurev, Grgić, *op. cit.* note 14, p. 328-329.

[52] *Ibid.*

[53] County Court in Bjelovar,Gž-2000/2012, Judgement of 11 October 2012.

[54] Dika, *op. cit.* note 9, p. 76.

[55] See, for example, Supreme Court of the Republic of Croatia, Revr-856/2012, Judgement of 27 March 2013.

fail to make a clear and systematic allegation of discrimination in the first place. In a case involving a claim of unequal treatment in access to promotion and pay (apparently based on political belief, nationality and family status), the appellate court interpreted correctly that the burden of proof rules from the EU anti-discrimination legislation, as well as those applied before the European court of Human Rights require a person claiming discrimination to prove that he/she was placed in a less favourable position in comparison with other employees, from which it can be concluded, based on experience and basic indications that direct or indirect discrimination occurred.[56]However, applying that understanding to the facts of the case, that court concluded that *prima facie* evidence of discrimination does not exist, since internal rules of the respondent prescribe that pay is a category defined by results of actual work and responsibilities of an employee, and that "the title of the work place does not automatically grant the right to equal pay".[57]So, basically, the court concluded that pay system is not discriminatory because the difference in pay is prescribed in internal acts of the employer. There is no mention about the transparency of the pay system, which is exactly what triggered the shifting of the burden of proof in the CJEU *Danfoss* case, for example.[58]What evidence would in this case convince the court in the existence of *prima facie* discrimination? From the court's reasoning, it seems that anything shorter of the employer's acknowledgement of discrimination would miss that target.[59]

5. CONCLUDING REMARKS

The case-law on the burden of proof in anti-discrimination cases in Croatia is too scarce and practically anecdotal to draw any definite conclusions, but it does show a certain lack of consistency. This is not just due to insufficient knowledge and interpretation of *prima facie* evidence in court proceedings. The fact that the burden of proof clause in the GEA is expressed differently than the burden of proof clause in the ADA is certainly capable of contributing a great deal to this confusion. As stated above, all EU anti-discrimination directives contain almost identically worded provision on the burden of proof. There was no reason whatsoever for the two crucial Croatian acts in the anti-discrimination field to contain divergent

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[56] County Court in Zagreb, Gžr-330/14, Judgement of 6 October 2014, as cited in the Constitutional Court decision U-III-7490/2014 of 13 April 2016.

[57] *Ibid.*

[58] See above at note 24.

[59] The Constitutional Court also concluded that the claimant failed to prove discrimination, and that the burden of proof was on her, because a "subjective assessment of the claimant […] is not enough to establish unequal treatment." U-III-7490/2014 of 13 April 2016.

provisions, particularly having in mind the importance of a uniform and correct application of this standard in practice. Not only is the wording of these two provisions divergent when compared to each other, but both of them are different from the wording used in the EU anti-discrimination directives. Implementation of directives does not require literal transposition of their particular provisions. However, it defies logic to have different wording for provisions which should express the same standard. Despite of the differences in Member States regarding the approach and regulation of the civil procedure, there is no denying that the burden of proof rule from the EU anti-discrimination directives should be interpreted uniformly and in line with the CJEU case-law. This may be more readily accepted by the courts applying the GEA. The GEA, namely, expressly contains an EU-friendly interpretation clause or non-regression clause in Article 4, guaranteeing that provisions of that Act 'shall not be interpreted or implemented so as to restrict or diminish the content of warranties on gender equality enshrined in the universal rules of international law [and] the *acquis communautaire* of the European Community, […]'. This article could serve as a recourse to overcome any inconsistencies in the wording of the burden of proof clause in the GEA, which, if not interpreted correctly, might have adverse consequences not only on the position of the claimant, but also on the respondent in anti-discrimination proceedings.

Undoubtedly, a simple, clear and consistent wording would do the anti-discrimination case-law in general a better service. Not least because the relevant case-law in the field of gender equality, or better said, lack thereof, does not convey the real situation regarding the prevalence of gender (in)equality issues in the Croatian society.

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THE POSITION OF THE INDIVIDUAL IN THE EUROPEAN UNION THROUGH THE LENS OF THE ACCESS TO JUSTICE

ABSTRACT

This paper aims to question the position the individual has in the European legal sphere, understanding it as a fundamental topic within the frame of general international law. Since the positive international law lacks a normative definition of the subject, partly because of the inherent complexity of the problem, and partly because of the terminological inconsistency, this work aims to point on the major theoretical and practical dimensions of the issue at hand, focusing on the European region. The author will pay special attention to the procedural level of the individual's position, embodied by the right of individual to access justice in the European Union. The author will question the capacity for action, which is the ability of individual to initiate proceeding of judicial and other relevant authority. Inevitably, the attention will be given to the interrelation between the ECtHR and the ECJ with regard to the status individual has before two major judicial bodies in Europe. The paper aims to offer significant scientific and social contribution to enlightening the controversies over the traditional understanding of the individual`s position in positive international law, and to offer a new approach, especially with the relation to the standing of the domestic and regional legal theory and practice, as well as the consequences such new approach entails.

The author will use the following scientific methods in the project: comparative method, method of analysis and synthesis, historical legal method and sociological method.

Keywords*: Individual, European Union, European Court of Human Rights, European Court of Justice*

1. INTRODUCTION

The controversy over the position of the individual in international law is nothing less current now than it was in late 20s when Professor Spiropoulos delivered his lecture at The Hague Academy of International Law titled "*L'individu et le droit international*", starting with the thought: "*Le problème de la position de l'individudans la vie juridique internatonale est a l´heure actuelle un des problems*

les plus discutes de notre discipline".[1]As one of the timeless problems of the international legal doctrine, debate over the legal status of the individual still occupies legal scholars from all around the globe. Moreover, we are still as far from reaching the unique standing on it as ever before.

The position of the individual in a legal system, international or regional, is a vast topic, examined through centuries, and yet sorely controversial. Legal scholars since the very beginning of the development of the international legal thought questioned legal status of the individual in internal and external legal frames, questioning the possession of the recognised constituent elements of the notion of subjectivity. Traditionally, it has been widely accepted that only sovereign states and international organisations possess full legal personality and subjectivity in international law. The massive change in understanding of the legal status of the individual came under the spotlight again in the recent years.

Whether the individual is or is not subject of international law is an age-old issue. We tend to agree with Professor Brownlie when he wrote that *"[i]t is common for writers to pursue problems relating to the status of the individual in international law in terms of the large theoretical question"*[2], which might not be the only way in assessing the individual´s position. Since the question previously proposed demand a broad analysis, in this contribution we intend to approach one particular element inherent to the international legal personality, which is the procedural level of the individual's position, embodied by the right of individual to access to justice. In accordance with the general topic of the Conference, our focus will be directed specifically to the European legal sphere.

Questioning only active capacity of the individual, and leaving all other elements aside, we indent to prove that the ability of individual to *"directly, by his own actions, start international mechanism for protection of his rights and interests"*[3], which presents an active dimension of the international subjectivity, is of decisive importance for the assessment of the individual's position. Main motive for this research is to question the importance of the individual´s access to justice for its overall position in the given legal system. In most of the academic considerations to this topic, the authors identified major constituent elements of the subjectivity, amongst which the ability to protect himself before the courts and other bodies has the important place. Even though the individual is still far from being granted

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1 Spiropoulos, J., „L'individu et le droit international", *Recueil des cours*, vol. 30, 1929, pp. 192 – 270.

2 Brownlie, I., *The individual before tribunals exercising international jurisdiction*, International and Comparative Law Quarterly, Vol. 11, Issue 3, 1962, p. 702.

3 Kreća, M., *Međunarodno javno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2016, p. 133. (translated by author)

the full procedural capacity on the international level, due to the dominant understanding of the central role of the State, inherited from the classical law, there are, however, some strong arguments in support of the ongoing evolution of the individual´s position. Specifically, the European region, embodied by the Council of Europe and the European Union, leads in the progressive steps towards full and efficient protection of the human being.

2. WHY IS THE ACCESS TO JUSTICE RELEVANT FOR THE ASSESSMENT OF THE POSITION OF THE INDIVIDUAL IN THE EUROPEAN LEGAL SPHERE?

Without imposing a unique view on the status of the individual in international law, Shaw subtly highlights that the "*essence of international law has always been its ultimate concern for the human being*".[4]Even though primarily developed under the auspices of human rights law, in the present reflections on the subject, the issue of the individual´s status exceeds the human rights field and goes well beyond it.[5] In other words, not only human rights law governs the individual-related issues, but also some other fields of pubic international law. For instance, it is widely accepted that apart of possession of rights and duties in international law, the individual could also be held responsible for the breach of legal norms that constitute part of the international criminal law, etc.

Furthermore, the legal status of any entity in international law could not be assessed fully without taking into the consideration its procedural capacity. In spite of the fact that the individual does not possess full procedural capacity in the general international law, it is reasonable to conclude that this capacity represents one of key constitutive elements of subjectivity. If there is one factor to be determined for the effective protection of the individual´s interests and rights, that would be the ability of the individual to initiate proceedings against any state or international organisation before national and international juridical bodies. Effectiveness of the legal regime guaranteeing individual rights could be maintained only if the individual who suffered from the injury has capability of initiating the judicial mechanism against anyone that caused the injury.

According to Professor Cançado Trindade, "*the right of access to justice (comprising the right to an effective domestic remedy and to its exercise with full judicial guarantees of the due process of law, and the faithful execution of the judgement), at national and*

4 Shaw, M., *International law*, 7th edition, Cambridge University Press, Cambridge, 2014, p. 188.

5 For the overall analysis of the legal status of the individual beynd human rights, see: Peters, A., *Beyond Human Rights: the legal status of the individual in international law*, Cambridge University Press, Cambridge, 2016, pp. 602.

international levels, is, in effect, a fundamental cornerstone of the protection of human rights."[6] Especially at the regional level, where the individual has capacity to initiate proceeding before variety of bodies, the right of access to justice represent substantial guarantee of the effective legal regime.

3. ACCESS OF THE INDIVIDUAL TO EUROPEAN JUSTICE

European community of states has, through centuries, been characterised by several different ways of merger. After the World War II, the Churchill´s idea of uniting and rebuilding the European nation has been implemented in two ways. One of them represent the most advanced organisation for the promotion and protection of human rights in the contemporary world, Council of Europe (CoE), consisted of 47 European states and the other represents the European Union (EU), the economic and political union of 28 states, already members of the CoE.

It is beyond any doubt that for the sake of gaining effective protection of its rights, every individual has to have an access to justice starting with the national, up to supranational level. Since all the Member States of the EU are already being members of the CoE and therefore signatories to the European Convention of Human Rights (ECHR, the Convention), every individual has a right to seek for a remedy against the actions of his own state before the Strasbourg Court, in accordance with the Convention. Besides the power to initiate proceedings against his state, the individual has to possess the same power against the international organisation, especially in cases when the actions of that organisation have direct effect on the individual, as in the case of the EU. Since, in the words of professor Peters, EU enjoys a special position among numerous international organisations,[7] our research will be focused mainly on the ability of individual to start direct complaint procedure against EU institutions and bodies.

3.1. European Union

3.1.1. *Historical background*

Direct access of the individual to the judicial bodies was inherent to European communities since the beginning of the development of first integration project after the World War II. Already at the time, the individual could submit the application to the Court under the same conditions as Member States, or the com-

[6] Cançado Trindade, A. A., *Some Reflections on the Right of Access to Justice in Its Wide Dimension*, Contemporary Developments in International Law, Essays in Honour of Budislav Vukas (ed. R. Wolfrum, M. Seršić, T. M. Šošić), Brill Nijhof, Leiden, 2016, p. 458.

[7] Peters, A., *op. cit.* note 5, p. 490.

munity bodies. Thus, the idea of placing individual in the almost equal position to other entities before the European court, on a higher level than national, had its proponents in the early 50s. Furthermore, the individual had been granted an access to the supranational court in the field that goes beyond human rights, since none of the first European communities dealt with the human rights in any way. Surely, from the historical prospective, the procedural capacity of the individual was a progressive idea as such. However, one has to bear in mind that the detail requirements for the access to the Court were given in the treaty establishing the respective community and were far from the ideal state of matter.

The first Court of Justice was established by the Treaty of Paris, signed in 1951, as a principal judicial institution of the then founded European Coal and Steel Community (ECSC).[8] Even though the ECSC was highly specialized and substantially related to the heavy industry, with the Court whose competence was limited to coal and steel disputes, or in other words whose jurisdiction was to "*ensure the rule of law in the interpretation and application of the Treaty constituting the Community and of its implementing regulations*"[9], for the purpose of our study it is worth noticing that the individuals were given the *locus standi* before the Court. According to Art. 66, para 5.2 of the Treaty "*actions can be brought by any person directly affected*".[10] It might be worth noticing that in the abovementioned case, the term individual was related to the coal and steel producers or even buyers in some cases, rather than any interested person.[11]

When summarizing the principal functions of the Court, Lagrange *inter alia* stipulates that the Court was "*entrusted with the protection of individual rights against the arbitrary and the illegal action of the Administration*", which was of a decisive importance for the individual since national judges did not have that competence after establishing the ECSC.[12] As a matter of fact, it was obvious that the individuals, together with the associations and enterprises, initiated proceedings against

[8] Traité instituant la Communauté Européenne du Charbon et de l'Acier, URL=http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT&from=EN. Accessed 5 February 2017.

[9] Brownlie, I., *op. cit.* note 5, p. 712.

[10] Valentine, D. G., *The Court of Justice of the European Coal and Steel Community*, Martinus Nijhoff, The Hague, 1955, p. 132.

[11] As an illustration, Gormley quotes the case from 1954, when „*the Court rejected the complaint of an association of consumers for the reason that it had no standing before the Court under the terms of the Treaty permittingonly associations of producers to appear as litigants*". Gormley, W. P., *The Procedural Status of the Individual before International and Supranational Tribunals*, Martinus Nijhoff, The Hague, 1966, pp. 142 – 143.

[12] Lagrange, M., *The role of the Court of Justice of the European Communities as seen through its case law*, Law and Contemporary Problems, Vol. 26, Issue 3, 1961, pp.404 - 405.

the High Authority more often than Member States. The reasoning behind that might be the fact that the States' interests were less likely to collide with the interest of the ECSC, unlike individuals who represented most commonly opposing economic and social group.[13]

In the upcoming years, the idea of European unity has taken on a wider scale and culminated with the adoption of Treaties of Rome in 1957, and the establishment of two other communities, the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM).Under the same treaties, the Court of Justice of the European Communities was created, soon becoming a unique body with jurisdiction in matters relevant to all three, then existing, communities.[14]"*The Rome Treaty provides that the Court of the European Economic Community may review the legality of the decisions of the Council and of the Commission. Individuals and private corporations may appeal to the Court under the same conditions as a member State, the Council and the Commission*."[15]In other words, the individual could seek protection against actions of the Community institutions in the same way as governments. They had direct access to the Court, of course, with some limitations but without any need for the activation of the diplomatic protection mechanisms, which were still necessary in case of individual protection at the international level. That is why some authors from that time tend to conclude that "*the individual is a subject of Community law, though he does not possess the status equal to that of Member States*".[16]

When comparing the relevant provisions from all three treaties, related to the *locus standi* of the individual before the joint Court of the Communities, it is evident that the drafters of the first treaty establishing ECSC reached by far the most favourable solution for the individual. Thus, according to Article 33 of the ECSC Treaty, Article 173 of the EEC Treaty, and Article 146 of the EURATOM Treaty, the procedural capacity has been recognized to all persons.[17] The main difference, however, lies in the additional criteria that had to be met, according to each treaty. While under the ECSC Treaty the only condition on the side of the applicant was that he was "*affected by*" the action against which he is appealing or "*deem to*

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13 *Ibid*., p. 405.

14 The Convention on certain institutions common to the European Communities, which was signed on the same day sa the Rome Treaties, established that the ECJ was to replace the Court of the ECSC. Further information on the history of the Court of Justice available at: URL=http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-08/histoire_en.pdf. Accessed 5 February 2017.

15 Brownlie, I., *op. cit.* note 5, p. 712.

16 Gormley, W. P., *op. cit.* note 11, p. 135.

17 *Ibid*, p. 147.

involve an abuse of power affecting them"[18], the wording of the latter two treaties consist of a bit restrictive solution. Article 173 of the EEC Treaty reads as follows: "*Any natural or legal person may ... appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him.*"[19] As mentioned above, under the treaties establishing the EEC and EURATOM, the applicant had to be directly, personally affected by the action against which he is appealing. What it meant being individually concerned the Court explained already in 1962, in *Plaumann & Co v Commission*, stating that "*[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.*"[20] Ever since this case, the Court introduced restrictive approach in the interpretation of the capacity to bring an action before it.

It is considered that the main reason behind previously quoted solution was the intent of the Member States to narrow the Court´s jurisdiction. Gormley believes that this solution "*must sadly be conceded to represent a clear intention on the part of the Member Governments to return to the traditional object theory of classical international law, for under Article I73 the States have been given a favoured position.*"[21]

3.1.2. *The Individual in the EU after Lisbon*

The entering into force of the Lisbon Treaty brought massive change in the overall status of the individual within the legal scope of the EU. Even though, regarding recognition and protection of human rights, the EU took the opposite way than usual, with having Court recognised human rights in its case law before having them formally implemented to a treaty[22], it was still necessary to adopt, we might say, a proper human rights document. That has happened in 2000, by adoption of the Charter of Fundamental Rights of the European Union. However, even adopted, the Charter did not come into the force until the 2009 and the entering into the force of the Lisbon Treaty. According to the words of a former president

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[18] Art. 33 of the ECSC Treaty.

[19] Art. 173 of the EEC Treaty.

[20] Case 25-62 *Plaumann & Co v Commissionof the European Economic Community* [1963] ECR 1963, p. 107.

[21] Gormley, *op. cit.* note 11, p. 150.

[22] For the detail analysis of fundamental rights as judge-made law, see: Rossas, A., *The EU and Fundamental Rights/Human Rights*, International protection of Human Rights: A textbook (ed. Krause, C.; Scheinin, M.), Institute for Human Rights, Turku/Åbo, 2009, pp. 443 – 474.

of the European Commission, José Manuel Barroso, a goal of the Lisbon reform was to "*put citizens at the centre of the European project*".[23]Hence, it was rightly expected that the Lisbon reform foster advancement of the environment in which individuals can use Union law to enforce their rights.

The Treaty of Lisbon, consisted of two renewed treaties, Treaty on European Union and Treaty on the Functioning of the European Union (further reference: TEU and TFEU), entered into force on 1 December 2009.[24] It has introduced "*a new nomenclature*"[25] for the judicial system of the European Union. As from September 2016, the judicial institution of the EU consists of two bodies: the Court of Justice and the General Court. The Civil Service Tribunal, established in 2004, has ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court.[26]

Generally speaking, the competence of the Court of Justice relates to the review of the lawfulness of the Community measures, with recognised ability of the individuals to access the Court in case of the infringement of their rights. It might be worth noticing that the Court of Justice, unlike the Court in Strasbourg, does not recognize any specific human rights remedy, but the individual could initiate the usual proceeding, in a manner stipulated by the Treaties. Yet, having in mind the specific nature of the European Union as an international organisation, such legal status of the individual shouldn't be surprising. As professor Von Bogdandy stressed with eloquence, *"[t]he European legal order started as functional legal order: it was set up in order to integrate the European peoples and States, mainly through an integration of their national economies. European law has been an instrument for political and social transformation of completely new dimensions for democratic societies, not meant to protect, but rather to change them with a view toward a common European future*."[27]

Anyhow, the individual found its way to the European justice. As stated in literature, "*two roads lead to Luxemburg. One goes straight, the other takes a detour via*

[23] Quoted in: Peters, A., *op. cit.* note 5, p. 490.

[24] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are reproduced in [2016] O.J. C 202, pp. 1–388.

[25] Barents, R., The *Court of Justice after the Treaty of Lisbon*, Common Market Law Review, Vol. 4, Issue 3, 2010, p. 709.

[26] General presentation of the Court of Justice of the European Union, available at URL=http://curia.europa.eu/jcms/jcms/Jo2_6999/en/. Accessed 2 February 2017.

[27] Von Bogdandy, A., *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, Common Market Law Review, Vol. 37, Issue 6, 2000, p. 1308.

the national courts."[28] In this paper, we are focusing on the most effective one, the right of direct appeal.

With regard to the right of direct appeal of individuals, the only relevant provision, and method available to the individual, is stipulated in Article 263 (4) TFEU (*ex Article 230 (4) TEC*):

> "*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*."[29]

Therefore, according to the wording of the previously quoted article, any individual may bring action against an act as long as the act concerns that person directly and individually. At the same time, all actions brought by individuals against Community could be declared inadmissible if the Court finds that the abovementioned requirement is not fulfilled.[30] Individuals, as co-called "non-privileged applicants"[31], are facing few possible scenarios. Either they are being addressees of the act against which they are initiating the proceeding, or the act is of direct and individual concern to them (this provision is nothing new, since it has been the same since the Rome Treaty), or, as a last case scenario, they are challenging the regulatory act that is (1) of direct concern to them and (2) does not entail implementing measures.

As it may be seen, the wording of the new article suffers from many ambiguities. Many questions arose from the final part of the provision stated above. Starting with the scope of the term "regulatory act", all the way to the already mentioned "direct concern" and "implementing measures". Not even legal doctrine nor practitioners are entirely convinced in the meaning of the controversial article. Additionally, the case law of the Court, relying on not-so-convincing arguments in several cases, does not help in clarifying the ambiguity completely.

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[28] Schwensfeier, H. R., *Individuals´ Access to Justice under Community Law*, University of Groningen, doctoral thesis, 2009, p. 13.

[29] Article 263 (4) TFEU (Lisbon), ex Article 230 (4) TEC

[30] As a matter of fact, some authors argue that nearly all action brought by individuals against Community regulations failed because of the un fulfilment of this condition. See: Barents, R., *The Court of Justice after the Treaty of Lisbon*, Common Market Law Review, Vol 47, Issue 3, 2010, pp. 722 – 724.

[31] Schwensfeier, H. R., *op. cit.* note 28, p. 43.

A former ECJ judge, Everling, claims that all kinds of regulations, including legislative acts fall within the scope of the abovementioned article.[32] On the other hand, there are others who tend to understand the meaning of the provision narrowly and argue that the direct challenge is limited to non-legislative acts only.[33] However, if we bear in mind that the reasoning behind the article 263 (4) TFEU was to promote judicial protection of the individual, as well as the fact that the language used in the Treaty suggests that the term "regulatory act" should be taken broadly, since the term "non-legislative acts" has been used in the Treaties elsewhere[34], than we are closer to the conclusion that the individual could directly challenge both kinds of acts before the Court.

Yet, even though our conclusion might be more favourable for the overall position of the individual in the EU legal sphere, it does not mean that it is being supported by the appropriate case-law. In the *Inuit* case Court proposed restrictive view and stated that "*it is apparent from the third limb of the fourth paragraph of Article 263 TFEU that its scope is more restricted than that of the concept of 'acts' used in the first and second limbs of the fourth paragraph of Article 263 TFEU, in respect of the characterisation of the other types of measures which natural and legal persons may seek to have annulled.*"[35] Therefore, according to the Court´s view, the "regulatory act" cannot mean any type of act, but only non-legislative acts of general application, since any other understanding "*would amount to nullifying the distinction made between the term 'acts' and 'regulatory acts' by the second and third limbs of the fourth paragraph of Article 263 TFEU*."[36] It seems that the Court did not take into the consideration the fact that many authors had pointed to, that there is also a distinction made in the Treaties between regulatory acts and non-legislative acts of general application.[37]

The other path available to the individual, mentioned at the beginning of this chapter, is the possibility of the individual to challenge the Union acts indirectly, through the procedure of the national court. As suggested before, this option is

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32 Everling, U., *Rechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon*, Europarecht, 2009; reffered by: Balthasar, S., *Locus Standi Rules for Challenges to Rgulatory Acts by Private Applicants: The New Article 263 (4) TFEU*, European Law Review, vol. 35, 2010, p. 544.

33 *Ibid.*

34 Some of provisions that refer to „non-legislative acts of general application" are consisted in Article 290 (1) and Article 297 (2) TFEU; referred by: Balthasar, S., *op. cit.* note 32, p. 545.

35 Case C-583/11 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] ECR, par. 58.

36 *Ibid.*

37 Van Malleghem, P. A.; Baeten, N., *Before the law stands a gatekeeper – Or, what is a „regulatory act" in Article 263 (4) TFEU? Inuit Tapiriit Kannatami*, Common Market Law Review, Vol. 51, Issue 4, 2014, p. 1198, 1204.

more demanding and definitely less certain than the direct access to the Court. Still, it means additional support for the individuals' position in the EU. According to the view of the Court in *UPA* case from 2002, *"[u]nder that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty*, [now, article 263 TFEU, *op. a.*] *directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid* […] *to make a reference to the Court of Justice for a preliminary ruling on validity."*[38]

Uncertainty of the proposed alternative is the most visible through the dominant role of the national court that decides on the formulation of the question, as well as the possibility of the national court to refuse to refer to the ECJ.[39] Also, the indirect procedure could require more time and finances.[40]

Even though we are not fully convinced that the view proposed by the Court in *UPA* case, that the remedy available before the national court is as effective as direct access to the Court of Justice, we admit that the subsidiarity does not necessarily lower the procedural capacity of the individual. According to Article 19(1) of the TEU, „*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*."[41] In the multi-level juridical system, as the one in the EU, "*the level at which the rights are established and the level at which legal protection is granted institutionally are often not the same*".[42] However, it should be noted that the indirect path leading to justice could be strewn with thorns and reaching light at the end of the tunnel questionable.

3.2. The individual in the Council of Europe

3.2.1. *Historical overview*

In the aftermath of the World War II, when creation of the first regional organisation on European ground took its place, the position of the individual in international law was stilling shadow of the idea of absolute sovereignty of the state, especially in the human rights field. By proposing mechanisms for supervision of

38 Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR 2002 I-06677, par. 40.

39 Van Malleghem, P. A.; Baeten, N., *op. cit.* note 37, p. 1215.

40 *Ibid.*

41 Article 19 (1) TEU; reffred by: Peters, A., *op. cit.* note 5, p. 483.

42 *Ibid.*

the implementation of the European convention on Human Rights, open for the direct access of the individual, the Member States of the Council of Europe have begun to create a unique system of human rights protection.

The first phase of development of the system of human rights protection within the Council of Europe lasted until the adoption of the Protocol XI and was unfavourable for the individuals since there was no possibility of direct application to the Court. Individual petitions had to be assessed before the Commission and only after the Commission carried out the procedure on the merits, the case could come before the Court. The role of the Court in this period was vividly expressed by Frowein, former Vice President of the Commission, describing it as a "*sleeping beauty, frequently referred to but without much impact*."[43]Fortunately, with the entry into force of Protocol XI, the Court has become the main body monitoring the implementation of the provisions of the Convention in the territories of all Member States of the Council of Europe.

Since the individual petition system of the ECtHR has been discussed widely, in this contribution we intend to point to the major characteristic and obstacles faced by not only individuals but also the system itself. It is well known that the human rights system under the auspices of Council of Europe provides protection for around 800 million people in Europe. In time when the national state fails to protect or even breach someone´s rights, the fact that there is a mechanism that challenge the national court´s decision often means the last hope for the individual.

3.2.2. *Direct access to the ECtHR*

According to Article 34 of the Convention, "*any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols*"[44] could refer to the Court directly. Thus, the right to institute proceedings before the Court is not reserved only for the nationals of the Contracting States, but this right belongs to all persons whose rights have been violated by a State Party. The key is a violation of the provisions of the Convention.

It is beyond the scope of this paper to assess both the substantial and procedural aspects of the Convention system regarding the status of the individual before the

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[43] Quoted in: Janis, M. W., *European Court of Human Rights*, International Courts for the Twenty-First Century (ed. Janis, M. W.), Martinus Nijhof Publishers, Dordrecht, 1992, p. 135.

[44] Article 34 ECHR

Strasbourg Court. Therefore, we will make brief reference to some of the most disputable aspects of it.

One of admissibility criteria for submitting the application by the individual to the ECtHR is a victim status. The main reason behind this criteria is to prevent *actio popularis* in Court proceedings. However, the concept of victim cause numerous uncertainties. In the case of *Vallianatos and Others v. Greece,* the Court gave an interpretation of the notion of victim stating "*[a]ccording to the Court's established case-law, the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. (…) The word "victim", in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation.*"[45] Thus, in order to lodge an application to the Court, the person has to demonstrate that ether he is directly affected by the measure he is complaining to, or to be able to act as an "indirect victim", the notion that has been thoroughly assessed in the Court´s case-law.[46] In other words, when the direct victim is prevented from accessing the Court, the person that belongs to category of indirect victims may do so.

Former greatest achievement of the Council of Europe, the individual's right to direct protection before the Court, now threatens to become a stumbling block of the entire system. According to the numerous scholars who devoted their work to the assessment of the Strasbourg human rights system, for most of its first 30 years the Court has received only 800 individual petitions per year, mainly due to "ignorance".[47] Over the years, the Court manage to build confidence of the individuals in the system of human rights protection, and according to Professor Cançado Trindade "*has contributed, in its own way, to the gradual strengthening of the procedural capacity of the complainant at international level*".[48]However, the Court´s overload due to numerous individual petitions nowadays largely slows down the process of achieving individual justice. In 2016, for instance, there have been almost 80 000 pending applications.[49] Therefore, the effectiveness of the Court has become a matter of profound debates between legal scholars and prac-

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45 Judgment *Vallianatos and Others v. Greece* (2013) [GC], par. 47.

46 List of cases containing explanation of the notion of „indirect victim" provided in: European Court of Human Rights*, Practical guide on admissibility criteria*, 2014, URL=http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf. Accessed 15 February 2017.

47 Greer, S.; Williams, A., *Human Rights in Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?,* European Law Journal, No. 4, 2009, p. 464.

48 Cançado Trindade, A. A., *The Access of Individuals to International Justice*, Oxford University Press, Oxford, 2011, p. 27.

49 Statistical data available at: URL=http://www.echr.coe.int/Documents/Stats_pending_2016_ENG.pdf. Accessed 15 February 2017.

titioners. The general conclusion is that the ongoing reforms of the Strasbourg system regarding the individual petitions has to be supported by the better implementation of the Convention by national authorities, so that the number of clearly inadmissible applications, or repetitive applications get reduced.[50]

4. CONCLUDING REMARKS

We might conclude this paper with the last though of Professor Spiropoulos in the abovementioned contribution from the 1929: "*Espérons seulement que les efforts conjugués de pensées amies arriveront à hâter l'heure ou l'individu se verra assurer, dans l'ordre international, la place qui répond au développement récent de l'organisation du monde*." Among all aspects of its legal status, the access to justice undoubtedly deserves significant place.

The assessment of the individual´s procedural capacity in the European region, with proposed emphasis to the European Union system, was supposed to point to the basic differences between the systems itself. A striking difference in systems under CoE and EU regarding the individual lies in the nature of the two subjects of international law. CoE imposes rights and duties indirectly and therefore the individual can appeal only after the unsatisfactory solution in the national state, while the EU can impose various rights and duties directly through the activity of its institutions and the secondary law, so there must be an opportunity for the individual to appeal directly to the Court. The second point of divergence lies in the scope of jurisdiction and fields covered by both organisations. While the CoE serves as the best established human rights forum in the international community, the EU embodies primarily economic integration, which has a substantial influence on reasons for which an individual may lodge an application. „*An economic institution must carry out its assigned tasks rather than becoming overly involved with political-type questions. Consequently, a clear sphere of authority is left to the Council of Europe, even though concurrent jurisdiction may arise*."[51]

Despite all the pros and cons inherent to both systems, by observing the global picture of the individual´s position, it is safe to conclude that the individual in Europe has forged the path to the regional justice.

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[50] For the assessment of the Court´s efficacy see: Mahoney, P., *The European Court of Human Rights and its ever-growing caseload: Preserving the mission of the Court while ensuring the viability of the individual petition system,* The European Court of Human Rights and its Discontents (ed. Flogaitis, S.; Zwart, T.; Fraser, J.), Edward Elgar, 2013, pp. 18 – 25.

[51] Gormley, W. P., *op. cit.* note 11, p. 158.

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THE SOVEREIGNTY OF THE MEMBER STATES OF INTERNATIONAL ORGANIZATIONS WITH SPECIAL FOCUS ON EUROPEAN UNION

ABSTRACT

This paper will discuss issues of possible limitations of sovereignty in the so-called deliberative organizations (UNESCO, Council of Europe, OSCE), the United Nations (with respect to the authority and responsibility of the Security Council under the Chapter VII of the Charter), and the European Union. Special focus will be on the supranational system of the European Union.

The term „supranational" means that it is a legal concept, and refers to issues of superiority and direct applicability of the rules of the European Union on the territory of the Member States. The traditional view of sovereignty is replaced by the new concept of sovereignty and the interdependence of the countries.

The competencies of the European Union overcome national borders and interests. This implies that the EU can make binding decisions not only for Member States, but also for legal entities and individuals in the Member States. That makes the biggest difference between European Union and all other international organizations. Membership in such organization is reducing the sovereign rights of member states.

The successor states of the former Yugoslavia will join the EU faster than it is now assumed. That is why it is even more necessary to clarify the superiority of EU law in relation to the national laws of states, and to point out the sovereignty of the member states of international organizations, especially of the European Union.

Keywords: *Sovereignty of the member states, Deliberative International Organizations, Supranational Organizations, Chapter VII of the UN Charter*

1. INTRODUCTION

Sovereignty means supreme authority within a territory. Each element of this definition highlights an important aspect of the concept of sovereignty. First, a holder of sovereignty possesses authority. Second, sovereignty is not a matter of mere authority, but of supreme authority. And third, territoriality is a principle by which members of a community are to be defined. It specifies that their membership derives from their residence within borders.[1]

However, EU Member States have relinquished part of their sovereignty to EU institutions. This paper will discuss issues of possible limitations of sovereignty in the so-called deliberative organizations, the United Nations (with respect to the authority and responsibility of the Security Council under the Chapter VII of the Charter), and the European Union. Special focus will be on the supranational system of the European Union.

International law divides international organizations according to different criteria, but the most important one for the jurists is their division by the degree of authority and range of decisions of their organs. Thus the international organizations can be divided into deliberative and supranational. Deliberative organizations are for instance UNESCO, the Council of Europe or OSCE, while supranational organization is as of now only the European Union.[2]

The basic hypothesis of the paper is that the sovereignty of member states of supranational organizations is much more limited than the sovereignty of states members of deliberative organizations. In addition to the basic hypotheses an additional auxiliary hypothesis is set up:

- Supranational organizations have in strictly narrow responsibilities delegated authorities to take decisions from its member states to the joint organization bodies. The decisions made in this way are binding not only for all member states, but also for individuals and legal entities within them.

The fundamental goal of the research is to point out the level of authorization and the range of decision making of the bodies of supranational and deliberative

1 Stanford Encyclopedia of Philosophy, URL=https://plato.stanford.edu/entries/sovereignty/. Accessed 17 March 2017.

2 Nedžad Smailagić states that there is a third category of international organizations which is called operational organization. According to him, operational international organizations are authorized to carry out specific issues and projects so as to act independently in all aspects of the enforcement of assigned tasks, while the general policy and principled solutions are decided by the member states. (Smailagić, N., *Međunarodne organizacije, Država, politika i društvo u Bosni i Hercegovini: analiza postdejtonskog političkog sistema*, Gavrić, S. (ed.), University press, Magistrat, Sarajevo, 2011, pp. 550)

international organizations. The goal is also to point at influence that a creation of one supranational entity (European Union) had on the erosion of the classic concept of sovereignty. Membership in the EU is doubtless leading to the giving up of a measure of sovereignty. Related to the goals of the research is the stated and fundamental research question of whether or not we are the witnesses of the creation of the identity of the European Union that will replace the existing national identity of the Member States.

To reach the previously listed goals of research, we combined several scientific methods. Normative approach aims at determine legal regulations of the Acquis of the European Union. The comparative method is used to point out the difference between these two kinds of international organizations regarding the sovereignty of their member states. A special emphasis will be given to the United Nations with regard to the authorization of the Security Council of Chapter VII of the UN Charter.

2. SOVEREIGNTY OF THE MEMBER STATES OF DELIBERATIVE INTERNATIONAL ORGANIZATIONS

Deliberative international organizations are the most common forms of lasting cooperation between the countries. The bodies of these organizations discuss the issues on the agenda, which are of common interest. On the meetings, the members' points of view are being adjusted, and in the end decisions are being made by majority vote.[3] The decisions of these organizations are important, but they are usually only in the form of recommendations. The success of their implementation depends on the member states.

The deliberative international organizations include, for example, OSCE, Council of Europe and UNESCO. These international organizations are dealing with global issues of importance such as human rights, democracy, rule of law, conflict prevention, combating the crisis and post-conflict reconstruction of the countries. Mostly their member states have equal status and decisions are made by consensus. The sovereignty of the member states of such organization is untouched. As a part of the organization they retain its authority over its territory and its citizens. This authority is not subject to anyone's control and not dependent on any other authority. Deliberative organizations make decisions that are binding for their member states, but which must be transformed into a national law in order to be

[3] *Ibid.*

directly applicable on the territory of member states, especially to be directly applicable for legal and physical entities.[4]

2.1. The powers of the Security Council of the United Nations in connection to Chapter VII of the UN Charter

Globalization and interdependence of states at the global level lead to joint decision-making in many issues. Each state tends to achieve its interests, and common way of decision-making will lead to the fact that the strongest states are deciding in the name of all. It will lead to presenting national interests of the strongest ones as international. Less developed states will be forced to abide by such decisions. The interests of small states are in international co-operation in the form of an international organization because it often provides a basis for access by developing states to the playing field of the stronger states.

We tend to speak of sovereignty in a too narrow sense, without taking into account things that has taken place in the world in recent. Interests of all states in conditions of globalization consist in working together for the purpose of achieving common goals.[5] In globalizing world state acting alone cannot achieve governance interests.

The United Nations is the world's largest and most important international organization. As noted above, it is in a group of deliberative international organizations. The bodies of the United Nations make decisions that are usually in the form of recommendations. United Nations Security Council still has the power to bring binding decisions under Chapter VII of the Charter of the United Nations, but the member states dictate the choice of the manner of execution of these decisions. Therefore, although limited, the Security Council has the authority to make

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4 See for example: Röben, V., *The Enforcement Authority of International Institutions*, German Law Journal, Vol. 09, No. 11, 2008, pp. 1965-1985; Bogdandy, A., Dann, P., *International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority*, German Law Journal, Vol. 09, No. 11, 2008, pp. 2013-2039; Bernstorff, J., Procedures of Decision-Making and the Role of Law in International Organizations, German Law Journal, Vol. 09, No. 11, 2008, pp. 1939-1964; Goldmann, M., Inside *Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, German Law Journal, Vol. 09, No. 11, 2008, pp. 1865-1908 (particularly Part IV 1. and IV 2.); Bogdandy, A., *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, EJIL , Vol. 23, No. 2, 2012, pp.315–334.

5 Something similar has been pointed out by the Minister for Foreign Affairs of Iceland Halldor Asgrimsson at the University of Iceland in January 2002. (URL=https://www.mfa.is/news-and-publications/nr/1902. Accessed 02 March 2017.)

binding decisions, in contrast to the General Assembly. Of course, such binding decisions are binding only on the member states of the United Nations.[6]

The Security Council of the United Nations is the primary body for consideration of disputes. Thus, over three fifths of disputes which the United Nations dealt with was the exclusive responsibility of this body, and over 82% of disputes within the shared competence of the Security Council and General Assembly.[7] Since 1970, more than 90% of the cases on which the United Nations discussed were entrusted to the Security Council.[8]

Chapter VII of the Charter is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression". Its text is specific and unique in international law. It allows the Security Council to make binding decisions if it determines that somewhere in the world peace and security are disturbed. It also authorizes the Security Council to ask the member states of the United Nations for the use of force to safeguard international peace and security. [9] It represents an exception to the principle of non-interference in the internal affairs of member states (Article 2 (7) of the UN Charter).

Chapter VII of the Charter provides for the conclusion of additional agreements on the use of military contingents at the request of the Security Council. It also guarantees the right of states to self-defense. Furthermore, authorizes the Security Council to determine the aggressor in the conflict and that, accordingly, appoints itself towards the parties to the conflict.[10] Of course, all of the above applies only to situations where no permanent member of the Council files the right to veto a decision.

The decisions that the Security Council is empowered to make under Chapter VII of the UN Charter can be divided into decisions involving the use of force and decisions that do not involve the use of force. Decisions that do not involve the use

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6 See: Degan, V. Đ., *Međunarodno pravo*, Školska knjiga, Zagreb, 2011, pp. 439-441

7 Bennett, A. L .; Oliver, J. K., *Međunarodne organizacije*, Politička kultura, Zagreb, 2004, pp. 125

8 *Ibid*.

9 Today almost all countries of the world are members of the United Nations. United Nations, URL=http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html. Accessed 02 November 2016.

10 The Security Council is very reluctant to declare one side in the conflict as the aggressor, even when the public has it very clearly that it is aggression. The closest to that qualification was on 31 of March 1976 in Resolution No. 387, in connection with the intervention of South Africa in Angola, and 15 of December 1982 in Resolution No. 527, in connection with the intervention of South Africa in Lesotho. Texts of the resolutions available at: URL=http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/387(1976) and URL=http://www.un.org/en/ga/ search / view_doc.asp? symbol = S / RES / 527,1982. Accessed 02 November 2016.

of force are often economic or political sanctions.[11] Decisions involving the use of force may be taken by air, sea or land forces.[12] Their goal is re-establishment of international peace and security through diplomatic, economic or military action.

The above shows that the Security Council (i.e. the United Nations) has vast powers if international peace and security are violated. The problem in practice is that these powers are not used (enough).[13] Until the '90s the Security Council did not refer to Chapter VII of the UN Charter even when it called for the application of sanctions.[14] Due to the impossibility of agreement between the major powers Chapter VII of the Charter mostly represents just a dead letter. Total activity of the United Nations with regard to threats to peace, breach of the peace and acts of aggression was assessed as ineffective and disappointing. High hopes that were placed in the security system remained unfulfilled mainly because of the bulky apparatus of the United Nations and its inability to act if there is no cooperation between major powers.

With regard to the sovereignty of the member states of the United Nations it can be said that it is untouched, except in the implementation of Chapter VII of the UN Charter. If the Security Council determines the existence of any threat to the peace, breach of the peace, or act of aggression, it has the right to demand action by all member states of the United Nations for peace to be re-established.

3. SOVEREIGNTY OF THE MEMBER STATES OF SUPRANATIONAL INTERNATIONAL ORGANIZATIONS (THE EUROPEAN UNION)

A state is a type of an organized political and social community that acts as the highest legal order of the community and is not subject to any other order.[15] The definition of supranational international organizations differs from this understanding of the state, which implies the complete substitution of the traditional concept of sovereignty. One part of the sovereignty of the member states of supranational organizations transfers to the organization itself. Its member states lose the exclusive right to make the rules that will be directly applicable in the territories of the member states, and directly applicable to their legal and physical persons. The above is

[11] Article 41 of the Charter of the United Nations.

[12] *Ibid.*, article 42

[13] By 1990, economic sanctions in accordance with Article 41 of the Charter of the United Nations have been applied only twice: in 1966 a partial economic sanctions against Southern Rhodesia, and in 1968 their extension. (Bennett, A. L.; Oliver, J. K., *op.cit.* note 7, pp. 137)

[14] *Ibid.*, pp. 138.

[15] Andrassy, J., *Međunarodno pravo*, Nakladni zavod Hrvatske, Zagreb, 1949, pp. 37.

contrary to the traditional understanding of the sovereignty of state.[16] States agree to such renunciation of their sovereignty in order to achieve their internal objectives and interests. Currently, the only such organization is the European Union.

Supranationality implies that the member states of such an organization waive of part of their sovereignty. Decisions taken by such organization are binding to all its member states. The member states of such organizations essentially transfer some of their sovereign powers to a higher level, i.e. the level of international organizations. Therefore supranationality itself implies the existence of sovereignty. It is sovereignty of member states that voluntary transfer its own national powers to an international organization.[17]

The supranational character of the European Union does not mean "state above all states", but refers to two characteristics of this organization: supremacy and direct applicability of its rights in relation to the national rights of its Member States. If the European Union adopts a rule, it binds all its Member States. It does not matter whether any of the Member States voted against this rule. If some of them do not respect it, a proceeding against that state may be initiated before the judicial body of the Union. The process may not only be run by some other Member State, but also a legal or physical person of any Member State.

Many decisions of the Court of Justice of the European Union confirmed stated. One of the most important among them is the decision in the Van Gend en Loos case.[18] This case significantly affected the development of EU law. From that point, the Court began to directly differentiate the legal system of the EU from legal system of international law. Also, the Court in this case found that the Treaty establishing the European Economic Community affirmed a new legal relationship in which both individuals and states have rights and obligations.

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16 Lindseth, P., Democratic *Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, Faculty Articles and Papers, Columbia Law Review, 1999, pp. 628-738; Lindseth, P., *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s*, University of Connecticut School of Law Articles and Working Papers, Loyola of Los Angeles Law Review, 2004, pp. 363-406.

17 Lindseth, P., *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s*, University of Connecticut School of Law Articles and Working Papers, Loyola of Los Angeles Law Review, 2004, pp. 397.
The term „supranational" was first used in the establishing treaty of the European Coal and Steel Community. Today, this agreement represents the only founding act of an international organization which defines the jurisdiction of any of its bodies as supranational. (Miščević, T., *Novi teorijski pravci u izučavanju međunarodnih organizacija*, Godišnjak Fakulteta političkih nauka, Beograd, 2007, pp. 356)

18 Case 26/62 Van Gend en Loos [1963] ECR 1

In the Costa v. E.N.E.L. case the Court of Justice of the European Union established the supremacy of European Union law over the laws of its Member States.[19] The Court pointed out that the grant of jurisdiction to the European Union limit the sovereign rights of Member States.

The right of the European Union and the acts adopted by this organization are superior to the national rights of the Member States.[20] There are three main arguments for this: international legal obligations with respect to contracts, ensuring the effectiveness and uniform application of European Union law and emphasizing the autonomy of the EU legal order.[21] In addition, Member States are disabled to enact laws and other acts that would be incompatible with the obligations of the state within the Union.

The European Union has some attributes of a State. It has created some of the symbols of statehood with a flag and an anthem.[22] Also, the launch of the euro clearly marked a major advance in the integration process.[23] The EU regulations are directly applicable in all Member States; that is, there is no need for national implementing measures to be taken in order for regulations to have binding force within the Member States.[24]

The European Union is not a federation - though various academic observers regard it as having the characteristics of a federal system.[25] Similarly, it cannot be identified with the confederation.[26] The prevailing school of thought is of the opinion that the European Union constitutes an advanced, international political

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[19] Case 6/64 Flaminio Costa v. ENEL [1964] ECR 585

[20] This does not come from the founding treaties, nor is it stipulated in the constitutions of Member States. It is stated only in The Treaty establishing a Constitution for Europe, which never entered into force. Article 4 (3) of the European Constitution establishes the principle of loyalty, which obliges the Member States to adopt measures to ensure fulfillment of the obligations arising from the Constitution for Europe or are a result of acts of the institutions of the Union. However, the rule of supremacy of EU law in relation to the right of Member States was introduced by the Court of Justice of the European Union. (Mahmutović, A., *Uvod u pravo Evropske unije*, Pravni fakultet Univerziteta u Travniku, Travnik, 2015, pp. 204-205)

[21] *Ibid.*, pp. 206

[22] Nugent, N., *The Government and Politics of the European Union*, Duke University Press, Sixth edition, Durham, 2006, pp. 548

[23] *Ibid.*, pp. 582

[24] Article 249 of the Treaty Establishing the European Community

[25] Hazak, G., *The European Union—A Federation or a Confederation*?, Baltic Journal of European Studies, Tallinn University of Technology (ISSN 2228-0588), Vol. 2, No. 1 (11), 2012, pp. 63

[26] A confederation is a system of government or administration in which two or more distinct political units keep their separate identity but transfer specified powers to a higher authority for reasons of convenience, mutual security, or efficiency. (McCormick, J., *The European Union: Politics and Policies*, Westview Press, Boulder Colorado, 1999, pp. 85)

entity with a correspondingly welldeveloped legal system.[27] The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU, they remain with the Member States.[28]

The obligation of the EU Member States to comply with EU law is a subject of international law which is the addressee of the pacta sunt servanda rule. When Member States enter into an agreement, they are expected to willingly commit to its content.

Related to the goals of the research we seek to understand whether or not we are witnessing the replacement of the existing national identity of the Member States with the identity of the European Union?

Replacement of one identity with another one does not mean the disappearance of the previous identity, but only an upgrade and reorganization of the existing hierarchical identity characteristics. The European Union is not likely to become a state. This cooperation means just that the Member States have created supranational institutions that can make decisions opposed by some Member States. It can be said that in one sense, the European Union is a product of state sovereignty because it has been created through voluntary agreements among its Members. However, in another sense, it fundamentally contradicts conventional understandings of sovereignty because these agreements have undermined the juridical autonomy of its Members.[29]

Constitutional court of Germany in Maastricht-Urteil case pointed out that the performance of sovereign authority by the European Union is founded on the permission of its Member States and that these states are still remaining sovereign and in international matters mainly acting through their governments.[30] "The result is not that the states are disappearing or necessarily losing their power, but that they operate and function in new ways and that international cooperation has become an increasingly vital part of governmental institutions work."[31]

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27 Jones, Mark L., The *Legal Nature of the European Community: A Jurisprudential Analysis using H.L.A. Hart's Model of Law and a Legal System*, Cornell International Law Journal, Vol. 17, Issue 1, 1984, pp. 28

28 Article 5 (2) of the Treaty on European Union

29 Krasner, S. D., *Think again: Sovereignty, Foreign Policy*, URL=http://foreignpolicy.com/2009/11/20/think-again-sovereignty/. Accessed 17 March 2017.

30 BVerfGE 89, 155 (12 October 1993), Az: 2 BvR 2134, 2159/92

31 Sand, I. J., *From National Sovereignty to International and Global Cooperation: The Changing Context and Challenges of Constitutional Law in a Global Society*, Scandinavian Studies In Law, 1999-2012, pp.

Some authors do not agree with this. For example, Inger-Johanne Sand has reviewed the situation as a form of de-nationalization. She has explained that territories of Member States remain with the states but significant parts of the authorities are spread to organizations on higher levels. She also pointed out that the nation-states are not disappearing. They just have become part of interaction and networks of some other dynamics.[32] We agree with her when she said that national constitutions of most European states were originally created in a different time when focus was on sovereignty and nationally based problem-solving. Today decision-making needs cross-boundary problem-solving.[33] The European Union is a new and unique institutional structure, but it will coexist with, not displace, the sovereign-state model.[34]

4. CONCLUSION

The paper presents the basic characteristics of the sovereignty of the member states of international organizations. Due to the division of the organization on deliberative and supranational, it is shown that the sovereignty of the member states of supranational organizations is much more limited when compared to deliberative organizations. The extent to which states are able to contest the exercise of sovereign powers by an international organization depends on the degree of conferrals of powers that have been made to the organization.

Today the only supranational international organization is the European Union. The main characteristic of the term "supranational" is that it is a legal concept, and refers to issues of superiority and direct applicability of the rules of the European Union on the territory of the Member States. The traditional view of sovereignty is replaced by the new concept of sovereignty and the interdependence of the countries.

Member States of the European Union have transferred significant parts of their constitutional legislative, executive and judicial powers to the authorities of the European Union. The competencies of the European Union lie beyond national borders and interests. This implies that the European Union can make binding decisions not only for the Member States, but also for legal entities and individuals within the Member States. This distinguishes the European Union from all other international organizations. Membership in such an organization reduces the sovereign rights of

294-295

32 *Ibid.*, pp. 295

33 *Ibid.*, pp. 298

34 Krasner, S. D., *Think again: Sovereignty, Foreign Policy*, URL=http://foreignpolicy.com/2009/11/20/think-again-sovereignty/. Accessed 17 March 2017.

the Member States. However, the European Union is product of state sovereignty because it was created through voluntary agreements among its Member States.

Deliberative international organizations, on the other hand, were created to meet the common objectives of its members, but do not influence their sovereignty much. All their member states are represented by their representatives in the bodies of deliberative organization, who represent the interests of their country, and not the interests of the organizations of which they are members. The decisions adopted at their meetings are not directly applicable in the territories of the member states, and especially not on their citizens and legal persons who have domicile in the territories of the member states. In order for them to be applicable, it is necessary for them to be translated into laws by state authorities.

In conclusion we can point out that membership in an international organization could reduce certain state powers, but it is still within the sovereign power of a state to decide not to be part of an international organization. We did not want to compare deliberative and supranational organizations merely for the sake opposing them but rather with the intention of showing that the scope of the sovereignty of the member states of international organizations depends on the will of the states.

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EU AGENCIES PROCEDURE – IS THERE A POSSIBILITY FOR AN INTER-AGENCY AND CROSS-SECTORAL APPROACH IN MATTERS OF SECURITY

ABSTRACT

The European Agenda on Security of April 2015 indicates that the Union needs a more joined-up inter-agency and cross-sectorial approach. Explicitly, it states that "given the increasing nexus between different types of security threats, policy and action on the ground must be fully coordinated among all relevant EU agencies, in the area of Justice and Home Affairs and beyond." Furthermore, it suggests that the Union needs to bring together all internal and external dimensions of security. This paper will take a look at the new Regulation (EU) 2016/1624 on the European Border and Coast Guard (Frontex) and analyse whether there has been improvement in the possibility for an inter-agency and a cross-sectorial approach for agencies from the Area of Common Foreign and Security Policy. The paper will try to answer the question of prospect of progress in joining internal and external dimensions of security of the Union, considering the rising threat of terrorism and the continuing migration crises that have been shaking EU since the adaptation of the European Agenda on Security.

Keyword: *EU agencies, European Agenda on Security, inter-agency cooperation, Frontex, CFSP*

1. INTRODUCTION

Agentification is a phenomenon affecting not only the Member States of the Union, but also the Union itself. According to the EU Agencies website, the EU Agencies Network comprises 45 EU Agencies.[1] The many studies of EU agencies[2] in literature clearly demonstrate that due to the non-existence of legal provisions

[1] EU agencies network, URL=https://euagencies.eu/ . Accessed 10 February 2017.

[2] See for example : Everson, M.,*Independent Agencies: Hierarchy Beaters?* European Law Journal , Vol 1, No 2 , 1995, pp 180-204; Everson, M, *Administering Europe ?* , Journal of Common Market Studies, Vol 36, No 2, 1998, pp 195-215; Vos, E., *Reforming the European Commission: What Role to Play for EU Agencies*, Common Market Law review , Vol 37, 2000, pp 1113-1134.; Craig, P.; *EU Administrative law*, Oxford University Press, Oxford, 2006, pp 143-190; Busuioc, E.M., *European Agencies : Law and Practice of accountability*, Oxford University Press, Oxford,2013.; Chamon, M.; *EU Agencies – Legal and Political Limits to the Transformation of the EU Administration*, Oxford University Press, Oxford, 2016.

there is no academic agreement on many legal aspects regarding EU agencies. Accordingly, without any prejudice to the existing academic debates on the topic of EU agencies, the paper shall first identify the basic terms and definitions relating to EU agencies, then move on to defining inter-agency and cross-sectoral cooperation (approach) and what it would entail in the selected field of study (Union security). The research in this paper derives from two sources: legal and policy documents. The legal document sources include among others Treaty provisions, basic agency regulation and agency annual reports), whereas policy documents include Commission communications and European Parliament regulations. Building on these sources and focusing on the possibility of cross-sectoral and inter-agency cooperation of EU agencies that are engaged in matters of Union security, especially bearing in mind the new Regulation (EU) 2016/1624 on the European Border and Coast Guard (Frontex), the paper will conclude with a possible answer to the underlying question: is there progress in joining internal and external dimensions of security of the Union?

2. WHAT ARE EU AGENCIES?

There is no definition of EU Agencies in the Treaties, but there are several definitions in secondary EU legislation and policy documents. For example, EU Staff Regulations refer to agencies as "*Union bodies to whom these Staff Regulations apply under the Union acts establishing them.*"[3]The European Commission refers to EU agencies in various policy documents regarding EU Agencies, two of which contain further definitions. The 2002 Communication of the Commission on the European Regulatory Agencies states that "[…] *various decentralised organisations which can be grouped together under the general umbrella of European agencies have certain formal characteristics in common: they were created by regulation in order to perform tasks clearly specified in their constituent Acts, all have legal personality and all have a certain degree of organisational and financial autonomy*."[4]The 2005 Communication of the Commission changes the definition slightly: "*European Regulatory Agency shall mean any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy*."[5]

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[3] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community

[4] Communication from the Commission - The operating framework for the European Regulatory AgenciesCOM (2002) 718 final, p. 2-3.

[5] Communication of the Commission on the operating framework for the European regulatory agencies COM (2005) 59 final, definition.

Furthermore, there is no consensus on the definition of EU agencies in academic debates. For example, Everson in 1995[6] and Vos in 1997[7] found that the definition of EU agencies was lacking. According to more recent definitions by e.g. Busuioc(2013), "*agencies are specialised, non-majoritarian bodies, established by secondary legislation, which exercise public authority and are institutionally separated from the EU institutions and are endowed with legal personality*"[8], and Chamon (2016): "*EU agencies may be defined as permanent bodies, under EU public law, established by the institutions through secondary legislation and endowed with their own legal personality.*"[9] Building on the said authors' findings and the above-mentioned EU legal document, we propose a definition of EU agencies for the purpose of this paper: EU agencies may be defined as hybrid sui generis permanent bodies with legal personality, autonomous but created by EU institutions on the basis of EU legislation to perform specific tasks.

As previously mentioned, the Treaties do not offer a definition of EU Agencies, but there are numerous legal bases for the establishment of EU Agencies in secondary legislation as well. Communication of the Commission (2005) states that agencies are an instrument for implementing a particular Union policy, and that its basic act must be built on the provision of the Treaty which forms the specific legal basis of the policy in question.[10]Aside from this policy-related legal basis, Article 352 (1) TFEU is also used as a legal basis in exceptional cases.

According to the EU agencies website, there are 45 agencies[11]and the consensus is that they had developed over a three-generation period, starting with the first two agencies: The European Centre for the Development of Vocational Training (CEDEFOP), and The European Foundation for the Improvement of Living and Working Conditions (EUROFOND) in 1975.The second generation followed in 1990 and the third, ongoing one in 2000.[12]However, there is no consensus in

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6 Everson, op. cit. note 1, p. 185.

7 Vos, op. cit. note 1, p.1114.

8 Busuioc,op. cit. note 1,p. 21.

9 Chamon, op. cit. note 1, p. 10.

10 COM (2005) 59 final, legal basis. Current legal basis for EU Agencies: Articles 19 (2) TFEU 43 TFEU; 66 TFEU, 74 TFEU; 77 TFEU, 78 TFEU, 82 TFEU, 83 TFEU, 85 TFEU, 87 TFEU, 88 TFEU, 91 TFEU, 100 (2) TFEU, 114 TFEU; 153 TFEU; 168 TFEU; 192 TFEU; 28 TEU; 42 TEU, 45 TEU. See more on legal basis in: Chamon, op. cit. note 1, p. 18 -21.

11 EU agencies network, URL= <https://euagencies.eu/> Accessed 10 February 2017.

12 See more on the *"agentification"* process in the EU: Vos, E.; *European Agencies and Composite EU Executive* in Everson, M; Cosimo, M.; Vos, E. (ed.), European Agencies in between Institutions and Member States, Kluwer Law International, Alphenaan den Rijn, 2014, p. 11 – 20; Busuioc, op. cit. note 1,p. 13 ; Chamon, M.;op. cit. note 1, p. 13-18.

the literature or in the Commission's official documents on how these 45 existing agencies should be classified.

Authors provide different classifications of agencies, drawing mainly on their functions prescribed in the respective constituent acts.[13] Academics strongly disagree with the Commission's simplification of classifying agencies as regulatory and executive. For example, in the 2002 Communication, the Commission defined regulatory agencies as "*agencies that were created by regulation in order to perform tasks clearly specified in their constituent Acts, all have legal personality and all have a certain degree of organisational and financial autonomy*", and executive agencies as "*agencies that are responsible for purely managerial tasks, i.e. assisting the Commission in implementing the Community's financial support programmes and are subject to strict supervision by it.*"[14] Today the EU distinguishes between decentralised agencies (set up by the EU to perform technical and scientific tasks that help the EU institutions in implementing policies and decision-making), executive agencies, agencies under common foreign and security policy, and EUROATOM agencies.[15]

By moving from regulatory to decentralised agencies, the European Commission shifted the terminology, thus oversimplifying it for any serious debate on the classification of agencies. Although relevant for other studies, a detailed classification of agencies is not relevant for the present one. The differences between Common Foreign and Security Policy (CFSP) agencies and other EU Agencies (called regulatory and executive in the Commission's terminology and other literature) are evident even without analysing the typology and classification that exist in literature: their legal basis, the EU policy they belong to and the Union's competences in terms of related policies. The chapters below will discuss the possibility of cooperation between the CFSP agencies and agencies from the Area of Freedom Security and Justice, with reference to the call of the European Agenda on Security from April 2015 for a more joined-up inter-agency and cross-sectorial approach of the Union especially in bringing together all internal and external dimensions of security.

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[13] Vos, E.; *Agencies and the European Union*, In Verhey, L. and Zwart, T. (ed.) Agencies in European and Comparative Perspective, Intersentia, Antwerp, 2003, pp. 119-121.; Craig, P;,op. cit. note 1, pp 154-159; Busuioc, op. cit. note 1, p 37 – 42; Chamon, op. cit. note 1, p. 18-45

[14] COM (2002) 718 final, p. 2-3.

[15] Decentralised agencies, URL= https://europa.eu/european-union/about-eu/agencies/decentralised-agencies_en. Accessed 12 February 2017

3. INTER-AGENCY AND CROSS-SECTORAL APPROACH

As stated above, aside from having different legal bases, the today's 45 EU agencies operate in different regulatory areas (security, human rights, food, financial sector, space, CFSP etc.).Before analysing the possibility of an inter-agency and cross-sectoral approach in the field of the EU security, it is necessary to define inter-agency cooperation (collaboration) and cross-sectoral collaboration (cooperation).

Cross-sectoral cooperation or collaboration as a need of the modern world is growing. Bryson, Crosby and Middleton Stone offer a framework for understanding cross-sectoral collaborations, and define them as "*linking or sharing of information, resources, activities, and capabilities by organizations in two or more sectors to achieve jointly an outcome that could not be achieved by organizations in one sector separately.*"[16]Cross-sectoral collaboration presumes collaboration of at least two organisations (entities) that hardly relate to each other, but need to address same problem. In literature, collaboration (or cooperation) is determined according to various elements: leadership, resources, role of organisation, reputation etc.[17] Considering the sources form the literature, one can assume that inter-agency cooperation (collaboration) of EU Agencies can be a form of cross-sectoral cooperation, where two or more agencies from different sectors (i.e. regulatory areas) that hardly relate to each other cooperate to achieve joint outcome.

The possibility of an inter-agency and cross-sectoral cooperation arises from the European Agenda for Security. The Agenda was introduced by the European Commission in April 2015. It implements the political guidelines of the Commission in the area of security and replaces the previous Internal Security Strategy (2010-2014).In the light of new and complex security threats to the EU and its Member States, in its Agenda the Commission highlights the need for further synergies and closer cooperation at all levels of security. Among other security relevant issues, the Agenda calls for "*a more joined-up inter-agency and a cross-sectorial approach. Given the increasing nexus between different types of security threats, policy and action on the ground must be fully coordinated among all relevant EU agencies, in the area of Justice and Home Affairs and beyond. These agencies provide a specialised layer of support and expertise for Member States and the EU. They function as information hubs, help implement EU law and play a crucial role in supporting operational cooperation,*

[16] Bryson J.M., Crosby B.C., Middleton Stone M. *The Design and Implementation of Cross-Sector Collaborations: Propositions from the Literature*, Public Administration Review, (Special Issue), 2006, pp. 44-55, p. 44 ; See more in literature on cross-sectoral collaboration: Crosby B.C., Bryson J.M., A Leadership Framework for Cross-Sector Collaboration, Public Management Review, No 7, Issue 2 , 2005, pp 177-201

[17] Busuioc, M.; *Friend or foe? Inter-agency Cooperation, Organizational Reputation, and Turf;* Public administration, Vol. 94, No. 1, 2016 (40–56), p. 41.

such as joint cross-border actions. It is time to deepen cooperation between these agencies. The Commission will launch a reflection on how to maximise their contribution, through closer inter-agency cooperation, coordination with Member States, comprehensive programming, careful planning and targeting of resources."[18]The Agenda lists and defines EU agencies in the Area of Freedom, Security and Justice as follows: the EU law enforcement agency (Europol), the EU agency for the management of operational cooperation at the external borders (Frontex), the EU judicial cooperation agency (Eurojust), the European police college (Cepol), the EU agency for large-scale IT systems (eu-LISA), and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA). However, it does not define what the agencies "beyond" these are. The list of the agencies "beyond" must be read from other Union documents on security.

When considering the external and internal security issues in the EU, the focus should be on the new EU Global Strategy on Foreign and Security Policy: Shared Vision, Common Action: A Stronger Europe (EUGS). The EUGS was presented on 28 June 2016 by the High Representative and adopted by the European Council in October 2017. The EUGS identified priorities for Union security: the security of the EU; the neighbouring countries (State and Societal Resilience to our East and South); how to deal with war and crisis (An Integrated Approach to Conflicts and Crises); stable regional orders across the globe (Cooperative Regional Orders); and effective global governance (Cooperative Regional Orders).[19]Most importantly, the EUGS called for strengthening of the internal and external security.[20]Furthermore, the joint Council conclusions on implementing the EU global strategy in the area of security and defence stress the need for strengthening the nexus between internal and external policies, updating existing or preparing new regional and thematic strategies and stepping up public diplomacy efforts.[21]

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[18] The European Agenda on Security (COM(2015) 185 final), URL= http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0185, see more on European Agenda on Security in: Ham van, P.K The EU's joined-up approach to security | Clingendael Report, September 2016 URL=<https://www.clingendael.nl/sites/default/files/Clingendael_report_The_EUs_joined_up_approach_to_security.pdf>Accessed 12 February 2017

[19] See more on EUGS: Duić, D. *EU Global Strategy on Foreign and Security Policy and the role of High Representative of the Union for Foreign Affairs and Security* in Primorac, Z., Bussoli, C., Recker, (ed.), Economic and Social Development – 16th International Scientific Conference on Economic and Social Development – "The Legal Challenges of Modern World" Split: Varaždin Development and Entrepreneurship Agency, 2016, pp. 289-299.

[20] EU Global strategy on foreign and security policy: Shared Vision, Common Action: A Stronger Europe. URL=http://www.eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf. Accessed 12 February 2017

[21] Council conclusions on implementing the EU global strategy in the area of security and defence, 14009/16 CFSP/PESC 889 CSDP/PSDC 629 COPS 321 POLMIL 122 CIVCOM 214,URL=<http://

The documents of the European Commission, the European Council, the Council and the High Representative show that there is a consensus on the aspiration to achieve cohesion of internal and external security aspects in Union policies. According to the Union division of competences, Security is covered by two main policies: Common Foreign and Security Policy (CFSP - external security of the Union) and Area of Freedom Security and Justice (AFSJ - internal security of the Union).

Both policies were introduced into the EU legal system by the Maastricht Treaty with the creation of the Union pillar structure.[22]The CFSP was at the time Second pillar regulated under Title V TEU, and Area of Freedom Security and Justice (*Justice and home affairs* at the time) was Third pillar regulated under Title VI TEU.[23]The Title VI TEU Amsterdam was changed from *Justice and home affairs* to *Police and judicial cooperation in criminal matters*, and regulation of external borders, visa, asylum, immigration and other policies were moved from the Third Pillar to Title IV TEC.[24]In the current Treaty regulation under Lisbon Treaty, the Third Pillar was abolished – the result is that today all policies relating to "internal security" of the Union form Title V (Area of Freedom, Security and Justice) of the Treaty on the Functioning of the European Union (TFEU). For the Area of Freedom Security and Justice, the following applies: ordinary legislative procedure, ordinary types of legal instruments, and full power of EU institutions including the Court of Justice of the European Union (CJEU). The CFSP remained different from all other EU policies. All provisions of this policy can still be found in the Treaty on European Union (TEU).It has special legal instruments and sui generis competences, and EU institutions have special competences in the area of the CFSP.[25]

www.consilium.europa.eu/en/press/press-releases/2016/11/14-conclusions-eu-global-strategy-security-defence/>

22 See more on pillar structure: Wessel, R., *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, Common Market Law Review; Issue. 37: No. 5; 2000 pp. 1135-1171

23 Art J – J 11 (CFSP) and Art. K- K9 Maastricht Treaty

24 Art. 29–42 TEU Amsterdam Treaty

25 See A 21–27 TEU

Table 1. Articles from Treaties relevant for the security of the Union

External security (CFSP)[26] **Title V TEU (Article 23–46 TEU)**	**Internal security (AFSJ) Title V TFEU (Article 67–89 TFEU)**[27]
• Common provision (23-41 TEU) • Common security and defence policy (42-47 TEU)	• general provision (67-76 TFEU) • policies on border checks, asylum and immigration (77-80 TFEU) • judicial cooperation in civil matters; (81 TFEU) • judicial cooperation in criminal matters (82-86 TFEU) • police cooperation (87-89 TFEU)

When considering the possibility of inter-agency and cross-sectorial approach in the matters of Union security, it could be inferred that the possibility of such cooperation could be achieved through the cooperation between CFSP agencies and AFSJ agencies.

As previously mentioned, there are six EU agencies in the Area of Freedom, Security and Justice: the EU law enforcement agency (Europol), the EU agency for the management of operational cooperation at the external borders (Frontex), the EU judicial cooperation agency (Eurojust), the European police college (Cepol), the EU agency for large-scale IT systems (eu-LISA), and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA). On the other hand, there are three EU agencies in the CFSP: the European Defence Agency (EDA), the EU Foreign and Security Policy Institute, and the European Union Satellite Centre (EUSC). [28]

Of the above agencies, the one that has been in focus for the last few years is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) established

[26] See more on the Common foreign and security policy in general : Cardwell, P. J. ; EU external relations law and policy in the post-Lisbon era. T.M.C. Asser Press, The Hague; 2012.;Eeckhout; Piet; EU External Relations Law; Oxford University Press, Oxford, 2011.; Eckes, C. ; External Relations Law: How the Outside Shapes the Inside. In: D. A. Arcarazo& C. Murphy (Ed.), EU Security and Justice Law: After Lisbon and Stockholm (pp. 186-206). Hart Publishing.; Oxford, 2014 , pp 186-206 ;

[27] See more on Area of freedom security and Justice in general : Peers, S.; Mission accomplished? EU Justice and Home Affairs law after the T*reaty of Lisbon. Common Market Law Review, 48(3)*, 2011, pp. 661–693. Peers, S.; EU Justice and Home Affairs Law, 3rd edition. Oxford University Press, Oxford 2011.

[28] Types of EU agencies: URL= https://europa.eu/european-union/about-eu/agencies/decentralised-agencies_en#search-for-an-agency. Accessed 13 February 2017

by Council Regulation (EC) 2007/2004 (which was repealed by Regulation (EU) 2016/1624 establishing European Border and Coast Guard Agency (Frontex) on 14 September 2016).Given that these are the last amendments to the regulation on the AFSJ agencies, the paper will analyse the new Regulation (EU) 2016/1624 on the European Border and Coast Guard (Frontex)[29] to answer whether there has been improvement to the possibility for an inter-agency and cross-sectorial approach with the CFSP agencies.

4. EUROPEAN BORDER AND COAST GUARD AGENCY (FRONTEX)

The legal bases for the establishment of the European Border and Coast Guard Agency (Frontex) are Articles74 TFEU and 77(2)(c) TFEU (ex 66 TEC and 62(2)(c) TEC)).[30]Frontex is an Area of Freedom Security and Justice agency, first established in 2004 with the task of improving the integrated management of the Union's external borders.[31]The number of the today's main tasks of Frontex has been increased: under the new Regulation, the agency has been tasked with ensuring a coherent European integrated border management: "*The key role of the Agency should be to establish a technical and operational strategy for implementation of integrated border management at Union level; to oversee the effective functioning of border control at the external borders; to provide increased technical and operational assistance to Member States through joint operations and rapid border interventions; to ensure the practical execution of measures in a situation requiring urgent action at the external borders; to provide technical and operational assistance in the support of search and rescue operations for persons in distress at sea; and to organise, coordinate and conduct return operations and return interventions*.[32]Moreover, the list of

[29] 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

[30] A 74 TFEU: "The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament." Art 77 (2) (c) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning any measure necessary for the gradual establishment of an integrated management system for external borders.

[31] Art (1) Council Regulation (EC) 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

[32] Article (11) Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 Sep-

task has grown from six main tasks under Article (8) of Council Regulation (EC) 2007 to twenty-one specific tasks under Article (6) of the current Regulation.[33] Although the current tasks are more specific, they can still be divided into regulatory tasks (assistance to the Commission and Member States) and operational tasks (joint operational activities).[34] Finally, it is important to mention that Frontex, unlike any other AFSJ agency, has autonomous decision making powers.[35]

In terms of cooperation possibilities, Articles 13 and 14 of the Council Regulation (EC) 2007 previously very briefly regulated Frontex cooperation with Europol and international organisations (Article 13) and cooperation with third countries.[36]The new Regulation states: "*For the purpose of fulfilling its mission and to the extent required for the accomplishment of its tasks, the Agency may cooperate with Union institutions, bodies, offices and agencies as well as with international organisations in matters covered by this Regulation in the framework of working arrangements concluded in accordance with Union law and policy. Those working arrangements should receive the Commission's prior approval.*"[37]Article 52 further states*: "The Agency shall cooperate with the Commission, other Union institutions, the European External Action Service, EASO, Europol, the European Union Agency for Fundamental Rights, Eurojust, the European Union Satellite Centre, the European Maritime Safety Agency and the European Fisheries Control Agency as well as other Union bodies, offices and agencies in matters covered by this Regulation, and in particular with the objectives of better addressing migratory challenges and preventing and detecting cross-border crime such as migrant smuggling, trafficking in human beings and terrorism.*"[38]Interestingly, the number of EU agencies and bodies that Frontex is able to cooperate within creased from just one (Europol) to eight specific EU agencies (but not excluding cooperation with other bodies and agencies), with the possibility of cooperation

tember 2016 on the European Border and Coast Guard

33 Art (6) (2), Art (8) Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard

34 Rijpma, J.; *Hybrid agentification in the area of Freedom, Security and Justice andits inherent tensions : the case of Frontex* in M Busuioc, M Groenleer, and J Trondal (eds), The agency phenomenon in the European Union (pp. 84 -102), Manchester University Press, Manchester , 2012 , p- 90 – 91

35 Ibid, p. 89

36 See more in literature on this subject: Ott, A.; Vos, E.; Coman-Kund, F.; *European Agencies on the Global Scene : EU and International law Perspective* in Everson, M; Monda, C.; Vos, E. (eds.) European Agencies in between Institutions and Member States (pp 87 – 123), Kluwer Law International, Alphen aan den Rein, 2014, p 109-111; Vara, J. S; T*he External Activates of AFSJ Agencies : The Weakness of Democratic and Judicial Controls*; European Foreign Affairs Review, Issue 20, No. 1, 2015, p 115-136 , p 121

37 (43) Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard

38 Ibid Art 52.

being determined according to specific objectives. Reading this *stricto sensu*, if a new security objective appears, it will be hard to manage the cooperation of Frontex with any other Union body of agency considering the fact that the list of objectives that presume cooperation under Article 52 is finite.

Conclusively, the aspects mentioned in this chapter (tasks of the agency and co-operation) are more explicitly regulated under the new Regulation. Although this can be regarded as an improvement, it should be noted that over-regulation of tasks gives less opportunity for cooperation with other actors and less possibility to adjust to new unforeseeable situations (as for example the migration crisis of 2015).

5. AGENCIES IN THE COMMON FOREIGN AND SECURITY POLICY

The three EU agencies in the CFSP are the European Defence Agency (EDA), the EU Foreign and Security Policy Institute, and the European Union Satellite Centre (EUSC).

The European Defence Agency (EDA) was established by Council Joint Action in 2004 as an agency in the field of defence with a mission to support the Council and the Member States in their effort to improve the EU's defence capabilities in the field of crisis management.[39] The Treaty of Lisbon introduced a specific provision on the EDA (Article 45 and 42(3) TEU).[40] Consequently, in July 2011, the Council adopted Decision 2011/411/CFSP replacing Council Joint Action from 2004. The Agency's tasks involve contributing to identifying EU countries military capability and evaluating observance of their capability commitments, promoting the harmonisation of operational needs; putting forward multilateral projects to fulfil military capability objectives; ensuring coordination of programmes implemented by member states and management of specific cooperation programmes; supporting defence technology research and coordinating and planning joint research activities.[41]

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39 Art. 2 Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency,

40 Article 45 and Article 42(3) TEU.

41 Art 5 Council Decision 2011/411/CFSP of 12 July 2011 defining the statute, seat and operational rules of the European Defence Agency and repealing Joint Action 2004/551/CFSP. See more on EDA in literature: Ferrar, S. L.; *The European Defence Agency: Facilitating Defence Reform or Forming Fortress Europe?;*Transnational law and Contemporary Problems, 16, 2007, p. 570 – 600; Heuninckx, B.; *Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives;* Public Procurement Law Review Volume 17, Issue 1, 2008, pp. 1-20.

The EU Foreign and Security Policy Institute was created by Council Joint Action in 2002 as an agency under the Common Foreign and Security Policy and is now regulated by Council Decision 2014/75/CFSP. The Institute is set to contribute to development of EU strategic thinking in the CFSP field including conflict prevention and peace-building and strengthening the EU's analysis, foresight and networking capacity in external action.[42]

The Council adopted Joint Action 2001/555/CFSP and established the European Union Satellite Centre (SATCEN) in 2001.[43] This Joint Action was replaced with the Council Decision 2014/401/CFSP that now governs the European Union Satellite Centre (SATCEN). The SATCAN products and services result from the exploitation of relevant space assets and collateral data, including satellite and aerial images.[44]

6. IS THERE A POSSIBILITY FOR AN INTER-AGENCY AND CROSS-SECTORIAL APPROACH BETWEEN FRONTEX AND CFSP AGENCIES?

To answer the research question of whether there has been progress in joining internal and external dimensions of security of the Union on the case study on EU agencies, the paper will move on to a specific analysis of the possibility of an inter-agency and cross-sectorial approach between Frontex and the CFSP Agencies. The conclusion will be drawn by comparing CFSP Agency functions (tasks) with Frontex functions (tasks) specified in their founding acts.

Inter-agency cooperation (collaboration) of EU Agencies has previously been defined as a possible form of cross-sectoral cooperation, wherein two or more agencies, that hardly relate to each other, from different sectors (i.e. regulatory areas), cooperate to achieve a joint outcome. Moreover, it has been found that although their activity addresses security, CFSP Agencies and Frontex come from different sectors(regulatory areas, i.e. EU policies). Frontex has been put in focus due to the fact that a new Regulation that has been in force since September 2016 made important changes to said founding acts. The founding acts of CFSP agencies were changed after entry into force of the Lisbon Treaty and they all date from 2011 and 2014.

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42 Council Decision 2014/75/CFSP of 10 February 2014 on the European Union Institute for Security Studies.

43 Council Joint Action of 20 July 2001 on the establishment of a European Union Satellite Centre (2001/555/CFSP).

44 Council Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre.

Firstly, the new Frontex Regulation provides a list of EU agencies and bodies that Frontex is expected to collaborate with. The only CFSP agency on the list is the European Union Satellite Centre (SatCen).[45]SatCen produces results from the exploitation of relevant space assets and collateral data including satellite and aerial images which can be of use to Frontex in its operational tasks. Conclusively, pursuant to the regulation in the founding act of Frontex, the possibility of cooperation with SatCen is provided for, possible and can be considered as an improvement in the inter-agency and cross-sectoral approach considering the fact that in previous Frontex Regulation the only possibility provided for was the cooperation with Europol.[46]

The European Defence Agency function, in accordance with Article 5 of Council Decision 2011/411/CFSP, is to support the Council and the Member States in matters of defence capabilities development, research, acquisition and armaments.[47]This function is incompatible with the functions of Frontex listed in Article 8 of Regulation 2016/1624[48] and by deduction there is no possibility for direct inter-agency cooperation. There could however be indirect cooperation in the sense that some equipment used by Frontex be developed through research supported by the European Defence Agency.

Lastly, the EU Foreign and Security Policy Institute, whose function is foreign policy analysis, is an agency that can cooperate with Frontex to a large degree in tasks relating to monitoring migration flows and risk analysis, assessment of threats and challenges at external borders etc.[49]If the EU Foreign and Security Policy Institute was added to the list from Article 52 of bodies and agencies that Frontex shall cooperate with, the cooperation would be much easier.

7. CONCLUSION

This article offers two definitions for the purpose of this research. Firstly, it defines EU agencies as hybrid sui generis permanent bodies with legal personality, autonomous but created by EU institutions on the basis of EU legislation in order to perform specific tasks. Further, drawing on literature sources, it considers that

[45] Art 52 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard

[46] Art 13 Council Regulation (EC) 2007/2004

[47] Art 5 Council Decision 2011/411/CFSP of 12 July 2011 defining the statute, seat and operational rules of the European Defence Agency and repealing Joint Action 2004/551/CFSP.

[48] Art 8 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard

[49] Ibid.

inter-agency cooperation (collaboration) of EU Agencies can be a form of cross-sectoral cooperation, where two or more agencies that hardly relate to each other, from different sectors (i.e. regulatory areas), cooperate to achieve a joint outcome.

It is established that, in the matter of Union security, cross-sectoral and inter-agency approach is the cooperation between CFSP and AFSJ agencies. The decision to analyse cross-sectoral and inter-agency approach through a case study of EU agencies stems from the fact that the most exposed AFSJ Agency in the last few years has been Frontex, which has undergone substantial changes as a result of the new Regulation (EU) 2016/1624 on the European Border and Coast Guard. Frontex tasks are more explicitly regulated in the new Regulation and this can be considered an improvement. However, over-regulation of tasks gives less opportunity for cooperation with other actors and less possibility to adjust to new unforeseeable situations. The aspects of the Regulation as analysed indicate that the number of EU agencies and bodies that Frontex is able to cooperate with has been increased and that the possibility of cooperation is determined by specific objectives. Regarding the cooperation between Frontex and the three CFSP agencies, it was found that the possibility for cooperation has been provided for in the new Frontex Regulation for European Union Satellite Centre and that there can be cooperation with the EDA and the EU Foreign and Security Policy Institute, but that the Frontex Regulation does not explicitly provide for cooperation with these two agencies.

The overall conclusion is that the new Regulation (EU) 2016/1624 on the European Border and Coast Guard (Frontex) offers better possibilities for inter-agency and cross-sectoral approach in the matters of Union security. It remains to be seen whether these improvements will be implemented in practice.

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Topic 5

EU civil justice (international private and family law procedures)

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THE APPLICATION "RATIONE TEMPORIS" OF THE BRUSSELS I REGULATION (RECAST)

ABSTRACT

The recast Brussels I Regulation entered into force on 10 January 2015. The application ratione temporis of this Regulation is regulated in its Article 66, which provides that judgments issued in proceedings started before the mentioned date, are subjected to the rules of the original version of the Regulation, adopted in 2000. However, the latter entered into force at different times in different Member States, depending on the date of their accession to the EU. As a consequence, in a dispute falling into the material scope of the Regulation, the judges must first determine, which act is temporally applicable, which can sometimes be difficult, especially concerning the recognition and enforcement of judgments.

As was confirmed by the Court of Justice of the EU, the Regulation of 2000 can be applied to the recognition and enforcement of a judgment from another Member State only if, upon the issuance of the judgment, it was already in force in both the state of origin and the state of enforcement. But even in such case, the application of the Regulation is only automatic if also the judicial proceedings were started after the entry into force of the Regulation in both states. If the proceedings were started before that time, the Regulation can only be applied if the court of origin based its jurisdiction on the same rules as can be found in the Regulation or on an international convention in force between the Member States "involved". In all other cases, national rules or an international convention concerning the recognition and enforcement of judgments must be applied. The article represents a thorough study of the different most common cases where the problem of the application ratione temporis of the Regulation arises or could arise. The article specifically addresses the application ratione temporis of the recast Brussels I Regulation and the relationship between the original and the recast version of the Regulation.

***Keywords**: Regulation 44/2001, Regulation 1215/2012, Brussels I Regulation, recast Brussels I Regulation, scope of application, application ratione temporis, recognition and enforcement of judgments, exequatur, Brussels Convention, Lugano Convention, jurisdiction, international jurisdiction, foreign judgments.*

1. INTRODUCTION

In January 2015, the recast Brussels I Regulation[1] entered into force. The transitional provision of Article 66 regarding the temporal scope of application reads as follows:

> 1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.
>
> 2. Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.

In cross-border disputes, falling into its material scope of application, the courts will thus have to assess their jurisdiction following the rules of the recast regulation, if the proceedings have been started on or after 10 January 2015. Furthermore, judgments from other EU Member States shall be recognized and enforced under the rules of the recast regulation only if the proceedings have been started on or after the mentioned date. Article 66 provides for no exception to this rule. This means that for many years to come, the Brussels I Regulation of 2000[2] or the national law of the Member State of enforcement will remain applicable to the recognition and enforcement of judgments issued in proceedings started before 10 January 2015. Thus, it is very important that the courts have clear understanding of which legislation is applicable to the case at hand.

The Brussels I Regulation was adopted in December 2000. Article 76 of the Regulation determined that the Regulation was to enter into force on 1 March 2002. Regarding the temporal scope of application of the Regulation, the transitional provision of Article 66 provides:

> "1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351.

[2] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted."

The case law of the national courts shows that these apparently clear rules, when applied to the real cases, prove(d) to be quite problematic, especially regarding the recognition and enforcement[3] of judgments. The original version of the Regulation namely entered into force at different times in different Member States. What to do if, for example, at the time of issuing a judgment the original Regulation was in force in the country of origin of the judgment (e.g. in Slovenia in 2012), but not yet in the country where the enforcement of this judgment would later be sought (e.g. in Croatia), whereas the enforcement is sought when the Regulation is already in force also in the country of enforcement (e.g. in 2014)? What if the proceedings were instituted when the Regulation was in force in the country of origin (e.g. Italy in 2003), but not in the country of enforcement (e.g. the Czech Republic), whereas the judgment was issued when the Regulation was already in force in both countries "involved" (e.g. in 2005)? What if the judgment is delivered when the Regulation was in force in both countries (e.g. in Croatia and Slovenia in 2014), whereas the proceedings were instituted when the Regulation was in force only in the country of enforcement (e.g. in Slovenia in 2012), but not in the country of origin (e.g. Croatia)?

The Regulation of 2000 namely entered into force in different Member States in the moment of their accession to the European Union (hereinafter the EU). Almost half of today's Member States entered the EU after the "initial" entry into force of the Regulation in March 2002. The question of the application of the Brussels I Regulation *ratione temporis* (and thus the application of the transitional provision of Article 66) has thus not lost its relevance in the several years following

[3] In this article, the term "enforcement" will be used in the sense of private international law, i.e. in the sense of the declaration of enforceability (*exequatur*) and not in the sense of the specific acts in the enforcement proceedings (e.g. seizure), which are conducted under the national law of the country where the enforcement is sought.

the entry into force of the Regulation, as is usually the case regarding the transitional provisions in legislative acts, but continues to be relevant even after the adoption of the recast Regulation, limiting its temporal scope of application only to proceedings started after 10 January 2015.

Namely, if the Regulation of 2000 is applicable, it must naturally be applied as a whole, i.e. including its own transitional provision providing for an exceptional application to the judgments issued in proceedings started before the entry into force of this Regulation. Therefore, much time will still have to pass before a clear and unequivocal interpretation of Article 66 of the Brussels I Regulation of 2000 will no longer be needed. This article will attempt to systematically present when during this on-going transitional period the original and the recast version of the Brussels I Regulation are temporally applicable. When they are not, the national laws of the Member States or, if they exist, the international treaties between the states "involved" must be applied.

Before we can begin the search for answers to the above questions, two deciding moments must be defined: first, for the purposes of application *ratione temporis –What is the moment when the proceedings were initiated?*; and second, for the purposes of application *ratione temporis –When did the Regulation enter into force?*

2. WHEN WERE THE PROCEEDINGS INITIATED?

Different legal systems consider different moments as the starting point of judicial proceedings. This was obvious, for example, when the *lispendens* rule of Article 21 of the Brussels Convention (Article 29 of the Brussels I bis Regulation) had to be interpreted. Some of the Member States namely consider the filing of the lawsuit as the beginning of the proceedings; some other Member States consider that proceedings start with the service of the introductory document on the defendant; the third group, however, considers that the determining moment is the handing over of the lawsuit to the person authorised for service. Furthermore, the moment of the beginning of the proceedings is not everywhere also the moment of the *lispendens* coming into existence. In Slovenian law, for example, the proceedings are instituted upon the filing of the lawsuit, but the moment of the establishment of *lispendens* is the service of the introductory document on the defendant, i.e. when the litigation is deemed to be started.[4]

[4] Articles 179 and 189 of the Slovenian Civil Procedure Act of 1999 (*Zakon o pravdnem postopku)*, Official Gazette No. 26/1999, with further amendments

In 1984 the Court of Justice of the EU (hereinafter the CJEU)[5] first declined to provide an autonomous interpretation of the term "court first seised" and referred the courts to the application of their national rules.[6] However, as this approach proved to be problematic, since the courts of more than one country could consider that they were the "court first seised", the European legislature decided to insert a new rule in Article 30 of the Brussels I Regulation (Article 32 of the Brussels I bis Regulation). This rule provides that

> "a court shall be deemed to be seised: 1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or 2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court."

Article 30 expressly refers only to the rules on *lispendens* and the so-called related actions. It is questionable whether the interpretation of the term "court first seised" from this article can also be applied to the transitional provision of Article 66. The problem is accentuated by the differences in different language versions of the Regulation, e.g. in the Slovenian version, the same term is used regarding *lispendens* and in Article 66, whereas different terms are used in the English and the French versions: "*court first seised*" and "*tribunal saisi*" (Article 27), and "*proceedings instituted*" and "*actions judiciairesintentées*"(Article 66), respectively.

The CJEU has not yet had the opportunity to provide an answer to this question, and the case law of national courts, according to the information available, diverges. For example, in 2002 the Austrian Supreme Court adopted the interpretation that in spite of the restrictive introduction of Article 30 of the Brussels I Regulation, the rule it contains should also be used to interpret the moment when the "proceedings are instituted" for the purposes of Article 66.[7]However, in December 2003 and December 2004 the German *Bundesgerichtshof* found that the determining moment in Germany was the service of the lawsuit,[8]i.e. that the national law

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5 For the purposes of clarity, the current name of this court will be used throughout this article.

6 CJEU, *Zelger v. Salinitri*, 129/83 of 7 June 1984.

7 Judgment No. 3 Nd 509/02 of 18 December 2002.

8 BGH, XI ZR 474/02 of 16 December 2003, and BGH, XI ZR 366/03 of 7 December 2004. In 2003 the appellate court in Koblenz, Germany, decided on a case where the lawsuit was filed with the court before the entry into force of the Brussels I Regulation, whereas this lawsuit was served on the defendant after the entry into force of the Regulation. The court decided that Article 66 does not determine

is applicable to the question of when the lawsuit was filed.[9] In February 2004 and in December 2005 the same court applied the interpretation of Article 30 of the Regulation to Article 66 and found that the determining moment was the filing of the lawsuit.[10]In 2005, an English court decided that the moment when the proceedings are initiated must be determined according to the national law of the country where the proceedings are being conducted.[11]

In the case of *lispendens*, where a "competition" between the courts of two or more countries must be resolved and the issuance of conflicting judgments prevented, it is understandable that all courts must consider the same moment as the starting point of the proceedings. This is, however, probably not necessary in the case of the rules on the recognition and enforcement of judgments from other Member States. Nevertheless, at least the law applicable to this question should be determined. If there were namely more options, the recognition or the declaration of the enforceability of the same judgment could be assessed under different rules in different countries – in some of them the Brussels I Regulation would be considered applicable, in others, the conditions for such application would be considered to not be satisfied. In this regard, it seems reasonable to apply the law of the country where the proceedings which led to the issuance of the judgment were conducted.[12]Still, in such case, actions filed in different Member States at the same moment could be subjected to different rules – in one country the Brussels I Regulation and in the other the formerly applicable rules. Therefore, it would nevertheless be prudent to set up a uniform interpretation of the moment when the proceedings were initiated for the purposes of the temporal application of the Regulation.

the moment of the beginning of the proceedings, and also that the interpretation of Article 30 cannot be applied to the transitional provision; therefore, the national law of the Member State where the proceedings are being conducted must be applied, in this case German law (OLG Koblenz, No. 23 U 199/02 of 7 March 2003, and the same also OLG Düsseldorf, No. I 23 U 70/03 of 30 January 2004, and OLG Düsseldorf, No. I 24 U 86/05 of 22 December 2005.

9 In German law proceedings are started when the lawsuit is served on the defendant *("Klageerhebung"*, Article 261 of the German Civil Procedure Act (*Zivilprozessordnung*)).

10 BGH, III ZR 226/03 of 19 February 2004, and in BGH, III ZR 191/03 of 1 December 2005. Same also OLG Frankfurt, No. 16 U 26/04 of 25 November 2004.

11 High Court – Queen's Bench Division England, *Advent Capital Plc v. GN Ellinas Imports- Exports Ltdand S. Trading Limited*, No. [2005] EWHC 1242 (Comm) of 16 June 2005.

12 See also A. Borrás in: T. Simons, R. Hausmann (ed.), *Brüssel I – Verordnung, Kommentar zur VO (EG) 44/2001 und zum Übereinkommen von Lugano*, IPR Verlag GmbH, München 2012, p. 1006.

3. WHEN DID THE REGULATION OF 2000 ENTER INTO FORCE/ BECOME APPLICABLE?

The date of the applicability of the Regulation is the decisive moment in the determination whether the Regulation is applicable to the recognition and the enforcement of a certain judgment or not. The answer is clear concerning the recast version of the Regulation – it became applicable in all Member States of the EU on 10 January 2015. However, the Regulation of 2000 entered into force in March 2002 in the then Member States, in May 2004 in the ten new Member States, in 2007 in Romania and Bulgaria and in 2013 in Croatia. The question which showed to be the most problematic is whether the Regulation had to be in force/applicable in both countries "involved" at the beginning of the proceedings or at the moment of the issuance of the judgment, or if it suffices that the Regulation was, at that time, in force only in the country of origin of the judgment (the country of origin) or, perhaps, only in the country where the recognition or enforcement is sought (the country of enforcement).

For example, in the Slovenian case law we can find several decisions in which the Brussels I Regulation was applied regarding the declaration of the enforceability of judgments from Member States which joined the EU before 2004, which were delivered after 1 March 2002, when the Regulation entered into force in those countries, but before 1 May 2004, when Slovenia entered the EU and the *acquis communautaire* became applicable. The courts expressly state that such judgments were issued after the Regulation entered into force.[13] On the other hand, we can also find Slovenian case law in which it is explained that the proceedings had to be instituted after the entry into force of the Regulation in both states "involved".[14]

The international doctrine is in agreement that, for the purposes of Article 66, the entry into force of the Regulation is the first day when the Regulation was in force in both the country of origin and the country of enforcement. If, at the moment

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[13] For example, Judgment of the Supreme Court of the Republic of Slovenia (hereinafter the SC RS), No. Cp 2/2005 of 25 August 2005, regarding the recognition of an Italian judgment of 2003, where the court assessed whether it could apply the Brussels I Regulation and for that purpose verified on which rules the jurisdiction of the court of origin was based. It would have been correct for the court to establish that the Regulation is not applicable, since in 2003 it was not yet in force in Slovenia. See also Judgment of the SC RS No. Cpg 5/2006 of 26 February 2007 and Judgment No. Cp 22/2008 of 15 January 2009. In the cases where the judgment was delivered after the entry into force of the Regulation in the country of origin and in Slovenia, however, this court often did not (expressly) verify when the proceedings were started, in order to establish whether the basis for jurisdiction of the court of origin had to be reviewed, e.g. Judgment of the SC RS No. Cp 13/2009 of 18 February 2010.

[14] In Judgment No. Cp 7/2010 of 31 January 2011, the SC RS correctly justified the application of the Brussels I Regulation by establishing that the Polish judgment had been delivered in 2008 and the proceedings had been started in 2005.

of the issuance of the judgment, the Regulation was not in force in both countries, its provisions cannot be applied to the recognition or declaration of the enforceability of such judgment. On the other hand, the Regulation is always applicable if the proceedings were instituted and the judgment was delivered after the Regulation had entered into force in both countries. Concerning the recognition and enforcement of judgments issued after the entry into force of the Regulation in both countries, whereas the proceedings were instituted before the entry into force in both countries, the Regulation is applicable only under the special conditions of the transitional provision of Article 66.[15]

In 2012 the CJEU confirmed this interpretation. In the case *Wolf Naturprodukte GmbH v. SEWAR spol. s r.o.*[16] the court ruled as follows: "Article 66(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed." The case concerned the enforcement in the Czech Republic of an Austrian judgment delivered in 2003, whereas the Regulation entered into force in Austria in 2002 and in the Czech Republic in 2004. At the moment of the issuance of the judgment, the Regulation was thus in force in the country of origin, but not yet in the country of enforcement, whereas it was already in force in both states at the time when the enforcement was sought.

The position that the Regulation in principle had to be in force in both countries already at the moment when the proceedings were instituted is logical if we would like to protect the defendant from the so-called exorbitant jurisdictions provided for in many national legislations. If the Regulation was not yet in force at the time of the beginning of the proceedings, the court will namely apply the national rules of the country of origin to determine its international jurisdiction. In cannot be self-evident that the judgment issued in such proceedings can profit from the more advantageous Brussels regime of recognition and enforcement just because

[15] See, e.g., P. Stone, *EU Private International Law*, 2nded., Edward Elgar Publishing, 2010, p. 236; A. Borrás in: T. Simons, R. Hausmann (eds.), *op. cit.* note 12, pp. 1004, 1005; P. Oberhammer in F. Stein, M. Jonas (eds.), *Kommentar zur Zivilprozessordnung*, 22nd ed., 2011, Band 10, Article 66, No. 8, p. 777, and the references cited there; A. Galič, *Die Anerkennung von gerichtlichen Entscheidungen in Slowenien*, in: M. Kengyel, W. H. Rechberger (eds.), Europäisches Zivilverfahrensrecht: Bestandsaufnahme und Zukunftsperspektiven nach der EU-Erweiterung, Neuer Wissenschaftlicher Verlag, Graz, Vienna 2007, pp. 134, 135; M. Becker, K. Müller, *Intertemporale Urteilsanerkennung und Art. 66 EuGVO*, in: IPrax, 2006, pp. 432-438.

[16] C-514/10 of 21 June 2012.

the country of origin has joined the EU while the proceedings were conducted.[17] It is, however, also important to emphasise that the same is true in the inverse case, i.e. if the country of origin was a Member State at the beginning of the proceedings (thus the Regulation was already in force), whereas the country which is later requested to recognise this judgment was at that moment not yet a Member State. In disputes against defendants with domicile outside the EU[18] the Member States will namely (in principle) apply the national rules that can provide for exorbitant jurisdiction (as, for example, jurisdiction on the basis of the location of any property of the defendant(Article 58 of the Slovenian Private International Law and Procedure Act of 1999 (hereinafter the PILPA)[19] or jurisdiction based on the nationality of the plaintiff (Article 14 of the French Civil Code)). Even though the proceedings were initiated in one of the "old" Member States in the period between 1 March 2002 and 1 May 2004 (or the respective dates in 2007 and 2013 regarding the accession of Romania, Bulgaria, and Croatia), this does not entail that the jurisdiction was determined under the Brussels I Regulation.[20] Therefrom we can deduce the need toreview the basis of jurisdiction in each individual case, even though the judgment was issued when the Regulation was already in force in both countries.[21]

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17 Thus, in September 2013 the SC RS, in a situation where the Regulation was, at the time of the issuance of the foreign judgment (2007), not yet in force in the country of origin of the judgment (Croatia), but was already in force in the requested country (Slovenia), correctly decided that the Regulation was not applicable to the recognition of such judgment, even though at the time of the recognition proceedings the Regulation was already in force in both countries (Judgment No. Cpg 3/2013 of 10 September 2013). However, some courts in the "old" Member States have encountered problems in such cases: e.g. the first instance court in Coburg (Germany) declared a Czech judgment from 2002 enforceable under the Brussels I Regulation, even though the Czech Republic accessed the EU only in 2004 (the opposite decision was later adopted by the appellate court in Bamberg: OLG Bamberg, No. 3 W 17/05 of 9 February 2005).

18 Recognition and enforcement are very often requested in the country where the defendant has his/her domicile or headquarters, since the defendant's property or its biggest part is most often in that country.

19 *Zakon o mednarodnem zasebnem pravu in postopku*.

20 See also A. Galič, *op. cit.* note 15, pp. 134, 135, especially footnote No. 26.

21 We can mention two digressions from this logic: first, the Regulation is never applicable to judgments delivered before the Regulation was in force in both countries, regardless of the basis for the international jurisdiction, which can also in these cases be perfectly acceptable and "accords" with the Regulation's rules; and second, the Regulation is always applicable to judgments delivered in proceedings started after the entry into force of the Regulation in both countries, even though the jurisdiction could, if the defendant was domiciled outside the EU, be exorbitant on the basis of the application of the national rules on international jurisdiction.

4. THE APPLICATION *RATIONE TEMPORIS* OF THE RULES ON INTERNATIONAL JURISDICTION

The rules on international jurisdiction are usually not very problematic from the point of view of their application *ratione temporis*. The Regulation is applicable to proceedings instituted after its entry into force in the country where the proceedings are being conducted. Since international jurisdiction is determined at the beginning of proceedings (the existence of international jurisdiction is one of the formal prerequisites for the court to start deciding on the merits of the case), international jurisdiction is not assessed again in subsequent stages of proceedings (it can only be verified if, regarding the circumstances at the beginning of the proceedings, international jurisdiction was determined correctly).

The question might arise as to how courts should act in cases where the Regulation entered into force after the beginning of the proceedings but before the court (of first instance) decided on its jurisdiction. The Brussels I Regulation does not contain an express provision regarding this question. However, it can be deduced from the case law of the CJEU that the decisive moment is the beginning of the proceedings ("*when the procedure is set in motion*";Ger. "*wenn die Klageerhobenist*").[22]

As was explained above, the setting in motion of the proceedings is, however, interpreted differently in different Member States. In a case where the lawsuit was filed before the entry into force of the Brussels I Regulation in Slovenia, but the first instance court was deciding onits jurisdiction when the Regulation had already entered into force, the Supreme Court of Slovenia decided that jurisdiction had to be assessed under the national rules on international jurisdiction (i.e. the PILPA) applicable at the beginning of the proceedings.[23] Also the Austrian Supreme Court decided in 2003 that the Regulation was not applicable to lawsuits filed before the entry into force of the Regulation, even if the Regulation entered into force during the proceedings.[24] In German law, however, proceedings begin with the service of the lawsuit on the defendant (as is also true for the coming into existence of the *perpetuatiofori* and the *lispendens*).[25] In cases where the Regulation had not yet entered into force at the moment of the filing of the lawsuit, whereas it was already in force at the moment of the service of the lawsuit on the defendant, in assessing their jurisdiction the German courts would apply the Regulation.[26]

[22] CJEU, *Sanicentral GmbH v. René Collin*, 25/79 of 13 November 1979.

[23] SC RS, Judgment No. III Ips 164/2008 of 3 February 2009.

[24] OGH, No. 7 Ob 89/03v of 30 June 2003.

[25] *Klageerhebung*, *Rechtshängigkeit*, Article 261/3 of the German Civil Procedure Act (*Zivilprozessordnung*).

[26] OLG Koblenz, No. 23 U 199/02 of 7 March 2003, the same also in OLG Düsseldorf, No. I 23 U 70/03 of 30 January 2004.

It has also proven to be problematic which choice of court agreements had to be assessed under the Regulation, regarding the time of their conclusion and of their assertion in proceedings. Very early the CJEU had an opportunity to decide on the question of which legal act had to be applied in assessing the choice of court agreement if such was concluded before the entry into force of the Brussels Convention (the predecessor of the Brussels I Regulation with very similar provisions regarding choice of court agreements), while the proceedings in which this agreement was submitted were commenced when the Convention was already in force. The CJEU decided that the legislation in force at the beginning of the proceedings had to be applied, and not the legislation in force at the conclusion of the agreement. Therefore, in cases where the agreement was invalid under the national law of the chosen court, but valid under the Regulation, it is deemed to be valid.[27] Such was also the decision of the Austrian Supreme Court in 2008. In cases where the choice of court agreement was concluded before the entry into force of the Brussels I Regulation, and the lawsuit was filed after the entry into force of the Regulation in both countries, the jurisdiction had to be assessed under the Regulation.[28]

Article 66 of the Regulation does not tackle the intertemporal application of the Regulation in the possibly problematic situations of *lispendens*, i.e. especially in cases where the first action was filed before the entry into force of the Regulation and the second one after its entry into force. When resolving this issue regarding the intertemporal application of the Brussels Convention, the CJEU decided for an analogous application of the transitional provision[29] in that the Convention was applicable (i.e. that the court second seized must dismiss the claim after the court first seized has accepted its jurisdiction) if the court first seized based its jurisdiction on rules according with the jurisdictional rules of the Convention or the international treaty in force between the "involved" states when the proceedings were instituted; *"if the court first seised has not yet ruled on whether it has jurisdiction, the court second seised must apply that article provisionally"*.[30] There is,

27 CJEU, *Sanicentral GmbH v. René Collin*, 25/79 of 13 November 1979. For more on the question of the application *ratione temporis* of the choice of court agreements in the Brussels I Regulation, see J. Kramberger Škerl, *Choice of Court Agreements in the Brussels I Regulation*, in: Recent Trends in European Private International Law – Challenges for the national legislations of the south-east European countries: collection of papersIX Private International Law Conference, September 23, 2011, Saints Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law, 2011, pp. 127, 128.

28 OGH, No. 5Ob201/08g of 23 September 2008.

29 Article 54/2 of the Brussels Convention (the wording is parallel to Article 66/2 (b) of the Regulation).

30 CJEU, *Elsbeth Freifrau von Horn v. Kevin Cinnamond*, C-163/95 of 9 October 1997.

in our opinion, no reason not to apply the same interpretation to Article 66 of the Regulation.[31]

4. THE APPLICATION *RATIONE TEMPORIS* OF THE RULES ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN THE REGULATION OF 2000

Under Article 66 of the recast Regulation, this Regulation is only applicable to the recognition and enforcement of judgments issued in proceedings started after 10 January 2015. The mere issuance of the judgment after that date does not suffice. If the proceedings were commenced earlier, the original version of the Regulation will apply.

As has been explained earlier, the Regulation of 2000 applies to the recognition of enforcement of judgments issued in proceedings started after its entry into force in the State of origin of the judgment as well as in the State of enforcement. In Article 66/2 the Brussels I Regulation of 2000 determines its application in the transitional period, i.e. in cases where, at the beginning of court proceedings, the Regulation had not yet entered into force in the country where the proceedings are being conducted or in the country where the recognition of enforcement of the judgment issued in the first country is later requested. In such cases, only if the conditions of this article are satisfied does the Regulation replace the national law and the existing international treaties between the Member States at issue.[32]

The purpose of the transitional provision is to guarantee that the Regulation would only be applicable if certain prerequisites are fulfilled, on the basis of which the Member States have enacted the simpler regime of the "movement" of judgments in the EU. The goal is to achieve predictability, i.e. that the parties can, at the beginning of proceedings, know under which conditions the judgment issued in these proceedings would be effective in other countries. Furthermore, the milder conditions for the recognition and enforcement of judgments from other Member States are based mainly on the supposition that the dispute was decided on the merits by a court whose jurisdiction was based on a connecting factor which is acceptable for the country of origin of the judgment as well as for the country in which the enforcement is requested (i.e.it was not the case of an exorbitant jurisdiction used against a person domiciled in the country of enforcement).[33]

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[31] Cf. P. Oberhammer in F. Stein, M. Jonas (eds.), *Kommentar zur Zivilprozessordnung*, 22nd ed., Band 10, Article 66, No. 16, 2011, p. 779.

[32] Which agreements these are is determined in Article 69 of the Brussels I Regulation.

[33] See, e.g., P. Stone, *EU Private International Law*, 2nd ed., Edward Elgar Publishing, 2010, p. 237.

Besides the determination of the moment when the lawsuit was filed, the definition of the moment when the judgment was issued can present difficulties, as the laws of different Member States also differ on this question. The convincing opinion of the majority of authors is that the answer must be sought in the national law of the country where the judgment was issued.[34]

In this regard, another question should be addressed: What to do if the conditions for the recognition or enforcement under the Regulation are fulfilled regarding one part of the judgment (concerning the claims or the defendants) but not for the other part? In principle, partial recognition of a foreign judgment is possible if different parts are sufficiently autonomous and not interdependent. According to this principle, it should be possible to recognise the first part of the judgment under the Regulation's rules, and the other part under the national rules. If, however, the parts are not sufficiently autonomous, we should return to the finding that Article 66/2 only provides for exceptional application of the Regulation, therefore the Regulation cannot be applied if only one part of the judgment fulfils its conditions and the other not; the national rules should prevail in such cases.

Regarding the structure of Article 66/2, three situations must be distinguished: first, the Regulation was not in force either at the beginning of the proceedings or when the judgment was issued; second, the Regulation was not in force at the beginning of the proceedings, but was in force when the judgment was issued; and third, the Regulation was in force at the beginning of the proceedings and when the judgment was issued.

5.1 The Proceedings were Initiated and the Judgment was Issued before the Entry into Force of the Regulation of 2000

Article 66/1of the Brussels I Regulation determines that the "*Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.*" The Regulation rules on the recognition and enforcement of judgments are thus normally applicable only to judgments issued in proceedings *started* after the entry into force of the Regulation in both countries "involved". The exceptions of the second paragraph of Article 66 apply only to judgments *issued* after the Regulation was already in force. Therefore, it is not possible (regardless of the basis for international jurisdiction or any other circumstance) to apply the Regulation to the recognition and enforcement of judgments issued before the Regulation was in force in both the country of ori-

[34] See, e.g. P. Oberhammer in F. Stein, M. Jonas (eds.), Kommentar zur Zivil prozessordnung, 22nd ed., Band 10, Article 66, No. 7, 2011, p. 776 and the references cited there.

gin and the country of enforcement. The national rules regulating the recognition and enforcement of foreign judgments will apply.

5.2. The Proceedings Were Initiated before the Entry into Force of the Regulation of 2000, while the Judgment was Issued after the Entry into Force of the Regulation

Article 66/2 of the Regulation of 2000 refers to cases when the rules of the Regulation are exceptionally applicable to the recognition and enforcement of judgments issued in other Member States after the entry into force of the Regulation, even if the condition under the first paragraph is not fulfilled (i.e. at the moment of the beginning of the proceedings the Regulation was not yet in force). This is possible:

> "(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;
>
> (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted."

5.2.1. *The Proceedings were Initiated after the Entry into Force of the Brussels or the Lugano Convention in both the Country of Origin and in the Country of Enforcement*

The exception of point a) is applicable regarding "old" Member States, i.e. the countries where the Brussels Convention of 1968[35] was applicable before the entry into force of the Brussels I Regulation of 2000, as well as regarding the countries which were, at the beginning of the court proceedings, bound by the Lugano Convention. The Brussels I Regulation is namely the successor of the Brussels Convention and its wording is very similar to the wording of the convention, with some actualisations and amendments. The Lugano Convention of 1988[36] was concluded between the then Member States of the European Economic Community (EEC) and the then Member States of the European Free Trade Association (EFTA). The Lugano Convention had practically the same wording as the Brussels Convention, as its purpose was to enlarge the successful "Brussels regime"

[35] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

[36] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters.

to EFTA members. The Lugano Convention was open to accession by other countries, however only Poland accessed and the Convention entered into application there in 2000.[37] Poland became a Member State of the EU in 2004, when the Lugano Convention was replaced, in relation to other Member States, by the Brussels I Regulation. In 2007, the EU concluded a recast Lugano Convention with Iceland, Liechtenstein, Norway, and Switzerland.[38] The text of the new Convention is in concordance with that of the Brussels I Regulation of 2000.

Article 66/2(a) of the Brussels I Regulation expressly determines that the Brussels or Lugano Conventions had to be in force at the beginning of court proceedings in both the country of origin and the country of enforcement. The situation is thus analogous to cases where the proceedings started after the entry into force of the Brussels I Regulation and should not present much difficulty.

Nevertheless, in 2006, the German Supreme Court decided on the following case. The proceedings started when the Brussels Convention was in force in both the country of origin and the country of enforcement, while the judgment was delivered when the Brussels I Regulation was already in force in both countries. The jurisdiction of the court was based on Article 13 of the Brussels Convention, which determines jurisdiction in consumer disputes. The parallel Article 15 of the Regulation was, however, slightly different, so that the jurisdiction could not have been based on that article, even though the actually applied Article 13 of the Convention was not violated. The question arose whether it is possible to refuse a declaration of enforceability under Article 35/1 of the Brussels I Regulation, which provides that the judgment is not declared enforceable if the Regulation's rules on the protection of consumers were not respected in the proceedings of origin of the judgment. The court judged that that was not possible.[39]

The court left open the question of what should be done if it is established that the court of origin of the judgment erroneously applied the provisions of the Brussels Convention. Commentators are of the opinion that the requested court can review the correctness of the application of the provisions of the Brussels or the Lugano Convention in the case of a consumer or insurance dispute or exclusive jurisdiction.[40]

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[37] A. Borrás, I. Neophytou, F. Pocar, 13th *Report on National Case Law Relating to the Lugano Conventions*, May 2012, URL=https://www.bj.admin.ch//content/dam/data/wirtschaft/ipr/lugjurispr-13-e.pdf. Accessed on 14 February 2014, p. 21.

[38] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, UL L 339 of 21 December 2007.

[39] BGH, Judgment of the IX Senate No. IX ZB 102/04 of 30 March 2006.

[40] N. Joubert, M. Weller in: T. Simons, R. Hausmann (eds.), *op. cit.*, pp. 1010, 1011.

5.2.2. *The Jurisdiction was Based on the Rules of Chapter II of the Regulation*

If the proceedings were initiated before the entry into force of the Brussels I Regulation or one of the aforementioned conventions, the application of the Regulation's rules on the recognition and enforcement of judgments from other Member States is also possible if the jurisdiction of the court which issued the judgment was based on "*rules which accorded with those provided for […] in Chapter II*", i.e. the chapter devoted to international jurisdiction.

The question could arise whether the requested court must verify if the jurisdiction would have existed in general, i.e. under any of the rules of the Regulation, or, on the other hand, it must be verified whether the actually applied rule "accords" with any of the rules of the Regulation. Namely ,we can think of a case where the court in the country of origin would base its jurisdiction on one of the exorbitant jurisdictions, for example because some movable property of the defendant is situated in that country, whereas we would see from the circumstances of the case that the court could have established its jurisdiction also, for example, because the contractual obligation was to be fulfilled in that country (such rule is provided for in Article 5/1 of the Regulation).

Since Article 66/2 provides for exceptions and the exceptions must be interpreted strictly, and the Regulation furthermore expressly states that the jurisdiction *was* founded on rules which accorded with those of its Chapter II, we think that, from the point of view of the Regulation, it would be correct to assess only the specific basis for jurisdiction cited in the foreign judgment.[41] Thus, the question which must be resolved is whether, in case the Regulation had already been in force in the country of origin and would thus be applied, the court would have had jurisdiction on the basis of the cited connecting factor. There are certainly many cases where it is difficult to take that decision and draw a line between rules

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[41] It must be noted that the adoption of the opinion that the courts should verify if the court of origin could have had jurisdiction on the basis of a circumstance that that court had not actually deemed as determining would open new questions and problems. Under Article 35/2 of the Regulation, the requested court is namely, when reviewing the jurisdiction, bound by the establishment of the facts on which the court in the country of origin based its jurisdiction. Therefore, the requested court could in no case establish that the jurisdiction in a specific case could have also been based on other facts not established by the court of origin. Thus, the specific basis of jurisdiction cited by the court of origin will be decisive. It could be established that the facts established by the foreign court could obviously serve as a connecting factor regarding another basis of jurisdiction that is acceptable from the point of view of the Regulation, but in such a case the question again arises what to do if the national law of the country of origin applied by the court of origin does not provide for such a basis for jurisdiction.Cf. P. Oberhammer in F. Stein, M. Jonas (eds.), Kommentar zur Zivilprozessordnung, 22nded., Band 10, Article 66, No. 11, 2011, p. 778. The author is of opinion that the court in the country of enforcement is not bound by the rules on jurisdiction applied by the court of origin; however, it is bound by that court's findings on the facts.

which "accord" and those which do not. It is naturally not necessary that the applied provision contains exactly the same wording as the Regulation, however the purpose and the meaning of the applied rule should be compared to that of the Regulation's rule, and the principle of the strict interpretation of exceptions should also be respected.

The task of the courts is made easier by the list of exorbitant jurisdictions contained in Annex I to the Regulation. Those are the jurisdictions that are certainly not acceptable from the point of view of the Regulation so that judgments issued on the basis of such jurisdictions (in proceedings that started before the entry into force of the Regulation) cannot be recognised or declared enforceable under the Regulation. Besides the already cited jurisdiction on the basis of the defendant's property (provided for, e.g., in the national legislation of Slovenia,[42]the United Kingdom, and Croatia), such exorbitant jurisdictions also include jurisdiction based on a temporary residence of the defendant in Slovenia (Article 48 of the PILPA)[43], jurisdiction on the basis of the plaintiff's nationality(France), or jurisdiction on the basis of the service of the lawsuit on the defendant (United Kingdom).[44]

In assessing whether the jurisdiction was based on rules similar enough to those of the Brussels I Regulation, one must also pay attention to the so-called derived jurisdictions of Article 6 of the Regulation (Article 8 of the Brussels I bis Regulation). These are the possibilities of the joinder of actions that are provided for by the Regulation in the case of multiple defendants, counter-claims, third party proceedings, and connected actions *in rem* and *in personam*. If there are several claims or several defendants, it must be verified if the joinder of actions regarding different claims or defendants would also have been permitted under the Brussels I Regulation. If, for example, in the case of multiple defendants, the jurisdiction regarding one of the defendants has been based on a choice of court agreement and for the second one on the basis of the joinder of actions, the condition of Article 66/2 would not have been fulfilled regarding the second defendant, since the Brussels I Regulation only permits a joinder of actions before the court of the place of domicile of one of the defendants and not before any of the courts compe-

42 Article 58 of the PILPA provides: "(1) A court in the Republic of Slovenia shall also have jurisdiction in disputes regarding property claims when the object of the suit is located in the territory of the Republic of Slovenia. (2) If any of the defendant's property is located in the territory of the Republic of Slovenia, then a court in the Republic of Slovenia shall also have jurisdiction if the defendant's permanent residence or head office is in the Republic of Slovenia, provided that the plaintiff proves as probable that the decision can be enforced out of this property."

43 Article 48/2 of the PILPA provides: "If the defendant does not have his/her permanent residence in the Republic of Slovenia or any other country, then a court in the Republic of Slovenia shall have jurisdiction if the defendant's temporary residence is in the Republic of Slovenia."

44 See Annex I to the Brussels I Regulation.

tent for the first defendant under the Regulation (Article 6/1 of the Regulation).[45] The CJEU interprets the rules on the joinder of actions strictly, since this is an exception to the general rules; in the case *Réunioneuropéenne* the CJEU thus rejected the joinder of actions before the court of the place of the performance of the contractual obligation.[46]

Finally, it should be emphasised that the exception of Article 66/2(b) is only applicable if the judgment contains information on the basis for jurisdiction applied by the court of origin. If this information is not provided it should be deemed that the condition of the "according" rule on jurisdiction is not satisfied.[47]

5.2.3. *An International Treaty Concerning International Jurisdiction was In Force Between the Country of Origin and the Country of Enforcement at the Time when the Proceedings Were Initiated*

The second situation regulated by Article 66/2(b) is that an international treaty between the countries "involved" was in force at the beginning of the proceedings that provided for common rules on international jurisdiction. Since the main purpose of the transitional provision is to guarantee that the jurisdiction of the court which issued the judgment was based on a connecting factor acceptable to all countries "involved", i.e. that no exorbitant jurisdiction was applied against a person domiciled in the country of enforcement, such purpose can also be attained if the jurisdiction was based on a common rule on international jurisdiction adopted by the country of origin and the country of enforcement. Thus, in such cases, the rules of the Brussels I Regulation are also applicable to the recognition and enforcement of judgments (naturally, only those delivered after the entry into force of the Regulation in both countries).

As in the case of judgments delivered under the jurisdictional rules of the Brussels or Lugano Conventions, the possibility of the refusal of recognition or a declaration of enforceability on the basis of Article 35/1 of the Regulation (i.e. because certain most important rules of the Regulation were not applied regarding the jurisdiction of the court of origin) must also be denied in cases where the jurisdic-

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[45] See, e.g., S. Corneloup and C. Althammer in: T. Simons, R. Hausmann (eds.), *op. cit.*, p. 302. Under the Regulation the court must thus not only be in the country but also in the place of the domicile of the defendant.

[46] CJEU, *Réunioneuropéenne v. Spliethoff'sBevrachtingskantoor*, C-51/97 of 27 October 1998.

[47] N. Joubert, M. Weller in: T. Simons, R. Hausmann (eds.), *op. cit.*, pp. 1011, 1012, and the case law of the Austrian Supreme Court and the Swiss courts cited therein.

tion was (correctly) founded on a bilateral agreement between the countries. A review of jurisdiction from the point of view of public policy is also excluded(Article 35/3 of the Regulation).

5.3. The Proceedings Were Initiated and the Judgment Was Issued after the Entry into Force of the Regulation

Regarding the original and the recast version of the Regulation, in cases where the court proceedings started after the entry into force of the Regulation in both the country of origin as well as the country of enforcement, the Regulation applies without a review of any other circumstances being necessary (naturally within its scope of application *ratione personae*and *rationemateriae*).

It must also be emphasised that in this case, the rules on the recognition and the enforcement from the Regulation are applicable regardless of whether the jurisdiction was, in the specific case, also determined under the Regulation.[48]The Regulation's rules on jurisdiction are namely in principle (with some exceptions) only applicable if the defendant is domiciled in an EU Member State, otherwise the national rules should be applied to determine the international jurisdiction of the court of origin. Thus, it can happen that the possibly existing exorbitant jurisdictions from the national legislation are applied and the judgment will nevertheless be able to be recognised and enforced in other EU Member States under the "Brussels regime" (except for the exception of Article 72 of both Regulations).[49] The exorbitant jurisdictions cannot even be asserted indirectly, via the public policy defence, because Article 35/3 of the Regulation of 2000 (Article 45/3 of the recast) expressly forbids the review of jurisdiction from the point of view of public policy.[50] If, in such cases, it is not guaranteed that the court decides on the basis of a jurisdiction that is acceptable in the EU context, at least predictability is guaranteed, since it is clear from the beginning of the proceedings that the judgment

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48 See, e.g., P. Rogerson, *Collier's Conflict of Laws*, 4th ed., Cambridge University Press, 2013, p. 221.

49 Article 35/1 of the Brussels I Regulation. Article 72 of the Regulation determines the following: "This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention."

50 It would only be possible to assert, on the basis of Article 35/1, that the court did not apply the Regulation's rules on jurisdiction in insurance and consumer matters or on exorbitant jurisdiction, even though it should have done so – i.e. that the court incorrectly applied the national rules instead of the Regulation.

issued in these proceedings will profit from the "Brussels regime" of recognition and enforcement.

6. CONCLUSION

In principle, the procedural rules in force at the time of the proceedings are applied. Hence, since during the proceedings (from the beginning of the proceedings until the judgment takes effect) the procedural rules can change, such situations are regulated in the transitional provisions of the newer legislation. The Brussels I Regulation of 2000, arguably the most important EU act in the field of EU Civil Procedure, and its successor the recast Brussels I Regulation of 2012 contain such provision in Article 66.

The transitional provision of the Regulations demands the application of each Regulation in cases where court proceedings were initiated after the entry into force of such Regulation. Regarding the recognition and enforcement of judgments from other EU Member States, however, the Brussels I Regulation of 2000 provides for an exception: the Regulation is also applicable in cases where the proceedings were started before its entry into force, but only if the judgment was issued after its entry into force and the jurisdiction of the court issuing the judgment was based on a connecting factor which is acceptable in the EU context or at least by the two "involved" states.

Many problems in the interpretation of the aforementioned rules arose regarding the moment of the entry into force of the Regulation of 2000. In an absolute sense, the Regulation entered into force on 1 March 2002, but naturally only in the then EU Member States. In the countries that entered the EU later, the Regulation entered into force on the date of their accession, i.e. in 2004, 2007, or 2013. Which date should thus be deemed as the date of the entry into force of the Regulation, if it entered into force on different dates in the country of origin of the judgment and in the country where the recognition or the declaration of the enforceability of the judgment is requested? The interpretation adopted by legal doctrine was finally confirmed by the CJEU in 2012, when it adjudged that, for the purposes of the application of Article 66 of the Regulation, the Regulation is deemed to have entered into force on the later of the aforementioned dates.

The analysis of the most common possible situations where the application of the Regulation of 2000*ratione temporis* could prove problematic shows that the judge must executea meticulous task in interpreting the transitional provision of Article 66. The work of the courts can be especially difficult in cases where the application of the Regulation depends on the question of whether the court that issued the

judgment based its jurisdiction on a substantially same rule as is contained in the Regulation. The courts must also be vigilant of the possible application of the rules on the joinder of proceedings that must also be assessed from the point of view of the Regulation's provisions on such joinder. In the event of doubt, we suggest a strict interpretation of the transitional provision.

Lastly, a brand new issue must be mentioned when speaking of the application ratione temporis, namely the so-called Brexit. The United Kingdom will soon leave the EU, probably somewhere in 2019. Under which rules should the remaining Member States recognize and enforce British judgments after that date? Under both versions of the Brussels I Regulation, the "Brussels regime" is provided for the "judgments given in a Member State". Does this mean that the State of origin had to be a Member State at the moment of the issuing of the judgment or also at the moment when the enforcement is sought in another (still) Member State? This is just one of the numerous questions and problems Brexit raises in private international law that will have to be resolved in the following years.

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THE EFFECTIVENESS OF MUTUAL TRUST IN CIVIL AND CRIMINAL LAW IN THE EU

ABSTRACT

According to the sociologist Niklas Luhman trust represents a 'confidence in one's own expectation to another person's behavior. With such understanding of the etymology of the term "trust", its position in the everyday life has paramount importance in the social interaction of humans. Therefore, the understanding of the term 'mutual trust' must be derived from its definition as a basic fact of social life and a component of human behavior. This term has reached new level of meaning in Europe with the creation of the European Union. The whole apparatus of cross-border cooperation in criminal and civil matters in the EU is centered around the principle of "mutual trust" and its influence regarding "mutual recognition". In this article the authors will address these aspects from different point of views: cross-border cooperation in criminal matters and in civil matters in order to determine whether "mutual trust" really exist between the designated stakeholders in criminal and in civil matters, and try to identify the reasons for the drawbacks. Having in mind that these two fields are completely different, the authors will try to find common ground in the actual effective implementation of the principle of 'mutual trust' and understand the functioning of the principle in these two fields. Alternatively, their proposition is that the main stakeholders in the EU should use their resources in building a long term 'actual trust' instead of politically motivated 'mutual trust' that creates notable difficulties in the functioning of the 'mutual recognition' in the EU.

Keywords: *Mutual trust, mutual recognition, European Union, recognition and enforcement, foreign judgments, EU private international law, EU criminal law.*

1. INTRODUCTION

One of the main objectives of the European instruments of cross border cooperation in criminal and in civil matters is to achieve the 'free movement of court decisions', to create a 'genuine judicial area' within the 'area of freedom security and justice' and recognizing and enforcing all judgments given in Member States in the Euro-

pean Union without a formal recognition procedure.[1]As a prerequisite for achieving such objectives the EU has established the principle of mutual recognition as a key concept and a vital rule for construction of an area which unites the diversity of 28 Member States.[2]In order to have proper functioning of the internal market (later in other areas) this principle[3] has been established as an alternative for the full substantive harmonization which in general is unachievable.[4]Having in mind that full substantive harmonization cannot be achieved, in order to effectively materialize free movement of goods/services/people Member States have to recognize standards of another Member State which can be potentially lower or at least different than their own.[5]However this "cheap alternative"[6] of full substantive harmonization as it is sometimes referred to[7],does not mean that Member States should not have some degree of minimum approximation of their legal standards. Nevertheless the question is how much degree of equivalence or approximation of standards is essential precondition for mutual recognition.[8]In all of these cases in which mutual recognition is carried out, mutual trust is the main component for its functioning.[9]

The idea of introducing mutual recognition in the area of recognition of decisions between the Member States was also based on the principle of mutual 'confidence'.[10] Further in the Commissions' White Paper from 1985,the mutual

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union', COM (2014) 144 final of 11 March 2014.

2 This article has been written during the United Kingdom's prospective withdrawal from the European Unionknown as 'Brexit' and its final outcome.

3 Firstly, introduced with the *Cassis de Dijon* case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649). See also Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon') [1980] OJ C 256, p. 2–3

4 Möstl M., *Preconditions and Limits of Mutual Recondition*, Common Market Law Review, No.47, 2010, p.406.

5 Weller, M., *Mutual Trust: In Search of the Future of European Private International Law,* Journal of Private International Law, Issue 1, 2015, p.76.

6 Möstl M., *op.cit.* note 4, p. 407

7 Möstl M., *op.cit.* note 4, p.407; Kerber W.,Vanden Bergh R., "Unmasking Mutual Recognition: Current Inconsistencies and Future Chances",Marburg Papers on Economics, No. 11, 2007, available at URL=<https://www.uni-marburg.de/fb02/makro/forschung/gelbereihe/artikel/2007-11_kerber.pdf>;

8 Möstl M., *op.cit.* note 4, p.418.

9 Weller, M.,, *op.cit.* note 5, p. 65; Canor I., *My brother's keeper? Horizontal solange: "An ever closer distrust among the peoples of Europe"*, 50 Common Market Law Review, Issue 2, 2013, p. 400; Wischmeyer, T., *Generating Trust Through Law? – Judicial Cooperation in the European Union and the 'Principle of Mutual Trust*', 17 German L. J., 2016, p. 341.

10 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) by Mr P. Jenard OJ No. C 59/1, pp. 46-47.

'confidence' has been restated as the 'principle of mutual trust' which is precondition for mutual recognition in the single market.[11]In this fashion, the principle has been adopted and explained, establishing the nexus between mutual recognition and mutual trust.[12]

The whole idea of the cross border cooperation in the EU is 'to make sure that the bridges built between Member States' legal systems are structurally sound'.[13]The basis for the functioning of the whole EU legal system in the EU is mutual trust.[14]In view of the CJEU in Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights it was stated that the principle of mutual trust is at the heart of the EU and a "fundamental premise" of the European legal structure.[15] Often it is reiterated that 'mutual trust is cornerstone of judicial co-operation in the EU'.[16]Moreover, this position is reassured even by the ECtHR where it is stated that the Brussels regime in the EU 'is based on the principle of 'mutual trust in the administration of justice' in the European Union'.[17]

The principle of 'mutual trust' from the perspective of the recognition and enforcement of foreign decisions in the EU[18] is manifested through the principle of 'mutual recognition'. However, 'mutual trust' and 'mutual recognition,' understood as terms and principles, are not synonyms. Mutual recognition of judgments is a goal, an objective,[19] while the principle of mutual recognition is a legal principle of EU law[20], a cornerstone of the internal market, and a fundamental principle in judicial cooperation in civil and criminal matters.[21] On the other hand, mutual trust is an obligation of all the authorities of a Member State to trust the authori-

[11] Completing the Internal Market, White Paper from the Commission of the European Communities to the European Council, COM (85) 310 final, Brussels, 14.06.1985, para.93

[12] Wischmeyer, T., *op.cit.* note 9, p. 351

[13] The EU Justice Agenda for 2020, p. 144

[14] European Commission, Press Release 'Building Trust in Justice Systems in Europe: 'Assises de la Justice' Forum to Shape the Future of EU Justice Policy', 21 November 2013.

[15] See Opinion 2/13, ECLI:EU:C:2014:2454, para.168 and 169.

[16] European Commission, Press Release *Towards a true European area of Justice: Strengthening trust, mobility and growth*, 11 March 2014.

[17] *Avotiņš v Latvia*, app.no. 17502/07, par. 49.

[18] But also in other fields of EU law.

[19] Arenas García R., *Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea*, Yearbook of Private International Law, 2010, p. 362.

[20] C-120/79 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1980] ECR 00731.

[21] Kramer, X., *Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, International Journal of Procedural Law, 2011, p. 209.

ties of the other Member State and therefore to assume their decisions,[22] and is the cornerstone in the construction of a true European judicial area.[23]In the area of criminal justice, mutual trust between Member States has been strengthened by progressively establishing, throughout the EU, a set of fair trial rights by means of common, EU-wide, minimum standards to protect persons suspected or accused of a crime.[24] Thus, mutual trust is a factual and political ground for the implementation of mutual recognition: and on the other hand when mutual trust exists, mutual recognition should be improved.[25]

Such position shows how important 'mutual trust' is for the area of freedom security and justice in the EU. This article will initially provide a brief explanation of the understanding of trust as a psychological, philosophical and social phenomenon. Further this article will address two aspects of mutual trust from different point of views. The first part will elaborate the mutual trust of cross-border cooperation in criminal matters while the second part will refer to the cross border cooperation in the EU in civil matters (highlighting the recognition and enforcement of foreign decisions, especially the child abduction cases), in order to determine whether "mutual trust" really exists between the designated stakeholders in criminal and in civil matters, and try to identify the reasons for the drawbacks.

2. UNDERSTANDING OF TRUST IN SOCIAL SCIENCES

Trust is something that we became acquainted with from our earliest age. For example, the first demonstration of social trust in the baby is in the ease of his feeding or the depth of his sleep.[26]In context of such events, trust is understood as an essential truthfulness of others as well as a fundamental sense of one's own trustworthiness.[27] In the transition from infancy to adulthood along, there are different points of trust and with that people in general are having different level of natural trust as their "trust baseline" or default level of trust.[28] Over this "trust baseline"

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22 Arenas García R., *op.cit.* note 19, p. 375.

23 European Council, 'The Stockholm Programme - An open and secure Europe serving and protecting the citizens', [2010] OJ C 115, p. 11.

24 The EU Justice Agenda for 2020, p. 144

25 Arenas García R., *op.cit.* note 19, p. 362.

26 Erikson identifies eight stages trough which healthy individual passes from infancy to adulthood. The first stage is where the basic interactions with his/her parents leads to trust or mistrust. Erikson E., *Childhood and Society*, Paladin Grafton Books, London, 1950, p.222.

27 The general state of trust, furthermore, implies not only that one has learned to rely on the sameness and continuity of the outer providers, but also that one may trust oneself and the capacity of one's own organs to cope with urges; and that one is able to consider oneself trustworthy enough so that the providers will not need to be on guard least they be nipped. Erikson E., *op. cit.* note 26, p.222

28 Cross F., *Law and Trust*, 93 Georgetown Law Journal 1457, 2005, p. 1462.

there are other factors which influence the development of trust or mistrust such as the surrounding circumstances and what is being entrusted.[29]

From philosophical perspective, it is argued whether trust can be attributed to machines because they are lacking will.[30] More over such position trough wide interpretation can be even extended to the state institutions.[31]

The understanding of the term ‘mutual trust’ must be derived from its definition as a basic fact of social life that is the understanding of trust as a component of human behavior. Trust is described as ‘confidence in one’s expectations for other peoples’ behavior’.[32] Therefore, trust directly influences the perception of complexity of life with all its incidents and possibilities. Trust is a behavior meant to reduce complexity to the degree that decisions about present alternatives of actions can be taken with a view to the future.[33] On the other hand, trust is reduced where control is guaranteed.[34] In this context, law plays important role in society, because it provides certainty by control.[35] So from a sociological point of view, law and trust represent functional equivalents.[36] In context of cross-border cooperation within the EU, the search for better procedures represents a search for the balance between trust and control.

3. MUTUAL TRUST OF CROSS-BORDER COOPERATION IN CRIMINAL MATTERS IN THE EU

Ius Puniendi is traditionally considered as emanate power of one state. However, with the Treaty of Lisbon and the creation of the EU’s Area of Freedom Security and Justice (AFSJ) it appeared that the EU Member States have individually reduced this original right which was until than jealously guarded and considered as un-transferable and un-detachable part of a state sovereignty. Furthermore, starting with the establishment of the mutual recognition of the decisions in the criminal matters, based upon the principle of mutual trust, the EU Member States have steadily moved towards the creation of the mutual EU Criminal Law. In this fashion, Andre Klip[37] has noted that the European criminal justice system is emerging

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29 *Ibid.*

30 Jones K., *Trust as an Affective Attitude*, Ethics, Vol. 107, No. 1, October 1996, p.14.

31 *Ibid.*

32 Luhmann N., *Vertrauen,* 4th ed., Frankfurt, 2000, p.1, (translated by Weller, M., *op.cit.* note 5, p. 68).

33 Weller, M., *op.cit.* note 5, p. 68.

34 Luhmann N., *op.cit.* note 32, p. 19.

35 Weller, M., *op.cit.* note 5, p. 68.

36 Weller, M., *op.cit.* note 5, p. 69.

37 Klip, A., *European Criminal Law. An Integrative Approach*, 2nd edition, Intersentia, Cambridge/ Antwerp, 2012, p. 425

trough the gradual establishment of Union bodies and offices such as Europol, Eurojust, the European Judicial Network, and the European Public Prosecutor's office[38], by merging the two areas as provided by the Treaty of Lisbon. As he continues, this was a result of the Member States' obligation to enforce the Union law and the application of the supervisory mechanism that allows the Union to be characterized as a criminal justice system *sui generis* that applies the rule of law.

Bearing this in mind, it is of essential importance to examine whether the principle of mutual trust in the criminal matters between the Member States was the driving force for such expansion and creation of the EU Criminal Law.

Considering the beginnings of this idea, namely the implementation of the Convention implementing the Schengen Agreement (CISA) or better known as Schengen Agreement, it was obvious that the EU Member States needed instrument which would replace the existing cumbersome procedures for mutual cooperation in the area of criminal law.[39] With the establishment of the principles developed in the internal market of the EU, several problems have risen regarding the crimes, as part of the third pillar of the Justice and Home Affairs (JHA), which were performed in the Schengen area. These problems were primarily based on the fact that until then assistance between the EU Member States in the criminal justice area rested solely upon the bilateral or multilateral Treaties which were overburdened, overcomplicated and ineffective as such.[40] Solution to this was the creation of the EU instrument for recognition of the EU Member State's decisions in the area of the criminal justice and as such to accept it into the national criminal justice system.[41] These were the reasons for establishing the idea of mutual recognition. However, this principle could not be accepted if it was not based upon the principle of mutual trust of the EU Member States' criminal justice system, trust that the other Member State's criminal justice system is equally democratic and bears equally effective mechanisms for protection of the human rights. In essence, this means that one EU Member State recognizes a decision performed within the criminal justice system of another EU Member States trusting that this decision was performed considering the same or similar procedural guarantees as estab-

[38] Caianiello, M., *The Proposal for a Regulation on the Establishment of an European Public Prosecutor's Office: Everything Changes, or Nothing Changes*, European Journal of Crime, Criminal Law and Criminal justice, No.21, 2013, pp. 5-25.

[39] Spencer, J.R., in *European Union Law*, Bernard C. and Peers S., Eds., Oxford University Press, 2014, pp. 755-756.

[40] Chalmers, D., Davies,G. and Monty, G., *European Union Law*, 2-nd Edition, Cambridge University Press, 2010, pp. 583-586; or Woods, L., Watson, P., *Steiner and Woods EU Law*, 11-th Edition, Oxford University Press, 2012, pp. 576-578.

[41] Kaczorowska, A.,*European Union Law*, 3-rd Edition, Routledge, 2013, pp. 943-945.

lished within the criminal justice system of the recognizing state. Furthermore, this principle of mutual recognition based upon mutual trust means that the criminal justice systems of the EU Member States are based upon same principles and bear same ethical and legislative values which are of immense importance for just and effective criminal justice system.[42]As Valsamis Mitsilegas defines mutual recognition - "a journey into the unknown", where national authorities are in principle obliged to recognize standards emanating from the national system of any EU Member State on the basis of mutual trust, with a minimum of formality.[43]

Besides the general determination for mutual recognition[44] and general idea of trust between the EU Member States, the situation of lack of legal mechanisms for effective implementation of these principles was still present. This situation has been circumvented by the enactment of several Framework Decisions which gave the incentive of practical implementation of the principle of mutual recognition and mutual trust in the area of criminal justice. Framework decision for establishment of the European Arrest Warrant was the first and most frequently used in the series of these mechanisms, enacted by the European Council.[45]

These mechanisms were enacted as tools for efficient recognition[46] of the decisions between the Member States brought in the context of the criminal justice procedures. It is needles to mention that these instruments were initially meant to support the criminal procedures that were commenced for the cross-border crimes and/or to provide assistance to the Member States in the criminal procedures which had cross-border elements within the EU Member States.

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42 See for example art. 4 of the Directive 2010/64/EU of The European Parliament and of The Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, URL=http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF

43 Mitsilegas, V.,: *The Constitutional Implications of Mutual Recognition In Criminal Matters in the EU*, Common Market Law Review, No. 43, 2006, 1277-1311, p. 1281.

44 Sullivan, G., *The European Arrest Warrant: Abuse of Process as a Bar to Extradition*, New Journal of European Criminal Law, Volume 0, 2009, Special edition. pp. 37-44; Lavenex, S., *Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy*, Journal of European Public Policy 14:5, August 2007, pp. 762–779.

45 Under the Principle of mutual trust there are 8 Framework Decisions that provide mutual recognition: European Arrest Warrant (2002/584/JHA); European Evidence Warrant (2008/978/JHA); Framework Decision Mutual Recognition of Freezing Orders (2003/577/JHA); Framework Decision on Mutual Recognition of Supervision Orders as an alternative to detention (2009/829/JHA); Mutual Recognition of Fines (2005/214/JHA); Mutual Recognition of Confiscation Orders (2006/783/JHA); Mutual Recognition of Probation Orders and other Non-custodial Penalties (2008/947/JHA) and Mutual Recognition of Prison Sentences (2008/909/JHA). Spencer, J.R., *op.cit* note 39, pp. 766-767.

46 See inter alia: Borgers, M. J., *Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters*, European Journal of Crime, Criminal Law and Criminal Justice, No. 18, 2010, pp. 99–114.

Considering the effects of these mechanisms, additional Framework decisions and Council Directives' were enacted in the area of Substantive Criminal Law,[47] as well, as part of the optimistic necessity for unification of the legislation regarding the most important crimes, which were tangling the EU interests as union.[48]

Regarding the principle of mutual trust within this period it was obvious that it has remained as basic principle for the implementation of these Framework decisions between the Member States, but also served as an apparatus for examination of their efficient implementation. As Linda Groningen has observed that regarding the mutual trust in criminal matters between the EU Member States the problems of legitimacy, asymmetry and constitutional pluralism exist on system level, and considering the necessary development of the EU criminal law these problems will have to be solved in order to uphold the virtues of the criminal justice system.[49]

Namely, with the process of expanding of the EU over 28 Member States[50] and in the ambiance of the enactment of the Treaty of Lisbon, it appeared that the implementation of the principle of trust within these mechanisms was more perceived as distrust and as mechanisms that highlighted the differences of the criminal

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[47] Harmonization trough Framework Decisions in the area of Substantial Criminal Law was performed by establishing criminalization and providing legal definitions regarding the following crimes: terrorism (2002/475/JHA); drug-dealing (2004/757/JHA); child sexual abuse and pornography (2011/92/EU); cybercrime (2013/40/EU); bribery(2003/568/JHA); money-laundering (2001/500/JHA); human trafficking (2011/36/EU); human smuggling (2002/946/JHA); racism and xenophobia (2008/913/JHA); frauds in relation to electronic payments (2001/413/JHA); counterfeiting the euro currency (2000/383/JHA) and frauds against EU budget (OJ [1995] C316).Together with the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (2014/42/EU). Spencer, J.R., *op. cit.* note 39, pp. 770-771. See also: Mostl M.,*Preconditions and Limits of Mutual Recondition op. cit.* note 4, p. 407, or Herlin-Karnell, E., *Waiting for Lisbon… Constitutional Reflections on the Embryonic General Part of EU Criminal Law*, European Journal of Crime, Criminal Law and Criminal Justice No. 17, 2009, pp. 227–242; or: Elholm, T., *Does EU Criminal Cooperation Necessarily Mean Increased Repression?*, European Journal of Crime, Criminal Law and Criminal Justice 17, 2009, pp. 191–226.

[48] Such problem Andre Klip identifies with the EU frauds cases. See: *The Substantive Criminal Law Jurisdiction of the European Public Prosecutor's Office*, European Journal of Crime, Criminal Law and Criminal Justice 20 ,2012, pp. 367—376; See inter alia: Klip, A., *European Criminal Policy*, European Journal of Crime, Criminal Law and Criminal Justice Vol. 20, No. 3–12, 2012, p.5. or: Hetzer, W., *Fight against Fraud and Protection of Fundamental Rights in the European Union*, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 14/1, 2006, pp. 20–45.

[49] Groning, L., *A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law*, European Journal of Crime, Criminal Law and Criminal Justice, No. 18, 2010, pp. 115–137.

[50] For example see the Croatian example with the implementation of the EAW regarding the principle of mutual recognition: Sokol, T., *Implementation of European Arrest Warrant in Croatia: A Risk for the Functioning of Judicial Cooperation in Criminal Matters in the EU?* European journal of crime, criminal law and criminal justice 23, 2015, pp. 258-280.

justice systems between the Member States[51]. This perspective was even more reinforced by the jurisprudence of the ECtHR[52] regarding the proper protection of the human rights by the EU Member States.

However, despite the fact the in the recent years the principle of trust in the criminal matters was questioned more than ever, its influence and significance has not been reduced at all. Furthermore, considering the provisions regarding the articles 82-98, Chapters 4 and 5, of Title V, Part Three of the TFEU, proscribing that the EU Criminal Law provisions are enacted as part of the regular legislative procedure of the EU (art. 288 TFEU), can be only concluded that in regard to the AFSJ of the EU the legal activity is aimed in further strengthening of the strive for establishment of one mutual EU Criminal Law[53]. This process of creation of the EU Criminal Law is done through harmonization process by the enactment of European Parliament's and Council's Directives in the area of Procedural Criminal Law, such as: Directive on the Right to Interpretation and Translation in Criminal Proceedings (2010/64 EU); Directive on the Right to Information in Criminal Proceedings (2012/13 EU); Directive on the Right to a Lawyer in Criminal Proceedings (2013/48 EU) and Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings (2016/800 EU).

> This general trend was further supported with the European Council's Stockholm Programme[54] where its priorities were defined as endeavor for process of recognition and enforcement of all judgments given in Member States in the European Union without a formal recognition procedure.[55] While specifically in the area of criminal justice, mutual trust between Member States has been strengthened by progressively establishing, throughout the EU, a set of fair trial rights by means of

[51] See: Willems, A., *Mutual Trust as a Term of Art in EU Criminal Law: Revealing Its Hybrid Character*, European Journal of Legal Studies, Vol. 9, No. 1, 2016 pp. 212-249; or Helenius, D., *Mutual Recognition in Criminal Matters and the Principle of Proportionality, Effective Proportionality or Proportionate Effectiveness?* New Journal of European Criminal Law, Vol. 5, Issue 3,2014; or: Öberg, J., *Subsidiarity and EU Procedural Criminal Law*, European Criminal Law Review, Vol. 5, 2015, pp. 19-45.

[52] See: Banach-Gutierrez J.B., Christopher Harding, *Fundamental Rights in European Criminal Justice: An Axiological Perspective*,European journal of Crime, Criminal Law and Criminal justice, No. 20, 2012, pp. 239-264.

[53] See more: Spronken, T., *EU Policy to Guarantee Procedural Rights in Criminal Proceedings: An Analysis of the First Steps and a Plea for a Holistic Approach*, European Criminal Law Review, 2011, p. 212-233

[54] European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01).

[55] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union', COM (2014) 144 final of 11 March 2014.

common, EU-wide, minimum standards to protect persons suspected or accused of a crime.[56]

4. MUTUAL TRUST OF CROSS-BORDER COOPERATION IN CIVIL MATTERS IN THE EU (WITH SPECIFIC REFERENCE TO CHILD ABDUCTION CASES)

Recognition and enforcement represents one aspect of private international law whose goal is to avoid re-litigation and provide for harmonized decisions in which the parties' rights are protected.[57] The principle of territoriality and the rise of the sovereignty among the countries provided for the limitations of the authority of judgments to within State boundaries. Due to these facts, no foreign judicial decision could be executed *proprio vigore* in another country.[58] That places the countries involved between two separate necessities: on one side, they have to protect their sovereignty and the integrity of their legal system,[59] and on the other they have to satisfy the party's needs by sparing them of starting a new action in front of a court of a foreign country on an issue and between the same parties which was already decided by a court of another country.[60] In essence this relates to the balance between 'trust' in the procedural and substantive law standards of foreign legal systems and the extent of the 'control' of the state of enforcement that it imposes on the foreign decision and through that on the foreign legal order.

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56 *Ibid.*

57 Whytock, Christopher A., *Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments* (January 14, 2015). Erasmus Law Review, No. 3, November 2014, p. 121.

58 Lenhoff A., *Reciprocity and the Law of Foreign Judgments: A Historical - Critical Analysis*, Louisiana Law Review, Vol. 16 No. 3, 1956, pp. 465-466; Castel J.G., *Recognition and Enforcement of foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada*, E.G., McGill Law Journal, Vol 17 No.1, 1971, p.14; Michaels R., *Recognition and Enforcement of Foreign Judgments*, Rüdiger Wolfrum ed., Max Plank Encyclopedia of Public International Law, Heidelberg and Oxford University Press, 2009, par. 1.

59 Whytock defines these actions as 'governance values' and provides that governance values focus on policies facilitating, guiding or restraining collective activity. These values have implications that extend beyond the parties to particular disputes. Governance values include efficiency, which is concerned with avoiding the expenditure of societal resources to re-litigate issues that have already been litigated, and with reducing transaction costs in transnational business. Further it elaborates that "Governance values also include certainty and predictability, which help 'to establish the security of contracts, promote commercial dealings, and generally further the rule of law among states that are interdependent as well as independent", Whytock, *op.cit.* note 57, p. 120.

60 Rights values focus on justice for particular litigants in particular cases. These values emphasise what Arthur von Mehren calls the 'principle of correctness,' which 'expresses the concern that legal justice, as understood by the society in both substantive and procedural terms, be done. Rights values also entail the 'concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent. Whytock, *op.cit.* note 57, p. 120.

With the Amsterdam treaty norms of private international law are established in the first pillar.[61] As a result of that, the EU has direct competences over recognition and enforcement of foreign judicial decisions coming from the EU Member States in particular legal fields.[62] This directly influences the 'trust' between the countries where in the EU this principle is raised to a new level of 'mutual trust' and in the field of recognition and enforcement is manifested through the principle of 'mutual recognition.' This aspect in turn influences the 'control' of foreign judicial decisions in the EU where fewer and fewer standards are required and the tendency is to fully abolish exequatur.

The idea of the abolition of the exequatur has been in development for almost 20 years. Its origin can be traced back to the summit of the European Council held in Tampere on 15-16 October 1999(Tampere summit),[63] which is known as a starting point of the development of the European Union as an area of freedom, security and justice.[64] Among the 62 conclusions,[65] regarding cross-border recognition and enforcement the European Council held that:

> [E]nhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights.[66]

In civil matters, the Commission was called upon to make a proposal for further reduction of the intermediate measures which were still required to enable the recognition and enforcement of a decision or judgement in the requested State.[67] The idea was that such decisions would be automatically recognized throughout the

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[61] Treaty of Amsterdam, OJ 1997, C 310. With this Treaty the responsibility for creating legislation with regard to international judicial co-operation in civil matters was shifted from the third pillar to the first pillar, i.e. the Community legislator, Wischmeyer, T., *op. cit.* note 9, p. 354.

[62] Stone P., *EU Private International Law: Harmonization of Laws,* (first ed.), 2006, p. 4.

[63] Even before the summit in Tampere, there were considerations about the abolishment of the exequatur, nevertheless because of differences of procedural law regarding enforcement it became official EU policy at the Tampere summit, Kramer, X., *Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights*, Netherlands International Law Review (NILR), Vol. 60 Issue 3, 2013, p. 348.

[64] The Tampere Summit was the first summit in which the head of states and governments of 15 EU Member States come together to discuss the justice and home affairs policies of the European Union. European Commission, Fact Sheet #3.1 Tampere Kick-start to the EU's policy for justice and home affairs, available at URL=http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf. Accessed 12 March 2016.

[65] For the full Presidency Conclusions of the Tampere European Council, see URL=http://www.europarl.europa.eu/summits/tam_en.htm. Accessed 12 March 2016.

[66] Point 33 of the Presidency Conclusions of the summit in Tampere.

[67] Visitation rights was pointed out as one of the fields, point 34 of the Presidency Conclusions of the summit in Tampere.

Union without any intermediate proceedings or grounds for refusal of enforcement, and could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.[68]

From that moment on it started to be considered that mutual recognition is a 'cornerstone of judicial cooperation.'[69] The first instrument that abolished exequatur for particular decisions was the Brussels II bis Regulation.[70] This policy initiated legislative activities that at the beginning were expected to lead to abolition of exequatur[71] in the new Brussels I Regulation.[72] The Commission conducted consultations on the basis of the Green Paper of 2009[73] and proposed only partial abolition, maintaining safeguards in the form of extraordinary remedies that permitted a limited review of the jurisdiction to be enforced but with no public policy exception.[74] However, the final result is that the Council adopted a recast Brussels I Regulation that abolished *exequatur* generally but permits an application by any interested party for refusal of recognition (including public policy)[75] and application by the person against whom the enforcement is sought for refusal of enforcement.[76] In this way the possibility of opposing recognition and enforcement was maintained in the Brussels Ibis Regulation, but limited significantly by the fact that the exceptions must be expressly invoked by application.[77]

The return mechanism for the child abduction cases in the Brussels IIbis Regulation represents a manifestation of the concept of 'mutual recognition'. This policy should reflect the integration and the trust that exists in the European Judicial

68 Point 33 of the Presidency Conclusions of the summit in Tampere.

69 Kramer, X., *op. cit.* note 63, p. 348.

70 The abolishment of exequatur in family matters was outlined in Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [2001] OJ C12/1.

71 Report from the Commission to the European Parliament, the Council and The European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (2009) 174 final p.4. For more on evolution of the systems for the recognition and enforcement in the EU see text to n 450 Part II ch V sec 5.1.

72 More on the Brussels Ibis Regulation see text to note 477 Part II ch V sec 5.1.

73 Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009) 175 final.

74 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final.

75 Article 45 Brussels Ibis Regulation.

76 Article 46 Brussels Ibis Regulation.

77 Scott M. J., *A question of trust? Recognition and enforcement of judgments*, Nederlands Internationaal Privaatrecht (NIPR), 2015, p. 29.

Area.[78]At the core, there are two main rationales for this policy stance: the economical and the political.[79] Regarding the former rationale, this abolition of the exequatur increases the economic welfare of the European economic actors and citizens[80]. Regarding the latter rationale, 'mutual recognition' exists to ensure that judgments circulate freely within the European Union.[81] In civil and commercial matters, to achieve these goals brings certainty and efficiency.[82] However, the implementation of this policy in the aspect of parental responsibility issues, namely child abduction cases, creates a certain discomfort.

The basis for the functioning of this return mechanism is that the Courts and the Central Authorities cooperate among themselves. Each case holds its peculiarities and at the same time basic principles have to be taken into account by the relevant institutions. This means that the Court must apply the rules of the Brussels II bis Regulation and protect the principles of the 1980 Child Abduction Convention. This aspect is in conflict with the short time in which these procedures should be completed. These 'procedures' refer not only to the measures that the Court should take regarding the case in the Member State of refuge, but also to the transfer of the information and documents to the Court of habitual residence of the child. Problems may arise because of the language barriers which are result of the multi-lingual character of the EU and as a consequence represent a problem for direct communication between the relevant authorities. This can be a real danger to the proper transfer of the guiding principles according to which the Court of refuge rendered the non-return order. They could easily be neglected and improperly applied, according to the application guidelines provided in article 42(2) (c) of the Brussels II bis Regulation.[83] Article 11(8) of the Brussels II bis Regulation gives discretionary power to the Court of habitual residence of the child to determine whether or not to issue a certificate of enforceability to the extent that it follows the guiding principles. In such an event, procedural steps which have been taken after a non-return decision has been rendered are not decisive and may be regarded as irrelevant for the purposes of implementing the Regulation.[84] This

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78 McEleavy P., *The new child abduction regime in the European Union: Symbiotic relationship or forced partnership?* Journal of Private International Law, Issue 17, 2005 p.32.

79 Cuniberti G. and Rueda I., *Abolition of Exequatur. Addressing the Commission's Concerns*, Rabels Zeitschrift, 2011, p. 286-316(31).

80 Cuniberti G. and Rueda I., *op.cit.* note 79, p. 291.

81 *Ibid.*

82 McEleavy P., *op. cit.* note 78, p. 32.

83 *Ibid.*

84 Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 par. 80.

position is provided so that the Regulation might achieve its full effect, which is the immediate return of the children.[85]

If the Court of habitual residence renders a certified decision, that decision cannot be appealed,[86] but only rectified, according to the Member State of origin.[87]Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child, the court of origin may declare the judgment enforceable.[88] By excluding any appeal against the issuing of a certificate pursuant to Article 42(1), other than an action seeking rectification within the meaning of Article 43(1), the Regulation seeks to ensure that the effectiveness of its provisions is not undermined by abuse of the procedure.[89] Moreover, Article 68 does not list among the redress procedures any appeal against decisions taken pursuant to Section 4 of Chapter III of the Regulation.[90] Once a non-return decision has been made and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 of the Regulation, if that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, insofar as the return of the child has not actually taken place. If no doubt has been expressed as regards the authenticity of that certificate and if it was rendered in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return

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85 If the position were otherwise, there would be a risk that the Regulation would be deprived of its useful effect, since the objective of the immediate return of the child would remain subject to the condition that the redress procedures allowed under the domestic law of the Member State in which the child is wrongfully retained have been exhausted. That risk should be particularly balanced because, as far as concerns young children, biological time cannot be measured according to general criteria, given the intellectual and psychological structure of such children and the speed with which that structure develops. See Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 par 81.

86 Case C-195/08 PPU *Inga Rinau*[2008] ECR I-05271 par. 84.

87 Article 43 Brussels IIbis Regulation. In the Rinau case it was stated that this article reflect 'procedural autonomy' meaning that the enforceability of a judgment requiring the return of a child following a judgment of non-return enjoys procedural autonomy, so as not to delay the return of a child who has been wrongfully removed to or retained in a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention. This procedural autonomy of the provisions in Articles 11(8), 40 and 42 of the Regulation and the priority given to the jurisdiction of the court of origin, in the context of Section 4 of Chapter III of the Regulation, are reflected in Articles 43 and 44 of the Regulation, which provide that the law of the Member State of origin is to be applicable to any rectification of the certificate, that no appeal is to lie against the issuing of a certificate and that that certificate is to take effect only within the limits of the enforceability of the judgment. Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 par. 63 and 64.

88 Article 42(1) Brussels IIbis Regulation.

89 Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 55.

90 Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 para 85; Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 50

is not permitted and it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child. In doing so, the Court of the refuge is put in a position to 'trust' the foreign order even if this trust not been reciprocated by the authorities of the Member State of habitual residence of the child.[91]

As much as the rationale of this abolition of exequatur can be accepted, that the child must be returned to the place from which it was abducted, still, the 'imposed mutual trust' creates a certain discomfort. The principle of mutual recognition corresponds with the principle of mutual trust. It is said that where mutual trust exists, mutual recognition should be improved.[92] Nevertheless, in child abduction cases the question arises, which should be first? Does this statement mean that the Member States should firstly develop increased trust among their legal systems and then they should abolish every possibility of opposing enforcement of a certified decision, or they should rely on the imposed trust gained through the political sense of the EU institutions transposed in the Brussels IIbis Regulation and it is through its implementation that they should build actual trust? The answer seems to fall somewhere in the middle. The EU should firstly develop necessary facilities, something that is manifested in the enhanced cooperation between the relevant authorities (for example, EJN), the Justice scoreboard[93], and the Guidelines for proper implementation of the Brussels IIbis Regulation measures which should represent a 'physical' manifestation of the proper implementation of the Regulation by the authorities. These activities taken together can establish actual trust. Then for the final stage, full abolition of the exequatur should be introduced and the authorities should help the children involved in the cases. It is left for the future amendments to the Brussels II bis Regulation to gradually accept the differences between the legal systems of the EU and their distrust of one another and to build trust as it should be built. This is achieved by showing that the 'other' legal system applies the same rules properly, as they are applied in the domestic court, and caring for what is most significant: the child's best interest. In such way the trust would cease to be imposed and become a reality, something that the EU needs desperately. It will be a trust in the fact that the whole EU system functions

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[91] The CJEU strongly insists that review is only permisiable in the Country of origin and with that provides for almost irrefutable presumption of compatibility of member States' laws and judgments with European fundamental rights and with the CFR, Canor I., *My brother's keeper? op.cit.* note 9, p.410; McEleavy P., *op.cit.* note 78, p. 33.

[92] Arenas García R., *op.cit.* note 19, p. 362.

[93] EU Justice scoreboard, URL=http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm. Accessed 12 March 2015.

as a whole and not as a 'battlefield' where Member States strive to prove whose system is better.

ECtHR has addressed the issue of the relationship between Article 8(1)[94] of the European Convention on Human Rights (ECHR) and the enforcement of family law orders in general and the execution of return orders in particular.[95] Article 8(1) of the ECHR and its violations were initially focused on public law situations, but were later extended to private law situations and have been relied upon, with success, in child abduction cases and access rights.[96]This is especially important regarding how the exceptions provided in Article 13 of the 1980 Hague Child Abduction Convention are to be applied in a manner that is consistent with Article 8 of the ECHR and how the Courts of the EU Member States handle child abduction cases where the courts of the habitual residence have made use of their power under Article 11 of the Brussels IIbis Regulation.[97] In a series of cases the ECtHR has held, in general, that returning a child under the procedures set out in the Brussels IIbis Regulation and in the 1980 Hague Child Abduction Convention who has been wrongfully removed or retained is not in breach of obligations under the ECHR, in particular of Article 8 thereof.[98] With such an approach of supporting the functioning of the child abduction regime established by the Brussels IIbis Regulation and the 1980 Hague Child Abduction Convention, the ECtHR has shown that it supports the restitution of the *status quo,* which was unilaterally disturbed by the wrongful removal or retention. The ECtHR has in only a small number of cases, and mostly in exceptional circumstances, held that the return of a child after a wrongful removal or retention may constitute a breach of Article 8 of the ECHR.[99]

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94 Article 8(1) of the ECHR provides that:
"Everyone has the right to respect for his private and family life, his home and his correspondence."

95 See, cases *Maumousseau and Washington v. France* (Application No 39388/05); Lipkowsky and McCormack v. Germany (Application No 26755/10); Sofia Povse and Doris Povse v. Austria (Application No 3890/11); Raban v. Romania (Application No 25437/08); Šneersone and Kampanella v. Italy (Application No 14737/09); B. c. Belgique (Requête No 4320/11); Neulinger and Shuruk v. Switzerland (Application No 41615/07) X. v. Latvia (Application No 27853/09); Ignaccolo-Zenide v. Romania, Application No 31679/96, (2001); *Maire v. Portugal*, (Requête no 48206/99); *P.P. v. Poland*, (Application no. 8677/03); *H.N. v. Poland*, (Application No. 77710/01); *Raw and Others v. France*, (Application No 10131/11).

96 Magnus U., Mankowski P.(eds) *European Commentaries on Private International Law: Brussels IIbis Regulation*, Sellier, European Law Publishers, 2012, p. 390.

97 Beaumont P. and others, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, International and Comparative Law Quarterly, Vol.64, 2015, p. 40.

98 See, *Maumousseau and Washington v. France* (Application No 39388/05); *Lipkowsky and McCormack v. Germany* (Application No 26755/10); *Sofia Povse and Doris Povse v. Austria* (Application No 3890/11); *Raban v. Romania* (Application No 25437/08).

99 See, Šneersone *and Kampanella v. Italy* (Application No 14737/09); *B. c. Belgique* (Requête No

The aim of ECHR and Charter of Fundamental Rights of the EU (CFR) generally is the same; both protect and guarantee fundamental rights and both contain provisions which are intended to protect the rights of the child. Nevertheless, they may not share the same methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which make up the process.[100] It was nonetheless expected that these two legal orders would be addressed over the child abduction, because these cases have a high intensity of emotional charge and the participants in these proceedings would use almost every legal remedy at their disposal because they represent a 'pathological aspect' of the custody disputes.

The *Bosphorus* case provides a solution and gives a certain order in the interaction between ECtHR and CJEU legal orders in that it accepts the change in the dominance of the ECtHR over human right issues.[101]This case in a certain way was inspired by the *Solange II* case-law of the German Constitutional Court[102] and gives input to the reasoning of the ECtHR by developing a translation, a kind of 'Europeanisation of the Solange.'[103] Bringing along the inspiration of the *Solange II*, the ECtHR in the case M. & Co. v. Germany [1990] ruled that applications against individual EU Member States concerning material acts of Community law were inadmissible only under one condition: *'Provided that within that organization fundamental rights will receive an equivalent protection.'*[104] This principle, which evolved during the Bosphorus judgment, was referred to as the 'principle of compliance' and provides that the ECtHR has no competence to review Community acts as such. Nonetheless, the Court recognizes a competence to review these acts indirectly through examining specific implementation measures at the national level.[105] In the *Michaud v. France* Case, the ECtHR when applying this

4320/11); *Neulinger and Shuruk v. Switzerland* (Application No 41615/07) and *X. v. Latvia* (Application No 27853/09).

[100] Muir Watt H., *Muir Watt on Abolition of Exequatur and Human Rights*, Online Symposium: Abolition of Exequatur and Human Rights, URL= http://conflictoflaws.net/2013/muir-watt-on-povse/. Accessed 10 April 2016.

[101] Preshova D., '*Legal Pluralism: New Paradigm in the Relationship Between Legal Orders*' in Marko Novakovic (ed.) Basic Principles of Public International Law: Monism & Dualism, Belgrade: Faculty of Law University of Belgrade, Institute of Comparative Law and Institute of International Politics and Economics, 2013, p.19.

[102] Solange II, [1986], BVerfGE 73, p. 339

[103] Groussot X. '*Constitutional Dialogues, Pluralism and Conflicting Identities*' in M. Avbelj/J. Komarek (eds.) Constitutional Pluralism in the European Union and Beyond, 2012, p. 319, (as cited by Preshova D., *op.cit.* note 101, p.18).

[104] M. & Co. v. Germany, [1990] ECHR (Ser. A), p. 138

[105] Kuhert K. '*Bosphorus – Double Standards in European Human Rights Protection?'* Utrecht Law Review Volume 2, Issue 2, 2006. p. 188.

'principle of compliance' stated that *'…the Court may, in the interest of international cooperation, reduces the intensity of its supervisory role*'.[106] This doctrine now represents a 'bridge'[107] between these two legal orders, moreover because the CJEU gave opinion that

> [T]he agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.'[108]

However, this doctrine of 'principle of compliance' is not without criticism. The principle is criticized for representing a political gesture on behalf of the ECtHR and for the fact that it applies a much lower standard of protection of human rights to EU law than to non-EU law.[109]

The cases of child abduction have shown how complex the situation is regarding the existence of several legal sources that can be applied in a certain case. The 'Bosphorus presumption' provides for some resolution between ECHR and EU law. Nevertheless, this aspect is just a starting position because in essence the national courts (local judges) have to decide this 'mega-conflict'[110] between two supra-national regimes which both purport to promote the interests of the child. For example, the local judge, when deciding for return of the child under Article 11(8) Brussels IIbis Regulation, must act promptly and thoroughly because this fast-track procedure and the abolition of the exequatur is counterbalanced by the particular duty to properly conduct 'in-depth examinations' as regards the reasons for such refusal (as was the case in Šneersone *and Kampanella v. Italy,* which was reiterated the *Neulinger* approach) and that the child is heard, unless is inappropriate (as was the case in *Zarraga*). If the Court of habitual residence of the child fails to do so, or does it unsatisfactorily, it is open to the applicant to challenge the order – including through an individual application to the ECtHR (as indicated in *Povse v. Austria* case).

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106 *Michaud v. France* (App. No. 12323/11), par. 104.

107 Requejo M., *Requejo on Povse*, Online Symposium: Abolition of Exequatur and Human Rights, URL=http://conflictoflaws.net/2013/requejo-on-povse/[page unavailable]. Accessed 12 December 2016.

108 Opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law (2/13), Press Release No.180, 2014 (18.12.14).

109 Kuhert K.., *op.cit.* note 105, p. 188; Beaumont and others, *op.cit.* note 97, p. 56.

110 Muir Watt H., *op.cit.* note 100, p.1.

The Brussels IIbis Regulation in Article 11(6)-(8) is positioned in such a way that the court of origin (the court where the child had his habitual residence before the wrongful removal or retention) is the final arbiter regarding child abduction cases.[111] The procedure was designed as such because of the restoration of the *status quo ante,* which is the main goal in the child abduction cases.[112]Nevertheless, infringement on human rights in correlation with the Charter of the EU and the ECHR can occur in both places, in the country of origin (country of the habitual residence of the child prior to the abduction) and the country of enforcement (country of refuge). This aspect cannot be disregarded, because the procedure provided in Article 11(6)-(8) of the Brussels IIbis Regulation is intended to have limitations in the country of enforcement for the reasons of the child's best interest and the unilateral disturbance of the jurisdictional regime by the abducting parent who voluntarily choose that forum. From the point of view of the Brussels IIbis regime,[113] such conduct is intolerable and the CJEU allowed no exceptions to the concertation of the jurisdiction in the country of origin, (the country of the child's habitual residence prior the abduction) including for human right protection (Article 24 of the Charter of the EU), reasoning that there are locally available remedies despite the fact that the abducting parent and the child are found elsewhere.[114] At the same time, the ECtHR in the Šneersone *and Kampanella v. Italy* case evidently left a possibility to the abducting parent to raise human rights infringement in the country of enforcement. Between these two standpoints, there is the *Bosphorus* presumption in the *Povse v. Austria* case, which tries to reconcile these two regimes by diminishing the distress of the national courts to be put in a position to choose between two competing international obligations[115] and by that to demonopolize human rights protection. Following this presumption, the ECtHR did not find justification to rebut it and rejected the application.

Such a position of the ECtHR regarding the application of Article 11(6) – (8) of Brussels IIbis Regulation ultimately leads to the two most essential questions regarding the abolition of the exequatur in the Brussels IIbis Regulation: Does the abolition of the *exequatur*, as a part of the child abduction procedure, deprive the child of adequate protection? And secondly, taking into consideration the procedure provided in the Brussels IIbis Regulation regarding child abduction

[111] Such situation is not exclusively attributed to child abduction cases, but also in criminal law in the Case *Advocaten voor de Wereld VZW* the CJEU reached similar result. Case C-303/05, Advocaten voor de Wereld VZW v Leden van de Ministerraad, (2007) I-03633.

[112] Perez-Vera report, Actes et Documents de la Quatorzieme Session, Vol. 3, October 1980, p.106.

[113] Case C-211/10 *Doris Povse v Mauro Alpago* [2010] ECR I-06673 par. 74; Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 69.

[114] Canor I., *op.cit.* note 9, p.410.

[115] Muir Watt H. *op.cit.* note 100, p. 3.

cases, can the abductor and the child still possibly raise human rights infringement before the country of refuge, if in particular case the court of origin ordering the return did not deal or dealt inadequately with the human's right challenge?

Regarding the first question, the CJEU and the ECtHR are in line in the reasoning that the court of origin is the forum in which all infringements of are to be addressed. The CJEU held this position in the *Zarraga* Case and in the *Povse* (preliminary ruling) case, that questions concerning the lawfulness of the judgment ordering return as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied,[116]are solely questions for the national courts of the Member State of origin to examine, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003.[117] The ECtHR reached a similar conclusion by applying the Bosphorus presumption in the Povse case and providing, firstly, that the Austrian Courts (court of enforcement) had no discretion but to order the return of the child; secondly, that the CJEU in its preliminary ruling considered that the child and the mother could search for adequate humans right protection, namely Article 8 of the ECHR, in front of the Italian Courts (court of origin).[118] With these two factors in mind and applying the 'Bosphorus presumption,' the protection of these rights according to ECHR, which is provided by the ECtHR, is equivalent to the protection afforded by the Brussels IIbis Regulation. In the context of the Povse case, there is also a condition which is in line with the Bosphorus presumption, that the parties must avail themselves of all local remedies and challenge the order in the Court of origin (with the possibility of lodging an application with the ECtHR if such an attempt fails). All of these factors provide that in the cases with questions which are specific to the infringement of human rights and are conducted by the abolition of the exequatur in the Brussels IIbis Regulation, are to be addressed in the Country of origin. However, this does not preclude the challenge of the return order in the country of enforcement, which is shown by the mere fact that Bosphorus presumption is rebuttable, but only in extreme cases.

This aspect of the rebuttable presumption (*praesumptio iuris tantum*) under the Bosphorus presumption requires quite strict standards of proof of violation and the presumption can be rebutted if, in the circumstances of the particular case, it is considered that the protection of ECHR rights was manifestly deficient. In such cases, the interest of international cooperation is outweighed by the Convention's

[116] Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 51.

[117] Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247 par. 69.

[118] *Povse v. Austria* (App. No 3890/11) par. 86.

role as a 'constitutional instrument of European public order' in the field of human rights.[119] So the questions stands, can the abductor and the child still possibly raise human rights infringement before the country of refuge, if in that particular case the court of origin ordering the return did not deal or dealt inadequately with the human rights challenge? If this aspect is seen only through the Šneersone *and Kampanella v. Italy* case, then the answer would be yes.[120] But this case does not bring into the equation the Bosphorus presumption. What this presumption does, together with all that was said about the access to justice in the court of origin, is mandate that only severe disallowance to such access (which includes disallowance of application to the ECtHR) could lead to the possibility of effectively raising the access argument in front of the court of enforcement.[121] From another point of view, if both safeguards are applied and used, that the parties use all of their remedies in front of the Court of origin (provided that they are accessible!) and if that court fulfils its obligations under Article 42 of the Brussels IIbis Regulation, then there wouldn't be any need to call for help from the courts of the country of refuge under the ECHR.[122]

With all of which was said, the ECtHR and the CJEU have put on the court of origin, very important role, to swiftly and thoroughly examine all of the circumstances when applying Article 11(6)-(8) of the Brussels IIbis Regulation and to allow access to justice to the parent which wrongfully removed or retained the child in the country of refugee. This role is evidently not an easy one, but it's necessary, because here at stake is very fragile right. That is the child future, its relation with the environment and its self-awareness. For that there could not be any excuses that the role is hard.

5. CONCLUSION

Historically, countries had different approaches and different concepts regarding *exequatur*. From the first position of free circulation of judgments to the *révision au fond,* the balance has shifted to the extremes. Due to some practical aspects, it was much easier to lower the 'control' regarding the application of the substantive law by the foreign court. As a consequence, 'trust' was achieved much faster regarding this requirement. Minimum 'control' of the application of the foreign substantive law is still kept if these errors amount to violation of public policy. In fact, the 'trust' afforded to the foreign legal system is not so much based on the

[119] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim* Şirketi *v. Ireland* (App. No. 45036/98) par. 156.

[120] Canor I., *op.cit.* note 9, p.413.

[121] Muir Watt H., *op.cit.* note 100, p. 4.

[122] *Ibid.*

abstract legal comity between the countries, but on the 'trust' of the administration of justice by the foreign courts when addressing individuals' rights of access to justice in due time and without disproportionate effort in international cases. Therefore 'trust' is not something general, but is an effective individualization in the performance of the judicial authorities when addressing cross-border cases. As has been previously stated, 'trust' in other countries' administration of justice may be conceptualized as a practice for optimizing the individual's effective access to justice in cross-border cases. Such position is particularly visible within the EU Criminal law, bearing in mind that mutual trust cannot exist without institutional support.

On the other hand, the idea of free circulation of judgments within the EU has existed for more than 35 years, but it was realized for the first time in the Brussels IIbis Regulation for limited cases of child abduction and access rights. The principles upon which this abolition of exequatur is build are 'mutual trust' and 'mutual recognition'. So in a way, increased 'trust' (constructed in the EU in the political idea of 'mutual trust') between the Member States is responsible among other reasons for the decrease of the 'control' that Member States have regarding exequatur. The basic formula is this: where 'mutual trust' exists, procedures for recognition and enforcement should be improved. However, this 'trust' ('confidence in one's own expectation to other person's behavior') is not something which was totally acquired through experience during the interaction between legal orders ('actual trust'), but it is imposed 'trust', a political decision that Member States can have confidence not in their own expectation, but rather in the political assessment of the EU institutions that other Member States' behaviors are satisfying expectations. As such, for this type of trust it can be said that it represents an 'indirect trust' gained through the assessment of the EU institutions. In some cases, it was shown that the lack of the imposed 'mutual trust' was creating problems and resulted in the circumvention of the application of the Brussels IIbis Regulation regarding 'mutual recognition'. Thus, the cure which was proposed by the EU legislator is that the lack of 'mutual trust' should be improved by imposing an obligation for 'mutual recognition'. Once more the problem is what comes first. Should 'mutual trust' be gained first and then the Member States should proceed in building system of 'mutual recognition' with further free circulation of judgments in mind or through the process of 'mutual recognition' the EU should build 'mutual trust'? What is necessary is that instead of building politically imposed 'mutual trust', Member States should steadily build 'actual trust' through direct contact between the authorities of different Member States and with trust in each other's administration of justice. In this approach, the work of the European ju-

dicial network (EJN) and the European judicial training network (EJTN) play important roles.

Therefore, a question of balance between the 'trust and 'control' arises regarding the enforcement of parental responsibility decisions in the EU. If we look at the recent approach taken by the EU regarding the abolition of exequatur in Brussels Ibis Regulation, certain safeguards were kept. So total 'trust' was not achieved but rather the approach of limited 'control' was postponed to a later stage. 'Control' was taken in the form that the *ex ante* control by the state now is transformed to *ex post* control initiated by the parties. So the abolition of the exequatur in the Brussels regime represents moving the coordination to a later stage of the implementation of recognition and enforcement. It is very realistic to assume that the new Brussel IIbis Regulation will follow these new tendencies in the Brussels regime. Again the question of balance regarding the Brussels IIbis Regulation translates to the answer of the question whether removing the requirement of exequatur could mean abandonment of certain 'control' and with that introducing new problems, without tackling what is important here, the child's best interest.

As much as the political will of the EU is understandable, there must be some kind of realistic expectations for the modalities of building 'actual trust'. This cannot be achieved by imposing an obligation that Member States have to 'trust' other authorities. 'Trust' is not something which can be built by theoretical or political will. The persons who are implementing the Regulation have to have confidence in the other person's behavior in the application of the Regulation. In addition, they have to understand the regulation and the values it protects. When they have understood these values and when they are certain that the other persons have also understood the values, then the 'actual trust' would emerge. Without 'trust' all that would be left are ineffective rules, as much as they are flawlessly drafted or constructed. The protection of the best interest of the child is a universal value. It must be understood and it must be protected.

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PROTECTION OF THE RIGHT OF THE CHILD TO BE HEARD IN DIVORCE PROCEEDINGS – HARMONIZATION OF CROATIAN LAW WITH EUROPEAN LEGAL STANDARDS

ABSTRACT

Contemporary developments in European procedural law reveal a growing interest in the protection and promotion of children's (procedural) rights. The right of the child to be heard in proceedings resulting in decisions which directly or indirectly affect its rights and interests, is a procedural right of the child, granted by numerous European documents. One of such proceedings is certainly divorce proceedings involving children. This paper is aimed at demonstrating and analysing the ways in which the right of the child to be heard is protected in European law as well as at examining whether the protection of the right of the child to be heard in divorce proceedings in Croatian law is harmonized with the standards of European law in this legal area. Considering that the latest reform of Croatian family legislation (2015) has proposed some new solutions relating to the expression of child's views in divorce proceedings, the author has conducted empirical research to examine the experiences of application of those solutions in legal practice.

Keywords: *child, right to be heard, divorce, European law, Croatian law*

1. INTRODUCTION

Making the justice systems across Europe more child-friendly is a key action under the EU Agenda for the Rights of the Child[1]. Pursuant to European child-friendly justice standards, the Member States are obliged to undertake measures which should enable the child, in accordance with its age and degree of maturity, to participate in proceedings dealing with its rights and interests. Those measures should also ensure that such proceedings are child appropriate. As asserted by Vandekerckhove and O'Brien "in circumstances where children's rights are at stake in a

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child /* COM/2011/0060 final */, available at: URL=http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0060. Accessed 12 January 2017.

(court) case, it is important not only to look at the merits of the case, or the (legal) characteristics of the given situation, but also to consider the manner in which the court system actually deals with and relates to children throughout the course of the proceedings themselves."[2] The protection of the right of the child to be heard in proceedings directly or indirectly affecting its rights and interests are vital for the implementation of child-friendly justice standards.[3] In terms of civil proceedings, children's rights in Europe are most often affected by parental divorce and relating proceedings.[4] Children, as "principal victims of divorce"[5], should enjoy a special form of protection of their (procedural) rights in this type of proceedings.

Croatian family legislation obliges parents and other childcare providers to respect child's views in accordance with its age and level of maturity. Likewise, in all proceedings resulting in decisions affecting a child's right or interest, the child has the right to be appropriately informed about relevant circumstances of the case, to get advice and express its views, and find out about possible consequences of taking its opinion into consideration. The child as well needs to know that its opinion is taken in compliance with its age and level of maturity.[6] This paper elaborates in detail how the right of the child to be heard is protected concrete in divorce cases by Croatian family legislation. First, it shows and analyses the protection of the right of the child to express its views in the context of European law. Then it examines the protection of the right of the child to express its views in divorce proceedings within Croatian family legislation. The paper also includes analysis and comparison between non-contentious divorce and contentious divorce proceedings in the light of the legal protection of the right of the child to express its views. For that purpose, the author has conducted empirical research of the expression of child's views in the mandatory counselling procedure, which precedes judicial divorce proceedings involving minor children.[7] The paper concludes with

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2 Vandekerckhove, A.; O'Brien, K., *Child-Friendly Justice: turning law into reality*, ERA Forum, Vol. 14, No. 4, 2013, pp. 524/525.

3 See the overview of EU activities on child-friendly justice in Tuite, M., *The way forward: the implementation of the EU Agenda for the Rights of the Child*, ERA Forum, Vol. 14, No. 4, 2013, pp. 543-556.

4 See the *Summary of contextual overviews on children's involvement in civil and administrative judicial proceedings in the 28 Member States of the European Union*, Luxembourg, Publications Office of the European Union, 2015, available at URL=https://bookshop.europa.eu/en/summary-of-contextual-overviews-on-children-s-involvement-in-civil-and-administrative-judicial-proceedings-in-the-28-member-states-of-the-european-union-pbDS0115277/?CatalogCategoryID=z4mep2Ow4uMAAAFOy2gi8_Ki. Accessed 14 January 2017.

5 Freeman, M., according to Parkes, A., *Children and International Human Rights Law: the Right of the Child to be Heard*, Routledge, Abingdon/New York, 2013, p 90.

6 See Article 86.

7 The research was conducted in the form of an on-line questionnaire forwarded to social welfare centres. The questionnaire included 17 questions related to the implementation of the mandatory counselling

an assessment of the compliance of the Croatian solutions with European legal standards in this legal area.

2. PROTECTION OF THE RIGHT OF THE CHILD TO EXPRESS ITS VIEWS IN THE CONTEXT OF EUROPEAN LAW

The right to be heard is a right of the child, granted by numerous European documents.[8] The importance of the protection of the right of the child to express its view in proceedings resulting in decisions which directly or indirectly affect its rights and interests has been recognized in the case-law of European courts too.[9]

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procedure. The following 21 social welfare centre took part in the research: Zagreb-subsidiary Gornji grad (Uptown), Zagreb-subsidiary Trnje, Zagreb-subsidiary Novi Zagreb (New Zagreb), Split, Osijek, Zadar, Slavonski Brod, Gospić, Križevci, Pazin, Valpovo, Beli Manastir, Đakovo, Dugo Selo, Bjelovar, Pakrac, Ludbreg, Našice, Koprivnica, Zaprešić and Novi Marof.

8 The European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe, 4 November 1950, ETS 5 (hereinafter: ECHR), under Article 10, proscribes that everyone has the right to freedom of expression. As Van Bueren explains, the law is clear that all children are included in term "everyone". However, Article 10 is principally focused on the necessity to protect against negative "interference" from the state, and for children negative protection may be inadequate, as children also frequently require a positive obligation placed on the state to create and protect accessibility. Van Bueren, G., *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Council of Europe, 2007, p. 83.
The right of the child to express its views in proceedings is also granted by the Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016 (art. 24. p. 1: *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*); European Convention on the Adoption of Children (Revised), CETS No.202, 27. 11. 2008 (see art. 5. and 6.); Recommendation No R (84) 4 of the Committee of Ministers of the Council of Europe on parental responsibilities (see Principle 3); Recommendation No R (87) 6 on foster families (see Principle 7) etc. Considering that divorce proceedings involving minor children deal with the issue of contact with the child, one should not forget to mention the protection of the right of the child to express its views, enshrined in the Convention on Contact concerning Children, ETS No.192, 15.5.2003 (art. 6.: *A child considered by internal law as having sufficient understanding shall have this right, unless this would be manifestly contrary to his or her best interests:*
–to receive all relevant information;
–to be consulted;
–to express his or her views.

9 The right of the child to be heard in civil proceedings is not expressly contained within the ECHR, nor has such a right been explicitly determined by the European Court of Human Right. Considering the principles of evolutive interpretation, the positive obligations inherent within Articles 6 and 8 as well as the case-law on hearing children to date, is to be argued that such a right can be derived under the ECHR. Daly, A., *The right of children to be heard in civil proceedings and the emerging law of the European Court of Human Rights*, The International Journal of Human Rights, Vol. 15, No. 3, 2011, pp. 441.
For the case-law of the European Court of Human Rights relating to the right of the child to express its views see, e.g.: *T. v United Kingdom* (1999) 30 EHRR 121; *Kutzner v Germany* (2002) Appl. No. 46544/99, *Sahin v Germany* (2003) 36 EHRR 765; *Sommerfeld v Germany* (2003), Appl. No.

Considering that the contents of particular European documents protecting the right of the child to be heard overlap, this chapter deals only with some of them, i.e. sheds light only on the most relevant ones for this study. The analysis of those European documents with respect to the protection of this children's right starts with their foundation, i.e. United Nations Convention on the Rights of the Child [10] (hereinafter: UN CRC).

2.1. United Nations Convention on the Rights of the Child as the basis of regional European documents regulating the right of the child to be heard

The UN CRC appears in the preamble of many regional European documents which regulate children's (procedural) rights. The European Court of Justice has recognized that all EU actions must respect fundamental rights and in this regard has noted that due account should be given to the UN CRC.[11] As rightly highlighted by Couzens, the UN CRC "has confirmed that children are regarded as subjects of human rights and not just as subjects of protections" and that "this position creates a direct link between the state and children, without parents or other adults playing a role as intermediaries."[12]

The right of the child to express its views is set forth in Article 12 of the UN CRC:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[13]

31871/96, etc.
For the case-law of the European Court of Justice relating to the right of the child to express its views see, e.g.: Case C-491/10 *Aguirre Zarraga v Pelza* [2010] ECR I-14247; Case C-400/10 *McB v L.E.*, [2010] ECR I-8965, etc.

[10] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[11] O'Donnell, R., *The role of the EU legal and policy framework in strengthening child friendly justice*, ERA Forum, Vol. 14, No. 4, 2013, p. 512.

[12] Couzens, M, *Autonomy rights versus parental autonomy*, The UN Children's Rights Convention: theory meets practice, Alen, A. *et al.* (eds.), Intersentia, Antwerpen/Oxford, 2007, p. 407.

[13] Article 12 of the UN CRC

It may be argued that recognition of the child's best interests in the sense of Article 3 underpins all the other provisions in the UN CRC[14]. The right of the child to have its best interest assessed and taken as a primary consideration along with the right of the child to be heard are compulsory passages for all those who have the crucial task of deciding on the child's future in a different official (judicial and administrative) context.[15] Article 3 of the UN CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.[16]

In Zermatten's opinion, we can give two significations to the expression "*the best interest of the child shall be a primary consideration*". First, the best interest principle is the fundament for a substantive right: the right of the child that its best interests will be assessed and determined and that it will be taken as a primary consideration whenever a decision concerning it is to be made. Second, it is a rule of procedure: whenever a decision affecting a specific child or a group of children is to be made, the decision-making process must be carried out through the consideration of a possible impact on the child concerned and this impact must be accompanied with a primary consideration in the appreciation of different interests in play.[17] The importance of the principle of priority protection of the best interests and well-being of the child as a starting point for any family proceedings which might affect its rights and interests is undoubted and divorce proceedings are no exception in this view. Not only that this principle should underpin all the national legislation provisions regulating divorce proceedings involving minor

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14 Freeman, M., *Article 3: The Best Interests of the Child*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 1.

15 Zermatten, J., *Best interests of the child*, Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child, Mahmoudi, S. *et al.* (ed.), Brill Nijhoff, Leiden/Boston, 2015, p. 42.

16 Article 3 of the UN CRC

17 Zermatten, J., *op. cit.* note 15, p. 31/32.

children but application and proper interpretation of this principle may fill legal lacunae, if any, pertaining to the protection of children's rights in such proceedings.

On the other hand, one of the recurrent critiques to the best interest is that this principle is too vague and that it is difficult to implement it without guidelines that are more precise.[18] Within the conflicting scenario of defining and enforcing the best interest principle, probably the most important right when dealing with the rights of children in marital breakdown relates to listening what children have to say.[19]

There are opposing opinions about whether the right of the child to express its views in divorce proceedings (granted by Article 12 of the UN CRC) and the best interests of the child (in the sense of Article 3 of the UN CRC) are complementary or conflicting. Sometimes the best interests of the child argument is used to encourage participation of the child in the proceedings and on some occasions hearing the child in divorce proceedings is deemed contrary to its best interests.[20] The Recommendations of the UN Committee on the Rights of the Child suggest that all the State parties should facilitate the exercise of the right of the child to express its views either in judicial divorce proceedings or within the framework of family mediation or in any other similar procedure envisaged for the regulation of divorce and post-divorce parental responsibility. This right depends neither on the age of the child nor on the parents' consent to its exercise. The Recommendations promote an individual approach to this issue or precisely, that it is advisable to assess the ability of the child to express its views.[21] One should also bear in mind that the expression of child's views is a child's right and not its liability. The child has the right to decide whether it will express its opinion or not and whether it will express its views directly or through a representative or an appropriate body.

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[18] *Ibid*, p. 36.

[19] Farrugia, R., *Children's rights in family court proceedings*, The UN Children's Rights Convention: theory meets practice, Alen, A. *et al.* (eds.), Intersentia, Antwerpen/Oxford, 2007, p. 407.

[20] Hemrica, J., Heyting, F., *Tacit Notions of Childhood: An Analysis of Discourse about Child Participation in Decision-Making Regarding Arrangements in Case of Parental Divorce*, Childhoods, Vol. 11. No. 4, 2004, pp. 449-468.

[21] "In cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. (…) For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child." UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, pp 12.

A parent, guardian, lawyer or another person can appear in the role of a child's representative. As proposed in the Recommendations, it must be stressed that in many cases, there are risks of a conflict of interest between the child and their most obvious representative parent. Certainly, such a conflict of interest may, but does not have to characterize divorce proceedings. Therefore, the author holds that the role of parents as primary representatives of the child, who convey child's views to the court, should not be necessarily played by another person. Unless there is another firm ground, this role should be played by someone else only if it is clear that parents do not protect the best interest of the child or that they do not respect its opinion or when there is no agreement between parents on who has the right to represent the child with respect to issues relating to the protection of its rights and interests. [22]

2.2. European Convention on the Exercise of Children's Rights

The European Convention on the Exercise of Children's Rights[23] (hereinafter: EC ECR) aims to protect the best interests of children, providing a number of procedural measures to ensure them exercise of their rights. The intention of the EC ECR was to supplement the UN CRC by assisting children to exercise their substantive rights set out in the Convention. It recognises that the most practical means for children to claim and enforce their rights is through legal proceedings.[24] Its application is exclusively related to family matters resolved before courts and competent administrative bodies. One of its most important features is that its provisions are always employed whenever proceedings affect a right of the child, regardless of whether the case revolves around the child or the child appears in the case collaterally. The former situation refers to cases where the child is the petitioner and the latter to cases in which a right of the child is interfered with, which is typical for divorce proceedings.[25]

The right of the child to be informed and to express its views in proceedings is regulated by Article 3 of the EC ECR:

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[22] In this light also see Rešetar, B., *Novi razvod braka u Republici Hrvatskoj pod utjecajem psihologije, sociologije i međunarodnog prava (New Divorce in the Republic of Croatia under the Influence of Psychology, Sociology and International Law)*, Suvremeno obiteljsko pravo i postupak (Contemporary Family Law and Procedure), Rešetar, B. *et al.*, Faculty of Law Osijek, 2017 (in print), p. 52.

[23] European Convention on the Exercise of Children's Rights, Council of Europe, 25 January 1996, ETS 160

[24] Fortin, J., *Children's Rights and the Developing Law*, Third edition, Cambridge University Press, 2009, p 73

[25] Tako i Hrabar, D., *Nova procesna prava djeteta - europski pogled (Children's New Procedural Rights – European View)*, Yearbook of the Croatian Academy of Legal Sciences, Vol. 4, No.1, 2013, p. 71.

A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

- *to receive all relevant information;*
- *to be consulted and express his or her views;*
- *to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.*[26]

As reasoned in the Explanatory Report to the EC ECR[27], Article 3 has not given the child the right to consent to or to veto a planned decision as it covers many different types of cases and it would not always be in the best interests of a child to be given such a right in the case of certain decisions. As far as the child's capacity to express its views is concerned, it is left to states to define the criteria enabling them to evaluate whether or not children are capable of forming and expressing their own views and states are naturally free to make the age of children one of those criteria.

Hrabar stresses that apart from shedding light on special rights of the child in court proceedings, the EC ECR highlights the importance of amending the court's role. According to the EC ECR, the court should be protective towards the child. The court deals with a case and the child, regardless of not being a party thereto, remains being in the spotlight, so the court should pay special attention to the child's subjectivity, who is in principle unguarded due to its age and immaturity.[28] In this view, Article 9 of the EC ECR foresees the power of the judicial authority to appoint a special representative for the child, irrespective of its capacity for understanding, in proceedings affecting the child where the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child. Furthermore, the Parties to the EC ECR must examine the possibility of giving the judicial authorities a power to appoint, for the proceedings, a separate representative for the child, even when there is no conflict of interest between the child and the holders of parental responsibilities. In any case, a representative shall, according to Article 10 of the EC, provide all relevant information to the child if the child is considered by internal law as having sufficient understanding, provide explanations to the child if the child is considered by internal law as having sufficient understanding concerning the possible

[26] Art 3. EC ECR

[27] Explanatory Report to the European Convention on the Exercise of Children's Rights, Council of Europe, European Treaty Series - No. 160

[28] Hrabar, D., *op. cit.* note 25, p. 78.

consequences of compliance with its views and the possible consequences of any action by the representative, determine the views of the child and present these views to the judicial authority. The necessary requirement for fulfilling these obligations is that none of them is contrary to the best interests of the child. "Determining the views of the child does not necessarily only mean speaking to the child and asking the child to express views verbally but also includes "observations" of the child by a representative or by, for example, an expert medical practitioner."[29] It should be noted that the EC ECR also regards the right of the child to express its views as a right of the child and not as its liability. In any case, the child may refuse to express its views, regardless of whether it is to be heard in person or through a special representative.

2.3. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice

With the adoption of the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice[30] (hereinafter: Guidelines), the concept of child-friendly justice has become part of the European legal and political framework concerning the position of children in justice systems.[31] Child-friendly justice aims to make justice systems more focused on children's rights, more sensitive to children's interests and more responsive to children's participation in formal and informal decision-making concerning them.[32] As accentuated in the foreword to the Guidelines, the Council of Europe adopted the Guidelines on child-friendly justice specifically "to ensure that justice is always friendly towards children, no matter who they are or what they have done. Considering that a friend is someone who treats you well, who trusts you and whom you can trust, who listens to what you say and to whom you listen, who understands you and whom you understand. A true friend also has the courage to tell you when you are in the wrong and stands by you to help you work out a solution. A child-friendly justice system should endeavour to replicate these ideals."[33]

[29] *Op. cit.* note 27

[30] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010

[31] Liefoard, T., *Child-friendly justice: protection and participation of children in the justice system*, Temple Law Review, Vol. 88, No. 4, 2016, p. 905.

[32] *Ibid.*

[33] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, Council of Europe Publishing, 2011, p. 7.

When defining their scope and purposes, it was proclaimed that the Guidelines should ensure that in every proceedings, children's rights, including the right to information, representation, participation and protection, are fully respected with due consideration to the child's level of maturity and understanding and to the circumstances of the case. The Guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil or administrative law.[34] The foreword to the Guidelines and the Explanatory Memorandum indicate the situations in which the child may come into contact with judicial and non-judicial proceedings and divorce appears as the first example thereof.

The Guidelines makes reference to the right of the child to express its views in Chapter III – Fundamental principles and Chapter IV – Child-friendly justice, before, during and after judicial proceedings. The Fundamental principles suggest that the right of all children to be informed about their rights and be consulted and heard in proceedings involving or affecting them should be respected, bearing in mind their maturity and any communication difficulties they may have or their ability to shape their own viewpoints. It is also denoted that when assessing the best interests of the child, due weight should be given to their views and opinions.

The part of the Guidelines elaborating child-friendly justice before judicial proceedings lays down that children should be thoroughly informed and consulted on the opportunity to have recourse to either court proceedings or alternatives outside court settings.

In terms of child-friendly justice during judicial proceedings, the Guidelines dedicate s special subchapter to the right to be heard and to express views:

Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.

The right to be heard is a right of the child, not a duty of the child.

[34] Considering their content, it might be asserted that the Guidelines are mostly concerned with criminal proceedings, but the part referring to their scope and purpose reveals that they should apply to civil and administrative proceedings too.

A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.

Children should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision.

Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.[35]

Taking account of the fact that efficient protection of children's procedural rights, including the right of the child to express its views, often depends on the skills and competences of those who carry the burden of the responsibility for representing the child, the Guidelines shed light on the importance of the possession of those skills and competences, but also on the ability to communicate with children in compliance with their level of understanding.

The Guidelines encourage the Member States to enhance their interdisciplinary approach in working with children. Cederborg justly concludes that "when children are involved in legal matters, there is a need for collaboration between professionals from behavioural sciences and the legal system" and that "such interdisciplinary collaboration can clarify the knowledge necessary to increase the chance that children are understood from their unique perspectives and conditions."[36] Guideline 14 sets forth that all professionals working with children (police, lawyers, judges, mediators, social workers and other experts) need to complete training in communication skills, in using child-friendly language and in developing knowledge on child psychology. As outlined in the Explanatory Memorandum, judges often lack qualifications to communicate with children and they rarely seek professional assistance in performing that task. In accordance with the data of the European Commission[37] a legal obligation to provide multidisciplinary training to all professionals working for and with children on the rights and needs of children

[35] Guidelines 44 do 49

[36] Cederborg, A., *Children's right to be heard from their unique perspectives*, Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child, Mahmoudi, S. *et al.* (ed.), Brill Nijhoff, Leiden/Boston, 2015, pp. 80/81.

[37] See the *Summary of contextual overviews on children's involvement in civil and administrative judicial proceedings in the 28 Member States of the European Union*, Luxembourg, Publications Office of the European Union, 2015, pp 27/28.

and on proceedings adapted to them exists in 13 jurisdictions[38] The legal obligation to provide mandatory training relating to communication with children in civil and judicial proceedings at all ages and stages of their development exists in 10 jurisdictions.[39] Non-mandatory training opportunities for professionals on communicating with children involved in civil and administrative proceedings exist in 17 jurisdictions.[40]

The discussion on the protection of the right of the child to express its views, laid down in the Guidelines, which truly represent one of the most significant contributions to the contemporary, exceptionally important doctrine of children's procedural rights[41], concludes with a formulation from the foreword thereto: justice is child-friendly only if "listens to children, takes their views seriously and makes sure that the interests of those who cannot express themselves (such as babies) are also protected."[42]

2.4. Council Regulation (EC) No 2201/2003

The importance of the protection of the right of the child to express its views in family proceedings resulting in decisions affecting its rights and interests has been recognized in some documents relating to the area of private international law. As far as the protection of the right of the child to express its views in divorce proceedings with an international element is concerned, the major role is played by Council Regulation (EC) No 2201/2003[43] (hereinafter: Regulation) which con-

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38 Estonia, Greece, Spain, France, Italy, Lithuania, Luxembourg, Latvia, Poland, Sweden, Slovenia, UK-England and Wales and UK-Northern Ireland.

39 Austria (mandatory only for social workers) Belgium, France, Greece, Spain (mandatory only for judges of special family courts) Luxembourg, Sweden, Slovenia, UK-England and Wales and UK-Northern Ireland (In UK- England and Wales and UK-Northern Ireland, general training in the form of Continuing Professional Development (CPD) is a mandatory requirement for all professions working with children, including the judiciary, solicitors, social workers and Children's Guardians/Guardians Ad Litem).

40 Austria, Cyprus (training is mandatory for the officers of the Social Services who come into contact with children), Czech Republic, Estonia (some of the courses for judges are in fact mandatory), Greece, Finland, Croatia, Ireland, Lithuania, Latvia, the Netherlands, Portugal, Sweden, Slovenia, Slovakia, UK- England and Wales and UK-Northern Ireland.

41 See also Korać Graovac, *Smjernice Odbora ministara Vijeća Europe o pravosuđu naklonjenom djeci (Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice)*, Dijete i društvo (Child and Society), Vol. 13, No. 1/2, 2011, pp. 274.

42 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, Council of Europe Publishing, 2011, pp. 8.

43 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsi-

tains uniform rules for jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.[44] Bearing in mind that in the EU, as disclosed by Župan, about 250,000 international divorce proceedings are initiated on an annual basis[45], it is clear how proper and harmonized application of the Regulation contributes to legal security with respect to conducting that kind of divorce proceedings in the Member States.[46]

The Regulation points out that children should be given an opportunity to express their views in proceedings affecting them.[47] The Regulation refers to the right of the child to be heard in various articles.[48] In the sense of the Regulation, the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to its age or degree of maturity. However, an exception to this principle, i.e. not hearing the child due to its age and degree of maturity, should be interpreted very restrictively and one should particularly take into consideration that children's rights are very important in proceedings relating to children and that generally, decisions on the future of the child and the relationship with its parents and others are of vital importance in regard to its interests.[49]

The Regulation provides that the violation of the child's right to be heard is one of the grounds for non-recognition of a judicial statement. Namely, Article 23 of the Regulation explicitly stipulates that a judgment relating to parental responsibility shall not be recognized if it is passed, except in case of urgency, without the child having been given an opportunity to be heard, thus violating the fundamental principles of procedure of the Member State in which recognition is sought.

Pursuant to Article 41 of the Regulation, the right to contact with the child granted in an enforceable judgment given in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of

bility, repealing Regulation (EC) No 1347/2000

[44] Scope of the Regulation is determined in its Article 1:
Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:
(a) divorce, legal separation or marriage annulment;
(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

[45] Župan, M., *Europski prekogranični obiteljski postupci (European Cross-Border Family Proceedings)*, Procesno – pravni aspekti prava EU (Procedural – Legal Aspects of EU Law), Petrašević, T. (ed.); Vuletić, I. (ed.), Faculty of Law of the Josip Juraj Strossmayer University of Osijek, Osijek, 2016, pp. 126.

[46] On the application of the Regulation in the Member States see in Boele-Woelki, K. (ed.), Gonzalez Beilfuss, C. (ed.), *Brussels II bis: Its Impact and Application in the Member States*, Intersentia, 2007.

[47] See Recital 19 of the Regulation.

[48] See Article 11 paragraph 2, Article 23 b), Article 41 paragraph 2 c) and Article 42 paragraph 2 a)

[49] Practice Guide for the application of the Brussels IIa Regulation, pp 77. An electronic version available at http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf . Accessed 20 February 2017.

enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin. However, the same Article prescribes that the judge of origin shall issue the certificate only if the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to its age or degree of maturity.

The Regulation does not modify the applicable national procedures for taking the views of a child. Techniques and strategies for taking the views of children are in the hands of national courts.[50] After analyzing the protection of the right of the child to express its views, laid down in the Regulation, Zoeteweij-Turhan drew the conclusion that it is misleading to declare that the Regulation confers an absolute right to be heard at court to children in proceedings that fall within its scope. The conclusion is accompanied with the explanation that even though the aim of the Regulation is to uniform the procedural law with regard to the matters failing within the scope of the Regulation, the regulation of child consultation continues to be a matter of national law.[51] A similar view has been brought up by Shannon, asserting that this is regrettable and can result in dependence of the child's right to be heard on the Member State in which it is habitually resident.[52] This problem has also been detected by Kruger and Samin and they link it to Article 23 of the Regulation, according to which a judgment relating to parental responsibility shall not be recognized if it is passed without the child having been given an opportunity to be heard, thus violating the fundamental principles of procedure of the Member State in which recognition is sought. They back their assertion with the following explanation: "This test seems overly prudent in the protection of national procedural autonomy. The test should rather be whether there was a violation of the Children's Rights Convention. Such reference would confirm what should be the case already: the same standards of children's rights apply all over the EU. Moreover, it would assist in converging the laws of Member States. This does

[50] The Practice Guide for the application of the Brussels IIa Regulation underlines that regardless of who hears the child, a judge, an expert, social worker or other official, it is of the essence that that person receives adequate training, for instance how to best communicate with children. Similarly, the Practice Guide propagates that whoever takes the views needs to be aware of the risk that parents seek to influence and put pressure on the child and that the hearing shall be carried out properly and with appropriate discretion. See Practice Guide for the application of the Brussels IIa Regulation, pp 77. An electronic version available at http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf . Accessed 20 February 2017.

[51] Zoeteweij-Turhan, M., *Brussels ii bis: The right of the Child to be Heard in International Proceedings*, Pravnik, Vol. 70 (132), No. 11-12, 2015, p. 873.

[52] Shannon, G., *The Internationalisation of Irish Family Law*, Judicial Studies Institute Journal, Vol. 5, No. 1, 2005, p. 80.

not mean that national procedural rules on how, and by whom the child is heard must be changed, merely that the standard should be set straight."[53]

3. THE RIGHT OF THE CHILD TO EXPRESS ITS VIEWS IN DIVORCE PROCEEDINGS IN CROATIAN LAW

In 2015, Croatia saw adoption of a new Family Act[54] (hereinafter: 2015 Family Act) which has reformed Croatian family legislation to a great extent. When preparing the latest reform in the field of divorce involving minor children, the Croatian legislator put the emphasis on children.[55] The reform was aimed at improving the child's procedural position in divorce proceedings and at shaping a legal framework for making judicial decisions on divorce, which are expected to serve as a source of protection of the rights and interests of the child after proceedings completion. This chapter offers a detailed analysis of the provisions protecting the right of the child to express its views within the new Croatian family legislation[56] and provides an assessment of their harmonization with the European standards of legal protection of the right of the child to express its views, which are discussed in the previous chapter.

3.1. Fundamental principles

What can be derived from the analysis of the provisions regulating divorce involving minor children in Croatia is that the child-friendly approach relies on three fundamental principles. The first one is the principle of priority protection and well-being of the child:

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53 Kruger, T.; Samyn, L., *Brussels II bis: successes and suggested improvements*, Journal of Private International Law, Vol. 12, No. 1, 2016, p. 157.

54 Family Act (Official Gazette no. 103/15)

55 The 2015 family legislation reform pays great attention to the child's procedural position in all family matters and not only in divorce proceedings. Croatian legal theory has often warned about the need for improvement of the child's procedural position in family proceedings. See, e.g., Uzelac, A.; Rešetar, B., *Procesni položaj i zastupanje djeteta u sudskom postupku prema hrvatskom i komparativnom pravu – neka otvorena pitanja (Procedural Position of the Child before Judicial and Administrative Bodies in Family Matters – Some Open Issues)*, Dijete i pravo (Child and Law), Rešetar, B. (ed.), Faculty of Law Osijek, 2009, pp. 163-194.; Hrabar, D, *Zastupanje djece i postupovna prava djeteta pred sudskim i upravnim tijelima u obiteljskopravnim stvarima (Representation of the Child and Its Procedural Rights before Judicial and Administrative Bodies in Family Matters)*, Croatian Legal Journal, Vol. 2, No. 10, 2002., pp. 46-53.

56 What turned out to be an incentive to reforms in this field was the results of a study of the case-law, revealing an embarrassingly small number of divorce proceedings in which the child was given an opportunity to express its views. See Rešetar, B., *Pravna zaštita prava na susrete i druženja (Legal Protection of the Right to Contact with the Child)*, Faculty of Law Osijek, Osijek, 2011.

Courts and public bodies adjudicating in cases indirectly or directly affecting children's rights have to protect the rights of the child and its well-being before all.

The child is entitled to contact with both of its parents unless this is contrary to its well-being.[57]

The second one is the principle of amicable resolution of family matters:

Encouraging amicable resolution of family matters is a task of all who provide the family with professional aid or decide on family relations.[58]

The third principle refers to proportional and the weakest interference with family life.

Measures which interfere with family life are eligible if they are necessary and if their purpose cannot be efficiently realized by undertaking more lenient measures, including precautionary assistance or support provided to a family.[59]

Taking account of all of the three principles, the protection of the best interest of the child in divorce proceedings is the primary task of all the participants in divorce involving minor children. One should also have regard to the fact that the protection of the best interest of the child needs to arise, if possible, from amicable resolution of family matters and without unnecessary interference with the family life of parents and their child. In this light, the Croatian legislator has opted for a divorce concept in which the exercise of children's (procedural) rights foreseen in international documents is facilitated and in which the child is protected from unnecessary exposure to (judicial) examination of its views relating to the parents' agreement where there is no doubt that such an agreement is justified and in compliance with the best interests of the child during and after the divorce.

3.2. Mandatory counselling and a parenting plan

Spouses having a minor child together are obliged to attend mandatory counselling at the competent social welfare centre prior to the initiation of judicial divorce proceedings.[60] In line with the legal definition thereof, mandatory counselling is a form of aid provided to family members to reach an agreement on family matters,

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[57] Article 5 of the 2015 Family Act

[58] Article 9 of the 2015 Family Act

[59] Article 7 of the 2015 Family Act

[60] Except prior to the initiation of divorce proceedings involving minor children, mandatory counselling shall be attended before the initiation of other judicial proceedings relating to the exercise of parental responsibility and the maintenance of contact with the child.

within the framework of which the counsellors show great concern for the protection of family relations affecting the child and present the legal consequences of a failure to reach such an agreement and initiation of judicial proceedings regulating children's rights.[61] The mandatory counselling procedure has substituted the mediation procedure envisaged by the former Family Act[62] (hereinafter: 2003 Family Act). The mandatory counselling procedure focuses on an attempt of divorcing parents to reach an agreement on the exercise of their post-divorce parental responsibility and not on an attempt to reconcile, which was the case with the mediation procedure.[63] In fact, if spouses wish to divorce based on an agreement, they shall draw up a parental responsibility agreement (hereinafter: PRA). A PRA is a written agreement of parents on the manner of the exercise of shared parental responsibility in the circumstances of separate life. In compliance of Article 106 of the 2015 Family Act and pursuant to Article 2 of the Regulation on the Required Form of a Parenting Plan[64] (hereinafter: Parenting Plan Regulation), a PRA shall govern as follows: child's residence, child's contact with both of its parents, information exchange and giving consent in relation to making decisions relevant for the child, exchange of child-relevant information, child maintenance as a liability of the non-resident parent and the manner of resolving possible controversial issues. A parenting plan may regulate other issues relating to the exercise of parental responsibility if the parents deem them relevant for the child or if they require an agreement between the parents.

What is posed here is the question how Croatian family legislation protects the right of the child to express its views about the content of the PRA, which sets grounds for making a decision on non-contentious divorce considering that the entire PRA affects the rights and interests of the child. The 2015 Family Act explicitly regulates that parents are obliged to introduce their child to the content of the PRA and provide it with the possibility to express its opinion in compliance with its age and degree of maturity. They shall also respect their child's opinion in

[61] Mandatory counselling is conducted by an expert team at the social welfare centre situated in the place of the child's residence or in the place of the parents' last common residence. See art. 321. p. 1. and 2. of the 2015 FA.

[62] Family Act (Official Gazette no. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, 25/13)

[63] Examination of the data on the successfulness of the mediation procedure has shown that the number of cases in which reconciliation or mediation activities resulted in dropping the intention to get divorced by one or both spouses is statistically negligible, so it can be asserted that 'saved marriages' and 'reconciliation' are very, very rare. Uzelac, A., *Novo uređnje obiteljskih sudskih postupaka - glavni pravci reforme obiteljskih parničnih postupaka u trećem Obiteljskom zakonu (New Regulation of Family Matters – Main Reform Courses of Contentious Family Proceedings in the Third Family Act)* , Novo uređenje obiteljskih sudskih postupaka (New Regulation of Family Matters), Barbić, J. (ed.), Croatian Academy of Sciences and Arts, Zagreb, 2014, p. 26

[64] Regulation on the Mandatory Content of a Parenting Plan (Official Gazette no. 123/15)

accordance with the well-being of the child standard.[65] Article 2 of the Parenting Plan Regulation prescribes what a proper parenting plan shall include, but it does not say anything about the expression of child's views in accordance with its age and degree of maturity. Still, a PRA template, which is an integral part of the Parenting Plan Regulation, contains a field in which parents should indicate if they have given their child an opportunity to express its views about the content of the PRA. In case they have failed to do so, they shall state the appertaining reasons. The template also involves a field in which parents should display whether they have taken the child's opinion into consideration or not. If they have not done that, they shall disclose their reasons. Concerning that pursuant to the Parenting plan Regulation, the required form of a PRA does not encompass expression of child's views and that the fields referring thereto provide the parents with the possibility to indicate that they have not taken into consideration their child's opinion about the content of the PRA, allowing them to state any ground for failing to do so[66], the Parenting Plan Regulation implies that expression of child's views in compliance with its age and degree of maturity does not have a binding character. Yet, since the parents' duty to introduce their child to the content of the PRA and allow it to express its views in compliance with its age and degree of maturity is set forth in the 2015 Family Act, which has superior legal force with respect to the Parenting Plan Regulation, the author believes that parents shall fulfil this duty of theirs regardless of the content of the Parenting Plan Regulation.

The survey has demonstrated that there are some ambiguities in the interpretation of the regulations referring to the (lack of) liability of incorporation of child's views into a PRA. Precisely, more than ¼ of the centres which participated in the questionnaire relating to the mandatory counselling procedure[67] have revealed that in the context of mandatory counselling, PRAs lacking a field intended for describing the child's views can be concluded too (see Graph 1). Therefore, the author points to the need for amendment of the Parenting Plan Regulation in a way that incorporation of child's views into PRAs shall become a liability of the parents.

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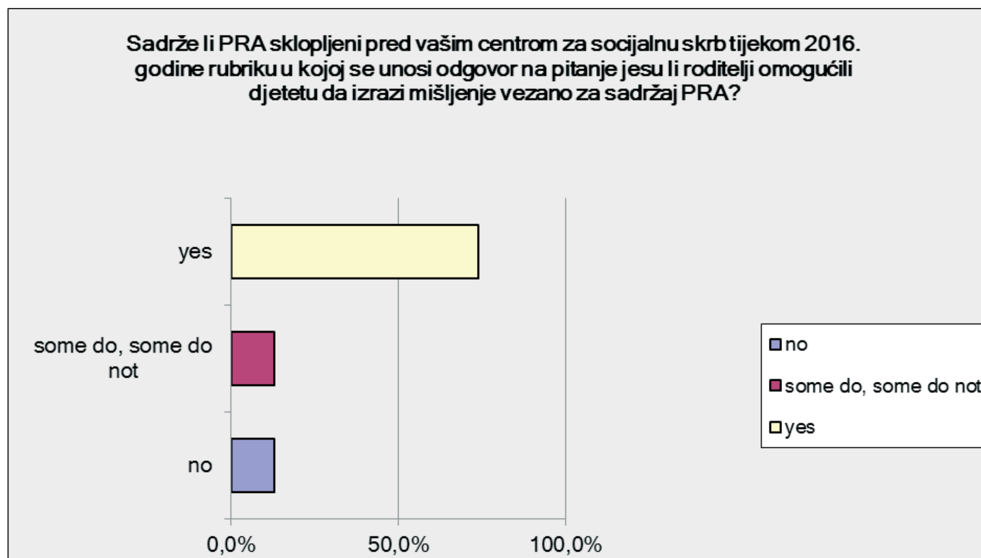
65 Article 106 paragraph 4 of the 2015 Family Act.

66 The reason can be, for instance, their own assessment that the child's opinion is not relevant.

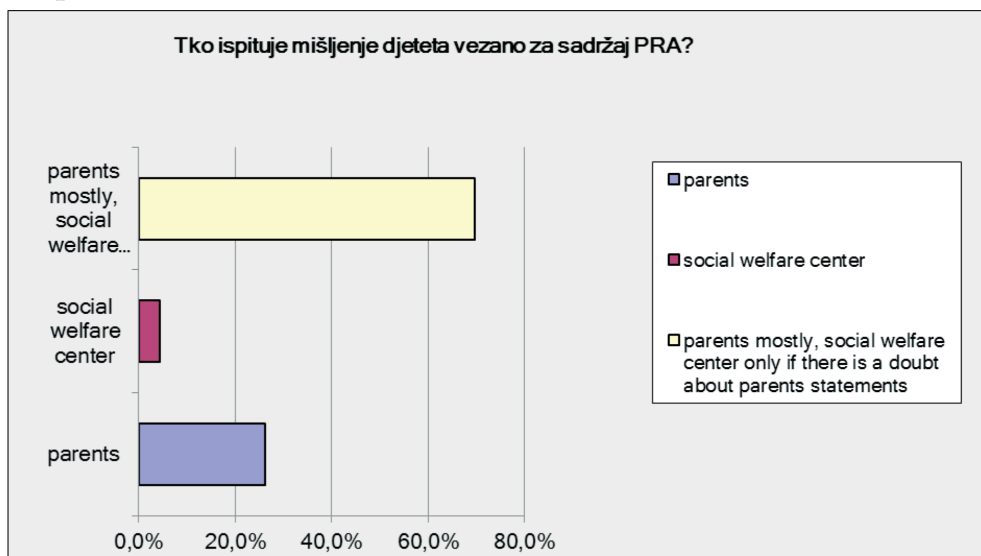
67 See footnote 7.

Graph 1



Child's views about the content of the PRA are mostly examined by its parents and the competent social welfare centre substitutes parents in interviewing the child only when there is a doubt that parents have not conveyed the child's opinion correctly (see Graph 2).

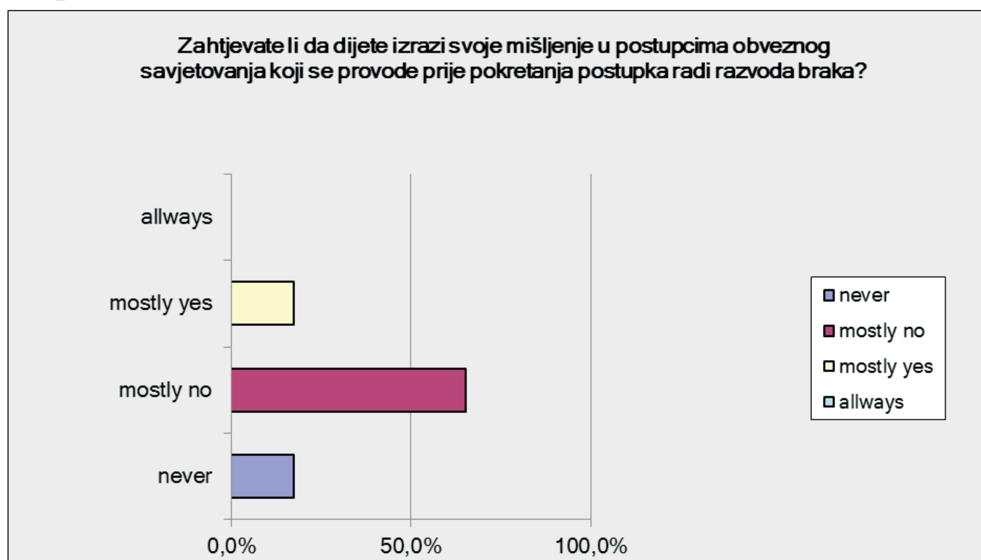
Graph 2



Regarding the possibility of the child to express its views (not only about the content of the PRA but also about any other issues) at the competent welfare centre within the mandatory counselling procedure which spouses shall attend before initiating divorce proceedings, the 2015 Family Act binds it to a parents' consent thereto.[68] Accordingly, there is the question how often children are heard within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings. Then, are parents reluctant to give their consent to the child to express its views or they encourage it to do that? The survey has shown as follows:

1. The majority of the social welfare centres that responded to the questionnaire never or hardly ever require from the child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings (see Graph 3). Only 17.39% of the investigated centres require from the child to express its views in most cases and none of the centres asks the child to express its views in every case.

Graph 3

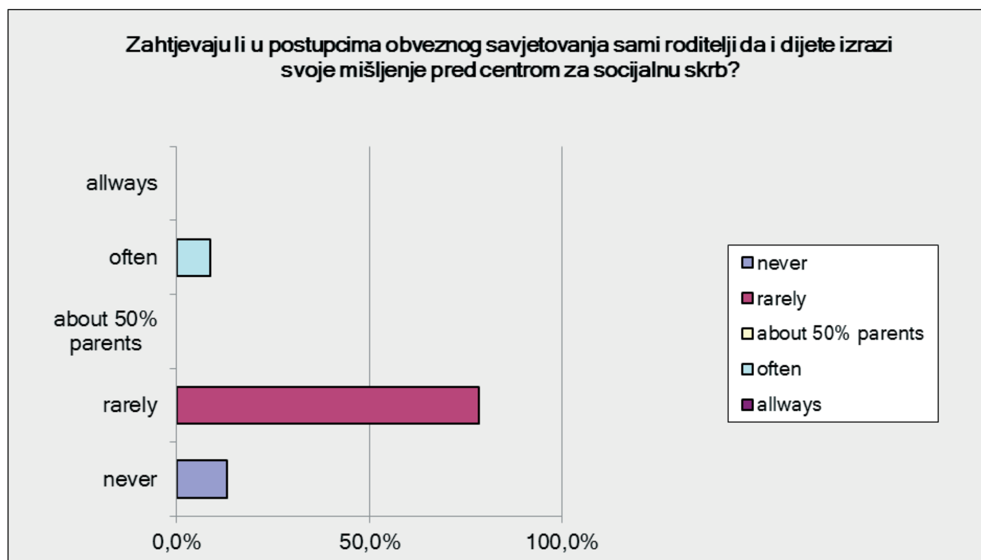


68 During mandatory counselling, the child can be invited to express its views, but this requires consent of its parents. See Article 325 paragraph 3. The same applies to expression of child's views during the mandatory counselling procedure which shall be implemented prior to the initiation of other judicial proceedings dealing with the exercise of parental responsibility and contact with the child. See Article 329 paragraph 2.

2. When social welfare centres require from the child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings, parents do not usually have any objections thereto. Indeed, most respondents have confirmed that parents never oppose this possibility.[69]

3. Parents rarely invite their child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings (see Graph 4).

Graph 4



If the Recommendations of the UN Committee on the Rights of the Child for Article 12 of the UN CRC[70] are taken into consideration, Aras Kramar's assertion seems to be right in principle. She claims that it does not make sense to bind the expression of child's views within the mandatory counselling procedure to the

[69] Zagreb Social Welfare Centre – subsidiary Trnje, Našice Social Welfare Centre and Zaprešić Social Welfare Centre have revealed that about 10% of parents are against the possibility of their child to be heard and thus express its views while Zagreb Social Welfare Centre – subsidiary Novi Zagreb (New Zagreb), Zadar Social Welfare Centre and Dugo Selo Social Welfare Centre have disclosed that about 5% of parents oppose this possibility. In Valpovo, only 2% of parents argued that their child should be given such a possibility. Other social welfare centres have brought forth that parents never prevent their child to express its views within the mandatory counselling procedure.

[70] As promoted in the Recommendations, the right of the child to express its view should not be subject to a parents' consent thereto. See Chapter 2.1.

consent of its parents.[71] Nevertheless, the Croatian solutions are still compliant with the international standards applying to the right of the child to be heard in divorce proceeding. Namely, non-contentious divorce involving minor children can be implemented only if spouses draw up a PRA. The required form of a parenting plan encompasses expression of child's views and hence, the child will be given an opportunity to express its views about divorce-related issues affecting its rights and interests. If parents do not prepare a PRA, their marriage will be dissolved in contentious proceedings in which child's views will be examined in an appropriate way.[72] The Croatian legislator uses such an approach to provide the child with a safeguard with respect to its right to be heard, protecting it from unnecessary participation in judicial proceedings. Indeed, when it comes to the protection of children's procedural rights in divorce proceedings, one should not forget what Diduck and others have to say in this light: "children may neither want complete autonomy nor to be treated as objects".[73]

A PRA may be regarded as a binding document upon spouses if the parties submit it to court for verification and approval through a decree.[74] As pointed out hereinabove, the 2015 Family Act assumes that a PRA is in principle better for the child than imposition of certain judicial solutions since parents know their children better than anyone else does.[75] As accentuated by Farrugia, "parents may stop their spousal relationship but where they have children in common they will invariably continue to meet and share interaction at least until the children attain the age of majority (…)". Considering the importance of an agreement on post-divorce parental responsibility both for the child and its parents, the Croatian legislator has set out that in case spouses do not conclude a PRA until mandatory counselling completion, spouses shall attend the first meeting with a family mediator.[76] What

[71] Aras Kramar, S., *Novi pristup uređenju postupka radi razvoda braka u Hrvatskoj (New Approach to the Regulation of Divorce Proceedings in Croatia)*, Collection of Contemporary Developments in Civil Procedure – achievements in national and comparative legal theory, Faculty of Law of the University of Split, Split, 2015, p. 246.

[72] See Chapter 3.4.

[73] Diduck, A. (2003), according to Fortin, *op. cit.* note 24, p. 242.

[74] See Article 107 paragraph 1 and Articles 461-467 of the 2015 FA

[75] If it comes to a dispute between parents about the representation of the child on the occasion of verification and approval of the parenting plan or particular clauses thereof, this would suggest that an agreement on parental responsibility has not been reached and the court would be forced to reject the non-contentious divorce request and refer the spouses to the possibility of submitting a divorce petition. Aras Kramar, S. *op. cit.* note 71, p. 252.

[76] Except in cases envisaged by Article 332 of the Family Act when family mediation is not carried out:
1. if based an assessment of an expert team in a social welfare centre or of a family mediator, equal participation of spouses in the family mediation procedure is not possible due to domestic violence,
2. if one or both spouses are deprived of the capacity to work and they cannot, despite professional

is also possible in this context is to draw up a parenting plan within the framework of family mediation.

3.3. Family mediation

Family mediation is a procedure in which the parties, assisted by one of more family mediators, try to amicably resolve family matters[77]. Licensed family mediators are impartial and specially trained persons registered in the family mediator register. The benefits of family mediation are numerous. Before all, they refer to family members who are expected to independently make decisions for the benefit of the whole family. Moreover, family members are taught to efficiently communicate and negotiate in order to get fitter for the resolution of family disputes, irrespective of the changes and reorganization of family life.[78] In terms of divorce involving minor children, the main purpose of family mediation in Croatian law is adoption of a parenting plan or an agreement on shared parental responsibility.

A family mediator is obliged to inform the participants of family mediation on the need for attainment of the well-being of the child and is entitled to enable the child to express its views within the family mediation procedure if approved by its parents.[79] This means that like in the mandatory counselling procedure, the expression of child's views within family mediation is also subject to a parents' consent thereto.

If the parties do not reach an agreement on shared parental responsibility, the family mediator shall prepare a report on the termination of family mediation and state therein whether the parties have actively participated in the respective procedure or not.[80]

3.4. The right of the child to express its views in judicial divorce proceedings

If having minor children together, only spouses who have concluded an agreement on shared parental responsibility (parenting plan) within mandatory counselling or family mediation are entitled to opt for non-contentious divorce. The parties to

assistance, comprehend the meaning and legal consequences of the procedure,
3. if one or both spouses are incapable of making judgements and reasoning and
4. if a spouse's residence or temporary residence is not known.

77 Article 331 paragraph 1 of the 2015 Family Act

78 Breber, M., Sladović Franz, B., *Uvođenje obiteljske medijacije u sustav socijalne skrbi – perspektiva stručnjaka (Introducing Family Mediation to the Social Welfare System – Experts' View)* , Ljetopis socijalnog rada (Social Work Yearbook), Vol. 14, No. 1, 2014, p. 122

79 Article 339 of the 2015 Family Act

80 Article 337 paragraph 1 of the 2015 Family Act

non-contentious divorce are spouses whereas the child is considered a party only in the part of the procedure relating to the approval of the parenting plan.[81] Prior to the acceptance of a non-contentious divorce request, the court shall check if spouses and their child agree with the parenting plan and if it is compliant with the well-being of the child. If there is a suspicion that particular clauses of the parenting plan are contrary to the well-being of the child, the court might obtain further evidence by hearing the parents and the child, and require from the social welfare centre findings and opinion about the clauses concerned.[82] To sum up, the existence of a parents' agreement does not prevent a court from hearing the child in the event of a doubt about the compliance of the agreement with the best interests of the child. In author's opinion, a good reason for hearing the child can be the court's suspicion that the parents have deprived their child of the right to express its views about the parenting plan, without having a reasonable justification in the child's age and degree of maturity.

The child is a party to their parents' parenting plan as well as to the non-contentious divorce procedure, so a decree on the approval of a parenting plan occurs to be prejudicial to the child.[83]

If spouses do not draw up a parenting plan involving an agreement on the child's residence, manner of the exercise of parental responsibility, maintenance of the contact between the child and its non-resident parent and the amount of child maintenance, the court shall ex officio regulate these issues in contentious divorce proceedings. One should keep in mind that the parties in contentious divorce proceedings are spouses whereas the child is a party to the part of the proceedings dealing with the above issues[84] and it is represented by a special guardian.[85]

Concerning that divorce proceedings deal with many issues affecting children's rights and interests, Article 360 of the 2015 Family Act imposes the liability on the court to provide the child with the possibility, unless the child does not want that, to express its opinion regarding issues affecting its personal and property rights and interests. Unless there are firm grounds not to do so, which requires detailed clarification in the court's decisions, the court is obliged to hear the child. The same Article governs that the court shall enable the child to express its views in an appropriate place and attended by a professional if it deems it necessary due to the circumstances of the case. It is highly important that the child is informed

[81] Aras Kramar,S. *op. cit.* note 71, p. 250.

[82] *Ibid*, p. 253.

[83] *Ibid*, p. 251.

[84] *Ibid*, p. 258

[85] See Chapter 3.5.

about possible consequences of respecting its opinion.[86] Because of its age, the child can have a narrow perception of things and be deprived of analytical thinking. Therefore, the right of the child to be informed about possible consequences of honouring its opinion is a certain compensation for these deficiencies and an attempt to balance its position with respect to other participants in the proceedings.[87]

If divorcing parents do not conclude a PRA, the competent social welfare centre shall warn them that the court, after ex officio initiating divorce proceedings based on a divorce petition filed by one of the spouses, is going to make a decision on issues relevant for the child[88], enable the child to be heard and appoint a child's special guardian.[89] The right to a child's special guardian is granted by Article 240 paragraph 1 of the 2015 Family Act. The role of a special guardian is to represent the child and protect its rights and interests in divorce proceedings as well as to respect its opinion and wishes, which is elaborated in detail in the subsequent chapter.

3.5. The role of a child's special guardian

The aforementioned demonstrates that a child's special guardian is utterly important for the development of child-friendly justice systems, which is promoted in relevant European documents. In order to avoid situations in which children get, as depicted by Vandekerckhove and O'Brien "the shortest end of the stick, when their rights are "balanced" against rights of opposing adults"[90], the Croatian legislator has significantly enhanced the role of a child's special guardian. Referring to recent case-law research with respect to the appointment and tasks of a child's special guardian, laid down in the 2003 Family Act, Rešetar and Rupić single out the reasons behind the 2015 reform of the Croatian family legislation in this subfield. Those two authors claim that until the entry into force of the new law, the child had no special guardian in decision-making and child arrangement enforce-

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86 This liability has been derived from international treaties (see Chapter II) and Article 86 of the 2015 Family Act.

87 Hrabar, D., *Europska konvencija o ostvarivanju dječjih prava – nov prilog promicanju dječjih prava (European Convention on the Exercise of Children's Rights – a New Contribution to the Promotion of Children's Rights)*, Collection of Works of the Faculty of Law in Zagreb, Vol. 46, No. 4, 1996, pp. 398/399.

88 Following a divorce petition, spouses may themselves propose a child's residence, manner of the exercise of their parental responsibility, maintenance of the contact between the child and its non-resident parent and amount of child maintenance, but the court is not bound to act in accordance with these proposals. Article 56 paragraphs 1 and 2 of the 2015 Family Act.

89 Parents shall be warned by the court that it may rule that they shall bear the costs of a child's special guardian. See Article 327 of the 2015 Family Act.

90 Vandekerckhove, A., *op cit*. note 2, p. 524.

ment processes even though it was clear that it had come to a conflict of interest between the child and its parents and the child needed more protection itself since enforcement orders represent the most delicate form of protection of the right to contact with the child. The same authors assert that the passivity and indifference to the protection of children's rights shown by special guardians in cases involving separation of the child from its family, i.e. situations affecting the fundamental human right to family life, were no exception before.[91] Encouraged by the poor state of the judicial practice and respecting the European guidelines for the protection of children's procedural rights, the Croatian legislator reformed the position and tasks of a child's special guardian.

Taking account of all the above things clarifying the importance assigned by the Croatian legislator to parents' agreements which are obviously contrary to the interests of the child, one can assume that in divorce proceedings a child's special guardian should defend the child from situations in which it is likely to get "the shortest end of the stick" only where there is no such agreement.[92] The interests of the child in proceedings dealing with the exercise of parental responsibility, contact with the child and child maintenance are represented by a special guardian appointed for the purpose of that proceeding[93] while the parents are not entitled to undertake any action on behalf of the child within the same proceeding.[94] A child's special guardian is a person who has passed the bar exam and works in the Centre for Special Guardianship. The duties of a child's special guardian are as follows[95]:

- represent the child in proceedings for which he/she is appointed,

- inform the child about the case, its course and outcome in an appropriate way corresponding to the child's age and degree of maturity,

- if need be, contact with the child's parents and other persons who have a close relationship with the child,

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[91] See Rešetar, B.; Rupić, D., *Posebni skrbnik za dijete u hrvatskom i njemačkom obiteljskopravnom sustavu (Child Special Guardian in Croatian and German Family Law)*, Collection of Works of the Faculty of Law of the University of Rijeka, Vol. 37, No. 3, 2016, pp. 1176/1177. See also Rešetar, B., Emery, E. R., *Children's Rights in European Legal Proceedings: Why are Family Practices so Different from Legal Theories?*, Family Court Review, Vol. 46, No. 1, 2008, pp. 65-77.

[92] Of course, if they are not compliant with the best interests of the child, which shall be assessed by the court prior to their approval.

[93] Exceptionally, the child may not be provided with a special guardian if it has turned 14 and has been recognized, by means of a decree, the capacity to undertake action in proceedings. See Article 240 paragraph 4 of the 2015 Family Act

[94] Article 414 of the 2015 Family Act

[95] Pursuant to Articles 240 and 360 of the 2015 Family Act

- investigate the opinion of children under 14 years of age, respecting the standards defined in the Ordinance on the Manner of Obtaining the Child's Views[96] (hereinafter: Ordinance).

When prescribing the protection of the right of the child to express its views, the Croatian legislator took account of the child's age, degree of maturity, and its mental and physical condition. In regard therewith, a child who has turned 14 can personally express its views and if the court deems it necessary considering the circumstances of the case, the child can be accompanied with a professional. A child under 14 years of age may, if allowed by the court, express its views in a convenient place[97] and through a person other than a child's special guardian, such as psychologists and other persons possessing adequate qualifications, skills and competences needed for determination of child's views.[98] Respecting non-discriminatory policies, the legislator intended to provide every child with the possibility to express its views. It is clear that the circumstance of a concrete case may require possession of special skills and competences by those who hear the child, particularly if children with deteriorated mental and emotional health are taken into consideration.

4. CONCLUSION

The analysis of the legal protection of the right of the child to express its views in civil and administrative proceedings in European law implies several basic conclusions:

1. the child has the right to express its views in all proceedings directly or indirectly affecting the protection of its rights and interests,

2. the child has the right to freely decide whether it wishes to be heard or not,

3. the child has the right to freely decide whether it wishes to express its views directly or through a representative,

4. the child needs to express its views in a convenient environment where it feels safe,

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96 Ordinance on the Manner of Obtaining the Child's Views (Official Gazette no. 123/2015)

97 A convenient place is, according to Article 5 of the Ordinance, a place beyond the courtroom, which is fitted and adapted to working with children and which ensures privacy, child safety and undisturbed work, specially equipped court premises, a special room in a social welfare centre, the Centre for Special Guardianship and other premises specified by the court.
Expression of child's views may take place in the family home (if permitted by the parents), in a foster home or in the home of a natural or a legal person where the child resides.

98 See Article 2 of the Ordinance.

5. in particularly delicate cases, relevant authorities should adopt a multidisciplinary approach to ensure the child the exercise of its right to be heard,

6. when the child expresses its views, its best interests and its private and family life should be fully respected.

Respecting the standards of European law in this legal area, the Croatian legislator gave due weight to the right of the child to express its views when undertaking the family legislation reform in 2015. Precisely, the right of the child to express its views in divorce proceedings is protected in Croatia in two ways, depending on whether there is an agreement on post-divorce parental responsibility or not. If there is such an agreement, it should be prepared in the form of a parenting plan which shall be supported by the child. If parents do not reach an agreement in the form of a parenting plan or if there is a doubt that its content is not compliant with the best interests of the child or if there is a conflict of interests between parents and their child, the child shall be given an opportunity to be heard in court proceedings. Moreover, the child shall be provided with a special guardian for the protection of its (procedural) rights and interest in contentious divorce proceedings. That way, the Croatian legislator ensures protection of children's procedural rights in proceedings resulting in decisions which directly or indirectly affect their rights and interests. Divorce proceedings definitely belong to such proceedings where the child shall be protected from exposure to judicial examination without reasonable justification in the protection of its best interests.

The author shares the opinion that if parents have agreed on all the issues relating to the exercise of their post-divorce parental responsibility and if the child has been given an opportunity to express its views about its parents' agreement, there is no need to examine the child's views additionally before competent bodies. Otherwise, the child may be unnecessarily exposed to possibly unpleasant situations. When parents live in a family union, the state does not interfere with their family life and the life of their children unless there is a reasonable doubt that parents' agreements on the manner of the exercise of their parental responsibility are not compliant with the best interests of their child or unless there is a suspicion that they do not respect their child's views in making decisions which affect its rights and interests. Indeed, there is no reason for the law to make a difference between situations in which parents live together and those in which they lead a separate life.

Certainly, due attention should be paid to the fact that the possibility of parents to examine their child's views and incorporate it into a PRA should not be interpreted as a possibility but as a liability of parents. Of course, this can be said under

the condition that the child's age and degree of maturity are not regarded as an obstacle to examination of its opinion, which should be transparently presented in the PRA. The author holds that when parents state in the parenting plan template that their child has not expressed its views about the parenting plan and when parents indicate that they have not accepted their child's opinion, without supporting it with the child's age and maturity, the court should not approve such a plan or agreement without hearing the child. Otherwise, the right of the child to be heard, which is granted by numerous international documents, will be violated and a PRA as such could be qualified as a controversial legal ground in the event of cross-border movement of the child. In this light, the author points to the need for amendment of the Regulation on the Required Form of a Parenting Plan in a way that examination of child's views shall be mandatory in terms of the content of a PRA. Such a need has been confirmed by a survey conducted in social welfare centres, which has disclosed that some social welfare centres permit conclusion of PRAs that do not contain a field designated for describing child's views. With this exception, the legislator's idea to protect the right of the child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings seems to work successfully in practice.

Hereby the light is shed on the need to conduct additional research of recent case-law relating to the exercise of the right of the child to express its views in divorce proceedings in Croatia, particularly studies of judicial practice regarding:

- court's approval of PRAs, depending on whether they include child's views or not,
- court's approval of PRAs, depending on whether the parents have taken into consideration child's views about the PRA content or not, and
- protection of the right of the child to express its views in contentious divorce proceedings.

To conclude with, an affirmative answer can be given to the question of the compliance of Croatian legislation with European standards in this legal area. Croatian legislation contains clearly elaborated mechanisms intended for efficient exercise of the right of the child to express its views in divorce proceedings without jeopardizing any element constituting its best interests. Final assessment of the successfulness of new legal solutions in practice requires performance of additional research.

In the end, one needs to stress that expression of views in divorce proceedings and other family matters hides a danger when children are involved therein. This danger can hinder efficient exercise of the right of the child to express its views if

persons who communicate with the child do not possess skills and competences needed for proper and appropriate communication with children. It should also be considered if there are reasonable grounds to introduce, like some other comparative European legislations, mandatory multidisciplinary training for Croatian experts who carry the burden of the responsibility for communicating with children in justice.

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NEW TRENDS IN EUROPEAN FAMILY PROCEDURAL LAW

ABSTRACT

The system of the European family procedural law is based on the multiple cross-border institutes which are developing gradually. It represents a complex system of many interrelated regulations directly regulating the cross-border family relations, through which European legislator seeks to equalize, where possible, or to connect the rules on jurisdiction and recognition, declaration of enforceability and enforcement. Also, speaking about the legal sources of the European family procedural law it is necessary to signify the interpretative power of the European Court of Justice. This paper will discuss present actuality – the Brussels IIbis Regulation Recast, respectively the Proposal COM (2016) 411/2 published by the European Commission on 30 July 2016. The proposal, in major, predicts changes regarding the rules of jurisdiction, provisional and protective measures and enforcement rules, and also introduces the new rules on incidental questions, right of the child to express his views and new rule on concentration of local jurisdiction. However, it is inevitable to raise the issue whether some other provision required changes in terms of additional explanation, referring to the rules on the transfer of jurisdiction, in the light of the new CJEU ruling in the case Child and Family Agency vs. J.D.

Keywords: *jurisdiction, enforcement, declaration of enforceability, Brussels IIbis Regulation Recast, Child and Family Agency vs. J.D*

1. INTRODUCTION

The main objective of the unification of EU family law since its beginning in early nineties was the establishment of the principle of mutual trust between the Member States. It has been continuously built by adopting and improving the rules considering the free movement of the judgments, implying the rules on jurisdiction, applicable law and recognition and enforcement, constantly keeping in mind the protection of the best interest of the child. The aspiration to simplify and make the procedure more efficient is contributing to its straightening. The field of family matters in EU is currently being regulated by the Brussels II*bis* Regulation, Rome III Regulation, Maintenance Regulation, Regulation on matrimonial property regimes, Regulation on the property consequences of registered partnerships, and with the closely connected Succession Regulation. Certainly, it is important

to note that the sources of European family law are also the conventions in family matters brought within the Hague Conference on Private International Law.[1] The Brussels II*bis* Regulation, characterised as the cornstone of judicial cooperation in family matters, is currently under revision. This paper will present the short overview of the European legislator's efforts on making the rules improving the principle of mutual trust, until its final product – the Proposal for Brussels II*bis* Recast (Chapter 2). It will be followed by the remarks on the Proposal; respectively, the significant changes regarding the procedural matters, all with the purpose of determining to what extent the objectives of the unification were achieved (Chapter 3-5).

2. UNIFICATION OF THE EUROPEAN FAMILY LAW IN MATRIMONIAL AND PARENTAL RESPONSIBILITY MATTERS

The European Union was originally focused on securing the economic freedoms rather than the family law matters until the Maastricht Treaty[2] had created the idea of the European Union citizenship,[3] providing the number of rights upon the European citizenship with emphasis on the right of free movement of the person.[4] However, the concept of citizenship established by the Maastricht Treaty did not bring effective rights to the EU citizens. They found themselves able to exercise their substantive rights, but unable to enforce the judgments determining those rights, especially in matrimonial matters.[5] European Community had no authority to adopt supranational legislation and the Council could only recommend the member states to adopt the conventions it had drawn up[6] because the judicial cooperation in civil matters had not yet been transferred from the third pillar to the first pillar of European integration.[7] At the meeting held in Brussels in 1993 the European Council had considered the possibilities of extending the scope of

1 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

2 Treaty on European Union [1992] OJ C 191.

3 Article 8 TEU (Maastricht).

4 *Ibid.* Art K.1.

5 Perin Tomičić, I., *Private International Law Aspects of the Matrimonial Matters in the European Union – Jurisdiction, Recognition and Applicable Law*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 57, No. 4-5, 2007, pp. 848-880, p. 849.

6 Article K.3(2) TEU (Maastricht).

7 de Boer, T.M., *What we should not expect from a recast of the Brussels IIbis Regulation*, Nederlands Internationaal Privaatrecht, Vol. 33, No. 1, 2015, pp. 10-19, p. 10.

the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[8] to matters of family law.[9] After a few years of negotiations, a Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (hereinafter: Brussels II Convention)[10] was agreed upon. As the treaty of Amsterdam[11] allowed its conversion into regulation, the European Commission had quickly drafted a proposal for a regulation covering the same topics. The Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses[12] (hereinafter: Brussels II Regulation) was the first instrument adopted in the area of judicial cooperation in civil matters.[13] The content of the Brussels II Regulation was taken over from the Brussels II Convention with few new provisions aimed to secure the consistency with certain provisions of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[14] (hereinafter: Brussels I Regulation).[15] The Brussels II Regulation came into force on 1 March 2001. For the reason that the children born out of wedlock and children who are not mutual to both parents remained out of the Brussels II Regulation sphere[16], there were proposals for its revision even before it entered into force.[17] On May 2002 the

8 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299.

9 Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegría Borrás Professor of Private International Law University of Barcelona [1998] OJ C 221/27, p. 31.

10 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters - Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C 221.

11 Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts [1997] OJ C 340/1.

12 Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160/19.

13 Perin Tomičić, I., *op. cit.* note 5, p. 854.

14 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] **OJ L 012.**

15 Brussel II Regulation, *op. cit.* note 12, Rec 6.

16 Pranevičienė, K., *Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges Applying Regulation Brussels II Bis*, Baltic Journal of Law & Politics, Vol. 7, No. 1, 2017, pp. 113-127, p. 117.

17 Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforce-

Commission presented a proposal which had covered both matrimonial matters and parental responsibility and had brought together all proposed innovation concerning the abolition of exequatur for decisions on access rights, and expansion of the regulation's substantive scope with regard to parental responsibility, cooperation between central authorities and demarcation in relation to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[18] (hereinafter: 1996 Hague Convention).[19] The new Regulation, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000[20] (hereinafter: Brussels II*bis* Regulation), entered into force on 1 August 2004 and applies from 1 March 2005.[21]

Still, at the time, there remained an unenviable situation for parties seeking a divorce.[22] There were no Community provisions on applicable law in divorce. On 17 July 2006 the Commission presented a Proposal for a Council regulation amending the Brussels II*bis* Regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters[23] (hereinafter: 2006 Proposal).[24] Because of the extensive discussion regarding the 2006 Proposal the

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ment of judgments on rights of access to children [2000] OJ C 234.

18 Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law and Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children [2008] L 151/36.

19 de Boer, *op.cit.* note 7, p. 11.

20 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338.

21 *Ibid.* Art 72.

22 Henderson, T., *From Brussels to Rome: The necessity of resolving divorce law conflicts across the European Union*, Wisconsin International Law Journal, Vol. 28, No. 4, 2011, pp. 768-794, p.769.

23 Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final.

24 The Proposal was named Rome III, which led to the confusion due to the fact that the designation "Rome" has been used for instruments which only contained conflict of laws rules whereas "Brussels" indicated that only procedural issues were being addressed, such as jurisdiction, recognition and enforcement. *Supra*. Boele-Woelki, K., *To be, or not to be: Enhanced cooperation in international divorce law within the European Union*, Victoria University of Wellington Law Review, Vol. 4, 2008, pp. 779-792, p. 783.

adoption of the choice of forum was genially welcomed by the Member States while the conflict of law rules were highly unaccepted.[25] When it became clear that the unanimity required for the adoption of the Rome III Proposal could not be obtained, eight Member States[26] informally reported the Council regarding their indentation to launch the enhanced cooperation mechanism and to request the Commission to draft a proposal to that end.[27] The 14 participating Member States[28] adopted Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter: Rome III Regulation),[29] which became applicable on 21 June 2012.[30]

Finally, we come to the last proposal. Pursuant to the Article 65 of the Brussels II*bi*s Regulation, every five years, the Commission shall present to the European Parliament, to the Council and to the European Economic and Social Committee, a report on the application of Brussels II*bis* Regulation on the basis of the information supplied by the Member States. On 15 April 2014 the Commission had published a Report on application of the Brussels II*bis* Regulation,[31] which represented a first assessment of its application.[32] Afterwards, on 30 June 2016 the Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (hereinafter: 2016 Proposal) was published.[33]

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25 *Ibid.* p. 784.

26 Austria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain.

27 Boele-Woelki, K. , *op.cit.* note 24, p. 785.

28 Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

29 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.

30 The Regulation applies in Lithuania from 2014 and in Greece from 2015, which gives the result of 16 Member States included in enhanced cooperation. Source: Law applicable to divorce and legal separation, European E-justice Portal, URL=https://e-justice.europa.eu/content_law_applicable_to_divorce_and_legal_separation-356-en.do?init=true. Accessed 18 January 2017.

31 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM(2014) 225 final.

32 It was based on the inputs received from the members of the European Judicial Network in civil and commercial matters, available studies, the Commission's Green Paper, the 2006 Proposal and the work done within the framework of the Hague Conference on Private International Law on the follow-up of the 1980 and 1996 Hague Conventions. Also, it took into account citizen letters, complaints, petitions and case law of the Court of Justice of the European Union. *Ibid.* p. 4.

33 Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in

3. BRUSSELS II *BIS* REGULATION RECAST

As it was noted in the 2016 Proposal's Explanatory Memorandum the objective of the recast was to further develop the European area of Justice and Fundamental Rights based on Mutual Trust, saying that among the two areas covered by the Brussels II*bis* Regulation, the matrimonial and parental responsibility matters, the latter was identified to have caused acute problems which need to be addressed urgently[34] while there is only limited evidence of existing problems regarding the matrimonial matters.[35] As introduction to the review of certain proposed changes, it is to be highlighted that the 2016 Proposal introduced a definition of a child which covers any person up to the age of 18.[36] The intention was to equalize the Regulation with the 1996 Hague Convention, in relation to non-child abduction child related matters within the scope of the Regulation.[37] The word *court* has been replaced by the word *authority*, while *judgment* has been replaced with the *decision.* This goes in favour of the objective of strengthening the legal certainty and increasing of flexibility while erasing the differences in national rules and legal terminology of the Member States. This legal terminology has already been seen in recent date regulation such as Succession Regulation[38], Regulation on matrimonial property regimes[39] and Regulation on the property consequences of registered partnerships.[40] Also, it is difficult no to see the significant increase of the recitals, from 33 to 57.

The following chapters will present the significant changes proposed by the 2016 Proposal concerning the matrimonial matters and parental responsibility. As well,

matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final.

34 The 2016 Proposal identified the six main shortcomings concerning parental responsibility: child return procedure, placement of the child in another Member State, the requirement of exequatur, hearing of the child, actual enforcement of decisions and cooperation between the Central Authorities.

35 2016 Proposal*, op. cit.* note 33*,* p. 1-2.

36 *Ibid.* Art. 2(1)(7).

37 Beaumont, P., Walker, L. and Holliday, J., *Parental responsibility and international child abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, International Family Law Journal, Vol. 4, 2016, pp. 1-16, p. 13.

38 Regulation (EU) No 650/2012 OF the European Parliament and the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

39 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] L 183/1.

40 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] L 183/1.

they will include the areas not affected by the 2016 Proposal but considered to be needed introduced or amended.

4. MATRIMONIAL MATTERS

4.1. Exclusive and residual jurisdiction

The change proposed by the 2016 Proposal concerning the jurisdiction refers to the present rules on exclusive nature of jurisdiction[41] and residual jurisdiction,[42] which had considered being very complex and confusing.[43] While the Court of Justice of the European Union (hereinafter: CJEU) gave the interpretation of the Article 3, 6 and 7 in the case *Sundelind Lopez*[44] saying that domestic rules on private international law of a Member State will only determine jurisdiction if none of the Brussels II*bis* rules is applicable,[45] there is still no clear answer to the question whether jurisdiction may be derived from national law if the respondent is a national or resident of a Member State, and no court in a Member State would have jurisdiction pursuant to the Regulation, namely it is doubtful whether the application of national law under Article 7 is excluded if one of the requirement of Article 6 has been met.[46] There is an example where French woman lives with her German husband in Canada. They separate and she returns to Paris with the intention to initiate the divorce proceeding immediately. No court of Member State has jurisdiction under Article 3 to 5 of the Brussels II*bis* Regulation since the parties are not habitually residents in a Member State, they do not share a common nationally and the wife does not have the habitual residence in France for a sufficient time. Is the wife able to rely on the French residual rules, or, is she unable because her husband has a German nationality and had special protection under the Article 6?[47] The "exclusive nature" of the rules seems to suggest that domestic

[41] "A spouse who: (a) is habitually resident in the territory of a Member State; or (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States, may be sued in another Member State only in accordance with Articles 3, 4 and 5." Brussels II*bis* Regulation, *op. cit.* note 20, Art 6.

[42] "Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State." *Ibid.* Art 7(1).

[43] Ní Shúilleabháin, M., *Cross-Border Divorce Law. Brussels II Bis*, Oxford Private International Law Series, Oxford, 2010, p. 156.

[44] Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECLI:EU:C:2007:740, para 24.

[45] Kruger, T., Samyn, L., *Brussels IIbis: successes and suggested improvements*, Journal of Private International Law, Vol. 12, No. 1, 2016, pp. 132-168, p. 139.

[46] de Boer, *op. cit.* note 7, p. 13.

[47] *Supra.* McEleavy, P., *The Communitarization of Divorce Rules: What Impact for English and Scottish Law?*, The International and Comparative Law Quarterly, Vol. 53, No. 3, 2004, pp. 605-642, p. 612.

private international law cannot be applied.[48] The 2014 Practical Guide for the application of the Brussels II*bis* Regulation was quite clear on this matter saying that because of the exclusive nature of the rules set out in Article 3 to 5, as is provided in Article 6, the rule in Article 7(1) only applies in relation to a respondent who is not habitually resident in nor a national nor domiciled in a Member State.[49] The questions remained whether the 2016 Proposal had removed those obstacles in the interpretation and had given the solution to the above described situation.

The 2016 Proposal connects those two articles in one, saying that where no authority of a Member State has jurisdiction pursuant to Article 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that Member State. This rule does not apply to a respondent who: (a) is habitually resident in the territory of a Member State, or (b) is a national of a Member State, or, has "domicile" in the territory of one of the Member States.[50] It is to be admitted that the proposed rule very easily solved the doubts in the interpretation of existing rules. Regardless, there is a still unsolved issue for the situation as one mentioned above, but for the applicant to wait for the prescribed timeframes to be fulfilled. Possible solution could be found in the introduction of a *forum necessitates* for a situation where no court in Member State can assume jurisdiction,[51] under conditions like already contained in the Maintenance Regulation,[52] Succession Regulation, Regulation on matrimonial property regimes and Regulation on the property consequences of registered partnerships.[53]

4.2. Prorogation of jurisdiction

The proposal for the introduction of the rule on choice of court can be found in the 2006 Proposal, which introduced the prorogation in matrimonial matters, as

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48 *Ibid.,* p. 140.

49 European Commission, *Practice Guide for the application of the Brussels IIa Regulation*, 2014, p. 13, URL: http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf. Accessed 10 January 2017.

50 2016 Proposal, *op. cit.* note 33, p. 37.

51 Kruger, T., Samyn, L. *op. cit.* note 45, p. 140.

52 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] L 7/1.

53 "Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised." *Ibid.* Art. 7. *Supra*. Art 11 of the Succession Regulation, Art 11 of Regulation on matrimonial property regimes and Art 11 of Regulation on property regimes of registered partnerships.

it already existed in respect to the parental responsibility.[54] Meaning that in the proceedings relating to divorce and legal separation to the spouses are allowed a limited choice of court. According to proposed rule they may select forum within the European Union with which they have some connection with that Member State by virtue of the fact: (a) any of the grounds of general jurisdiction applies, or (b) it is the place of the spouses' last common habitual residence for a minimum period of three years, or (c) one of the spouses is a national of the Member State or, has his or her "domicile" in territory of one of the Member States.[55] Above mentioned rule had never given legal force. As already noted, the product of 2006 Proposal, Rome III Regulation, only contains the rules on law applicable to divorce and legal separation, while the originally proposed rules on jurisdiction in matrimonial matters remained unsettled by the way it was proposed at the time. Still, the adoption of the choice of court was at the time genially welcomed by the Member States unlike the conflict of law rules.[56] Therefore, there was no reason for the drafter not to introduce this rule in 2016 Proposal giving that the forum choice can benefit the parties as it gives them additional control in a view of predictability and legal certainty and to help them to prevent the rush to court.[57]

5. PROPOSED CHANGES CONCERNING THE PARENTAL RESPONSIBILITY

5.1. Jurisdiction

5.1.1. *Provisional, including protective, measures*

The existing rule on provisional measures caused a problem in application by saying that the provisions of the Regulation shall not prevent the courts of a Member State from taking provisional, including protective measures in respect of persons or assets in that State. It was unclear to which the word "person" had referred to.[58] If is to be interpreted in the relation to the 1996 Hague Convention,[59] the rule re-

[54] de Boer, T. M., *The second revision of the Brussels II regulation: jurisdiction and applicable law,* In: Boele-Woelki, K. and Sverdrup, T. (Eds.), European challenges in contemporary family law, European family law series; No. 19, Antwerpen: Intersentia, 2008, pp. 321-341, p. 4. (UvA-DARE version of article used. URL= http://dare.uva.nl/search?arno.record.id=285566. Accessed 9 January 2017).

[55] 2006 Proposal, *op.cit.* note 23, p. 13.

[56] Boele-Woelki, *op. cit.* note 24, p. 784.

[57] Kruger, T., Samyn, L. *op. cit.* note 45, p. 144.

[58] *Ibid.* p. 147.

[59] "In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection." 1996 Hague Convention, *op. cit*. note 18, Art 11.

fers to the child. But, the CJEU caused confusion in his ruling in the case *Detiček*[60] saying that a provisional measure in matters of parental responsibility ordering a change of custody of a child is taken not only in respect of the child but also in respect of the parent to whom custody of the child is now granted and of the other parent who, following the adoption of the measure, is deprived of that custody.[61] The 2016 Proposal is giving the solution by adhering to the solution from the 1996 Hague Convention, precisely saying that in urgent cases the authorities of a Member State where the child or property belongings to the child is present still have jurisdiction to take provisional, including protective measures.[62] But still there is a disparity in relation to the provisional measures taken in child abduction case in relation to the new Article 25(1)(b). Namely, Recital 29 explains that before refusing to return the child, the court should, however, consider whether appropriate measures of protection have been put in place or may be taken to eliminate any risks to the best interest of the child. It could be that in certain cases measures are ordered in respect of the child which could ensure the protection of the parent.[63]

The Proposal moves the provision on provisional, including protective, measures to the jurisdiction chapter which means any measures made under this provision can be recognised and enforced in another Member State.[64] This significant change is contained in new Article 48 clarifying that enforcement rules shall apply to provisional, including the protective measures, which brings the Regulation in line with the 1996 Hague Convention.[65]

5.1.2. *Transfer to a court better placed to hear the case. Case C-428/15 Child and Family Agency vs. J.D.*[66]

As it follows from the text of the Article 15 the rule on the transfer to a court better placed to hear the case should be an extraordinary measure, but it is used fairly often in practice.[67] In spite of that, the practitioners are faced with the problems

[60] Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECLI:EU:C:2009:810.

[61] *Ibid.* para 50 and 51.

[62] 2016 Proposal, *op. cit.* note 33, Art 12.

[63] Beaumont, P., Walker, L. and Holliday, J., *op. cit.* note 37, p. 11.

[64] *Ibid*. p. 10.

[65] 1996 Hague Covention, *op. cit*. note. 18, Art 11(2).

[66] Case C-428/15 *Child and Family Agency vs. J.D.* [2016] ECLI:EU:C:2016:819.

[67] Friedrich, L., *The Experience of the National Central Authority*, Recasting the Brussels II*a* Regulation Workshop 8 November 2016, Compilation of briefings for the JURI Committee, 2016, pp. 45-55, p. 54, URL= http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf. Accessed 9 January 2017.

in its application[68] and also there are the examples of poor interpretation of this rule. This is confirmed by the case where a child, living in Italy, was neglected by the mother and instituted in hospital. The residence of the father was unknown and the Italian authority initiated a question of his adoption by a grandmother living in Lithuania. After deciding that this issues fall within the scope of Brussels II*bis* Regulation, the Italian Court issued a decision on the transfer of the proceedings to a Lithuanian court where it omitted to set out the time limit by which the Lithuanian court should have been seized, thus leaving uncertain whether and when the Italian proceeding might have been resumed.[69] Most common situation of the application of this rule was in cases where courts wanted to transfer a case concerning custody instituted after a motion by a parent who subsequently moved to another state with the child.[70] However, 2016 Proposal is excluding this possibility by amending the rule on general jurisdiction in parental responsibility matters saying that where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the authorities of the Member State of the new habitual residence shall have jurisdiction.[71] Still, with no proposed amendment of this rule the practitioners depend on the interpretation of the CJEU. While they were deprived from the CJEU's answer in the Case *E. v B.*[72] regarding the application of Article 15 in cases where there are no current proceedings concerning the child, there is a recent ruling in the Case *Child and Family Agency vs. J.D*. finally giving some explanation.

Ms D, UK national, was a subject to a „pre-birth assessment" carried out by the child protection authorities in UK in anticipation of the birth of her second child, R. The competent authorities considered that R. should after his birth be placed in the care of a foster family. Ms D. moved to Ireland shortly after. R. was born.

[68] Some of the problems were indicated by the Croatian practitioners as follows: possibility of receiving the case file in the foreign language, acceptance of the evidences presented by another court, situation where circumstances of the case change or the child moves to another country, possibility of submission of the request under Article 15 in the appeal procedure. *Supra.* Župan, M., Drventić, M., *Croatian Exchange Seminar, Osijek, 13-14 October 2016, Report on the Croatian Good Practices*, 2016, p. 12. The Report was drafted as a research output within the Project „Planning the future of cross-border families: a path through coordination" (EUFam's), coordinated by the University of Milan, co-funded by the Directorate-General for Justice and Consumers of the European Commission, within the programme "Projects to support judicial cooperation in civil or criminal matters" (Justice Programme), under the code JUST/2014/JCOO/AG/CIVI/7729. URL= http://www.eufams.unimi.it/category/research-outputs/. Accessed on 10 January 2017.

[69] Tribunale per i minorenni di Roma, 25 January 2008, EUFam's database: ITF20080125, URL= http://www.eufams.unimi.it/category/database/. Accessed 10 January 2017.

[70] Friedrich, L., *loc. cit.*

[71] 2016 Proposal, *op. cit.* note 33, Art 7(1).

[72] Case C‑436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246.

Shortly after, the Agency made an application to the District Court in Ireland for an order that the child should be placed in care. The Circuit Court ordered the provisional placement of R. in foster care. The Agency further made an application to the High Court requesting that the substance of the case be transferred to the UK court, pursuant to Article 15. That application was supported by R.'s guardian *ad litem*. The High Court authorized the Agency to make an application to the UK court to assume jurisdiction. After Ms D.'s appeal, the Supreme Court decided to stay the proceedings and to refer to CJEU. It asked to explain whether Article 15 applies to child protection proceedings based on public law, where such proceedings are brought by a competent authority in a first Member State although it is an institution of another Member State that will have to bring separate proceedings, under different legislation and relating to different factual circumstances. Also, it sought guidance regarding the interpretation and connection of the terms "better placed" and of "the best interests of the child". The CJEU answered that Article 15 is applicable where a child protection application brought under public law by the competent authority of a Member State, where it is a necessary that an authority of that other Member State thereafter commence proceedings that are separate from those brought in the first Member State, pursuant to its own domestic law and possibly relating to different factual circumstances. Further, the CJEU explained that the concepts "better placed" and "the best interests of the child", must be interpreted by taking into account their context and the objectives pursued by the Regulation. In order to determine the "better placed" concept, the court having jurisdiction must be satisfied that the transfer is such as to provide genuine and specific added value to the examination of that case, taking into account, *inter alia*, the rules of procedure applicable in that other Member State. The court having jurisdiction should not take into consideration the substantive law of that other Member State, doing so would be in breach of the principles of mutual trust between Member States and mutual recognition of judgments. In order to determine the "best interest of the child concept" the court having jurisdiction must be satisfied that that transfer is not liable to be detrimental to the situation of the child.

5.1.3. *Incidental questions*

The Commission proposed a new rule on the incidental questions saying that if the outcome of proceedings before an authority of a Member State depends on the determination of an incidental question falling within the scope of this Regulation, this authority may determine that question. The more precise explanation of this rule could be found in the Recitals by giving the practical example as follows: "…if the object of the proceedings is, for instance, a succession dispute in which

the child is involved and a guardian *ad litem* needs to be appointed to represent the child in those proceedings, the authority having jurisdiction for the succession dispute should be allowed to appoint the guardian for the proceedings pending before it, regardless of whether it has jurisdiction for parental responsibility matters under this Regulation. Any such determination of an incidental question should only produce effects in the proceedings in question".[73] However, there is an obligation for the authority having jurisdiction to decide on incidental question to determine the law applicable to the incidental question. Usually in this kind of situations the authority has two possibilities; to apply his national conflict of law rules (*lex fori*) to determine the law applicable to the preliminary question, or he can use the conflict of law rules of the law of the main question (*lex causae*).[74] However, where the substantive law of the private international law has been harmonized, the choice between two approaches leads to one solution: *lex fori*.[75] It follows that, in relation to the proposed rule, the court deciding in e.g. succession proceeding and applying the law applicable to that matter, in relation to the raised incidental question will have to apply the law applicable for the parental responsibility. According to the 1996 Hague Convention that would be the law of the State of the habitual residence of the child.[76]

While the Commission obviously tried to resolve the situation such as the one from the case *Matoušková*,[77] the question is was the proposer thorough enough by determining this rule. It is not for the sure that this rule will contribute to the highlighted legal certainty and flexibility by possibly imposing the obligation of application of foreign law to the authorities having jurisdiction to decide upon incidental question and by highly possible disparity of laws applicable to the main question and incidental question.

5.1.4. *Right of the child to express his or her views*

The rule saying that the child has to be given the opportunity to be heard has already been a part of the Brussels II*bis* Regulation, contained in Article 11(2) with the respect of cases in which the Art 12 and 13 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction[78] (hereinafter: 1980

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73 2016 Proposal, *op. cit.* note 33, Rec 22.

74 Goessl, S., *Preliminary question in EU private international law*, Journal of Private International Law, Vol. 8, No 1, 2012, pp- 63-76, p. 64.

75 *Ibid.* 67.

76 1996 Hague Convention, *op. cit.* 18, Art 15 and 16.

77 Case C-404/14 *Marie Matoušková* [2015] ECLI:EU:C:2015:653.

78 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Hague XXVIII, URL= https://www.hcch.net/en/instruments/conventions/full-text/?cid=24. Accessed 15 January 2017.

Hague Convention) had been applying. Currently, the importance of hearing children is not highlighted in the Regulation in general terms. The research within the Project "Conflicts of EU courts on child abduction"[79] showed that the majority of children in EU involved in proceedings under the Article (11)(8) were not heart by the courts; the overall data indicates that the child was heard in only 17 per cent of cases.[80] By setting the new rule under the Article 20 the Commission was giving stronger value to this matter by saying that the authorities of the Member State shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. The authority shall give due weight to the child's views in accordance with his or her age and maturity and document its considerations in the decision. Clearly the Commission recognised the existing issues by strengthen the right of the child to be heard.[81] Also, the above rule was additionally strengthened in the Recital 23 by calling upon the Charter of Fundamental Rights of the European Union[82] and the United Nations Convention on the Right of the Child.[83]

5.2. Child abduction

The Article 11 of the 1980 Hague Convention prescribes that the judicial or administrative authorities of Contracting State shall act expeditiously in proceedings for the return of children. Namely, to issue a decision within six weeks from the date of commencement of the proceedings. To be able to adjudicate child abduction proceeding in terms of rendering quality and within the timeframe decision, a judge must have certain knowledge and expertise.[84] The cross-border abduction

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79 The Project was conducted by the principal investigator prof Paul Beaumont, University of Aberdeen, funded from the Nuffield Foundation. It gathered and analysed proceedings involving Articles 11(6)-(8) and 42 of the Brussels II*bis* Regulation from every EU Member State apart from Denmark. *Supra.* URL= http://www.abdn.ac.uk/law/research/conflicts-of-eu-courts-on-child-abduction-417.php, Country reports available on: URL=http://www.abdn.ac.uk/law/documents/Conflicts_of_EU_Courts_on_Child_Abduction_Country_Reports_25_May_(Final).pdf. Accessed 15 January 2017.

80 Beaumont, P.,Walker, L., Holliday, J., *Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU*, Journal of Private International Law, Vol. 12, No. 2, 2016, pp. 211-260, URL=http://www.abdn.ac.uk/law/research/working-papers-455.php, p. 25. Accessed 16 January 2017.

81 *Ibid.* p. 6.

82 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Art 24(1).

83 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Art. 12. URL=http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. Accessed 13 February 2017.

84 Župan, M., Poretti, P., *Concentration of jurisdiction in cross-border family matters – child abduction at focus*, Vinković, M. (edt), New developments in EU labour, equality and human rights law, 2015, Osijek, pp. 341-359, p. 346.

cases are complex and sensitive but arise only on frequently for the individual judge when handled by every individual local family court. As a result, judges are less familiar with the procedures and provisions involved.[85] The advantages of the concentration of jurisdiction in child abduction cases can be manifested following advantages for the court system: clear system of jurisdiction, efficient case management and reviews of the performance.[86] Also, concentration of jurisdiction in Hague cases has been recommended by the academic's writing for many years.[87] Therefore, one of the most important innovations of the 2016 Proposal is the provision on concentration of local jurisdiction. This new rule requests the Member States to ensure that that the jurisdiction for the applications for the return of a child is concentrated on a limited number of courts.[88] It is explained that, depending on the structure of the legal system, jurisdiction for child abduction cases could be concentrated in one single court for the whole country or in a limited number of courts, using, for example, the number of appellate courts as point of departure and concentrating jurisdiction for international child abduction cases upon one court of first instance within each district of a court of appeal.[89]

The second novelty governs that the court may declare the decision ordering the return of the child provisionally enforceable notwithstanding any appeal, even if national law does not provide for such provisional enforceability.[90] This rule is described as useful in systems where the decision is not yet enforceable while it is still subject to appeal. As a result, a parent would be able to have access to the child based on a decision provisionally declared enforceable while the appeal proceedings concerning that decision will be carried out on request of the other parent.[91] Regarding this provision it is certainly needed to add that when deciding upon the provisional enforceability the court should keep in mind that the child's best interests will be most effectively served if coercive measures are only applied once it is clear that the return order will not be changed or annulled.[92]

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85 2016 Proposal, *op. cit.* note 33, p. 3.

86 *Supra.* Župan, M., Poretti, P., *op. cit*. note. 84, p. 350.

87 Beaumont, P., Walker, L. and Holliday, J., *op.cit.* note 37, p. 3.

88 2016 Proposal, *op. cit.* note 33, Art. 22.

89 *Ibid.* Rec 26.

90 *Ibid.* Art 25(3).

91 *Ibid.* p. 16.

92 Hague Conference on Private International Law Permanent Bureau, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part IV – Enforcement*, 2010, p. 19, URL=https://www.hcch.net/en/publications-and-studies/details4/?pid=5208. Accessed 10 February 2017.

Another novelty concerns the limitation of the number of appeals against a return order. It prescribes that only one appeal shall be possible against the decision ordering or refusing the return of the child.[93] Experience has shown that the appeal process in return cases can cause long delays before a final determination of the matter. This may be so even where a first instance decision has been made promptly. It should also be noted that the enforcement of a return order can be delayed because several levels of legal challenge exist and it is often not possible to enforce a return order until these have all been exhausted.[94] This proposed rule is supporting the requirement for the prompt return of the child and minimising the ability of the abducting parent to turn the appeal system in their favour.[95]

5.3. Abolition of the declaration of enforceability

The time for obtaining exequatur varies between the Member States; it can take from couple of days to several months, depending on the jurisdiction and the complexity of the case.[96] There might also be contradictory situations where a Member State must enforce access rights under the Regulation while, at the same time, the recognition and/or enforcement of custody rights granted in the same decision may be challenged and perhaps refused in the same Member State because decision on both rights are currently subject to different procedures under the Regulation.[97] The amended rule says that a decision on matters of parental responsibility in respect of a child given in a Member State which is enforceable in the other Member State shall be enforceable in the other Member States without any declaration of enforceability required.[98] While current Brussels II*bis* Regulation only abolished this requirement for decisions granting access and certain decisions ordering the return of a child, the Proposal now provides for a single procedure for the cross-border enforcement of all decisions in matters of parental responsibility. 1996 Hague Convention contains the exequatur in its provision, but sets out that each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.[99] Despite the difference, by

[93] 2016 Proposal, *op. cit.* note 33. Art 25(4).

[94] Permanent Bureau of the Hague Conference on Private International Law, *The link with international instruments and third countries*, Recasting the Brussels IIa Regulation Workshop 8 November 2016, Compilation of briefings for the JURI Committee, 2016, pp. 63-73, p. 66, URL=http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf. Accessed 12 January 2017.

[95] Beaumont, P., Walker, L. and Holliday, J., *op. cit.* note 37, p. 3.

[96] 2016 Proposal, *op. cit.* note. 33, p. 4.

[97] *Ibid.*

[98] *Ibid*. Art. 30(1).

[99] 1996 Hague Covention, *op. cit.* note. 18., Art 26 (2).

requesting a "simple and rapid procedure", the drafters sought to avoid long delays that may occur until a decision can be enforced and this amendment does not contradict the 1996 Hague Convention, considering that it renders the enforcement of decisions in matters of parental responsibility more effective.[100]

5.4. Enforcement of the decision granting right of access or entailing the return on a child

Under the current rules the right of access granted and return of a child entailed in an enforceable judgement given in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability without any possibility of opposing its recognition.[101] The CJEU strengthened those strict rules by ruling in the case of *Povse*[102] and soon confirmed in the case *Zarraga*.[103] As a consequence, and for the first time, a conflict of European Supranational Courts has arisen, with the European Court of Human Rights (hereinafter: ECHR) ruling in the Case of M.A. v Austria[104] considering the outcomes of the implementation of the rule potentially contrary to the best interests of the child.[105]

Finally, there is a new rule governing the grounds for refusal of enforcement of decisions in matter of parental responsibility, not excluding the decisions granting right of access or entailing the return on a child. Besides, there is a new Article 49 saying that the provision in the Chapter on recognition and enforcement on matters of parental responsibility shall apply accordingly to decisions given in a Member State and ordering the return of a child in another Member State pursuant the 1980 Hague Convention. Thus, the Article 40(2) drew attention by ordering that enforcement of a decision may be refused by virtue of a change of circumstances since the decision was given, if the enforcement would be manifestly contrary to the public policy of the Member State of enforcement. The Proposal states two bases on which a violation of public policy can be found. First, the child being of sufficient age and maturity now objects to such an extent that the enforcement

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100 Permanent Bureau of the Hague Conference on Private International Law, *op. cit.* note 94, p. 71.

101 Brussels II*bis* Regulation*, op. cit.* note 20, Art 41(1) and Art 42(1).

102 Case C−211/10 PPU *Doris Povse v Mauro Alpago* [2010] ECLI:EU:C:2010:400.

103 Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECLI:EU:C:2010:828, para 48.

104 Judgement M.A. v. Austria (2013), Application no. 4097/13, para 136.

105 Pretelli, I.*, Child Abduction and Return Procedures*, Recasting the Brussels IIa Regulation Workshop 8 November 2016, Compilation of briefings for the JURI Committee, 2016, pp. 1-18, p. 11-12, URL=http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf. Accessed 1 February 2017.

would be manifestly incompatible with the best interest of the child and secondly, other circumstances have changed to such an extent since the decision was given that its enforcement would now be manifestly incompatible with the best interest of the child. The first exception is compactable with the general approach of the proposal which seeks to give more weight to children's right especially the child's right to be heard.[106] Second exception is contrary to the CJEU ruling in the case *Povse* where court precluded a review in the state of enforcement because of a change in circumstances even if the enforcement was manifestly incompatible with the best interest of the child.[107] The described rule obliviously goes in the way of better protection of child's right and in the favour of increasing the mutual trust between Member States. Its real effectiveness remains to be seen in the interpretation and application by the Member State courts.

6. CONCLUSION

The 2016 Proposal had not introduced significant improvement regarding matrimonial matters, although they proved to be necessary. The drafter missed the opportunity to introduce the choice of forum in proceedings relating to divorce and legal separation by which had not eliminated the possibility of forum shopping and forum racing. While this matter was already thoroughly researched by the both Commission and academics, there was already the existing draft of the rule governing this matter. Also, the introduction of the rule on *forum necessitates* in matrimonial matters was held beneficial by a number of commentators in order to fill the gap that occurred between the rule on general and residual jurisdiction, but still not included in the Proposal. However, there are quite significant improvements to be found regarding the parental responsibility. The proposal clearly seeks to enhance children's rights, referring explicitly to the EU's Charter of Fundamental Rights and to the UN Convention on the Rights of the Child. First of all, the child return procedure was significantly improved by introducing the rules on concentration of local jurisdiction, provisional enforcement of return order, limited number of appeal and by introducing the guarantee for the enforcement of protective measures. They are undoubtedly correspondent with the objective of simplifying the procedures and enhancing their efficiency. The same could also be stated concerning the abolishment of the exequatur in the parental responsibility matters. Finally, there is a substantial improvement regarding the right of the child to express his views and also regarding the new ability for the court in the State where the child is present to refuse enforcement of the return order issued by the

[106] Beaumont, P., Walker, L. and Holliday, J., *op. cit.* note 37, p. 9.

[107] *Ibid.*

court of child's habitual residence on the basis of public policy if the enforcement of the order is manifestly incompatible with the best interest of the child. Still, the biggest objection to the drafters is not amending the rule on transfer of jurisdiction in parental responsibility matters, which had shown the non-uniformity in application and necessity of its amendment in terms of clarification of incurred questions.

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TRIAL WITHIN REASONABLE TIME IN EU ACQUIS AND SERBIAN LAW

ABSTRACT

Since the adoption of the Charter of Fundamental Rights of the EU, it has become clear that the EU prioritizes the protection of human rights as an EU policy. One of the key standards set out in the Charter is the right to a fair trial and, within it, the right to trial within reasonable time.

The extensive jurisprudence of the European Court of Human Rights provides key guidance in the interpretation of this standard both within the Council of Europe and within the EU. However, the Court of Justice of the European Union also started to build its particular case law related to trial within a reasonable time.

In this paper, the authors will present the developments related to the interpretation of the standard of trial within a reasonable time as a part of the EU acquis. Furthermore, the authors will explore the binding nature of the Charter of Fundamental Rights on the EU candidate countries. Lastly, the authors will analyze the steps that Serbia has taken in order to improve its practices in this field, particularly through the adoption of the Law on the Protection of the Right to Trial within a Reasonable Time. Using the comparative and exegetic method, the authors will assess the effectiveness of the normative approach utilized by the Serbian government aimed at ensuring improved compliance with the trial within reasonable time standards and its impact on the EU accession process.

Key words: *Charter of Fundamental Rights of the EU; The Right to a Fair Trial; The Right to Trial within Reasonable Time; Law on the Protection of the Right to Trial within a Reasonable Time.*

1. INTRODUCTION

The right to trial within a reasonable time became a component of the standard of independent and fair trial in the 20th century.[1]. The right to judicial protection, or the right of access to justice, is a human right that implies the right to trial within a reasonable time by an independent and impartial court, established by law. It is beyond doubt that the legal foundation of this approach lies in the interpretation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) by the European Court of Human Rights (hereafter: ECtHR).[2]

Historically speaking, the standard of trial within a reasonable time can be traced back to th eMagna Carta Libertatum.[3]In the comments on Magna Carta that were printed in 1642 as a part of his *"Institutes of the Laws of England"*, Sir Edward Coke described "delay" as a kind of "denial".[4]Indeed, justice delayed is justice denied, or even injustice, as William Gladstone pointed out. This quote became a globally popular maxim.

The XX century brought the adoption of supranational legal instruments that are now the cornerstones of this standard. The United Nations' Universal Declaration of Human Rights[5] represents a milestone in the development of human rights. Its Article 10 states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 14 of the International Covenant on Civil and Political Rights underlines: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... Everyone charged with a criminal offence shall have the right to be...tried without undue delay..."Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) prescribes that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established

1 Poznić, B., Rakić-Vodinelić, V., *Civil Procedure Law*, Law Faculty, Union University in Belgrade and Public Enterprise Official Gazette,Belgrade, 2015, p. 175.

2 *Ibid.* p. 69.

3 Magna Carta Libertatum, The Great Charter of Freedoms, an English constitutional document passed in 1215.

4 Martin, W, *Because delay is a kind of denial, Timeliness in the Justice System*, Ideas and Innovations, Monash University Law Chambers, Melbourne, 2014, pg. 3.

5 Passed and proclaimed a Resolution by the UN General Assembly 217 (III) on Dec. 10, 1948.

by law." The EU Charter of Fundamental Rights represents a unique document on fundamental rights protected in the EU. It involves all the rights contained in the European Court of Justice's case law, the rights and freedoms contained in the ECHR, as well as other rights that arise from common constitutional traditions of the EU countries and other international documents.[6]In addition to equality before the law[7], Article 47 of this Charter prescribes that „everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law…"

As justice delayed is justice denied, everyone is entitled to have their rights decided on within a reasonable time, without unnecessary delay. Adjudication within a reasonable time is a standard set in the judiciary in terms of its efficiency. Not abiding by this standard, or, in other words, delaying proceedings and decisions, is one of the key problems in most national judicial systems; it is therefore not surprising that, in the past few years, at least a third of applications submitted to the ECtHR are related to the breach of the right to trial within a reasonable time.

Trial within a reasonable time is the most frequently analyzed area of the fair trial standard, and it seems that this trend will not change soon. The reasons for this are twofold: first, the parameters that define a reasonable time are developed at a rather slow pace; and second, in order to observe this standard, national judicial system needs to reform, and these reforms are complex and slow processes, which often include numerous cases of trial-and-error solutions. This is particularly the case given that efficiency of the judicial systems is undoubtedly one of the major challenges that national judicial systems face nowadays.[8]On the other hand, the need for efficiency is sometimes juxtaposed with the need to respect human rights and ensure equal justice - courts all over the world are expected to perform their duties expeditiously, but never at the expense of a legitimate trial.[9]So how do supranational and national legal and judicial systems try to ensure that the standard of the trial within reasonable time is observed?

[6] URL=http://www.ec.europa.eu. Accessed 28 October 2016.

[7] Article 20.

[8] URL=http://www.humanrights.is. Accessed 8 November 2016.

[9] Gyampo, R.E.V, *Justice Delayed is Justice Denied: A Call for Timeous Court Rulings in Ghana*, Journal of Law, Policy and Globalization, Vol. 21, 2014, p. 36.

2. NATIONAL REMEDIES FOR BREACH OF RIGHT TO TRIAL WITHIN REASONABLE TIME IN THE CONTEXT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The success of the European Convention depends on the interaction between the domestic systems of human rights protection and the European umbrella held by the ECtHR.[10]Over the history, ECtHR has found more violations of Article 6 of the ECHR than of any other Convention Article.[11] However, the issue of introduction of special effective domestic remedies, in terms of Article 13 of the ECHR, regarding violations of the right to trial within reasonable time was not raised until the adoption of the seminal *Kudla v. Poland* judgment.[12] Until that judgment, the ECtHR's position was that Article 6, paragraph 1 constituted a *lex specialis* in relation to Article 13 of the Convention[13] and was not considered even when Article 6(1) was found to be violated.[14] However, in *Kudla v. Poland* judgment the court acknowledged that the Article 13 claim is not absorbed by the claim under Article 6(1) and clearly pointed out that complaints related to excessive length of proceedings should in the first place be addressed within the national legal system.[15]After the adoption of this decision, the adoption of the conclusions of the European Ministerial Conference on Human Rights[16]and of the Recommendation (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies,[17]several national systems started developing domestic remedies that could address the specific issue of breach of right to trial within reasonable time.[18]

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[10] Rotfeld D., *Welcome Speeches*, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, Workshop held at the initiative of the Polish Chairmanship of the Council of Europe's Committee of Ministers, Directorate General of Human Rights, Council of Europe, 2006, p. 5, URL=http://echr.coe.int/Documents/Pub_coe_Domestics_remedies_2006_ENG.pdf. Accesssed January 29, 2017.

[11] According to HUDOC data, 22328 violations of Article 6.

[12] Kudla v. Poland App No 30210/96, ECHR 2000-XI, [2000] ECHR 512, (2002) 35 EHRR 198, (2002) 35 EHRR 11, [2000] Prison LR 380, (2000) 10 BHRC 269, IHRL 2853 (ECHR 2000), 26th October 2000

[13] Article 13 envisages the right to an effective remedy

[14] Harris D. J., O'Boyle M., Bates E., Buckley C., *Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights*, Oxford University Press, 3rd Edition, p. 777.

[15] *Kudla v. Poland*, App No 30210/96, ECHR 2000-XI, [2000] ECHR 512, (2002) 35 EHRR 198, (2002) 35 EHRR 11, [2000] Prison LR 380, (2000) 10 BHRC 269, IHRL 2853 (ECHR 2000), 26th October 2000par. 155.

[16] Proceedings. European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights, Rome, 3-4 November 2000, Strasbourg: Council of Europe Publishing, 2002, p. 39.

[17] Which includes separate sections devoted to domestic remedies against unreasonably long proceedings

[18] See item III of the Recommendation and paragraphs 20-24 of the Appendix to Recommendation.

Some countries have adopted separate statutes to introduce a judicial remedy addressing the unreasonable length of proceedings. Italy, which was infamous for a high number of applications before the ECtHR and ECtHR judgments in which violations of Article 6 were established, adopted the so-called *Pinto Act*[19], which allows any party to criminal, civil, administrative and tax proceedings to complain of a breach of the reasonable time requirement and obtain financial compensation from a domestic court.[20] The Act lays down the criteria that judges must follow to verify the reasonable length of the trial, to consider the impact the duration of the trial has on the case, and to quantify and award damages. However, the Act does not provide for any measures to expedite the proceedings. Even though the introduction of the Pinto Act has to some extent reduced the number of applications against Italy before the ECtHR, it has also created an additional burden on domestic courts.[21] As a result, the Pinto Act was perceived by scholars as an expensive placebo.[22] In 2012, the Pinto Act was amended – the novelties included the provisions whereby access to the "Pinto" remedy was made conditional upon the termination of main proceedings, and compensation was excluded or limited in some cases. However, the purely compensatory nature of the "Pinto" remedy has been maintained.[23]

The Czech Republic has instituted reforms following the Hartman judgment[24], in which the ECtHR found that appeals to the Constitutional Court, enabling individuals to challenge any final decision of another state body, were not effective. In response to the judgment, Act No. 192/2003 was adopted. This Act has added a provision to the Act on courts and judges, under which it is possible to seek a remedy for excessive delays in judicial proceedings by applying for a deadline to be

19 Legge 24 marzo 2001, n. 89 "Previsione di equa riparazione in caso di violazione del termine ragionevole del processo e modifica dell'articolo 375 del codice di procedura civile", Gazzetta Ufficiale n. 78, 3.4. 2001

20 Crisafulli F., *The Italian Experience*, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, *op.cit.* note 10, 39

21 Candela Soriano M., "The Reception Process in Spain and Italy", *The Impact of the ECHR on National Legal Systems* (eds. H. Keller and A. Stone-Sweet), Oxford University Press, 2008, p. 427. In *Gaglione and others v. Italy*, Application No. 45867/07, the ECtHR found that delays by the Italian authorities in enforcing "Pinto decisions" ranged from 9 to 49 months, and that in 65% or more of the cases there was a 19-month delay (paragraphs 38 and 8).

22 See in particular Carnevali D. "*La violazione della ragionevole durata del processo: alcuni datisull'applicazione della 'legge Pinto*" ,C. Guarnieri e F. Zannotti (eds), Giusto processo?, Milano, Giuffré pp. 289-314

23 Report Doc. 1386 Implementation of judgments of the European Court of Human Rights, 9 September 2015, par.15.

24 *Hartman v. The Czech Republic*, Application no. 53341/99

set for the completion of a particular stage or formality in the process.[25] The ECtHR conducted an examination of i*n abstracto* conformity of this remedy with the Convention, and found it was ineffective, because the request only constituted an extension of the ordinary appeal. This prompted an additional legislative amendment, whereby the possibility was established for the court against the decision of which the appeal was filed to deal with the appeal itself, without having to transfer the case to the higher court – given that such practice has caused further delays in proceedings.[26]

In Poland, an Act on complaints against infringements of party's right to be tried without undue delay was adopted in 2004.[27] The Act relates to criminal and civil court proceedings, including enforcement proceedings, and proceedings before administrative courts. According to this Act, a party is entitled to file a complaint, seeking ascertainment of the fact that the proceedings in question infringed the party's right to have a case examined without undue delay. The criteria for evaluating whether the case was examined without undue delay are based on the practice of the ECtHR, and, as a rule, the complaint is examined by a superior court. Complaints may be filed only if the proceedings are still pending. In 2009, the regulatory framework was amended to enable the triggering of this mechanism even in preparatory proceedings, and the obligation to grant just satisfaction was set within a given pecuniary range.

In Bulgaria, following the pilot judgments in Dimitrov and Hamanov v. Bulgaria[28] and Finger v. Bulgaria,[29] in which the ECtHR required that Bulgaria introduce remedies to deal with unduly long criminal proceedings, and introduce a compensatory remedy in cases of unreasonably long criminal, civil and administrative proceedings, an administrative compensatory remedy was introduced and entered into force in 2012.[30] The remedy was introduced through the Judiciary Powers Act, which prescribes that applications for compensations for unduly long proceedings are addressed to the Minister of Justice through the Supreme Judicial Councils' Inspectorate. The time-limit for examination of applications is six

25 Schorm, V.A., *The Czech Experience*, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings,op. cit. note 10, pp.33-38

26 Schorm, V. A., *Remedies against excessive length of judicial proceedings in the Czech Republic*, The right to trial within a reasonable time and short-term reform of the European Court of Human Rights, p. 39-42, URL=http://www.mzz.gov.si/fileadmin/pageuploads/Zakonodaja_in_dokumenti/knjiznica/bled_proceedings.pdf.Accessed January 28, 2017.

27 Dz.U. 2004 nr 179 poz. 1843

28 Application No. 48059/06 and 2708/09

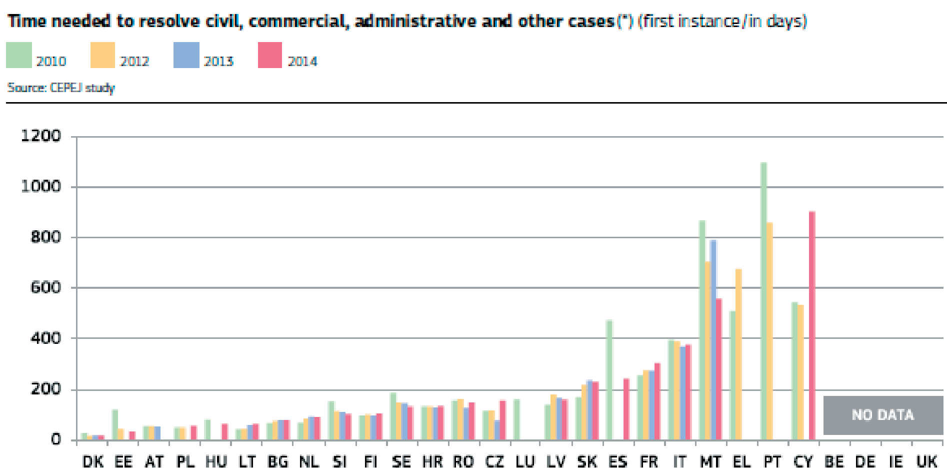
29 Application No. 37346/05

30 Impact of the European Convention on Human Rights in states parties - Selected examples, 2016, p. 18.

months. The applications can be directed against acts, actions or omissions of judicial authorities, but not for such delays stemming from the overburdening of the judicial system as a whole.[31] The merits of the application and the amount of compensation are determined in light of the Court's case law.

There are numerous examples of other countries that have developed specific domestic remedies, including Slovenia, Croatia, Cyprus and Germany. Last years' EU justice scoreboard[32] has shown that the length of first-instance proceedings in most countries has been reduced in 2014 compared to 2010, which shows that there are improvements with regards to the length of proceedings before national courts.

Figure 1.



Source: 2016 EU Justice Scoreboard, p.6

It must be underlined that the mere existence of national legal remedies in cases of breach of the right to trial within reasonable time is not the sole reason behind reduced duration of the length of proceedings in any Council of Europe country.

Evidence from the EU Justice Scoreboard source shows that numerous national judicial systems, including the ones that have introduced special national legal remedies in cases of violation of the standard of trial within reasonable time, are also taking other steps to ensure that justice is not delayed, such as the intro-

[31] CM/Inf/DH(2012)36

[32] The 2016 EU Justice Scoreboard, available at URL=http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf. Accessed March 15, 2017.

duction of timeframes in proceedings or introducing active age monitoring and backlog reduction systems.[33]Some countries as the case was in the Netherlands, have introduced additional programmes to reduce the excessive case backlog and provided instruments that will, in addition to ensuring that those whose right to a trial within reasonable time is violated have access to an effective remedy, also steer the judges towards working more efficiently and with a view to respecting the standards set by the ECtHR. After all, as indicated above, the domestic judicial systems are instrumental in ensuring that the rights set out in the ECHR are indeed exercised and duly protected.

3. PROTECTION OF THE RIGHT TO A PUBLIC HEARING WITHIN REASONABLE TIME IN THE CONTEXT OF ARTICLE 47 OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

The right to a hearing within reasonable time is one of the general principles of EU law – it is enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights, but also draws inspiration from the ECHR and its interpretative case law.[34] The way in which the EU interprets and implements the right to a public hearing within reasonable time is specifically important given Serbia's path towards EU accession and in particular the negotiation of Chapter 23.[35]

The Court of Justice and the General Court have developed jurisprudence on this issue, especially in the field of competition law. As Advocate General Mengozzi pointed out, "the observance of a reasonable time has been seen by the Community judicature above all as a test for establishing a possible breach of certain general principles of community law such as...protection of legitimate expectations, the principle of legal certainty, protection of the rights of defence, as well as the right to due process."[36] Moreover, he claimed that this right imposes on institutions a time limit for exercising the powers vested in them.

In landmark *Baustahlgewebe* case[37] the Court of Justice of the EU (hereafter: CJEU) recognized the violation of that right by the Court of First instance. More

[33] *Ibid.*, p. 32

[34] Borraccetti M., *Fair Trial, Due Process and Rights of Defence in the EU Legal Order*,The EU Charter of Fundamental Rights: From Declaration to Binding Instrument,p. 102.

[35] On judicial inefficiency and slowness as an obstacle to EU accession see Uzelac, A, *Vladavina prava i pravosudni sustav: Sporost pravosuđa kao prepreka pridruživanju*, Pridruživanje Hrvatske Europskoj Uniji, Izazovi institucionalnih prilagodbi, Drugi svezak, Institut za javne financijeZaklada Friedrich Ebert,Zagreb, 2004. pp. 99-123.

[36] Opinion of Advocate General Mengozzi, Case C-523/04 *Commission v the Netherlands*, pars. 57-60

[37] Case C-185/95 *Baustahlgewebe GmbH v Commission of the European Communities* [1998], ECR I-8417, par. 29

importantly, in this case the CJEU, by analogy with the ECtHR judgments in Erkner and Kemmache judgments[38] declared that the reasonableness of the time of the trial must be appraised in the light of circumstances that are specific to each case, the complexity of the case and the conduct of the applicant and of the competent authorities. As in other human rights issues, the CJEU has drawn inspiration from various human rights instruments, most notably the ECHR, but also from the European Social Charter.[39] However, the ECHR was only an inspiration and the CJEU did not find itself bound by these interpretations.

However, concerning the issue of just satisfaction with regards to breaches of the right to trial within reasonable time, in landmark cases *Kendrion*[40], *Gascogne*[41] and *Gascogne Germany*[42] the CJEU opted to follow the solution already utilized in the *Der Grüne Punkt* judgment[43], where it had concluded that there had been an infringement of the right to trial within reasonable time, but had also required a separate action for damages to be lodged before the General Court. Firstly, the CJEU started its analysis regarding Article 47 of the CFR and the related principle of effective judicial protection. Referring to the ECtHR case *Kudla v. Poland*, the CJEU asserted that if a violation of the right to trial within reasonable time was breached, an effective remedy had to be available. However, contrary to what was considered to be an effective remedy in that case by the applicants – the setting aside of the judgment on the appeal – the CJEU found that it would not remedy the infringement.[44] However, the CJEU found that a claim for damages brought against the EU pursuant to Articles 268 and 340, paragraph 2 of the Treaty on Functioning of the European Union did constitute an effective remedy for sanctioning such a breech.[45] Moreover, the Court stated that such a claim may not be filed to the CJEU as a part of the appeal, but has to be made directly to the General Court.[46]

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[38] Application No. 9616/81, *Erkrenr Hofauer v. Austria*, Application Nos. 12325/86 and 14992/89 *Kemacche v. France*

[39] Lawson R., "*International and European Human Rights Instruments*", Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency (Essays in European Law) (Philip Alston, Olivier De Schutter, eds.), Hart Publishing, 2005, p. 233

[40] C 50/12 *P Kendrion v Commission* [2013] EU:C:2013:771, (judgment of 26 November 2013)

[41] Case C 58/12 P *Groupe Gascogne v Commission* [2013]EU:C:2013:770, (judgment of 26 November 2013)

[42] Case C 40/12 P, *Gascogne Sack Deutschland v Commission* [2013]EU:C:2013:768, (judgment of 26 November 2013)

[43] Case C 385/07 P *Der Grüne Punkt – Duales System Deutschland v Commission* [2009] ECR I -6155, par. 190-196

[44] *Op. cit.* note 40, par.88

[45] *Ibid.,* par. 93

[46] *Ibid.,* par. 95

When it comes to the relationship between the protection of the right to trial within reasonable time in the ECHR and the Charter, in its case *Europese Gemeenschap v Otis NV and others*,[47] the CJEU stated that Article 47 of the Charter secures in the EU law the protection afforded by Article 6(1) of the ECHR and that was therefore necessary to refer only to Article 47. Clearlz, the CJEU will go on to set its own standards regarding the interpretation of the standard of reasonable time as protected by the Charter and the notion of effective remedies for protecting that right and resort to the already existing remedies in cases of breach of that right.[48]

However, in some cases, this remedy also means that the party whose right to hearing within reasonable time has been violated by the General Court would have to seek judicial protection and just compensation before that same court. Moreover, the General Court would have to ascertain that there was a causal link between the excessive length and the harm. Despite the general suspicion regarding the lack of impartiality in such a solution (there is no guarantee that a different composition of the General Court will decide in the action on damages), the instrument itself is not particularly different from other effective remedy instruments that have been put in place for violation of the same right, as guaranteed by the ECHR, in national legal systems. Consequently – it suffers from the same drawbacks; its resolution seeks additional time, it creates more work for the court (which is already heavily burdened with cases), and just compensation is reduced to pecuniary compensation. Interestingly, the Court was very firm in its position that there was no need for creating additional instruments to ensure an effective remedy for breaches of this provision of the Charter. Rather, the Court decided to rely on the existing remedy system, which is a practice rather contrary to the one taken by national systems after the *Kudla v. Poland* judgment.

For a country on its path to EU accession, such as Serbia, this means that, before the closing of Chapter 23 and becoming a full EU member, it must ensure that the observance of the standard of trial within reasonable time is fully internalized in its judicial system. Serbia will have to ensure that national judicial remedies for breach of this standard are just an auxiliary measure to ensure that a case is tried within reasonable time rather being the core measure for ensuring this right.

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47 Case C-199/11*Europese Gemeenschap v Otis and Other* [2012]EU:C:2012:684 (judgment of 6 November 2012)

48 More on the relationship between the European Court of Justice and the ECtHR see Coric Eric, V.,*Odnos Evropskog suda pravde i Evropskog suda za ljudska prava*, doctoral thesis, Law Faculty, Belgrade University, 2013.When it comes to the issue of just satisfaction, the approaches of the CJEU and the ECtHR are also somewhat divergent – for more see Ćoric V, Kneževic Bojović, A, Vukadinović, S. *Odštetni zahtevi pred evropskim nadnacionalnim sudovima*, Naknada štete i osiguranje – Savremeni izazovi, XIX Međunarodni naučni skup, Udruženje za odštetno pravo, Institut za uporedno pravo i Pravosudna akademija, 2016, p. 167-182

4. THE RIGHT TO A FAIR TRIAL IN THE SERBIAN LAW

Serbia has taken a number of steps to ensure that cases are tried within reasonable time. These include, inter alia, the setting of the timeframe for taking of procedural actions in the Civil Procedure Act,[49] introducing the right to trial within reasonable time as a principle in the Criminal Procedure Code,[50] and the adoption the National Backlog Reduction Programme.[51] In 2015, Serbia has adopted a separate statute introducing a new effective legal remedy for breaches of the right to trial within reasonable time, in line with comparative tendencies, mainly focusing on the fulfilment of its obligations related to the implementation of the ECHR.[52]

The right to a fair trial is guaranteed by the Constitution of the Republic of Serbia, which prescribes that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal, in the determination of their rights and obligations."[53]The Constitution established the Constitutional Court[54]and introduced constitutional appeal that "can be filed against individual acts or actions of state institutions in charge of public authorities, which breach or deny human and minority rights and the freedoms guaranteed by the Constitution, provided that other legal remedies for their protection are either exhausted or unavailable".[55]In the *Vinčić and Others vs. Serbia*(44698/06 et al.)[56]ECtHR maintained that a constitutional appeal is generally considered effective for all applications submitted after August 7, 2008, when the first meritorious decision on

49 Articles 10, 303 and 308 of the Serbian Civil Procedure Act, Official Gazette No. 72/2011, 49/2013-decision of the Constitutional Court, 74/2013- decision of the Constitutional Court and 55/2014.

50 Article 14 of the Criminal Procedure Code Official Gazette No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

51 The latest Programme for the 2016- 2020 period was adopted on August 10, 2016, available at URL=http://www.vk.sud.rs. Accessed 10 February 2017.

52 Even though a remedy did exist in the Civil Procedure Act as will be explained below.

53 Article 32 of the Constitution.

54 Article 166 of the Constitution which prescribes that the Constitutional Court is an "autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms", whose "decisions are final, enforceable and generally binding".

55 Article 170 of the Constitution. The same is envisaged by Article 82 of the Law on the Constitutional Court (Official Gazette of the Republic of Serbia, No. 109/2007, 99/2011, 18/2013 – a decision by the Constitutional Court and 40/2015 – other law).

56 The European Court of Human Rights passed a verdict on Dec. 1, 2009 concerning thirty one applications against the Republic of Serbia, Nos.: 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, filed because of the breach of the right to a fair trial (Article 6 Par. 1 of the Convention) in domestic court proceedings-labor disputes.

a constitutional appeal passed by the Serbian Constitutional Court was published in the Official Gazette of the Republic of Serbia.[57]Given the number of constitutional appeals submitted to the Constitutional Court, as well as the duration of the proceedings before this court, it was questionable whether a constitutional appeal complies with the criteria established in the practice of the ECtHR in terms of urgency and speeding up of proceedings.[58]In order to resolve this dilemma, the Law on Court Organization introduced new provisions,[59]which brought a new means of legal protection – a request to protect the right to trial within a reasonable time.[60]

4.1. The Law on the Protection of the Right to Trial within a Reasonable Time

The Law on the Protection of the Right to Trial within a Reasonable Time[61] (hereafter: the Law) was passed on May 7, 2015. However, the provisions of the Law on Court Organization apply to the proceedings for the protection of the right to trial within reasonable time initiated before this Law entered into force, and those proceedings are continued in line with the Law on Court Organization. According to the new law, the right to trial within reasonable time, in addition to litigation and criminal proceedings also covers enforcement proceedings and non-contentious proceedings.[62]This law does not cover administrative proceedings, which, according to the standards of the ECtHR, should be also be covered by the right protected under Article 6 – namely, ECtHR case law established that Article 6 of the ECHR also covers disputes between private persons and state bodies if administrative proceedings affect the realization of property rights.[63]Contrary to that, the Supreme Court of Cassation, at the 5th session of the Department for

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57 URL=http://www.zastupnik.mpravde.gov.rs/cr/articles/presude/u-odnosu-na-rs/vincic-i-drugi-protiv-srbije-44698-06-i-dr..html. Accessed 29 July 2015.

58 It should be noted that Article 8 of the Law on Court Organization (Official Gazette of the Republic of Serbia,No. 116/2008, 104/2009, 101/2010, 31/2011- and other law, 78/2011, 101/2013, 106/2015, 40/2015 other law and 13/2016) prescribes that "a party and other participants in court proceedings are entitled to appeal against the work of the court when they believe proceedings are delayed, irregular or under any illicit influence on their course and outcome".

59 Articles 8a, 8b i 8v, but all of the provisions ceased to be valid when the Law on the Protection of the Right to Trial within a Reasonable Time entered into force on Jan. 1, 2016, URL=http://www.vk.sud.rs. Accessed 8 November 2016.

60 Milutinović, Lj, *Facing the implementation of the Law on the Protection of the Right to Trial within a Reasonable Time in court proceedings*, Supreme Court of Cassation of the Republic of Serbia, the Council of Europe, 2015, p. 8.

61 The Law on the Protection of the Right to Trial within a Reasonable Time, Official Gazette of the Republic of Serbia, No.40/2015.

62 Article 2 of the Law

63 Milutinović, Lj., *op.cit.* note 60, pp. 13-14.

the Protection of the Right to Trial within a Reasonable Time, held on Sept. 15, 2014, adopted a legal position that the beginning of a reasonable time starts when the Administrative Court receives an application. Consequently, the duration of the proceedings before administrative bodies does not count in when reasonable time is assessed.

The holders of the right to trial within a reasonable time are all parties in court proceedings, including enforcement proceedings and the participants in non-contentious proceedings, as well as injured parties in criminal proceedings, private plaintiffs and injured persons as plaintiffs, provided that they filed a property-legal claim. According to the law, a public prosecutor as a party in criminal proceedings is not entitled to protection against the breach of the right to trial within a reasonable time[64]. Assessment criteria for the duration of trial within a reasonable time as prescribed by the Law[65]and interpreted by the Supreme Court of Cassationare in line with the interpretation of the ECtHR[66]in relation to the application of Article 6 of the ECHR.

Legal remedies for the protection of the right to trial within a reasonable time envisaged by the Law are the following:

1. a complaint to speed up the proceedings
2. an appeal, and
3. a just satisfaction claim.

A complaint and an appeal can be filed by the end of the proceedings. A decision which acknowledges or rejects an appeal or complaint must be thoroughly explained, and it must not affect the factual or legal issues that were the subject of the trial or investigation.[67]

4.1.1. *Complaint*

According to the Law, a complaint is filed to the court that adjudicates upon the proceedings, if the right to trial within a reasonable time was breached by the public prosecutor, considering that it is the court chairman, not the public prosecutor, who decides if there was a breach. If the breach was committed during court proceedings, the complaint is filed to the court in charge of the proceedings.[68]A

[64] Article 2 of the Law on the Protection of the Right to Trial within a Reasonable time.

[65] Article 4 of the Law

[66] Poznić, B, Rakić-Vodinelić, V., *op. cit.* note 1, pp. 175-176.

[67] Article 3 and Article 5 of the Law on the Protection of the Right to Trial within a Reasonable Time.

[68] Milutinović, Lj., *op.cit.* note 60, p. 16.

decision about a complaint must be made within two months after its filing.[69]A complaint can be rejected or dismissed without an examination procedure if it is obviously ungrounded, considering the duration of the proceedings stated in the complaint.[70]The court chairman dismisses or acknowledges the complaint and establishes if the breach of the right to trial within a reasonable time occurred, a decision against which the judge and the public prosecutor cannot appeal. In the decision that acknowledges a complaint and establishes a breach of the right to trial within a reasonable time, the court chairman points out the judge or public prosecutor the reasons of the breach of the party's right and orders the judge to conduct procedural actions which effectively speed up the proceedings. The immediate higher public prosecutor has maximum 8 days since the reception of the decision to issue a binding instruction that orders the public prosecutor to conduct procedural actions to effectively speed up the proceedings.[71]

4.1.2. *Appeal*

A party is entitled to an appeal if their complaint was dismissed, or if the court chairman does not pass a decision within two months since the filing of the complaint. The appeal can also be filed if the complaint was acknowledged, but the immediate higher public prosecutor failed to issue a binding instruction within 8 days after the court chairman's decision was received. An appeal can also be filed if the court chairman or immediate higher public prosecutor failed to order the judge or public prosecutor to conduct procedural actions which effectively speed up the proceedings, or if the judge or public prosecutor failed to conduct the requested procedural actions within a given deadline.[72]The appeal is filed to the court chairman who adjudicated on the complaint, and if in the proceedings in question a party claims to have suffered a breach of its right to trial within a reasonable time before the Supreme Court of Cassation, a three-member chamber of the Supreme Court of Cassation conducts and decides on the appeal proceedings.[73]According to Article 17 of the Law, no appeal is possible against a decision dismissing an appeal.[74]A decision may dismiss an appeal without an examination procedure if it

69 Oral hearing is not held, and the Law on Non-Contentious Proceedings is implemented on other matters (Article 7 of the Law).

70 The very examination procedure begins when the court chairman requests a judge or a trial chamber, or the public prosecutor to deliver a report within 15 days or as soon as possible (if a special law prescribes urgency for such proceedings).

71 Articles7-12 of the Law).

72 Article 14 of the Law.

73 Article 16 of the Law.

74 An appeal is not filed to the response and an oral hearing is not held. For other matters, the provisions of the Law on Non-Contentious Proceedings are applied.

is obviously ungrounded in terms of the proceedings duration stated in the appeal. If an appeal is not dismissed or rejected for the given reason, an examination procedure is conducted.[75] No appeal can be filed against the decision of the chairman of an immediate higher court on an appeal.[76]

4.1.3. *Just satisfaction claim*

The Law envisages the following types of just satisfaction:

- the right to monetary indemnification for non-property damage suffered by a party through a breach of their right to trial within a reasonable time;
- the right to the announcement of a written statement by the State Office of the Ombudsman which establishes that the party suffered a breach of their right to trial within a reasonable time; and
- the right to the announcement of a verdict which acknowledges the breach of the party's right to trial within a reasonable time.

A party whose complaint was adopted and who did not file an appeal, a party whose appeal was dismissed and the first-instance decision about the acknowledgement of the complaint confirmed, and a party whose appeal was acknowledged are entitled to just satisfaction.The Republic of Serbia has an objective responsibility for non-property damage caused by a breach of the right to trial within a reasonable time.[77]

The law also envisages a possible attempt of settlement with the Office of the Ombudsman and the possibility to submit a settlement proposal. If an agreement is reached, the Office of the Ombudsman concludes an out-of-court settlement with the party, which represents an executive document.[78] During the attempt of settlement and after concluding the settlement, the party has no right to initiate an action against the Republic of Serbia for monetary indemnification.[79]A party may also initiate an action for the indemnity of property damage caused by a breach of the right to trial within a reasonable time against the Republic of Serbia within one year since it acquired the right to just satisfaction. The Republic of Serbia has

[75] Article 18 of the Law.

[76] Article 21 of the Law.

[77] Articles 22-23 of the Law.

[78] Article 24 of the Law.

[79] A party may initiate an action against the Republic of Serbia within one year since the day it acquired the right to righteous redress. The proceedings for such action are based on the provisions of the Civil Procedure Law. The monetary indemnification may amount between EUR300 and EUR3000 per case in RSD countervalue .

an objective responsibility for such damage and monetary indemnification and a remuneration for property damage are paid by the court or the public prosecutor's office which breached the right to trial within a reasonable time.[80] The concluded settlement has the power of an executive document.

4.2. STATISTICAL DATA ABOUT THE NUMBER OF VERDICTS REGARDING BREACHES OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME BEFORE NATIONAL COURTS AND THE ECTHR FROM 2015 TO 2017

According to the Serbian Constitutional Court's data, 543 decisions were passed in 2015, which acknowledged constitutional appeals about a breach of the right to trial within a reasonable time in finalized proceedings.[81]Even though in most cases a breach of the right to a fair trial was established, the number of such breaches was significantly less in 2015 than in 2014 (a total of 544, which is 1,415 less compared to the previous year). The situation is the same with the reduced number of breaches of the right to trial within a reasonable time (in 2015 the court investigated such breaches only in relation to finalized proceedings).[82]

In 2015, the Department for Trial within a Reasonable Time of the Supreme Court of Serbia[83]received 4,114 cases, compared to the 1,117 received in 2014. 3,400cases were resolved, while in 2014, 543 cases were resolved. Of that number, in 2015. 3,024 cases were resolved meritoriously, compared to 392 in 2014, with 1,297 cases remaining unresolved in 2015, compared to 583 from 2014.[84]Therefore, the percentage of resolved cases in 2015 was 72.39%, of which number 88.94% cases were resolved meritoriously.[85]

According to the Council of Europe's data, from January 1, 2016 to January 11, 2017 five verdicts were passed against the Republic of Serbia due to a breach of the right to trial within a reasonable time. In the past 5 years (from Jan 11, 2012

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80 Articles 31-31 of the Law.

81 Constitutional Court of the Republic of Serbia, Review of the Constitutional Court's Work in 2015, URL=http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Преглед_2015.pdf. Accessed 9 January 2017, p. 11.

82 *Ibid*, p. 12.

83 Supreme Court of Cassation of the Republic of Serbia, Analysis of the Work of Courts of General and Special Jurisdiction for 2015, URL=http://www.vk.sud.rs/sites/default/files/attachments/Analiza rada svih sudova u Republici Srbiji za 2015. godinu.pdf, p 3. Accessed January 10, 2017.

84 *Ibid*., p. 14.

85 There is no available information for 2016 and 2017 yet.

and Jan. 11, 2017) a total of 27 verdicts were passed due to breaches of the right to trial within a reasonable time.[86]

> While there seems to be some improvement in the number of established breaches of the right to trial within reasonable time, the length of certain proceedings in Serbian courts has not been reduced. Quite to the contrary, in the Doing Business report, the ranking of Serbia related to enforcement of contracts has been reduced compared to its' 2016 ranking[87]with a staggering 635 days needed for enforcement of a commercial contract from the time the action is filed to payment, which includes 495 days for trial and judgment. The Supreme Court of Cassation reports do not measure the average length of proceedings, but it is indicative that according to this court's data for 2015, that the workload of judges sitting in courts of general jurisdiction consisted, on average, of 49.11% of old cases, where as much as 875099 cases were between 5 and 10 years old.[88] In case of courts of specialized jurisdiction in Serbia (Administrative court, commercial courts), this percentage was much lower – 18.49 on average, where the majority of old cases were 2-5 years old.[89]

5. CONCLUDING REMARKS

It seems that despite the efforts made over the last decade in various national systems to ensure that breaches of the right to trial within reasonable time are duly sanctioned and that this right is duly observed, there is no universal answer or model on how to best proceed with this exercise. Some models have in fact created additional workload for courts while only marginally contributing to the overall reduction of the instances of breach of this right – regardless of whether such breaches are registered before national courts or the European Court of Human Rights. The approach taken by the European Union, while strongly re-affirming the right to trial within reasonable time, did not however provide a practical mechanism that could be easily replicated on national level. The EU

[86] URL=http://www.hudoc.echr.coe.int. Accessed 11 January 2017.

[87] URL=http://www.doingbusiness.org/data/exploreeconomies/serbia#enforcing-contracts shows that Serbia has gone down by 8 places in 2017, so now it ranks 61st in relation to this indicator compared to the 53rd place it held in 2016. Accessed March 15, 2017.

[88] Statistika o radu sudova opšte nadležnosti u Republici Srbiji u 2015. godini, Vrhovni kasacioni sud, Beograd, 2016, p. 9. URL=http://www.vk.sud.rs/sr-lat/godi%C5%A1nji-izve%C5%A1taj-o-radu-sudova. Accessed March 15, 2017.

[89] Statistika o radu sudova posebne nadležnosti u Republici Srbiji u 2015. godini, Vrhovni kasacioni sud, Beograd, 2016, p. 8. URL=http://www.vk.sud.rs/sr-lat/godi%C5%A1nji-izve%C5%A1taj-o-radu-sudova. Accessed March 15, 2017.

seems to rely on the integrity of the judges sitting at its court rather than create additional mechanisms as outside incentives for its judges to observe their duties. In that respect, the jurisprudence of the Court of Justice of the European Union has not done much in changing the procedural law in the EU member states or accession countries

However, this approach may still be sending a strong message – one of the need to instill the core values of both the European Convention on Human Rights and the European Charter of Fundamental Rights into the actions of each and every judge acting in the European justice area. This is not just an issue of knowledge of law, although informed and trained judges are more likely to abide by these rules. This is also an issue of attitude, and an issue of integrity. And while the existence of effective remedies can serve a very straightforward purpose – compensating the party that sustained harm due to excessive length of proceedings - the need to have judges who observe this rule in their everyday work remains as strong as ever. As Lord Heward CJ stated in a seminal English case on impartiality of judges (R V. Sussex), "not only must justice be done, it must also be seen to be done". The core problem with the observance of this value will not be remedied through compensation alone – all such efforts must be coupled with those aimed at increasing knowledge and attitudes towards the observance of this rule.

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Topic 6

EU administrative and labour law procedures

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EUROPEAN PARLIAMENT'S CONTROL OF THE EUROPEAN COMMISSION – PROCEDURAL ASPECTS

ABSTRACT

The purpose of this work is to give legal analysis of the procedures for the political control of the European Commission by the European Parliament. The author has used the legal method for the analysis of legal acts which introduce in the EU political system the tools of political control which have been known in different systems of government based on the separation of powers. The use of comparative method has to facilitate the answer to the question whether the EU lawmaker could and should use the instruments of the political control which have been prescribed in the national legal systems.

Well-known instruments of the political control, such as parliamentary questions, inquiry, and the vote of no confidence, have been prescribed in different acts. However, legally prescribed conditions for the use of these instruments are usually quite strict. It seems that they exist only as legal and political possibility but they don't have any practical value. Therefore, it could be said that the political control of the Commission by the Parliament is more an idea than reality.

Key words: *European Union, European Parliament, European Commission, Political Control, Parliamentary Questions, Committees of Inquiry, Vote of No Confidence*

1. INTRODUCTION

The European Parliament has the right to control the European Commission. This control, which is political in nature, has different aspects, and includes different procedures. The purpose of this work is to analyze these procedures, and to answer the question what is the democratic capacity of this control.

The control ranges from the right of the MEPs to ask questions, and to make inquiries, to the duty of the Commission to submit reports to the European Parliament, and finally the right of the Parliament to vote no confidence in the Commission.

The purpose of this work is to analyze legal provisions which enable the Parliament to control the work of the Commission, to explain procedural aspects of

the political control, and to show its strengths and weaknesses. The issue of the political control of the Commission by the Parliament can be observed from different angles. The legal and the political angles are the most important, and they are tightly interdependent. Although there can be some unwritten conventions on the political control, it is mostly prescribed in different legal acts. Our intention is to analyze legal acts which are relevant at the level of the European Union. This is important since the legal provisions constrain the activities of both institutions, and set the legal basis for the political control. Of course, the legal framework is not a value in itself since it depends on the interests and political attitudes of the political actors in the European Union. Therefore, the main scientific method which has to be implemented in this work is the legal method. It is going to be complemented with the comparative method since our intention is to compare the legal acts of the European Union with the legal acts of its Member States. This is justified for two reasons. First, since the Member States have established or joined the European Union, it is natural that the EU law took over some principles of the relationship between the legislative and the executive of these states. Second, since the legal provisions in the Member States are not the same in all aspects, it is useful to analyze them in order to find those with the best possible democratic capacity for the European Union institutions.

Of course, it is not enough to know the legal framework since the practice often deviates from the legal provisions. It is important to explore how the institutions of the Union really function. Therefore, the political method has to be used. Since this work is based primarily on the legal analysis, the political method is going to be used only as an auxiliary method.

The political system of the European Union is based on the principle of the separation of powers. It is one of the basic notions of the constitutional as well as political systems in all the states of the European Union. Therefore, it has to be one of the pillars of the European Union's political system. Of course, there is much space and reasons for the criticism of the very idea of the separation of powers. However, the purpose of this work is not to criticize the very idea but to explore the main aspects of its fulfillment regarding the relationship between the European Parliament and the European Commission.

2. LEGAL BASIS

The legal basis for the European Parliament's control over the executive is laid down by the treaties establishing the European Union. Article 17 of the Lisbon Treaty prescribes the political control of the European Parliament over the Commission. However, the procedural aspects of this control are also very important

since they influence the content and the possibility of the fulfillment of the principle of the political control. Namely, the provisions on the procedure don't just give the answer to the question about the steps that have to be taken in order to realize the political control. They have a substantial importance since they influence to some extent the very relationship between two institutions.

The Lisbon Treaty follows the tradition of the European constitutionalism since the European constitutions contain only principles on the relationship between legislature and executive. However, much of the provisions, including those on procedural aspects of the political control, by their very nature can not be contained in the constitutions or the treaties.

Some other means of the political control have been prescribed too. For example, Article 226 of the Treaty on the Functioning of the European Union (ex Article 193 of the Treaty on the European Community) prescribes the establishment of the temporary committees of inquiry, on the request of one quarter of the members of the Parliament. Article 230 (ex Article 197 of the TEC) contains provisions on the oral or written questions put to the Commission by the members of the Parliament. The provisions on the motion of censure are contained in the article 234 (ex Article 101 of the TEC), as well as in the article 17 of the Treaty on the European Union. First, the article 234 prescribes that the European Parliament can not vote on the confidence before three days expire between the submitting the motion and the voting itself. Second, for the resignation of the Commission to happen, two-third majority of the votes cast, including the majority of the component members of the Parliament is necessary. The Treaty also regulates what is going to happen in this case: the Commission will be obliged to resign, while it will continue to operate, dealing only with current tasks until the election of the new Commission. The Treaty also regulates that the term of office of the new members of the Commission shall expire on the date on which the term of office of the members of the Commission obliged to resign as a body would have expired.

It seems that the provisions in the treaties are relatively detailed, at least concerning some of the means of the political control. This is the case with the provisions which regulate the vote of no confidence in the Commission, and, to lesser extent, with the provisions on the committees of inquiry. On the other hand, some of the instruments for the political control, such as the case with the parliamentary questions, have just been briefly regulated. These provisions have a constitutional character. Therefore, it is necessary for them to be included into the treaties or at least the Parliament's Rules of Procedure, which have a character of the constitution in material sense.

The Rules of Procedure of the European Parliament are very important legal source of the political control of the Commission. In their Title V („Relations with other Bodies"), Article 119 is dedicated to the motion of censure on the Commission. However, it is only one of the aspects of the relationship between the Parliament and the Commission since the political control means much more than mere motion of censure. It is only the final proof that there is no political confidence of the Parliament regarding the Commission. Before it happens, there are some instruments and provisions which enable Parliament to control the work of the Commission. These instruments also have to be enacted by legal acts, such as the Rules of Procedure. Chapter 3 of the same title of the Rules is dedicated to the parliamentary questions, an institute which is well-known in the parliamentary systems. The Annex II of the Rules contains criteria for questions and interpellations for written answers.

As it could be seen, the legal basis for the political control of the Parliament over the Commission is well developed. It includes the usual means of the control. Now, it is important to understand the content of these provisions, particularly since it is not possible to claim that the relationship between the institutions of the European Union is based on the principles of the parliamentary system, although there are some of its features.

3. THE RIGHT ON INFORMATION AS A MEANS OF THE POLITICAL CONTROL

The right on information of the Parliament is the first degree of the political control.[1] First of all, the Parliament has to have the information on the work of the Commission in order to control it and formulate attitudes on its work. Second, the right on information of the Parliament can lead to the political control of the Commission directly or implicitly.[2] Namely, any question of a MEP implicitly can have negative

[1] „Most studies of PQs have tended to focus on the issue of accountability and control. A series of country specific studies indicate that PQs are somewhat useful for holding the government to account." – Martin, S., *Parliamentary Question, the Behaviour of Legislators, and the Function of Legislatures: An Introduction*, Journal of Legislative Studies, Vol. 17, No. 3, 2011, 259–270, p. 261; „Parliament had a number of powers described as 'supervisory' in the Treaty consisting of the right to question the Commission (orally or in writing), to debate its activities and, ultimately, to adopt a motion of censure on it." – Corbett, R., *The European Parliament's Role in Closer EU Intgeration*, Palgrave Macmillan, Basingstoke and New York, 2001, p. 124; „A parliamentary question is, by definition, a request for information. Regular questioning can by used by parliament to hold the government to account." – Yamamoto, H., *Tools for Parliamentary Oversight, A Comparative Study of 88 National Parliaments*, Inter-Parliamentary Union, Geneva, 2007, p. 49.

[2] Some authors argue that this is particularly important for the national opposition parties. – Proksch, S.-O., Slapin, J.B., *Parliamentary questions and oversight in the European Union*, European Journal of Political Research, 50/2010, 53–79, p. 54.

political consequences for the Commission,[3] and can be used as a trigger for further investigation of its policies although the question itself can not have so sharp negative political consequences such as the vote of no confidence.[4] The parliamentary questions are particularly important for the national opposition parties, since it is one of few means which they have at their disposal for the control of the Commission, or, to be more precise, for the access to information. The parliamentary questions are even more important if we take into consideration another political factor – political groups which are active in the European Parliament. Namely, the parliamentary questions give the freedom to the MEPs to communicate with the Commission without previously getting explicit permission from their political group.

The Rules of Procedures differs between the questions for oral answers with debate, and the questions for written answers.[5] According to the Rule 128 of the Rules of Procedure, "Questions may be put to the Council, the Commission or the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy by a committee, a political group or Members reaching at least the low threshold with a request that they be placed on the agenda of Parliament". Comparative analysis show that it is usual for the parliamentary questions to be posed by any member of the parliament even when he/she doesn't have support for such an activity from any other member of the parliament. It is quite natural since all members of the parliaments have the right to be informed about the activities of the executive, which is necessary prerequisite for successful fulfillment of their duties.

The questions have to be submitted in writing to the President. He/she will immediately refer them to the Conference of Presidents,[6] who will decide whether the question will be placed on the agenda of the Parliament. If this doesn't happen during three months after the question has been submitted, it will lapse. It seems that the right to ask the question is limited, and that it depends to some extent on the will of the Conference of Presidents. However, it is important for the MEPs to have unlimited right to submit parliamentary questions. Maybe this could create

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3 „It is this instrument that gives MEPs and their parties the most direct access to oversight." – *Ibid.*, p. 56.

4 The purpose of the parliamentary questions can be different, as we shall see later. Theoretically speaking, the authors define 14 different purposes of the parliamentary questions. – Russo, F., Wiberg, M., *Parliamentary Questioning in 17 European Parliaments: Some Steps Toward Comparison*, The Journal of Legislative Studies Vol. 16, No. 2, June 2010, 215–232, pp. 217–218.

5 In practice, there are four times more written than oral questions. – Dann, Ph., *Looking through the federal lens: The Semi-parliamentary Democracy of the EU*, Jean Monnet Working Paper 5/02, New York, 2002, p. 30.

6 It is composed of the presidents of the political groups in the Parliament.

a situation that too many questions would be submitted which would influence the efficacy of the Parliament's proceedings. However, it is "an accident" of the parliamentary systems which has to be accepted as something unavoidable.

Questions must be referred to the addressee at least a week before the sitting of the Parliament begins, in order for the Commission to have enough time to prepare its answer. The procedure can be ended with voting. As some authors point out, the voting on the parliamentary questions is possible in some parliaments. Therefore, it is not unusual that the Rules of Procedure of the European Parliament prescribes the possibility of voting on the oral questions.[7] If one takes into consideration the fact that the debate is also a part of the procedure, the conclusion is that this is relatively powerful means of control. It is interesting that small number of European parliament's contain this possibility in the respective rules of procedure.[8]

The Rules of Procedure also contains the provisions on the question time. The MEPs have the chance to ask the Commissioners questions about particular horizontal theme(s) which are decided by the Conference of Presidents one month before the session. The number of the Commissioners who are going to be present at the session is limited to two, or three, and they are in charge of the themes which are at the agenda. The problem with the question time is threefold. First, the MEPs can't ask all kind of questions since they are limited by the decision of the Conference of Presidents. This could be observed as negative solution since the leaders of the political groups in the Parliament still have the greatest influence in the process of questioning the Commission for they decide about the issues which the Commission can be questioned about. The limitation comes also from the fact that two or three Commissioners can't be competent for answering all the questions. Of course, the reverse solution would be more in accordance with the principle of democratic control – all the Commissioners would attend the sessions of the Parliament and would be obliged to ask the questions posed to them.

The national parliaments regulate the issue of the question time in different ways. In some countries, the MPs can ask the questions at any session of a parliament,[9] while in others, they can do it at the end of each month,[10] or on particular days.[11]

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7 Here, the Rule 123 (2) to (8) shall be applied *mutatis mutandis*.

8 Russo, F., Wiberg, M., *op. cit.*, note 3, p. 222.

9 See Article 132 of the Rules of Procedure of the Croatian Parliament; Article 258 of the Rules of Procedure of the National Assembly of the Republika Srpska.

10 In Serbia, for example. – See: Petrov, V., *Parlamentarno pravo* (*Parliamentary Law*), Pravni fakultet Univerziteta u Beogradu, Beograd, 2010, p. 154.

11 The members of the Bundestag can put questions to the Federal Government on Wednesdays in weeks of sittings (Rules of Procedure of the Bundestag, Annex 7, see also Annex 4 I (1)).

Another procedural aspect of the question time is quite usual: it is prescribed that a MEP has the right to ask the question, and to pose the additional question after the answer of a Commissioner, while the latter has the right to clarify his/her answer, after a MEP asks his/her additional question.

The written questions are much more appropriate, since they enable MEPs to ask questions at any time, and to any Commissioner. The Article 130 of the Rules of Procedure prescribes that each MEP has the right to submit written question to the Commission. An MEP has the right to get the answer in written form. The question has to be submitted to the President of the Parliament who will decide on its permissibility. Each MEP has the right to submit up to 20 questions during the three months period. The answer has to be submitted for three or six weeks, depending on the character of the question (priority or non-priority question). In our opinion, this period is too long, and one could fear that the very submitting of the question could lose its purpose. This is particularly so if one takes into account the fact than in most national parliaments this length of time is considerably shorter (from six days to a month).

As it could be seen, there are no spontaneous questions. In our opinion, they should be prescribed, since in that way the MEPs would get more efficient way to receive information and to control the Commission. Sometimes the MEPs need immediate information, or they want to immediately point out the issues which are in the competence of the Commission.[12] It is true that written questions are principally more appropriate. They enable a Commissioner to give more detailed information, since he/she often can't give detailed answer immediately. However, even in the case of spontaneous questions, it would be possible for a Commissioner to give just a brief answer, with the duty to submit detailed written or oral answer in precisely defined time framework.

There are two more instruments for information. These are minor interpellations for written answers (Rule 130a), and major interpellations for written answer with debate (Rule 130b). The first ones are based on the questions for written answer, which can be submitted by a committee, a political group, or at least five per cent of the members of the European Parliament. Using these questions, the abovementioned subjects can submit to the Commission questions on concretely defined issues. The addressee has to submit answer for two weeks, although this deadline could be prolonged if necessary after the consultation of the President with those who have submitted the question. It has to be stressed that the role of

[12] We agree with the authors who claim that spontaneous questions ar useful for those members of parliamet who want to stress some failures of the government or of some of its members. – Russo, F., Wiberg, M., *op. cit.*, note 3, p. 221.

the President in the case of this kind of questions is limited since he/she only has the right to assess whether these questions are generally in accordance with the Rules of Procedure.

The major interpellations for written answer with debate means that the same subjects as the abovementioned can submit the questions and that the debate on the answer is possible if requested by a committee, a political group, or at least five per cent of the component members of the Parliament. This kind of interpellation is similar to the interpellation which is known in the national parliaments. The difference is that the debate can't have as its consequence the vote of no confidence. Namely, the Rules of Procedure prescribes the possibility that the discussion on the interpellation finishes with the adoption of a resolution, since the Rule 123 can be used in this situation. However, the Rule 123 doesn't mention the possibility of the vote of no confidence.

It is a departure from the notion of parliamentarism, since the essence of the interpellation is not only that the members of a parliament get information but also to show their dissatisfaction with the government's work. This dissatisfaction can have as its eventual consequence the vote of no confidence. First of all, the interpellation means getting information about a problem of general interest, not about a concrete issue. Second, the interpellation means the possibility to discuss about the issue. Third, it means the possibility to influence the actions of a government directly.[13]

The parliamentary questions have been used extensively during past few decades.[14] The fact that parliamentary questions have been used more after the introduction of the direct elections of the Parliament,[15] leads to the conclusion that the MEPs use them as a means of political control, as well as a means for promotion of their political attitudes. If the parliamentary questions have this important political role and nature, the procedural aspect of their utilization has to be clearly prescribed. It has been argued that the MEPs who belong to the national opposition parties use them more often than the MEPs of the ruling parties.[16] It is quite understandable why it is the case. The members of national opposition parties don't have many possibilities to get information about the work of the Commission, since they

[13] Sánchez de Dios, M., Wiberg, M., *Questioning in European Parliaments*, Journal of Legislative Studies, Vol. 17, No 3, 2011, 354–367, p. 355, 364.

[14] For example, the number of written questions to the Commission rose from 1.647 in 179 to 5.327 in 2006, while the number of oral questions rose from 42 in 1979 to 87 in 2006. – Simić, J., *Evropski parlament akter u odlučivanju u Evropskoj uniji*, Službeni glasnik, Beograd, 2010, pp. 145–146.

[15] Corbett, R., *op. cit.* note 1, p. 124.

[16] Proksch, S.-O., Slapin, J.B., *op. cit.* note 1, p. 54.

don't govern in their respective national states. Without information, these MEPs can't participate in the work of the Parliament successfully. Therefore, parliamentary questions are real means of the control, as some authors point out regarding their meaning in the national parliaments.[17] The significance of the parliamentary questions, as a tool in the hand of the national opposition parties, is even bigger if one has in mind the way of the selection of the members of the Commission. They are proposed by the national governments, and then agreed by the President of the Commission.[18] The MEPs practically don't have an influence on their nomination. Therefore, it is very important for them to get a chance to submit questions to these Commissioners, since parliamentary questions can be the only means of control of the work of individual Commissioners, as well as of the entire Commission.

It is also interesting to stress that the euro-skeptical MEPs use parliamentary questions more often than other MEPs.[19] This, of course, doesn't' have anything with the procedures prescribed by the Rules of Procedure, since the right to submit parliamentary questions is equal for all MEPs. On the other side, it seems that the euro-skeptical MEPs use the parliamentary questions not only for the purpose of information or control but more as a means of promotion of their political position. This doesn't mean promotion their attitudes to the wide layers of citizens, but more in narrower circles of political elites. Namely, for the MEPs it is much harder to use the parliamentary questions as a means of their promotion in wider audience than it is the case for the national parliamentarians. Some questions have to be published, which is the case with the questions for written answer, which have to be published at the Internet page of the Parliament (Rule 130 (7)). It is the same with the minor interpellations for written answer (Rule 130a (2)), and major interpellations for written answer with debate (Rule 130b (5)). These rules have a positive role in a sense that they enable even ordinary citizens to be informed on particular issues in the competences of the Commission, as well as on the relationship between the Parliament and the Commission. However, it can't be expected that this would be really useful for the citizens since they will not find out more about the work of MEPs by simply following the Internet page of the Parliament.

The MEPs' actions depend mostly on their party affiliation and not on their nationality. They act more as representatives of their political parties, and European

[17] Sánchez de Dios, M., Wiberg, M., *op. cit.* note 11, p. 359.

[18] Hix, S., G. Noury, A., Roland, G., *Democratic Politics in the European Parliament*, Cambridge 2007, p. 17.

[19] Martin, S., *op. cit.* note 1, p. 261.

political groups.[20] This fact influences the character of the parliamentary questions as a tool for political control even more than they could be understood merely as a tool for getting information. Considering this fact, it is not surprising that the Commission decided to adopt new arrangements for handling with the questions.[21]

4. THE COMMITTEES ON INQUIRY

The European Parliament has the right to control various institutions through committees of inquiry.[22] This power of scrutiny[23] has been particularly important after the signing of the Treaty of the European Union.[24] The very Parliament considers the committees as exceptional instruments of political control.[25] The committees can be set up in order „to investigate alleged contraventions or maladministration in the implementation of Union law" (Rule 198 (1) of the Rules of Procedure).[26] First of all, this kind of activity can't be limited to the relationship of the Parliament and the Commission, although it includes it. Second, these committees are ad hoc bodies, which can be established if required by one-fourth of MEPs. Third, they can't be established for the discussion on the issues of general policy, but only about concrete issues, and only when there is a doubt on violation of the law.

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20 Hix, S., *Parliamentary Behavior with Two Principals: Preferences, Parties, and Voting in the European Parliament*, American Journal of Political Sciences, Vol. 46, No. 3/2002, 688–698, p. 689.

21 „The Commission at the same time decided on new arrangements for handling parliamentary questions (faster answers and the attribution of authorship to responsible Commissioners, which had not been the case in the past) (...)" – Corbett, R., *op. cit.* note 1, p. 83.

22 „While it set up commissions of inquiry between 1993 and 1999 to look into suspicions of maladministration and violation of community regulations (concerning the circulation of goods and the 'mad cow' epidemic), in 1999, in the face of suspicions of fraud, nepotism and maladministration involving members of the Santer Commission, the EP preferred to delegate its powers of review to a Committee of Independent Experts." – Pinelli, C., *The Powers of the European Parliament in the New Constitutional Treaty*, The International Spectator 3/2004, 83–96, p. 85.

23 „A parliamentary inquiry is the reflection of parliament's constitutional role in overseeing the government." – Yamamoto, H., *op. cit.* note 1, p. 39.

24 Sobiech, A., *The European Parliament and the European Commission: Institutional Changes*, Tilburg Foreign L. Rev. Vol. 8, No. 281, 1999-2000, 281–296, pp. 292–293.

25 See Preamble of the Proposal for the Regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry and repealing Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission.

26 „'Contraventions' in this sense mean violations of EU law, while 'maladministration' includes, inter alia, administrative irregularities, omissions, abuses of power, unfairness, malfunction or incompetence, discrimination, avoidable delays, refusal to provide information, and negligence." – Poptcheva, E.-M., *Parliament's investigative powers, Committes of inquiry and special committees*, European Parliamentary Research Service, 2015, p. 2.

The Parliament decides on the creation of a committee, on the proposal of the Conference of Presidents, after discussion on the reasons for its creation. In our opinion, this provision is not quite acceptable. First of all, a serious condition for the creation of a committee, namely relatively high number of MEPs who have to propose its creation, has been prescribed. This is a condition which most of the political groups in the Parliament can't fulfill if they act alone since they don't have strong enough caucus.[27] Therefore, if the Parliament didn't wish to allow to only one MEP to submit the motion for establishing of a committee,[28] it could at least allow it to political groups. It could be understood that this condition has been prescribed in order to prevent baseless proposals for inquiry. However, such strictness could cause the opposite effect, namely inability of most MEPs to use this means of control. Second, the Parliament has the right to decide if a committee has to be created. It seems that this Parliament's right would be justified if less number of MEPs would be given the right to propose the creation of a committee. In a situation when this right has to be exercised by relatively high number of MEPs, it is inappropriate that the Parliament has the right to decide on the initiative for creation of a committee, since parliamentary majority could use its dominance to prevent it. In some national legal systems, it is possible that a committee is created simply by the initiative of certain number of members of the parliament, without the approval of the parliament.[29] It is a good solution, since it enables parliamentary minority to use the inquiry as a means of control. It is in the nature of the inquiry to become a means of protection against the executive which could practically become unaccountable. Therefore, the solution in the EU law is not appropriate. On the other hand, the good thing is that the Conference of Presidents can't change the subject of the inquiry. If this could be the case, the

[27] At the moment, only two biggest political groups have sufficient number of MEPs to propose the creation of a committee. All other political groups have to find MEPs from other political groups in order to have enough MEPs who would have the right to make a proposal for the creation of a committee.

[28] As it has been noted, in most countries even a single MP may submit a motion to set up of a committee. – Yamamoto, H., *op. cit.* note 1, p. 41.

[29] European national parliaments contain different provisions on this issue. For example, the Rules of Procedure of the French National Assembly prescribes in the Article 141 (1) that the establishment of a committee will be the result of the favourable vote in the Assembly. In Italy, according to Article 141 of the Chamber of Deputies Rules of Procedure, the Chamber decides to carry out an inquiry. The same solution has been adopted in Austria. On the contrary, according to Article 44 of the Basic Law of Germany, the Bundestag shall have the duty to establish the committee of inquiry on the request of one quarter of its members. The Constitution of Latvia prescribes in its Article 26 that a committee of inquire will be set up on the request of at least one third of MPs. In Portugal, according to Article 181 of the Constitution, „the parliamentary committees of enquiry are compulsorily set up whenever so requested by one-fifth of the members of the Assembly entitled to vote, up to the limit of one per member and per legislative session." In Slovenia, according to article 93 of the Constitution, the National Assembly has to order parliamentary inquiry if it is required by one-third of the MPs.

MEPs would not have any guarantee that their proposal would be adopted as they submitted it.

The composition of the committee has to be decided by the Parliament, at the proposal of the Conference of Presidents, while its members have to belong to different political groups. This is quite natural solution, which has to be adopted in order to prevent possible misuse of this instrument of control.

Although the committees have the right to investigate, to call witnesses, to require documents, or to hold hearings, they can't oblige the officials to appear before them in order to testify, since the officials can authorize subordinated officials to appear before the committee. The Commission (just like other institutions) has the right to refuse the cooperation with the committee on the ground of secrecy or security. These provisions, however, could be misused in order to prevent a committee from doing its job. If an official has the right not to appear before a committee, the importance of the committee inquiry decreases. On the other hand, the problem also lays in the fact that the Parliament doesn't have at its disposal sanctions against those who refuse to cooperate with it. The importance of the inquiry could be understood if one moves from the legal to the political field. The absence of legal sanctions could be at least partly compensated with the political sanction, i.e. the threat of the Parliament that the Commission could be voted out of office in the case of refusal of cooperation.[30] However, it is hard to believe that this kind of threat can have serious impact on the relationship between the Parliament and the Commission except in some controversial cases when doubts are so serious that the Commission could be faced with the vote of non-confidence. In "normal" situations, when there are no serious controversies, parliamentary inquiry hardly can have the removal of the Commission as its consequence.

Another problem could appear at the end of the procedure of investigation. Namely, a committee has to submit the report within 12 months, although this can be extended twice for the period of three months. The adoption of recommendations to the Commission can be the final result of the inquiry. However, the Commission (or any other institution) is not legally binding to adopt these recommendations.

The European Parliament adopted in 2012 new Proposal for the Regulation, which made some changes.[31] In 2014, the Parliament adopted legislative resolu-

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30 „In this sense, in 1997, the EP threatened the Commission with a motion of censure if it did not follow up on the recommendations of the BSE committee of inquiry in due time." – Poptcheva, E.-M., *op. cit.* note 22, p. 4.

31 Proposal for the Regulation of the European Parliament on the detailed provisions governing the exer-

tion, on which discussion had to be continued with the Council and the Commission. The latter expressed fears that the regulation would introduce too strong legal instrument in the hands of the Parliament for control of the Commission's activities. According to the regulation, the committee of inquiry can: hear members of Union institutions or members of governments of the Member States; obtain evidence from officials or other servants; request experts' reports; request documents; etc. (Article 12 (1)). The committee has the right to get any document which it requests if it finds that this is necessary for the investigation. The committee also has the right to request from any person who is a resident of the Union to participate in a hearing before it (Article 15 (1)). If there is a committee's request, the Commission shall designate one or more of its members to appear before a committee and testify. So, if there is a committee's request, the Commission can't refuse to cooperate with it.

5. VOTE OF NO CONFIDENCE

The power of the European Parliament to vote no confidence in the Commission is its final and the most important means of political control. It has been introduced by the Treaty of Rome (1958),[32] and has been strengthened since then. The procedure of vote no confidence has to be analyzed in the connection with the procedure for the Commission's election. The procedure is such that the Council, acting by qualified majority,[33] nominates the president of the Commission, and then he/she presents his/her program to the Parliament. After that, the discussion begins. The Council participates in the discussion as it has made this nomination. The Parliament confirms the President of the Commission by the majority votes of all MEPs. The elected President of the Commission and the Council have to agree on the other members of the Commission. The list of candidates for the post of Commissioners shall be made after the consultation with the Member States. The nominated members of the Commission are then subjected to hearings, after which the Parliament will elect them as a body. After that, the Council shall approve the Commission.

According to Article 234 of the Treaty on the Functioning of the European Union, the Parliament has the right to vote no confidence in the Commission. The Parliament can vote on the motion of censure at least three days after it was submitted.

cise of the European Parliament's right of inquiry and repealing Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission.

[32] Article 144. Also, according to the article 206 B of the same treaty, the Parliament can decide on the budgetary responsibilty of the Commission, on the recommendation of the Council, adopted by the qualified majority.

[33] See Article 17 of the Consolidated Version of the Treaty on the European Union.

The debate on the motion can start at least 24 hours after the MEPs have been informed that it had been submitted. The vote on the motion can be undertaken at least 48 hours after the debate started. These provisions seem quite logical. The MEPs need some time to prepare for discussion, to discuss about the motion, and to examine its reasonableness. Since the motion shall be forwarded to the Commission, it needs time to prepare its defense, and to try to convince the Parliament not to vote in favor of the motion.

The decision on motion has to be made by the two-thirds majority of the votes cast, which includes votes of the majority of all members of the Parliament. The Commission will be obliged to resign, but will continue to deal with everyday business until the new Commission is elected. Although known, it is quite unusual solution for the government to be voted out of office by two-thirds majority.[34] Since it is very hard to achieve this majority,[35] the Commission can be sure that it would be hardly possible for the Parliament to use this means of control.[36] The provision, according to which the vote of no confidence would lead to the Commission's resignation if the absolute majority of MEPs vote it, would be better solution. The vote of no confidence would be a realistic possibility in the case of the conflict between the Parliament and the Commission. One could understand why different majorities in the Parliament have been prescribed for the election and the removal of the Commission. The election by absolute majority has been prescribed in order to facilitate the election of the Commission. On the other hand, the two-thirds majority for its removal has been prescribed in order to prevent too often initiatives for removal, even when there is no objective chance or reason for the removal. However, such a strict condition for the removal doesn't seem justified although it contributes to the stability of the Commission. Namely, the Commission doesn't have to be so stable that it is practically impossible for the Parliament to remove it.

The Rules of Procedure of the Parliament contains more detailed provisions on the vote of no confidence. According to Rule 119, one tenth of the MEPs may

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34 It seems that it is the case in 10 per cent or even less number of parliaments. – See: Yamamoto, H., *op. cit.* note 1, p. 67.

35 „In practice, this means a large coalition must be in favour of sacking the Commission, and since the Commission is an oversized coalition in the first place, putting together a two-thirds coalition to remove the Commission is very difficult." – Hix, S., G. Noury, A., Roland, G., *op. cit.* note 17, pp. 183–184.

36 This is one of the reasons why the threat of vote of no confidence has been described as a practically useless „nuclear bomb". – See: Dann, Ph., *op. cit.*, note 5, p. 24. Some authors argue that this right of the Parliament is similar to the right of the US Congress to recall the President than on the right of the European parliaments to depose the government. – Hiks, S., *Politički sistem Evropske unije*, Službeni glasnik, Beograd, 2007, p. 74.

submit the motion of censure. But, if a motion has been voted on in preceding two months, a new one may be submitted by one-fifth of the MEPs. It seems that these conditions are not too strict, which is positive since the one-tenth is a reasonable and relatively easy to achieve number of MEPs who have the right to submit the motion. One could argue that this condition is too easy to achieve, which could be misused by small political groups, or even groups of individual MEPs who just want to promote themselves instead to do serious parliamentary work.[37] This could be possible but it doesn't mean that conditions for submission of motions have to be more rigorous. Namely, even if motions are submitted for strictly political or propaganda purposes, which don't have direct causes in the Commission's policies, the discussion which follows the motion could be useful in the sense that it could reveal weaknesses of the Commission's political positions. Second, if the conditions for the submission of motions would be more rigorous, it could prevent MEPs to submit the motions even when they don't have purely propaganda reasons for the submission. It also has to be stressed that the MEPs usually claim that the Commission lacks the competence in a sphere of its action which means that strictly political arguments for the censure don't prevail,[38] which is quite different than in the national parliaments.

The Commission is responsible to the Parliament as a body. The EU law recognizes only the collective responsibility of the government.[39] The individual responsibility of the Commissioners has not been prescribed in any treaty. Individual responsibility of ministers is one of the features of most parliamentary systems. Although there are some systems where only collective responsibility is known, it is not in the nature of the very parliamentary system.[40] One could argue that the European Union doesn't have the parliamentary system of government. Nevertheless, it is based on the principle of separation of powers, and of the principle of

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[37] „The censure may also be used in another political perspective, which is closer to what the French political scientist Georges Lavau called the 'tribunitian function' of the opposition. As the Rules of Procedure of the EP allow one tenth of its members to present a censure motion, minor groups, opposed to the Commission in general, or even to European integration in itself, have sometimes used this institution to make their protesting voice heard. This was the case with two motions tabled by an extreme-right wing French MEP in 1990 and 1991." – Magnette, P., *Appointing and Censuring the European Commission : The: Adaptation of Parliamentary Institutions to the Community Context*, European Law Journal, Vol. 7, No. 3, 2001, pp. 292–310.

[38] *Ibid.* Some authors stress that there is no firm conception of the nature of the responsibility of the Commission to the Parliament, namely whether it is political responsibility or responsibilty for conductiong the administrative affairs. – Simić, J., *op. cit.*, note 14, p. 140.

[39] Kohler, M., *European Governance and the European Parliament: From Talking Shop to Legislative Powerhouse*, Journal of Common Market Studies, Vol. 52, No. 3, 2014, 600–615, p. 606.

[40] According to Yamamoto, in 53 out of 88 analyzed parliaments, individual responsibility exists. – Yamamoto, H., *op. cit.* note 1, p. 68.

the political responsibility of the Commission to the Parliament, which is known in both systems of government based on the separation of powers with the government as one of the executive powers (parliamentary and semi-parliamentary systems). It is in the nature of the principle of political responsibility that both collective and individual responsibility are prescribed. If there is no individual responsibility, the parliament's power to control executive is limited in the case that the government is decisive in the decision to protect its member who is under critics of the parliament.

What has been said before doesn't mean that there is no individual responsibility of Commissioners at all. According to the Treaty of Nice (amendment to the Article 217 of the EC Treaty), members of the Commission will have to resign on the President's request, if he/she has obtained the Commission's approval.[41] This can be understood as an indirect tool of political control of the Parliament and of individual responsibility.[42] Whether the President will request the resignation depends on two factors. First, it depends on the relationship of forces of political groups in the Parliament, since the President has to estimate whether the Commissioner in question can count on the support of the Parliament, and whether the Parliament's attitude would change if the President would refuse to ask for the Commissioner's resignation. Second, it depends on the reasons for the Commissioner's resignation.

6. CONCLUSION

Procedural aspect of the political control is very important for the regulation of the relationship between the Parliament and the Commission. It has important political consequences. Legal regulation, established by different treaties as well as the Parliament's Rules of Procedure, depends on the political conception of the relationship between legislative and executive powers in the European Union. On the other side, the same legal regulation also influences the functioning of the Parliament and the Commission. Therefore, procedural aspect of the political control is legal as well as political in its nature.

The Member States are parliamentary or semi-presidential democracies. Their constitutional systems are, at least formally, based on the principle of the separation of powers. Therefore, the relationship between the Parliament and the Commission has to be based on the same principle. However, the nature of the

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[41] Fairhurst, J., *Law of the European Union*, Pearson Longman, Essex, 2006, p. 88.

[42] For example, the Parliament can threat to the President of the Commission that it will vote no confidence in the Commission if he doesn't remove a Commissioner.

European Union is different from the nature of the Member States. Therefore, the relationship between its legislative and executive can't be the same as the relationship between the legislative and the executive in the parliamentary or semi-presidential democracies. This is the reason why one can't be surprised by the fact that there are some inconsistencies in the regulation of relationship between the Parliament and the Commission. However, the specific nature of the European Union can't be justification for the absence of some means of political control, or for inadequate regulation of these means. For example, the right of the Parliament to vote no confidence in the Commission is so limited that it doesn't have much practical importance. Procedural provisions are very strict, although they are such for political reasons. Procedure and politics are intertwined.

Indeed, some elements of the systems based on the separation of powers are missing. For example, the Commission can't threat the Parliament that it is going to dissolve it. Therefore, one could argue that it is justified to enact strict provisions for the Commission's removal. The equilibrium must exist. If the Commission can't influence the Parliament's existence, the Parliament shouldn't influence the Commission's influence, or it could do it under strict conditions. We don't think that this is good argumentation since it justifies that the means of the Parliament's political control over the Commission has almost entirely formal character without real political significance.

The procedural provisions have to be changed in many ways in order to strengthen the Parliament's influence over the Commission, particularly considering the vote of no confidence as a means of control. This would inevitably mean strengthening the already existing elements of the parliamentary system in the European Union's political system. Whether it is possible or not is a political issue.

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PROCEDURAL ASPECTS OF EU STATE AID LAW

ABSTRACT

The article will discuss the main features of different procedural rules on EU State Aid law. The monitoring system of state aid control is based on ex ante verification pursuant to Article 108(3) TFEU. Since the European Commission has a central role, special emphasis will be on four different types of procedures: the procedure regarding notified aid, the procedure regarding unlawful aid, the misused aid procedure and the existing aid procedure.

Key words: *State Aid, European Union, European Commission, Procedural Regulation*

1. INTRODUCTION[1]

State aid generally distorts competition. Granting aid to individual undertakings affects allocation of resources, which can have adverse consequences on investment and development in the end. State aid can also influence the market production-wise and disturb the balance among competitors.[2]

Favouring domestic service providers can trigger the application of State aid rules. In EU law, any aid, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, is prohibited, as far as it affects trade between Member States. Even though State aid is prohibited in general, in some cases it may be found compatible with the internal market, if it promotes legitimate goals and satisfies the principle of proportionality.

In order to be characterised as aid, an advantage granted to the recipient has to be of economic nature and such that it could not be realised under normal market conditions. Measure must imply actual or potential use of public resources, and be selective, i.e. directed specifically at certain undertaking or type of goods. The

[1] This paper has been supported in part by Croatian Science Foundation under the project "Flexicurity and New Forms of Employment (Challenges regarding Modernization of Croatian Labour Law (UIP-2014-09-9377) "and in part by the University of Rijeka project No. 13.08.1.2.03 "Social security and market competition".

[2] Hancher, L., Sauter, W., *EU Competition and Internal Market in the Health Care Sector*, Oxford University Press, Oxford, 2012, p. 262.

last condition, which needs to be determined, is whether the measure distorts competition or affects trade between Member States. In principle, prohibition of State aid is usually concentrated on distortion of trade between Member States. It is interesting that under the existing case law, it is not necessary to prove that the granted aid actually caused distortion or disturbed the position of consumers. The most important thing is to show that the position of undertaking has been reinforced in any manner whatsoever, which would otherwise not have been possible. The mere possibility suffices. Increasing number of proponents insist, however, that the accent should be placed on stronger analysis of the impact on restriction of competition.[3]

Basic principles are found in Articles 107, 108 and 109 TFEU[4], as well as abundance of case law. Article 107 TFEU structurally consists of three parts. The first paragraph provides a general definition of aid contrary to internal market; the second paragraph enumerates so-called automatic exemptions, whereas the third paragraph prescribes certain categories of aid that can be declared compatible with the internal market. Therefore, any aid that distorts or threatens to distort competition by favouring certain undertakings or production of certain goods is prohibited, as far as it affects trade between Member States. However, certain situations are considered acceptable.[5]

There are two possibilities to justify aid that has been found incompatible with the internal market. Prohibition from Article 107 TFEU is never absolute or unconditional. Exceptions are contained in paragraphs 2 and 3 of the said Article. Paragraph 2 enumerates type of aid, which will always be exempted. This provision is of minor importance, given its limited scope. Paragraph 3, on the other hand, is more interesting, because it describes situations in which the Commission is entitled to authorise certain type of aid. As always, all exceptions are interpreted very strictly.

3 Bacon, K., *European Union Law of State Aid*, Oxford University Press, Oxford, 2013, p. 13.

4 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

5 Article 107(2) TFEU enumerates examples of aid that are always deemed compatible with the internal market. These include: a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas if the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused buy that division.

Pursuant to Article 107(3) TFEU[6], Commission has been granted wide powers to exempt a certain aid. A significant number of block regulations in this segment facilitates Commission's job. When a certain aid is not covered by regulation, Commission may grant the exception by referring to guidelines and instructions. In other words, a general prohibition of aid is complemented by the provisions of Article 107(2) and (3) TFEU, which give the Commission a certain amount of flexibility.

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[6] Article 107(3) (a) TFEU refers to aid to promote economic development of areas where the standard of living is abnormally low or where there is serious underemployment. It is interpreted jointly with subparagraph (c) of the same provision, which points out that aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the internal market. These provisions are the base for granting regional aid. Although subparagraph (a) does not mention EU interests, case law determines that the Commission must always be guided by the Union's interest when granting certain exceptions. Claiming that the measure has positive impacts on a certain region is not sufficient; what matters is the impact on trade between Member States. Therefore, even though aid falls under the category of aid described under paragraph 3, the Commission has the final say. This subparagraph may be linked to subparagraph (c), but the main difference lies in the criterion of "underdevelopment". Comparison under subparagraph (a) is made taking into account the entire Union, whereas under subparagraph (c) comparison is made in relation to the national average. Such aid should be granted in the manner which develops less advantaged regions and which supports investments and creation of new jobs. Scope of this subparagraph is very limited and specific, because the Commission is the one that evaluates problems existing in certain regions. It is therefore not surprising that this provision has rarely been applied.

Subparagraph b) contains exceptions for aid to promote execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. In order to assist recipients and providers of aid, the Commission has developed additional criteria to help by its assessment. The economic crisis in recent years heated up debates about potential aid to resolve serious disturbances in the economy of a Member State. In order to satisfy this criterion, disturbance must affect the entire national economy. It is said that this provision has blossomed after great economic turmoil in some Member States.

Pursuant to subparagraph (c), the Commission is entitled to grant aid to facilitate development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. It captures a wider spectrum of aid than subparagraph (a). This exception is also the one which is most commonly used. All sector and regional aid falls under this provision. The Commission's policy is more directed at granting horizontal aid used in certain activities or areas. In one of its judgments, the Court of Justice determined that all decisions in which the Commission adopts regional aid charts for each Member State should be interpreted so as to represent the integral part of Guidelines on regional State aid, and are considered binding only if accepted by Member States.

When it comes to granting aid to promote culture and heritage conservation (Article 107(3) (d) TFEU), it is important to highlight that the concept of culture is also interpreted narrowly. The commercial factor must not be neglected, because it can be a decisive element. Although sport is relatively closely linked to the notion of culture, is sometimes difficult to determine whether it falls under this exception. Heritage conservation is, in principle, covered by this subparagraph. Cultural activities are therefore subject to Commission's control. In other words, culture enjoys no special status when it comes to State aid.

Economic and social aspects are investigated. Arguments for and against the aid are put in balance. There are several questions, which the Commission always seeks to clarify.[7] In the end, it all boils down to compliance with the principles of necessity and proportionality.[8]

According to Article 108 TFEU, the Commission shall in close cooperation with Member States, control all systems of existing aid schemes. If there is a necessity, it shall propose any appropriate measure required for effective functioning of the internal market. Commission will issue notices to the Member States to submit their comments. If the Commission still finds out that the aid is not compatible with the internal market or it is being misused, it shall decide that the State concerned abolishes or alters aid within certain period. In case of no compliance with the Commission's decision, the Commission or any other interested state may refer the matter to the Court of Justice of the European Union.

Besides the Commission's central role, the Council has certain powers in exceptional circumstances. It can act on the application by the Member State. In those cases, if the case has already been initiated by the Commission the application has an effect of suspending the procedure before the Commission, until the Council has made its attitude known. It may unanimously decide that the aid is compatible with the internal market. The Council has three months to give its opinion. If it does not act in the prescribed time, the Commission can proceed with its decision (Article 108 (2) TFEU).

The Commission has to be informed of any plans to grant or alter aid. If it considers that the intended plan is not compatible with the internal market, it shall initiate the formal procedure. Member States have to await for the Commission's final decision before they can put the measure into effect (Article 108(3) TFEU). The Commission has a power to adopt decisions addressed to Member States in which it permits or prohibits aid and which are subject to review by the General Court in the first instance and the Court of Justice on appeal.

Article 109 TFEU gives the possibility to the Council, on a proposal from the Commission and after consulting the European Parliament, to enact regulations for the application of Articles 107 and 108 TFEU and to determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

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7 See State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009 (Consultation document) {SEC (2005) 795}, COM/2005/0107 final.

8 See Pošćić, A; *Gliaiuti di StatonellaRepubllica di Croazia,* in: Cosio, R., Sgroi A., Smokvina, V. (eds.),Italia – Croazia, ordinamenti a confronto,G. Giappichelli Editore, Torino, 2015, pp. 57-79.

The state aid system is based on the *ex ante* control. The Member States have to notify the Commission with plans to grant new aid or alter existing aid. However, the Commission has investigative powers and can act upon the complaint of any interested party or on its own initiative. Before it has been discussed, that in principle the Commission has a central role in the monitoring system except the situation concerning the Council. Another important feature not to be disregarded is that the administrative procedure is a procedure between the Commission and the Member State responsible for granting aid. The interested parties enjoy very limited procedural rights.[9]

Although the main features of the state aid control are contained in the Article 108 TFEU, there was a necessity for the regulation of procedure in details. The first Procedural legislation was No. 659/99[10] that codified the Commission's practice and existed case law. The Regulation has been amended several times. In order to simplify and rationalize, the Regulation has been codified in 2015.[11]In the next chapters, the main features of four different types of procedures depending on the type of the aid in question will be scrutinised.

2. PROCEDURE REGARDING NOTIFIED AID

The new aid and the modified aid must be brought to the Commission's attention. The Commission has two possibilities: either to approve the measure on the basis to the simplified procedure or to apply a normal preliminary review procedure. If there are doubts with the compatibility of the aid with the internal market, Commission will open formal investigative procedure.

There are exemptions of the notification duty: aid covered by a Block Exemption Regulations ,*de minimis* aid not exceeding €200,000 per undertaking over any period of 3 fiscal years or aid granted under an aid scheme already approved by the Commission.

The aid must be reported in a "sufficient time". In other words, it must be notified in the draft stage in order to have time and possibility to change the draft after the Commission's observations. Usually the Member State requests for the informal

9 Mazzocchi, F., *The Procedure before the Commission*, in: Santa Maria, A. (ed.), *Competition and State Aid, An Analysis of the EU Practice*, second edition, Wouters Kluwer, Alphen aan den Rijn, 2015, p. 109.

10 Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, [1999] OJ L 83/1. It was amended several times (in 2006 and two times in 2013).

11 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9.

opinion even before the notification.[12] The Member State must provide all the necessary information in order to enable the Commission to take a decision. The Member States are not allowed to put the measures into effect until the final decision. It derives from the Article 108(3) TFEU. The standstill obligation applies until the Commission adopts the final decision (the "positive" decision, the "no aid" decision or the "negative" decision).[13]

After receiving the complete notification from the Member State, the Commission has three possibilities. If the Commission, after the preliminary examination, finds that the notified measure is not state aid, it shall issue a decision. Secondly, if after a preliminary examination it finds that no doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide that the measure is compatible with the internal market ("decision not to raise objections"). The decision shall specify which exception under the TFEU has been applied. The last possibility is to initiate proceedings pursuant to Article 108(2) TFEU ("decision to initiate the formal investigation procedure").The last one concerns the situation where the Commission has doubts about the compatibility of the notified measure with the internal market.

All decisions have to be issued in the period of two months. Where the Commission has not taken a decision in the period of two months the aid shall be deemed to have been authorized. The Member State concerned may implement the measures in question after giving the Commission prior notice. The Commission has the last possibility to issue a decision in the period of 15 working days (Article 4 of the Regulation). This form of silent consent was implemented in the Regulation after the case *Lorenz* to protect the state interests.[14]

It has to be mentioned that even after the positive decision or after the decision that the measure does not constitute aid, the Commission has the power to revoke it, if it was based on imprecise information (Article 11 of the Regulation).[15]

Before going into the analysis of the formal investigation procedure, it has to be emphasized that in the 2009 Commission published the Notice on a simplified procedure for treatment of certain types of aid.[16]. The idea is to examine, in shorter time, certain types of state measures which only require the Commission to verify

[12] Mazzocchi, *op. cit.* note 9, p. 113.

[13] *Ibid.* p. 115.

[14] Case 120-73 Gebrüder Lorenz GmbH v Federal Republic of Germany et Land de Rhénanie-Palatinat [1973] ECR-01471, Mazzocchi, *op. cit.* note 9, p. 116.

[15] *Ibid.*p. 117.

[16] Commission Notice on a Simplified procedure for the treatment of certain types of State aid, [2009] OJ C136/3

that the aid is in the accordance with the existing rules and practice. The categories of aid on which the simplified procedure applies are elaborated in the Notice in detail. Those categories include aid measures falling within the "standard assessment" sections of existing frameworks or guidelines, measures corresponding to well established Commission decision-making practice and situations that contain prolongation or extension of existing schemes. If the criteria for the simplified procedure are fulfilled, the Commission will issue a short-form decision.

2.1. The Formal Investigation Procedure

If the Commission has still doubts as to the compatibility of the measure with the internal market, it can initiate the formal investigation procedure. It shall summarise the relevant case law issues with a preliminary assessment of the aid character of the proposed measure (Article 6 of the Regulation). The Member States and the interested parties[17] have a period of one month to submit comments that can be exceeded if justified. The Commission opens the formal investigation procedure only if it has serious doubts as to the compatibility of the measure with the internal market. One element that surely indicates "serious doubts" is a duration of the preliminary procedure.[18]The comments received shall be submitted to the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period, which shall normally not exceed one month. In some exceptional circumstances, the period can be extended (Article 6 of the Regulation). The Commission shall, as far as possible, endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission

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17 It is interesting to note that any interested party may submit comments following a Commission decision to initiate the formal investigation procedure. Also interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. The interested party shall complete a form with the mandatory information requested therein.
Where the Commission considers that the interested party does not comply with the compulsory complaint form, or that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful aid or misuse of aid, it shall inform the interested party thereof and call upon it to submit comments within a prescribed period which shall not normally exceed 1 month. If the interested party fails to make known its views within the prescribed period, the complaint shall be deemed to have been withdrawn (Article 24 of the Regulation) According to the doctrine, there are certain doubts regarding the position of the interesting party. The discipline of sending complaints has been changed after the Regulation No. 734/2013 (Council Regulation (EU) No734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [2013] OJ L 204/15) because there were divergence of views between the Commission and the courts.See Mazzocchi, *op. cit.* note 9, pp. 123,124.

18 See Mazzocchi, *op. cit.* note 9, p. 120 and Case T-73/98, Prayon-Rupel

and the Member State concerned. The procedure of reviewing the state aid is an adversary procedure.[19]

In particularly complex cases, the Commission may request any other Member State, an undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete final assessment. It should be again noted that the interested parties do not have the same rights as the Member States.[20]In addition, the person receiving aid is not in a special position because the proceeding is not against the addressee of the aid.[21]

The Commission will close the formal investigation procedure by a decision. There are a few scenarios. The first one is a situation where the Commission finds that, after the modification by the Member State concerned; the notified measure does not constitute aid. The second one refers to the context where the Commission finds that, after the modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the internal market have been removed and shall decide that the aid is compatible with the internal market ("positive decision"). The Commission may attach to a positive decision conditions and may lay down obligations to allow compliance with the decision ("conditional decision"). The last one concerns the situation where the Commission finds that the notified aid is not compatible with the internal market ("negative decision") (Article 9 of the Regulation).

As stated above, the Commission may revoke the previous decision, only in situations where it was based on incorrect information that was a decisive factor for the decision. In these situations, the Commission will open the formal investigation procedure. Article 11 of the Regulation speaks only of a revocation of positive, conditional or no aid decision. Nevertheless, the case law established that the revocation is not restricted only to the last circumstances.[22]

3. PROCEDURE REGARDING UNLAWFUL AID

The unlawful aid is not the same as incompatible aid. The possible situations encompassing unlawul aid include aid that has not been notified and has been put into effect before the Commission's authorisation, the aid that has been notified

[19] *Ibid*. p. 122.

[20] More details on the request for information made to other sources can be found in Article 7 of the Regulation.

[21] Mazzocchi, *op. cit.* note 9, p. 123.

[22] See Case T-25/04 González y Díez, SA v Commission of the European Communities [2007] II-03121

but put into effect before the authorisation and aid that has been given in breach of the authorisation terms. The simplified procedure is not applicable.

In general, the procedure is the same as for the notified aid. There are some particularities. The Commission is vested with the power to examine any information regarding alleged unlawful aid from whatever source. Usually the competitor is the one to give the information.[23] Here the Commission acts after a complaint or on its own initiative. Over the years there were certain doubts and misunderstanding of the Commission position in this situation. The Courts and the Commission were struggling with the unconditional nature of the obligation to start the procedure after receiving the complaint. Regulation 734/2013 introduced certain conditions to be fulfilled in order to confer the Commission a power to start a preliminary examination. The interested party must submit the complaints in a particular form.

The Commission has a power to issue injunctions. There are three types of potential injunctions. After the initiation of the formal investigation procedure, the Commission may request information from any other Member State, from an undertaking, or association of undertakings. Where, despite a reminder, the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information ("information injunction"). Those are interlocutory decisions. Another option is that the Commission, after giving the Member State concerned the opportunity to submit its comments, adopts a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market ("suspension injunction"). Those injunctions have been rarely used in practice. The injunctions may only be effective in situation where the Member State has not entirely paid or the state aid is expected to be to be paid in instalments.[24] The last possibility is to issue the so called "recovery injunctions". The Commission can adopt a decision requiring the Member State to recover any unlawful aid provisionally, until the Commission decides on the compatibility of the aid with the internal market. Three criteria have to be fulfilled: there are no doubts about the aid character of the measure concerned, there is urgency to act and most importantly there is a serious risk of the substantial and irreparable damage to the competitor. (Article 13 of the Regulation).

[23] Mazzocchi, *op. cit.* note 9, p. 129.

[24] *Ibid.*note 7, p. 134.

If the Member State fails to comply with a suspension injunction or a recovery injunction, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice of the European Union directly. It shall apply for a declaration that the failure to comply constitutes an infringement of the TFEU (Article 14 of the Regulation).

In case of negative decisions, the Commission shall decide that the Member State shall take all necessary measures to recover the aid from the beneficiary ("recovery decision") unless it is contrary to the general principles of EU law or the limitation period of 10 years has expired.[25]The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission.

4. PROCEDURE REGARDING MISUSED AND EXISTING AID

Procedure regarding misused aid refers to the aid used in violation of the Commission decision. The Commission is obliged to open the formal investigation procedure and can order the recovery of the misused aid at the end of the procedure. The procedure applicable to unlawful aid is used.

According to the Regulation, the existing aid may cover the aid that existed prior the entry into force of the Treaty in certain Member States and is still applicable after the entry into force of the Treaty; aid schemes and individual aid which have been authorised by the Commission or by the Council; aid which is deemed to have been authorised; aid for which the ten year period has been expired (these is the only exception of the rule that the unlawful aid may not be considered to be existing aid), aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. The existing aid is not notified but is under the constant review by the Commission.

If the Commission, after reviewing the information obtained by the Member States, concludes that the existing aid scheme is not, or is no longer, compatible with the internal market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. If the Member State accepts the proposed measures, it is bound to implement them. In case of no acceptance, if the Commission after having taken into account the arguments of the Member State

[25] On limitation periods forthe recovery of aid see Article 17 of the Regulation and Papi Rossi, A., *Recovery of Unlawful and Incompatible Aid*, in: Santa Maria, A. (ed.), Competition and State Aid, An Analysis of the EU Practice, second edition, Wouters Kluwer, Alphen aan den Rijn, 2015, pp.141-177.

concerned still considers that those measures are necessary, it shall initiate the formal investigation procedure. The procedure is the same as for the new notified aid except for the standstill clause.

5. CONCLUSION

There is a division of competences between the Commission and national courts. The Commission has a central role in determination whether the aid is compatible with the internal market. It is also the main policymaker. The Commission applies four different types of procedures: the procedure regarding notified aid, the procedure regarding unlawful aid, the misused aid procedure and the existing aid procedure. The national courts play an important role in safeguarding the stand still clause and in the case of enforcement of Commission's decisions.

Consolidated text of the Regulation serves as a tool for better understanding of the rules, their simplification and achieving uniformity in their application. Since the development of the internal market is a continuous process, clear and appropriate measures are required. It is also of vital importance to maintain the fundamental principles of EU law, such as equal treatment, legitimate expectations and proportionality.

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THE INFLUENCE OF THE EU HEALTH POLICY ON THE PROCESS OF PUBLIC HEALTH SYSTEM REFORMS IN THE REPUBLIC OF MACEDONIA

ABSTRACT

The public health system is a public service that aims to improve the quality of life of the citizens. Therefore, this kind of public service is crucial for normal functioning of any state system, alongside education and the other social services. In the context of the purpose behind this research and the context of the focus of the paper under the term `health services` will be used to describe the primary, secondary and tertiary health protection, which means that the dental health protection and the pharmacy services will be out of the scope of this research. The analysis showed that the health services are categorically connected with the position, the organization, the management and funding of the health system (the legislation, the government bodies, the executives, the health institutions, the health services, human resources, citizens, IT service and other technical segments). This means that the influence of the socioeconomic development of the state reflects, directly, at the public health system.

The EU integration process of the Republic of Macedonia has showed that the existing health system was needed to be reconstructed (legally and institutionally) so it could be competitive, efficient and effective. During these decades, having in mind, the EU recommendations the national health policy framework was rapidly changed.

Through survey of the relevant literature, questionnaires and interviews made for the article we will try to give an answer if the parallel existence of the primary, secondary and tertiary public and private health system is justified having in mind the population of the country. Furthermore, should the secondary and tertiary segment of the public health system serve as back up to the private system, in a situation where there is a lack of doctors and other specialized medical staff, as well as lack of medical equipment to perform basic work. The question is how to find a financially sustainable public health system under which the health insured individuals get adequate and quality health service.

Key words: *public healthcare, health system, reforms, patients' rights.*

1. INTRODUCTION AND DEVELOPMENT OF THE PUBLIC HEALTH SYSTEM AND HEALTH PROTECTION LAW REGIME IN THE REPUBLIC OF MACEDONIA

In 1991, after the breakup of Yugoslavia, Macedonia became an independent country, but the influence of the concept of socialist health insurance was held up for many years later. Namely, as in any democratic country, the Republic of Macedonia considers the social freedoms and rights of its citizen as fundamental human right.[1]In addition, after the independency, the health protection remains as priority in the national policy and health strategy.

The right to health care is social right guaranteed by article 39 in the Constitution of the Republic of Macedonia „Every citizen is guaranteed the right to health care. Citizens have the right and duty to protect and promote their own health and the health of others". This means that every citizen may ask for service and health protection from the Macedonian health institutions, regardless of their employment status. As a result, in 1991, the Health protection Law, which nullified the Law on Healthcare from Socialist Republic of Macedonia (Official Gazette of SRM 10/83, 43/85,50/87, 27/88, 36/89 and 42/90) and the Law on the conditions and manner of achieving reimbursement of health services, pointed on pages (Official Gazette of SRM No. 15/76) was passed. Respecting the principles of mutuality and solidarity the right to health protection through compulsory health insurance and voluntary health insurance was established.[2]

The Republic of Macedonia needed to overcome the consequences from the former system, which was not applicable in democratic state with unilateral governance. We inhered public health system that was good implemented by the geo-demographic position, but hard to maintain. This model of mandatory health insurance system – socialistic insurance is funded from the Fund Budget (Health Insurance Fund), the Central budget and the incomes from the individual health insurers.[3]However, the liquidity of the health system depends of the national economy, the employment of the population, the incomes of individuals and companies, etc. Yet, the design, creation and implementation of the health policy and public health system is still in the hands of the executive bodies (The Government, the Ministry of Health, the Health Insurance Fund and the public health

[1] Article 34,35 and 36 of the Constitution of the Republic of Macedonia.

[2] See article 3, Health protection Law, Official Gazette of the Republic of Macedonia No.38/91, 46/93, 55/95, 10/2004, 84/2005, 65/2005, 5/2007, 77/2008, 67/2009, 88/10, 44/11, 53/11).

[3] The contributions from health insurance fall under the revenues of the off-budget funds under the Budget of the Republic Macedonia, which with the transfers from the central budget never show deficiency in performance.

organizations). The citizens and the civil society in the area of the health care and health protection are not consulted, therefore their needs are not considered. This is one of the reasons why in general the health care system has overall not been efficient. However, at the end, the National health strategy and health institutions that are established should follow the Principle: finance should follow functions.

The Health protection law of 1991 had 11 amendments and additions.[4]This enabled changes in the ownership structure of the institutions. For the first time formally was provided the private health care (establishment of private hospital organizations and services). The responsibilities and complexity of work in the institutions were re-defined, which in turn was used to determine the activities and powers of both public and private institutions. In 2000, the Health Insurance law was passed, which to date has been subject to a record 32 amendments.[5]In 2007, the Ministry of Health of the Republic Macedonia adopted the National Health Strategy 2020[6], which emphasized the need for reform in the Macedonian health care system and the need for improvement of the public health in accordance with international standards and rules. This strategic document prompted the adoption of a whole set of legal acts. In 2008, the Law on the Protection of Patients' Rights entered into force.[7]In 2009, the Law on health care records was also passed with a few amendments.[8]In 2009 they start with implementation of the electronically Health Insurance Card. Till 2015-th R. Macedonia signed agreements with eight Member States on using the European Health Insurance Card.[9]In 2010 the Public HealthLaw entered into force, which has been subject to several amendments as well.[10] In 2012 the current Law on Health Care was passed, and up to today it has

[4] The Health protection Law, Official Gazette of the Republic of Macedonia No.38/91, 46/93, 55/95, 10/2004, 84/2005, 65/2005, 5/2007, 77/2008, 67/2009, 88/10, 44/11, 53/11).

[5] Law on health insurance, Official Gazette of the Republic of Macedonia No.25/2000; 96/2000, 50/2001, 11/2002,31/2003, 84/2005, 37/2006, 18/2007, 36/2007, 82/2008, 98/2008, 6/2009, 67/2009, 50/10, 156/10, 53/11, 26/12, 16/13, 91/13,187/13,43/14, 44/14, 97/14, 112/14, 113/14, 188/14, 20/15, 61/15 , 98/15, 129/15, 150/15, 154/15, 217/15, 27/16. Still , there is no official consolidated version on the Law.

[6] URL=http://www.nationalplanningcycles.org/sites/default/files/planning_cycle_repository/the_former_yugoslav_republic_of_macedonia/health_strategy_2020.pdf. Accessed 20 February 2017

[7] Patients right Law, Official Gazette of the Republic of Macedonia No. 82/08, 12/09, 51/11.

[8] Law covering the records in health care, Official Gazette of the Republic of Macedonia , No. 20/2009, 53/11, 164/13, 150/15.

[9] Commission Staff Working Document The Former Yugoslav Republic Of Macedonia Report 2015 , SWD(2015) 212 final , Brussels, 10.11.2015., pp. 34

[10] Public Health Act, Official Gazette of the Republic of Macedonia , No. 22/10; 136/11; 144/14; 149/15;

been amendment over 10 times,[11]The Law on Voluntary Health Care Insurance,[12] and over 20 laws and numerous bylaws were also instituted.[13]

According to the current Law on health protection, the advancement of the effective treatment and early detection of diseases is done on three levels: primary secondary and tertiary level of health care. This demands a reorganization of responsibilities and share powers among healthcare facilities depending on the complexity of the needed health service and individual health practitioners' health offerings. The primary care is under municipal jurisdiction in coordination with the central government. However, in the secondary level, this situation opened up the opportunity for the establishment of private hospitals and institutions, and to strength up their position in the national health system. They increased the competition at state hospitals and institutes covering secondary health care. At the moment, legally there are several state institutions that offer secondary and tertiary healthcare. Specifically, according to a current analysis of the territory of Republic of Macedonia there is a University Clinical Center (university clinics and clinical hospitals) offering tertiary health protection. Specialized/clinical and general hospitals, (there are three hospitals in Tetovo, Shtip and Bitola), 13 general hospitals, several special hospitals, and health institutes that are providing specialist-consultative services.[14]

For the purpose of this article, in the beginning of 2017, we made a survey in the southeastern part of the country for which is competent the clinical hospital in Stipas a secondary health care sector (note: As we said at the beginning of this paper the dentists and the pharmacy sectors are excluded).The target group of 70 patients that have public health insurance was randomly chosen (the people that were waiting to be examine at the primary and at the secondary level health institutions). In the queues, most of them were women from 18 to 64 years (see table 1 and table 2), 77,1% with high education. Most of the questioned people are satisfied from the services from the chosen doctor in the primary health sector (table 3), highlighting as advantage saving time. Almost half of them (48,6) said that they use public health services, but also more than a half (51,1) are doing parallel checkups (second opinion), using both public and private health services (see fig.1).

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[11] Law on Health protection, Official Gazette of the Republic of Macedonia No.43/12, 145/12, 87/13,164/13, 39/14,43/14, 188/14, 10/15,61/15, 61/15, 154/15, 192/15 37/16. This act has also been amended several times and, still, there is no consolidated version of this Law.

[12] Law for voluntary health insurance, Official Gazette of the Republic of Macedonia N .145/12, 192/15

[13] All Laws are published at the official web site of the Ministry of Health of The Republic of Macedonia, till 2015. For more see: URL=http://zdravstvo.gov.mk/zakoni-2/.

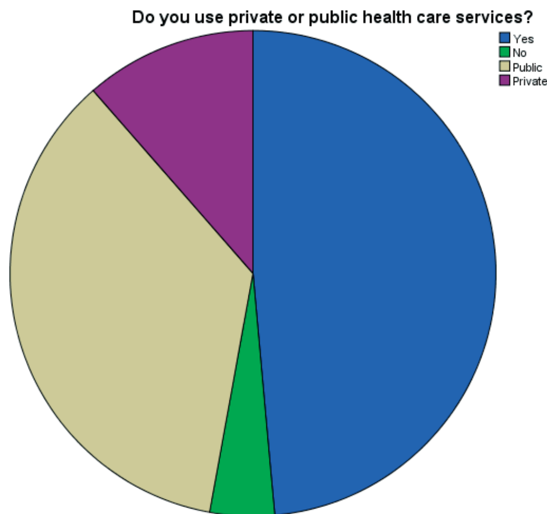
[14] Official website of the Ministry of Health of the Republic of Macedonia, URL=http://zdravstvo.gov.mk/sekundarna_i_tercierna/, last updated 2015. Accessed 31 January 2017.

Table 1 Gender					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Male	28	40,0	40,0	40,0
	Female	42	60,0	60,0	100,0
	Total	70	100,0	100,0	

Table 2. Age					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	under 18	2	2,9	2,9	2,9
	from 18 to 64	61	87,1	87,1	90,0
	over 64	7	10,0	10,0	100,0
	Total	70	100,0	100,0	

Table 3. Are you satisfied from the services of your chosen doctor primary health care ?					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	34	48,6	48,6	48,6
	Satisfactory	26	37,1	37,1	85,7
	No	10	14,3	14,3	100,0
	Total	70	100,0	100,0	

Figure1



Only the patients from the primary level, through the doctor in the primary health care sector, may be directed at the secondary sector. Perhaps the crucial novelty in this entire system of legal, organizational and functional modernization is the Integrated National Electronic system for scheduling and recording of medical interventions, so called, “My Appointment”. This system start with its implementation in 2013 and has several goals: electronic scheduling of medical check up, scheduling intervention and review in order to lessen the confusion and waiting lines in health care offices and facilities; the creation of unified and reliable database, quick and simple record updates on patient data; the creation of an electronic medical record (dossier); the setup of a quality health care service at the expense of reduced administrative work; the creation of a detailed timetable for the admission of patients in all doctors’ offices; the introduction of new work processes through the introduction of electronic medical record, electronic prescription, electronic referral, electronic scheduling of examinations and other services. In addition, the system aims to reduce the number of duplicate examinations and interventions, establishing faster communication and consultation between the primary, secondary and tertiary health care, providing better quality of service and reduction of the risk of wrong professional decisions. Financial savings are also a consideration behind the plan. Electronic processing of documents will replace the current paper referrals and prescriptions. Accurate and timely data for all the segments covered by the health system, and the opportunity for patients to access their own information and useful data through the internet is also a goal. Still, the survey indicates that 42.9 % are not satisfied with this concept (see table 4). Emphases couple situations as a weakness: that the people cannot chose the doctor specials that they prefer and very often they wait more than two –three months to appoint, and the second situation is that the appointed term in not in the line with the real situation at the hospital and the set time is extended (still there are long waiting lines). (See table 5). Furthermore, they are not satisfied from the quality of the serves they receive. (See table 6)

Table. 4 Are you satisfied from the „My appointment“ concept?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	15	21,4	21,4	21,4
	Satisfactory	25	35,7	35,7	57,1
	No	30	42,9	42,9	100,0
	Total	70	100,0	100,0	

Table 5. Are the doctors ontime and efficent according „My appointment“ ?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	23	32,9	32,9	32,9
	Satisfactory	31	44,3	44,3	77,1
	No	16	22,9	22,9	100,0
	Total	70	100,0	100,0	

Table 6. Are you satisfied from the quality of the services that your receive at the hospital?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	10	14,3	14,3	14,3
	Satisfactory	30	42,9	42,9	57,1
	No	30	42,9	42,9	100,0
	Total	70	100,0	100,0	

Despite mentioned, we should underline, that the interviewed patients are complaining that the hygiene and the medical furniture are below average (the waiting rooms, toilets, beds and the sheets are not clean and old), the medical staff (except the doctors)is not polite, most of the time there is deficit of the basic medical supplies and in some cases they are advice to buy on there one. On the other hand, there is new medical equipment that is not used in full capacity because there is not enough qualified doctors and healthcare staff, reconstruction of the existing buildings and building new ones are priority.[15]Although, this survey was made in one region, more or less, reflects the overall situation in the state.

With this “avalanche” of legal acts and electronic / automated developments, relating to the health care and health system in general a radical turn in the conception of the national health and national health policy was created. But it become obvious that not much thought has been put into whether such an extensive legislative changes could be implemented and whether there is the *de facto* capacity for them to be realized in practice? Is this national health care strategy compatible with the lifestyle of the citizens and their current socio-economic situation? Will these permanent changes encourage a development and improvement of the currently established system or they will cause distortion in the overall health system?

[15] In 2015, the Ministry of Health announced investment from 30.000.000 EUR for construction of new and modern hospital in Stip. URL=http://zdravstvo.gov.mk/klinichka-bolnica-shtip/. Accessed 15 December 2017.

2. REPUBLIC OF MACEDONIA AND POLICY ALIGNMENT WITH THE EU AND WHO

The Republic of Macedonia has shown anopenness to international standards in the field of social rights by harmonizing and changing its legislation regarding fundamental human rights and citizens' health protection.[16]After independence, Macedonia has shown an interest to get closer to the European states and its continental law system, and within a few years, its integration to the European Union became a focal strategy. Considering the commitment of the Republic of Macedonia to the European Community, European Union and its member states signed the Stabilization and Association Agreement with the Republic of Macedonia in 2001[17], first SAA in the region. By the SAA Agreement, the Republic of Macedonia is obliged to improve the level of health and safety protection of workers, using as a reference the levels of protection that exist in the European Community.[18]In 2006, based on official country reports, data and detailed descriptionsprovided from the relevant institutionsof the current Macedonian health system,[19]WHO European Regional office placed Republic of Macedonia as a country with transitional health system.[20] In 2007, leaded by the EU health policy Health 2020 and WHO strategy and priorities, the Ministry of Health of Republic of Macedonia brought a Health strategy of the Republic of Macedonia 2020. The strategy cares out the vision of safe, efficient and just national Health Care System.

The health condition of the Republic of Macedonia is more or less at the level of the southeastern European countries, but far behind the EU member countries.[21]Still, the last couple of years the Reports[22]from the European Commission in the area

[16] Public Health Act, Official Gazette of the Republic of Macedonia, No. 22/10; 136/11; 144/14; 149/15, 37/16.

[17] Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic Of Macedonia, of the other part, Council Of The European Union, 2001/0049 *(acv)*. 6726/01. limite. yu 6. coweb 20, Brussels, March 2001,
URL=https://eeas.europa.eu/sites/eeas/files/saa03_01_en.pdf.

[18] See article 168 (3) TFEU [2008] OJ C115/123.

[19] Health systems in transition, the Former Yugoslav Republic of Macedonia health system review, Vol.8, No.8, 2006.

[20] URL=http://www.euro.who.int/__data/assets/pdf_file/0007/98890/E89275sum.pdf?ua=1. Accessed 12 December, 2016

[21] Council Conclusions on Common values and principles in European Union Health Systems [2006] OJ C146/01.

[22] Commission Staff Working Document The Former Yugoslav Republic Of Macedonia Report 2015 , SWD(2015) 212 final , Brussels, 10.11.2015 and Commission Staff Working Document The Former Yugoslav Republic Of Macedonia Report 2016, SWD(2016) 362 final , Brussels, 09.11.2016

of the health protection have a status of *moderately prepared* with recommendation to ensure efficient and high-quality healthcare.[23]

The free movement of people and goods emphasis the inequality of good health at Union level which imply the necessary to promote common health policy and co-ordination between the national programmes of the EU Member States. Furthermore, the Union and the member states foster cooperation with third countries and the competent international organizations in the sphere of public health. To foster the health of the European citizens, the Community has made numerous studies, many activities and adopted several programmes in the field of public health and in the field of health in generally. In 2003, these separate programmes were replaced by a single integrated EU Public Health Programme (Decision No 1786/2002/EC)[24], later with the Second Public Health Programme (Decision No 1350/2007/EC)[25] and the Third Programme in the field of health which is called Health for Growth (Regulation (EU) No 282/2014)[26] established for 2014-2020. The Health for Growth Programme was build up on the two previous health programmes from 2003-2008 and 2008-2013. The current Programme efforts to fulfill several objectives: to promote health, to protect citizens from cross-border threads, to improve safer healthcare and to build up sustainable health systems. Additionally, to improve the quality of the health services, the patient rights and the health protection of the European citizens, the Community encourage co-operation and exchanging information in the field of public health between the Member States.[27]

When a Member State raises a specific public health problem in the field, which has been the subject of prior alignment measures, it shall bring it to the attention of the Commission, which shall immediately examine whether to propose appropriate measures to the Council.[28] Furthermore, in accordance with article 168(6) the Council, on a proposal from the Commission, may adopt recommendations

[23] Commission Staff Working Document The Former Yugoslav Republic of Macedonia Report 2015, Chapter 48, p. 68.

[24] Decision No 1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-2008) [2002] OJ L 271.

[25] Decision No 1350/2007/EC of the European Parliament and of the Council of 23 October 2007 establishing a second programme of Community action in the field of health (2008-13) [2007] OJ L 301/3.

[26] Regulation (EU) No 282/2014 of the European Parliament and of the Council of 11 March 2014 on the establishment of a third Programme for the Union's action in the field of health (2014-2020) and repealing Decision No 1350/2007/EC) [2014] OJ L86/1.

[27] See Article 168 (3) TFEU [2012] OJ C326.

[28] Article 114 , paragraph 8, Chapter 3- Approximation of Law , TFEU

for the public health matters, in full respect of the responsibilities of the Member States for the design of their health policies, the institutional organization and delivery of health services and medical care. Public health matters fall in the area of shared competences between the Union and the Member State.[29] In fact, the dual nature of the competences in the area of public health is reflected in the different types of measures that the EU can take.[30] The EU action in public health seize to set up a high level of human health protection standards and sustainable public health system. The public health is crucial pillar for every develop society and the Treaty of Lisbon enhanced the importance of that, by building up a coherent public health system by encouraging cooperation between the Member States and lending support to their national health policies and actions.[31]The EU health policy boost to prevent diseases and to improve and promote healthy lifestyle. The implementation of the Third Programme of EU`s action in the field of health in the Member States and participate countries gains to build up consist, equal and efficient health systems. In the line with the EU 2020 Strategy and the WHO priority objectives, the Union focuses on consolidation of the institutional and the legal framework in the field of public health, which implicates on the public health policies and activities in the Member States and the potential candidate countries for EU membership.

3. CONCLUSION

The health systems varied from county to country as a reflection of different demographic and socio-economic position, despite they are build up on similar common values and principals. Still, the Union support the Member States healthcare systems and policies, encourage cooperation and promotes the coordination between their national programmes and best practices.

[29] See Article 4 , paragraph 2 (k), Consolidated versions of the Treaty of European Union and the Treaty of the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007,Official Journal C 326 , 26/10/2012 P. 0001 - 0390

[30] See Article 168 (5) TFEU. `The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.`

[31] See Article 168 (2) TFEU

On the other hand, the current health care system in Republic of Macedonia has proved to be uncompetitive, inefficient, ineffective and without a clearly defined responsibilities of health institutions/organizations. There is a lack of coordination between authorities in-charge as well. As a result, some citizens in certain parts of the country are faced with unavailable and untimely health care system and public health services.

This gap in the quality of treatment is behind the revamp of the entire health system and the frequent amendments to the legislation which are ongoing, but ultimately destabilize the health system. The existence of private health facilities and specialty hospitals did not result in a spur of competitiveness among public institutions and hospitals to attempt to rival the private health sector; on the contrary, it resulted in collapsing the public system financially. Most of the citizens did not receive more options in choosing a better quality and more timely health care services, rather they were faced with an inequality in their ability to secure and upgrade their individual health and the health of their family (only higher income earners can afford private health services).

Naturally, the modernized health care system introduced certain improvements, such as: specialization and training of medical staff, better control over it, more effective patient records and in general, the application of health care improvement according to international standards, building and rehabilitating health care facilities, training of health personnel, providing equipment, essential medicines and supplies, etc.

Resent survey and analyses have shown that there is a functional separation between the primary, secondary and tertiary health protection on one hand and among the public and the private health systems on the other hand. So, the existing health system is based on a fragmentation and lack of communication between the health institutions (vertically / horizontally, state/private). Also, the annual 2015 reports from the World Health Organizations indicate that Macedonia is a country with the highest infant mortality rate, as well as the highest rate of death among pregnant women in the region.[32]

These numbers should put all stakeholders at a state of alarm. Having in mind the public health reform and the EU law on patients' health care rights, another aspect that needs to be explored is if the creators of the public health policy considered the birth rate / mortality ratio situation, or they were just trying to keep up with the European legislation regarding this issue.

[32] URL=http://www.who.int/countries/mkd/en/. Accessed 30 November 2016.

Having in mind the actual position of the health system seen through the survey and the interviewed people, maybe we should ask do we need to reform the reformed health system? The Republic of Macedonia needs a sustainable public health system, which will provide quality and equal services to every citizen. Citizens ought to enjoy the benefits of the health care services regardless of the place of living or their working position.

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