

Issue 1
Number 5

ISSN 2671-3128

SEE LAW JOURNAL 2019



Co-funded by the
Erasmus+ Programme
of the European Union

SEE^{Network}
Lawyers for Europe.

Issue 1

Number 5

SEE
LAW JOURNAL
2019

Dear Readers;

The edition you are reading is the fifth in the row, and second one issued within the frames of Strengthening the EU Law Studies in South Eastern Europe project, financially supported by the Erasmus+ Jean Monnet Associations programme of the European Union, and implemented by the SEELS network and the Centre for SEELS.

This is the second year of publication of this unique regional journal within these auspices, and as a novelty it includes the amended and broadened Editorial Policy which, we hope, will allow a wider group of interested academic to participate, providing thus a broader, more dynamic and substantive debate on EU law related topics. The new Editorial Policy also implies even more direct involvement of the Editors not only within the quality assurance, structuring of the overall topics and thematic style of the journal, but also in the wider promotion of the publication within their respective academic environments too.

Following this new praxis, we were pleasantly surprised to receive significant increase in the papers coming from our member faculties on our last two calls for papers. Significant number of these, were received from the Faculty of Law in Osijek dealing with the various aspects of the specific legal area of the Human Rights, namely the rights of the children. The remaining papers came from several other faculties dealing with various relevant legal topics, providing thus for material sufficient for publication of several issues of the SEE Law Journal or one rich issue of the same. However, due to the limits in the amounts of pages planned for the printed version, the editorial decision was reached that the current issue and the following one would be publishing the papers dealing with the rights of the children, while the remaining received papers will be published within the upcoming seventh edition of the journal, together with the papers which will be received to the last open call for papers.

The SEE Law Journal has all the potential of relatively new and fresh publications, and as such it is facing the standard challenges of development. Having said that, this new approach of the Editorial Policy and the subsequent results, are a proof of unmistakable signs of strengthening the processes of publication and of the teams working on them. We are thus further motivated and dedicated in our work to successfully pass all the steps leading towards the full establishment of the SEE LJ as a well-recognized and renowned publication in the region and wider.

Sincerely;

Gordana Lazetic

SEE LAW JOURNAL 2018

Publisher:

Centre for SEELS
Bul. Goce Delcev, 9B
1000 Skopje

Editor in Chief:

Gordana Lažetić,
Profesor at the Faculty of Law "Iustinianus I" Skopje

Editorial Board:

Svetislav Kostić, *Faculty of Law Belgrade*
Maja Čolaković, *Faculty of Law "Đemal Bijedić: Mostar*
Ivana Simonović, *Faculty of Law Niš*
Tunjica Petrašević, *Faculty of Law "Josip Juraj Strossmayer" Osijek*
Edita Čulinović Herc, *Faculty of Law Rijeka*
Iza Razija Mešević Kordić, *Faculty of Law Sarajevo*
Petar Bačić, *Faculty of Law Split*
Nada Dollani, *Faculty of Law Tirana*
Romana Matanovac Vučković, *Faculty of Law Zagreb*
Maša Alijević, *Faculty of Law Zenica*
Ana Nikodinovska Krstevska, *Faculty of Law Štip*

Graphic design and print:

Arcuss Design

Circulation: 500 copies

ISSN 2671-3128

Co-funded by:



Co-funded by the
Erasmus+ Programme
of the European Union

"The European Commission support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein."

CONTENT:

RECENT ISSUES OF THE RIGHT TO FAMILY REUNIFICATION WITHIN EU LAW - ANALYSIS OF THE CASE C-165/14 ALFREDO RENDÓN MARÍN V. ADMINISTRACIÓN DEL ESTADO	8
Dunja Duić, Tunjica Petrašević, Ena Buljan	
TRAFFICKING OF CHILDREN IN THE EUROPEAN UNION	28
Ksenja Pertinač	
CHILD PROPERTY RIGHTS - A CHILD AS A SHAREHOLDER	46
Zlatan Omerspahić	
CROSS-BORDER SUCCESSION PROCEEDINGS AFFECTING A CHILD*	64
Mirela Župan, Marina Čepo	

УДК 314.15:342.717

Title:

**RECENT ISSUES OF
THE RIGHT TO FAMILY
REUNIFICATION WITHIN
EU LAW - ANALYSIS OF
THE CASE C-165/14
ALFREDO RENDÓN MARÍN
V. ADMINISTRACIÓN
DEL ESTADO**

Authors:

Dunja Duić, PhD, LL.M (Ghent), Assistant Professor, Chair of European Law, Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Stjepana Radića 13, e-mail: dduic@pravos.hr

Tunjica Petrašević, PhD, Assistant Professor, Chair of European Law, Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Stjepana Radića 13, e-mail: tpetrase@pravos.hr

Ena Buljan, mag. iur., PhD student of European Law, Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Stjepana Radića 13, e-mail: buljan.ena@gmail.com

The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross Border Movement of a Child in the EU (575451-EPP-1-2016-HR-EPPJMO-CHAIR), held at the J.J. Strossmayer University of Osijek, Republic of Croatia on 15-16 of March 2018

ABSTRACT

This paper is concerned with the right to family reunification and its limitations. Freedom of movement of workers is one of the fundamental freedoms enjoyed by EU citizens. It encompasses the right of EU citizens' family members to move and reside freely within the territory of the Member States regardless of their EU citizenship. The right to family reunification and family members (spouse, partner with whom the Union citizen has contracted a registered partnership which has been equalized with marriage, his/her and his/her partner's direct descendants who are under the age of 21 and their dependent direct relatives in the ascending line) are defined under Directive 2004/38/EC of the European Parliament and of the Council.

This paper outlines the development of the right to family reunification and reviews CJEU jurisprudence regarding family reunification, especially landmark cases (C-109/01 Akrich, C-127/08 Metock and Others v Minister for Justice, and C-34/09 Ruiz Zambrano). It also offers an analysis of the most recent judgment of the CJEU in this regard: Case C-165/14 Alfredo Rendón Marín v. Administración del Estado. In its request for a preliminary ruling, the national court requested interpretation of Article 20 TFEU concerning the dispute between A. R. Marín – a third-country national and father having sole custody of two minor children who are EU citizens and who have resided in Spain since their birth – and the Director-General of Immigration in Spain who refused to grant the former a residence permit on grounds of Mr. Rendón Marín's criminal record in Spain. The purpose of this paper is to analyse this recent CJEU judgment to determine the scope of the right to family reunification with regard to protection of minor children.

Keywords: free movement of workers, citizenship, minor children, right to family reunification, Directive 2004/38/EC

INTRODUCTION

The Court of Justice of the European Union (CJEU) has on many occasions addressed the issues of family reunification right that is undoubtedly an essential part of European law today. This right derives from the Treaties, namely the right to free movement of persons (Article 45 TFEU) and citizenship rights (Article 20 TFEU), as well as from secondary legislation. The principal focus of the paper is the CJEU jurisprudence concerning the above-mentioned Treaty provisions and Directive 2004/38/EC of the European Parliament and of the Council. The latter Directive defines family member as spouse, partner with whom the Union citizen has contracted a registered partnership which has been equalized with marriage, his/her and his/her partner's direct descendants who are under the age of 21, or their dependent direct relatives in the ascending line.

After outlining the right to family reunification, the paper will analyse landmark cases involving the right to family reunification in their order of appearance before the CJEU (C-109/01 *Akrich*, C-127/08 *Metock and Others v. Minister for Justice*, Case C - 200/02 *Zhu and Chen* and C-34/09 *Ruiz Zambrano*). The central point of the paper is the analysis of the most recent judgment of the CJEU in this matter: Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*. The ruling in the *Marín* judgment concerns fundamental issues of the right to family reunification with regard to protection of minor children. In its request for preliminary ruling, the national court requested interpretation of Article 20 TFEU within the context of the dispute between A. R. Marín – a third-country national and a father having sole custody of two minor children who are EU citizens and who have resided in Spain since their birth – and the Director-General of Immigration in Spain who refused to grant him a residence permit on grounds of Mr Rendón Marín's criminal record in Spain. The analysis will examine the questions arising out of this recent judgment to determine the scope of the right to family reunification with regard to protection of minor children.

FREEDOM OF MOVEMENT AND EU CITIZENSHIP AS BASIS FOR THE RIGHT TO FAMILY REUNIFICATION IN THE EU

Mobility is a political, economic and social issue in the EU.² The largely positive effects of the opening of borders between Member States (such as increasing productivity, reducing unemployment and improving attitudes towards the EU) are evident in the fact that most EU citizens nowadays associate the Union with freedom of movement for the purpose of labour, study and travel.³ To increase labour mobility, Member States are obligated to take measures and guarantee effective legal protection of workers and members of their families who exercise their right to freedom of movement from nationality-based discrimination and unjustified restrictions and obstacles.⁴ Labour mobility is indispensable for employment and economic growth and the resulting suc-

² Euroguidance Hrvatska, *Savjetovanje o mobilnosti - intervju*, Agencija za mobilnost i programe EU, p. 14, available at: http://www.euroguidance-vlaanderen.be/file/view/euroguidance_web%20publ_v5%20croatia.pdf; Accessed 27 September 2017.

³ Goldner Lang, I., *Transitional arrangements in the enlarged European Union: How free is the free movement of workers?*, Croatian yearbook of European law & policy, Vol. 3. No. 3., 2007, pp. 241-271.

⁴ Marković, T., *Prava državljana članica EGP-a i članova njihovih obitelji u okviru slobode kretanja vs. mobilnost*, Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku, Vol.30 No.2, 2014, pp. 285-305, p. 302.

cessful and efficient functioning of the EU internal market. Free movement of workers is thus a particularly important and sensitive issue for the EU

1.1 Freedom of Movement

The first measures concerning the freedom of movement of persons were adopted over 40 years ago.⁵ They included the right of workers who were EU citizens to be accompanied not only by the spouse and children under 21, but also by dependent adults, parents and grandparents, irrespective of the family members' nationality.⁶ During the first stage of the European integration development (from 1957 to the mid-1980s), the free movement of persons was an exclusively economic and legal principle. It was aimed at removing obstacles to the movement of people as a factor in the production process and the creation of a common market of labour, goods, services and capital of EEC member countries.⁷ The concept of freedom of movement gradually evolved to include self-employed persons, students, and today all EU citizens.⁸

Freedom of movement of persons (workers) is one of the four fundamental freedoms underlying the EU and its unique market. It implies the right of EU citizens to cross EU internal borders exempt from the formalities envisaged for third country nationals, and to reside, work and receive education in Member States other than their native, exempt from nationality-based discrimination.⁹ Pursuant to Article 45 of the Treaty on the Functioning of the European Union (TFEU), freedom of movement for workers¹⁰ must be secured within the EU. The provisions of Article 45 prescribes the scope of the free movement of works and exceptions to that scope (public service exception and limitation of the free movement required by public order, public safety and health protection),¹¹ Nevertheless, the existence of a cross-border element is a prerequisite without which freedom of movement would not have achieved its purpose. A second prerequisite is the citizenship of a Member State, i.e. citizenship of the EU.

1.2 EU Citizenship

EU Citizenship was introduced by the Maastricht Treaty with the aim of bringing the EU closer to its citizens and strengthening the bond between the citizens and the EU.¹² The term "citizenship" here is used as a complementary term to the citizenship held by the EU citizens in their native Member States.¹³ The introduction of the EU citizenship extended the scope of family reunification rights to Member State nationals who are not involved in economic activities.¹⁴

5 Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on the freedom of movement of workers within the Community

6 Condinanzi, M.; Lang, A.; Nascimbene, B., *Citizenship of the Union and Freedom of Movement of Persons*, Martinus Nijhoff Publishing, Leiden Boston, 2008: pp. 65-102.

7 Novičić, Ž., *Sloboda kretanja ljudi u pravu Evropske Unije*, Bibliid, Vol. LV, No. 1, 2003, p. 58.

8 Goldner Lang, I., *Sloboda kretanja ljudi u EU*; Školska knjiga, Zagreb, 2007.

9 Novičić, *op. cit.* note 7, p. 57.

10 Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment - Article 45(2) TFEU, available at: <http://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A12016ME%2FTXT>

11 Article 45 TFEU.

12 Đerđa, D., *O državljanstvu Europske unije*, *Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu*, god. 11, 2002, No. 12, p. 84.

13 Grubiša, D., *Lisabonski ugovor i europsko građanstvo*, *Politička misao: Časopis za politologiju*, Vol. 47. No. 4, 2010, pp. 185-209.

14 Joint cases C-64/96 and C-65/96, *Kari Uecker and Vera Jacquet v. Land Nordrhein Westfalen*, 1997, ECR I-3171, par 23.

Per Article 20(1) TFEU: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' EU citizenship is thus held by Member State nationals (dual nationality individuals included) in accordance with the national law.¹⁵ 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.' 'They shall have, inter alia, the right to move and reside freely within the territory of the Member States.' 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'¹⁶ Owing to a number of important interventions by the CJEU in the last ten years as well as the legislative initiatives, EU citizenship has matured as an institute. One such intervention is the so-called Citizenship Directive (Directive 2004/38/EC).¹⁷

1.3 Family Reunification

Family reunification is a necessary way of making family life possible.¹⁸ As one of the fundamental pillars of our cultures and societies, it largely affects the protection and wellbeing of its individual members.¹⁹ Family life is even more important when it comes to children, who, because of their age and development, are more in the need of care, support and protection by their parents and other family members. In all cases, family separation increases distress and instability in children, and negatively affects their capacities to cope and integrate into the host society.²⁰

Since the establishment of the freedom of movement regime, efforts have been invested in establishing another principle – family reunification, thus extending the right to freedom of movement to family members of the original holder.²¹ The Charter of Fundamental Rights of the European Union addresses family life in a number of articles that set out the principles of respect for private and family life, the right to marry and the right to found a family, as well as lay down provisions on family and professional life. The right to family life is thus a fundamental right, but the question is: does EU rules *enhance* family reunification?²² As a document of great legal significance that establishes human and fundamental rights as the foundation of EU citizenship²³, the Charter recognises that 'the family' in the EU has to be protected in its own right, and not only in the process of achieving other goals, whether economic or not.²⁴

The right to free movement of EU nationals encompasses their right to be joined by family members and the right of these family members to be integrated into the host Member State by being granted certain rights, such as the right to obtain employment. As such, it

15 Ryland, D., European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?, 2010, In: 10th Jubilee International Academic Conference, 'State, Society and Economy' - Globalisation in a Contemporary World, June 2010, Modrzewski, A.F., Krakow University, Poland, available at: http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf; Accessed 28 September 2017.

16 Article 20(2) and Article 21(1) TFEU.

17 Kostakopoulou, D., *European Union citizenship: Writing the future*, European Law Journal, Vol. 13, No. 5, September 2007, pp. 623-646; Condinanzi, *et al.*, *op. cit.* note 6, pp. 1-65.

18 Töttös, Á., *Family reunification rules in the European Union and Hungary*, 2014, available at: <http://migrationonline.cz/en/e-library/family-reunification-rules-in-the-european-union-and-hungary>; Accessed 28 September 2017.

19 Article 16, Universal Declaration of Human Rights, available at: <http://www.un.org/en/universal-declaration-human-rights/>, Article 8, European Convention of Human Right (ECHR)

20 CRISIS, Unicef, *The Right of the Child to Family Reunification*, 2016, available at: https://www.unicef.org/eca/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf; Accessed 28 September 2017.

21 Krüm, K; *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*; Martinus Nijhoff Publishing, Leiden Boston, 2014, p. 210.

22 Töttös, *op. cit.* note 19.

23 Militaru, I.N., *Citizenship of the European Union under the Treaty of Lisbon*, Juridical Tribune, Vol. 1, 2011, p. 81.

24 Ryland, *op. cit.* note 16.

is obvious that an EU worker's right to family reunification is based on the perception of a worker as a human being exercising his/her social rights when moving to another Member State and taking up employment there. Thus, the right to family reunification departs from the image of an EU worker as a solely economic unit of production, instead of being founded on the free movement of persons as a realisation of one's personal rights and on the promotion of European integration.²⁵

Recent trends promulgated by CJEU case law indicate a changing approach towards family reunification, with free movement no longer being cited as the only legal basis for granting family reunification rights.²⁶ It is of importance to note that at the current stage of the European integration process the right to family reunification is not an autonomous right under EU citizenship law. In the eyes of the CJEU, its importance is reduced to a functional instrument in order to guarantee, on one hand, the right to free movement of persons, as well as, on the other hand, the genuine enjoyment of EU citizens' other rights stemming from EU law.²⁷

EU citizens can rely on their EU citizenship rights (including the right of residence of their third-country family members) only when they fall within the scope of application of the EU law. If not, they are subject to the often more restrictive national rules of the Member States. This leads to the well-known phenomenon of reverse discrimination,²⁸ which is usually regarded as an inevitable consequence of the division of competences between the EU and the Member States.²⁹ Static EU citizens occasionally not only face stricter family reunification conditions than their migrant compatriots and nationals of other Member States, but they may also find themselves in a less advantageous position in comparison to third country nationals residing lawfully in the territory of a Member State. The latter can benefit from the conditions laid down in Directive 2003/86/EC on the right to family reunification within the EU.³⁰

However, nothing seems to prevent the Member States from regulating the right to family reunification for all EU citizens. Ultimately, Article 79 TFEU provides an explicit legal basis for the regulation of conditions of entry and residence of third country nationals, 'including those for the purpose of family reunification'. This provision seems not necessarily limited to matters of family reunification with third-country nationals but may also include family reunification of (static) EU citizens and their third-country family members.³¹

Nevertheless, family life is a key part of the day-to-day lives of all residents of the EU, be they EU citizens or not.³² To that end, the EU has adopted two Directives to create common standards for family reunification within EU territory: Council Directive

25 Goldner, I., *Family reunification of European Community nationals*, Croatian yearbook of European law & policy, Vol. 1. No. 1. 2005, pp. 163-202.

26 *Ibid.*

27 Van Elsuwege, P.; Kochenov, D., *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, European Journal of Migration and Law, No. 13, 2011, p. 465.

28 Hanf, D., "Reverse Discrimination" in *EU Law: Constitutional Aberration, Constitutional Necessity,*

or Judicial Choice, Maastricht Journal of European and Comparative Law Vol. 18; No. 1-2, 2011 ; pp. 26-61; Van Elsuwege, P.; Adam, S., 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'Assurances soins flamande', 2008, Cahiers de droit européen, pp. 655-711; Tryfonidou, A., 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', Legal Issues of Economic Integration Vol. 35; No. 1, 2008; pp. 43-67.

29 Geelhoed, L.A., 'De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels', Manunza, E.; Senden, L. (Ed.), *De EU: De interstatelijkheid voorbij?* Nijmegen: Wolf Legal Publishers, 2006, pp. 31-49; Lord, S., *Introducing a European Legal Order*, London: Stevens and Sons, 1992, p. 99.

30 Van Elsuwege, *et al.*, *op. cit.* note 28, p. 456.

31 Proposal for a Council Directive on Family Reunification, COM (1999) 638 final, p. 14.

32 EU Law Analysis, Expert insight into EU law developments, *Family Reunion for Third-Country Nationals: Comments on the Commission's new guidance*, 2014, available

at: <http://eulawanalysis.blogspot.hr/2014/04/family-reunion-for-third-country.html>; Accessed 28 September 2017

2003/86/EC on the Right to Family Reunification³³ (Family Reunification Directive) and Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States³⁴ (Free Movement Directive),³⁵ as outlined below.

The Family Reunification Directive 2003/86/EC governs the conditions under which third-country nationals living legally in the EU (sponsors) are permitted to bring in their families to a Member State to preserve family unity.³⁶ This includes primarily the spouse and minor (adopted) children. However, Member States may also allow entrance and residence by law or regulation to first-degree relatives in the direct ascending line, to any spouse in case they are dependent of them and they are not provided sufficient family support in the origin state, or to the adult unmarried children that are not objectively able to take care of their needs because of their health condition.³⁷

Once admitted in a Member State, family members receive a residence permit and obtain access to education, employment and vocational training on the same basis as the sponsor. After a maximum of five years of residence, family members may apply for an autonomous permit. Member States may impose some conditions before allowing family reunification. They may require the sponsor to have adequate accommodation, sufficient resources and health insurance, and impose a maximum waiting period of two years. Family reunification may be refused to spouses who have not reached a required age (21 years at the highest). Lastly, threat to public order, public security or public health can be grounds for rejecting the application. The CJEU has underlined that Member States must apply the Directive in a manner consistent with the protection of fundamental rights, notably regarding the respect for family life and the principle of the best interests of the child.³⁸ Per Article 5 of the Directive, the child's best interests should be of primary consideration in all actions. Additionally, the CJEU has recognised that children should grow up in a family environment and that Member States should ensure that a child is not separated from his/her parents against his/her will. It has stated that applications by a child or his/her family member to enter or leave a Member State for the purpose of family reunification are to be dealt with by Member States in a positive, humane, and expeditious manner.³⁹

The Free Movement Directive 2004/38/EC governs the right of EU citizens and their family members to move and reside freely within the territory of the Member States. It compiles into a single legal act many existing pieces of legislation, lays down the conditions for the right of free movement and residence (both temporary and permanent) for EU citizens and their family members, and sets out the limits to those rights on grounds of public

33 Directive 2003/86/EC of 22 September 2003 on the right to family reunification

34 Directive 2004/38/EC of 29 April 2004 is about the right of citizens of the Union and their family members to move and reside freely within the territory of the EU and EEA member states.

35 Van den Broucke, S.; Vanduynslager, L.; De Cuyper, P., *The EU Family Reunification Directive Revisited, An analysis of admission policies for family reunification of Third Country Nationals in EU Member States*, 2016, p.1.

36 The Directive applies to third-country national sponsors who (1) have a residence permit, valid for at least one year or more, issued by a Member State and "reasonable prospects" of obtaining the right of permanent residence; (2) have stayed lawfully in the Member State for a period not exceeding two or three years before applying for their family members to join them, depending on the capacity of the given EU Member State to receive the migrants; and (3) comply with the Member State's procedural requirements, such as filing an application and providing documentary evidence of the family relationship; Library of congress, *Family Reunification Laws*, 2014, available at: <https://www.loc.gov/law/help/family-reunification/eu.php>; Accessed 27 September 2017.

37 Cf. *ibid.*, Article 4.

38 Guild, E.; Gortázar, C., *The Reconceptualization of European Union Citizenship*, Brill Nijhoff Publishing, Leiden Boston, 2014, p. 169-189.

39 CRISIS, Unicef, *The Right of the Child to Family Reunification*, note 21.

policy, public security⁴⁰ or public health.⁴¹ The Free Movement Directive extends the right of entry and residence accorded to the EU citizen⁴² to third-country family members⁴³ who are accompanying or joining the EU citizen in the host Member State.⁴⁴ The full extent of this provision became apparent as a result of the controversial ruling of the CJEU in the *Metock* case.⁴⁵ One of the postulates of the Free Movement Directive is the extension of the right of all EU citizens to move and reside freely within the territory of the Member States to their family members, irrespective of nationality. The Directive also allows Member States to extend the definition of family members to registered partners or even grant entry and residence as family members to persons not belonging to the narrow concept of family members, taking into consideration their relationship with the EU citizen or any other circumstances (such as their financial or physical dependence on the EU citizen).⁴⁶

In view of EU rules, national legislation of Member States observes family reunification in three regimes: that between third-country nationals (based on the Family Reunification Directive 2003/86); that of EU citizens residing in another Member State and their family members, (based on the Free Movement Directive 2004/38); and that of Member State nationals and their third-country national family members.⁴⁷ In the next chapter, we will illustrate landmark cases of the CJEU regarding this situations.

2. LANDMARK CJEU JURISPRUDENCE CONCERNING THE RIGHT TO FAMILY REUNIFICATION

This chapter analyses landmark cases involving the right to family reunification in the order of their appearance before the Court of Justice of the European Union (CJEU). It will briefly outline the reasoning of the Court in the respective judgments to determine the scope of the right to family reunification defined in CJEU jurisprudence.

2.1 Case C-109/01 Secretary of State for the Home Department v. Hacene Akrich

Moroccan citizen Hacene Akrich entered the United Kingdom on a one month tourist visa. His application for leave to remain as a student was refused in July 1989 and his subsequent appeal dismissed in August 1990. Moreover, he was found guilty of felony and

40 According to Article 27 of Directive 2004/38/EC, measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

41 *EU freedom of movement and residence*, EUR-Lex, 2015, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3AI33152>; Accessed 28 September 2017.

42 EU citizens with a valid identity card or passport may enter another EU country, as may their family members, whether EU citizens or not, without requiring an exit or entry visa, they may live in another EU country for up to 3 months without any conditions or formalities. EU citizen can live in another EU country for longer than 3 months if the citizen is subject to certain conditions, depending on their status in the host country (registration to relevant authorities). EU citizen is entitled to permanent residence if they have lived legally in another EU country for a continuous period of 5 years. This also applies to family members;

available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3AI33152>. Accessed 28 September 2017.

43 Defined in Article 2(2) (a)-(d) of Directive 2004/38/EC.

44 *Ibid.* Article 7(2).

45 Ryland, *op. cit.* note 16.

46 Directive 2004/38/EC, para. (5) and (6).

47 Töttös, *op. cit.* note 19; This third stipulation is not covered by EU law, therefore Member States have the discretion to regulate it according to their own interests, although the recent case-law of the CJEU to some extent interfered with this field of rules limiting the freedom of Member States.

was deported to Algiers. He returned illegally to the United Kingdom in 1996, married a British citizen and applied for leave to remain as her spouse. Mr Akrich was detained under the Immigration Act and afterwards deported to Dublin (Ireland) where his wife had meanwhile taken up employment.⁴⁸ Mrs Akrich had moved to Ireland with the intention of triggering the Treaty and consequently the right to family reunification that guarantees EU citizens the right to return with their spouses to their origin Member State after having exercised free movement rights.⁴⁹

The CJEU ruled that a third-country national married to an EU citizen must be lawfully resident in one Member State upon migrating to the host Member State to which the EU citizen is migrating or has migrated. Furthermore, the Court stated that Article 10 of Regulation 1612/68⁵⁰ applies to genuine marriages exclusively, and that the intention of the spouses migrating to another Member State is not relevant for the assessment of their legal situation.⁵¹ In other words, the Court took the position that once a third-country national has resided illegally in one Member State, cross-border movement cannot change his/her residence status from illegal to legal. Consequently, illegal residence status precludes the application of free movement rights provision and the right to family reunification.⁵² It emerges from the *Akrich* judgment that a Member State can refuse third-country national family members the right of residence if they had not previously resided lawfully within the territory of another Member State insofar as this refusal does not infringe the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁵³ However, the reasoning in *Metock & Others v. Minister for Justice* marks an evident shift in the position of the Court.

2.2 Case C-127/08, Blaise Baheten Metock & Others v. Minister for Justice

The reference for a preliminary ruling in *Metock* concerns the interpretation of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States. The reference was brought by the Irish High Court and merged four cases concerning third-country nationals who arrived in Ireland, applied for asylum and were refused. While residing in Ireland they all married EU citizens who were not Irish nationals but were lawful residents in Ireland. Per Court ruling in *Akrich*, the right of residence in another Member State extends to spouses of EU citizens insofar as they have been lawfully resident in one Member State and were either seeking to join their lawfully resident spouses in another Member State or seeking to enter the Member State in the company of their spouses. These conditions were not met in three of the four cases.⁵⁴

The Court ruled that Directive 2004/38/EC precludes Member State legislation that re-

48 Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* ECLI:EU:C:2003:491.

49 Spaventa, E., *Case C-109/01 Secretary of State for the Home Department v. Hacene Akrich, judgment of the Full Court of 23 September 2003*, [2003] ECR I-9607, Common Market Law Review, Vol. 42 ; No 1, 2005, pp. 225-239, p. 226.

50 Article 10: „The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse“, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L 257, 19/10/1968.

51 Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* ECLI:EU:C:2003:491, par. 61.

52 Goldner, *op. cit.* note 26, p. 181.

53 Article 8 ECHR: Right to respect for private and family life; Cambien, N., *Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice*, Equality and Law Reform, Columbia Journal of European Law, Vol. 15, No. 2, 2009, pp. 321- 341, p. 332.

54 Case C-127/08, *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449, par 21-35.

quires a third-country national, spouse of an EU citizen lawfully resident in but not national of the host Member State, to have previously been lawfully resident in another Member State prior to entering the host Member State, to benefit from the said Directive.⁵⁵ Furthermore, the Court stated that Article 3(1) of Directive 2004/38/EC⁵⁶ implies that the above third-country national accompanying or joining his/her EU citizen spouse, benefits from the provisions of the said Directive irrespective of when and where their marriage took place and of how the third-country national entered the host Member State.⁵⁷

The case was decided in an accelerated preliminary ruling procedure provided for in Article 104a of the Rules of Procedure⁵⁸ as there was legal uncertainty affecting the applicant's circumstances and danger of infringement of their fundamental rights (in particular, the right to family life under Article 8 ECHR). Given the fundamental impact of this judgment on the right to family reunification and free movement of EU citizens, the Court took the position that it is within the competence of the EC (today EU) to regulate entry and residence of family members of EU citizens irrespective of their prior lawful residence in the Member States. Moreover, in a significant shift from *Akrich*, the Court stated clearly that Member States are not permitted to impose the condition of prior lawful residence, thus strengthening the protection of fundamental rights.⁵⁹

2.3 Case C - 200/02 Zhu and Chen

The reference for a preliminary ruling was brought by the Immigration Appellate Authority (United Kingdom) in the course of proceedings instituted by Kunqian Catherine Zhu (Irish national) and her mother Man Lavette Chen (Chinese national) against the Secretary of State for the Home Department. The case concerned the rejection of applications of Mrs Zhu and Mrs Chen for a long-term permit to reside in the United Kingdom. Mrs Chen and her husband were Chinese nationals. Mr Chen frequently travelled for work to various Member States, in particular the United Kingdom. Their second child was born in Northern Ireland and was granted Irish nationality. She was in sole custody of her mother and unable to obtain Chinese nationality. The Secretary of State for the Home Department refused to grant the long-term residence permit to the two applicants in the main proceedings. It stated the grounds of Zhu, a child of eight months of age, not having exercised any of the rights arising from the EC Treaty and Mrs Chen not being entitled to reside in the United Kingdom under those regulations.⁶⁰

On the facts of the case, and in response to the questions of the national court, the Court ruled that Article 18 EC and Council Directive 90/364/EEC do confer the right to reside indefinitely in a Member State on a young minor provided that the minor holds nationality of the respective State, is covered by appropriate health insurance and is in the care of a third-country national parent, with resources sufficient for the minor not to fall financial burden on the host Member State. In such circumstances, the said provisions do allow the

⁵⁵ Case C-127/08, *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449, par 80.; See more in: Guild, E.; Peers, S.; Tomkin, J.; *The EU Citizenship Directive: A Commentary*, Oxford University Press; Oxford, 2014, pp. 82-85.

⁵⁶ Article 3(1) Directive 2004/38: „This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.“

⁵⁷ Case C-127/08, *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449, par 99.

⁵⁸ See more on accelerated and urgent preliminary ruling procedure in: Petrašević, Tunjica. *Accelerated and urgent preliminary ruling procedure*, Pre procedure in European Union law - cooperation of national courts with the European Court (Capeta, T., Goldner Lang, I., Perišin, T., Rodin, S., *Reforma Europske unije, Lisabonski ugovor* Narodne novine, Zagreb, 2011, pp. 103-124; Lenaerts, K.; Maselis, I.; Kathleen, G., *EU Procedural Law*, Oxford University Press, Oxford, 2006, pp. 613-614.

⁵⁹ Cambien, *op. cit.* note 54, pp. 321- 341, p. 334.

⁶⁰ Case C-200/02 *Zhu and Chen* EU:C:2004:639, par 7-14.

minor's primary carer to reside with the child in the host Member State.⁶¹ The case marks the first instance of the Court extending the right of residence of parents from the free movement right of their minor children to achieve protection of family life.

2.4 C - 34/09 Ruiz Zambrano

This landmark ruling was delivered by the Grand Chamber of the CJEU in 2011. Colombian nationals Mr and Ms Zambrano entered Belgium in 1999 with their first child on a tourist visa from Columbia. Belgian authorities refused their applications for asylum, but did not deport them to Colombia on account of the country's civil war. As of 2001, Mr and Ms Zambrano were registered residents in Belgium, and Mr Zambrano was employed for a certain time despite of him not holding a work permit. Their two children (born in 2003 and 2005) acquired Belgian nationality. Mr and Ms Zambrano's residence permit application was rejected on the grounds of having disregarded the laws of their origin country by not registering their children with the diplomatic or consular authorities, and yet correctly following the available procedures for acquiring Belgian nationality for their children, plausibly to attempt legalising their own residence by extension. Mr Zambrano was also refused the right to unemployment benefit on the grounds that the periods of work he had carried out without a work permit could not validly be taken into account.⁶²

The national court referred to the Court *inter alia* the question of whether the TFEU provisions on citizenship imply that the right of residence of a dependent minor child who is an EU citizen and national of the Member State in which he or she resides is conferrable on a third-country national relative in the ascending line (parents), as well as exempt the latter from the obligation to obtain a work permit in that Member State.⁶³

The scope of the Court's decision in Ruiz Zambrano is defined by circumstances where minor children are deprived of 'genuine enjoyment of the substance of the rights attaching to the status of European Union citizen', thereby falling within EU law.⁶⁴ The Court reminded that Article 20 TFEU confers EU citizen status on all Member State nationals, and as Belgian nationals, so onto Mr Zambrano's children.⁶⁵ Furthermore, the Court ruled that Article 20 TFEU implies precluding of national measures that effect deprivation of EU citizens of the *genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens*, irrespective of the citizens' previous exercise of their right of free movement.⁶⁶

In the judgment, instead of the cross-border element (free movement rights), the Court observed EU citizenship rights as the criteria for bringing a situation within the scope of EU law. The Court reasoned that deportation of Mr Zambrano by national authorities would have effected deprivation of his Belgian children of their EU citizen rights as established directly and exclusively under Article 20 TFEU.⁶⁷ In what had previously been con-

61 *Ibid.* par 47.

62 C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, par 14-24.

63 *Ibid.* par 36.

64 "Genuine enjoyment test". See more in: Lansbergen, A., Miller, N.; *Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution?* Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*. *European Constitutional Law Review*, Vol. 7; No. 02, 2011, pp. 287-307, p. 291.

65 C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, par 40; Case C-224/98 *D'Hoop*, ECLI:EU:C:2002:432, par. 27, Case C-148/02 *Garcia Avello*, ECLI:EU:C:2003:539, par 21.

66 C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, par 42-44.

67 Van Elsuwege, *op. cit.* note 28, pp. 443-466, p. 448.

sidered 'internal situations'⁶⁸ and outside EU law scope, the significance of this judgement lies in using citizenship rights as grounds for granting the right of residence under EU law to third-country national parent of children who are EU citizens but had not yet exercised their right to free movement.

3. CASE C-165/14 ALFREDO RENDÓN MARÍN V. ADMINISTRACIÓN DEL ESTADO

This request for a preliminary ruling concerns the interpretation of Article 20 TFEU in the proceedings between Alfredo Rendón Marín and the Spanish State Administration. Rendón Marín was a third-country national (Colombia) and father of minor children who were EU citizens in his sole care and resident in Spain since their birth. In the national procedure, the Director-General of Immigration of the Ministry of Labour and Immigration refused Mr Rendón Marín's application for residence permit under exceptional circumstances on grounds of his criminal record.⁶⁹

Rendón Marín's two children in his sole care and custody have been Spanish residents since their birth. His son was a Spanish national and his daughter Polish. Rendón Marín's criminal record involved a nine-month imprisonment that was sentenced in Spain. He was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. The decision on his application to remove mention of his criminal record from the register was due on the date of the order for reference, namely 20 March 2014. On 18 February 2010, Mr Rendón Marín applied with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit under exceptional circumstances.⁷⁰ The application was rejected on grounds of criminal record by decision on 13 July 2010.⁷¹ Mr Rendón Marín's appeal against said decision was dismissed by the National High Court on 21 March 2012, whereupon he brought an appeal against that judgment before the Supreme Court, basing it on the judgments in *Zhu and Chen* and *Zambrano*.

National law thus prohibited without any possibility of derogation the grant of a residence permit to applicants with criminal records in the country where the permit is applied for. Given that this inevitably effected depriving a minor EU citizen who is a dependant of the applicant for a residence permit of his right to reside in the European Union, the referring Supreme Court was uncertain whether said national law provisions were consistent with the Court's case law relied on in the case, with regard to Article 20 TFEU.⁷² The Supreme Court thus referred to the Court the following question:

"Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004, Zhu and Chen (C-200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C-34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?"⁷³

68 EU citizens and their family members can only rely on their EU citizenship rights, when they fall within the scope of application of EU law i.e. if there is no link with EU law, they are subject to national rules of the Member States that can be more restrictive. See more in: Tryfonidou, *op. cit.* note 29, pp. 43-67.

69 Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado* ECLI:EU:C:2016:675, par 2.

70 Pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.

71 Pursuant to Article 31(5) of Law 4/2000.

72 Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 14-22.

73 *Ibid.* par 23.

The Court examined whether a third-country national such as Mr Marín may enjoy a derived right of residence either under Article 21 TFEU and Directive 2004/38⁷⁴ or Article 20 TFEU⁷⁵, and if so, whether his criminal record could justify a limitation of that right (even though the referring court has limited its question to the interpretation of Article 20 TFEU). In particular, the Court examined the circumstances of case in light of the fact that rights granted to third-country nationals under provisions of EU law on EU citizenship are not autonomous rights of third-country nationals, but rather derived from the exercise of freedom of movement and residence of an EU citizen⁷⁶. As previously seen in its practice, even though exceeding the question of the national court, the Court took the liberty to extend the scope of EU law by referring to Article 21 TFEU and Directive 2004/38 in this context.

Article 21 TFEU and Directive 2004/38 provide the basis for the existence of a derived right of residence. Mr Marín's son (a minor) has always resided in the Member State of which he is a national, he is not covered by the concept of 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38⁷⁷ as he had never exercised his right of freedom of movement; the Directive is thus not applicable to him.⁷⁸ On the other hand, Mr Rendón Marín's minor daughter, a Polish national and resident of Spain since birth, was entitled to rely on Article 21(1) TFEU.⁷⁹

The limitations on the right of residence derive from Article 27(1) of Directive 2004/38. Under said Directive, Member States may restrict the right of residence of EU citizens and their family members, irrespective of nationality, on grounds, in particular, of public policy or public security. However, Article 27(2) of Directive 2004/38 provides that measures on grounds of public policy must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. Moreover, Article 27(2) of the Directive elucidates that criminal record cannot in itself constitute grounds for taking public policy or public security measures, that the personal conduct of the individual concerned must represent a genuine and present threat affecting one of the fundamental interests of society or of the Member State concerned, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.⁸⁰

Building on the said provisions, the Court concluded that EU law precludes limitation on the right of residence founded on grounds of a general preventive nature and ordered for the purpose of deterring other third-country nationals. In particular, this refers to instances wherein said measure was adopted in response to a criminal record, without considering the personal conduct of the offender or the danger that person represents for the requirements of public policy.⁸¹ For that reason, Mr Rendón Marín's criminal conviction from 2005 cannot in itself constitute grounds for refusing a residence permit.⁸²

⁷⁴ Article 21 TFEU: Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. [...] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

⁷⁵ Article 20 TFEU: Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship; Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States[...]

⁷⁶ Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 32-36. See: Case C-87/12 *Ymeraga and Others*, EU:C:2013:291, par 35; Case C-86/12 *Alokpa and Moudoulou*, EU:C:2013:645, par 22; and Case C-456/12 *O. and B.*, EU:C:2014:135, par 36.

⁷⁷ Article 3(1) of Directive 2004/38 : „This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.“

⁷⁸ See: Case C-256/11 *Dereci and Others*, EU:C:2011:734, par 57, and Case C-356/11 *O. and Others*, EU:C:2012:776, par 42.

⁷⁹ Case C-200/02 *Zhu and Chen*, EU:C:2004:639, par 26.

⁸⁰ Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 55-60.

⁸¹ Case C-33/07 *Jipa*, EU:C:2008:396, par 23 and 24; Case C-145/09 *Tsakouridis*, EU:C:2010:708, par 48.

⁸² Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado* ECLI:EU:C:2016:675, par 65.

Furthermore, to deport Mr Rendón Marín, the Member State would first have to observe fundamental rights: the right to respect for private and family life (Article 7 of the Charter of Fundamental Rights of the European Union), the obligation to take into consideration the child's best interests, recognised in Article 24(2) and the principle of proportionality. Conclusively, Article 21 TFEU and Directive 2004/38 must be interpreted as preclusive of national legislation under which a third-country national is automatically refused a residence permit on the sole ground of possessing a criminal record in the Member State wherein he or she co-resides with and parents a dependant minor child who is an EU citizen.⁸³

Article 20 TFEU grants EU citizenship to all Member State nationals. EU citizenship confers on all EU citizens the primary and individual right to move and reside freely within the territory of Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation.⁸⁴ Moreover, Article 20 TFEU precludes national measures that effect depriving Union citizens of the *genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens*, as the Court held in *Zambrano*.⁸⁵ The Court also found that in a narrow set of circumstances where freedom of movement has not been exercised, the right of residence must nevertheless be granted to a third-country national who is a family member of an EU citizen. The effectiveness of citizenship of the Union would otherwise be undermined and that citizen would be obliged to leave EU territory as a whole, thus denying him the said *genuine enjoyment of the substance of the rights conferred by virtue of his status*.⁸⁶ By the same token, if the refusal to grant residence to Mr Rendón Marín, a third-country national and sole custodian of EU citizen children, were to mean that he had to leave EU territory, the effect would be a restriction of his children citizens right, in particular the right of residence. Any obligation on their father to leave EU territory would thus deprive them of the *genuine enjoyment of the substance of the rights that the status of Union citizen confers upon them*.⁸⁷

It must be noted that, by contrast to *Zambrano* wherein the public policy or public security exception was not invoked, this limitation was addressed in detail in *Rendón Marín*.⁸⁸ In relation to the possibility of limitation of rights deriving from Article 20 TFEU (Member States' right to upholding the requirements of public policy and safeguarding public security), the Court concluded that refusal of the right of residence must be founded on the existence of *a genuine, present and sufficiently serious threat to the requirements of public policy or of public security*. This was not a case with Spanish national legislation, which automatically refused the residence permit on the sole ground of a criminal record. Conclusively, where required in effect that children leave EU territory, Article 20 TFEU must be interpreted as preclusive of national legislation under which a third-country national must be automatically refused a residence permit on the sole ground of a criminal record in the Member State wherein he or she co-resides with and parents dependant minor children who are EU citizens.⁸⁹

The reasoning of the CJEU in *Marín* generates several discussion points. The Court does not merely follow the principle established in *Zambrano*, but rather raises it to a new level – arguably a higher level of citizen rights protection. Primarily, the Court protects the third-country national parent of minor children who are EU citizens by interpreting Article 20, Article 21 and Directive 2004/38 as preclusive of national legislation that automatically

83 *Ibid.* par 67.

84 Article 20 TFEU.

85 Case C 34/09 *Ruiz Zambrano*, EU:C:2011:124, par 42.

86 Case C 34/09, of 8 March 2011, *Ruiz Zambrano*, EU:C:2011:124, par 43 and 44; Case C 256/11 of 15 November 2011, *Dereci and Others*, EU:C:2011:734, par. 66 and 67; Case C - 40/11 of 8 November 2012, *Iida* EU:C:2012:691, par 71; Case C- 87/12 of 8 May 2013, *Ymeraga and Others*, EU:C:2013:291, par 36; and Case C- 86/12 of 10 October 2013, *Aloka and Moudoulou*, EU:C:2013:645, par. 32

87 Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 67.

88 Opinion of Advocate general Szpunat of 4 February 2016, Case C-165/14, *Alfredo Rendón Marín v. Administración del Estado*, par 160.

89 Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 83-87.

refuses residence permit on the sole ground of a criminal record, in turn requiring minor children to leave EU territory. This sheds new light on the right to family reunification (in part with regard to minor children rights) by adapting it to the circumstances of *Marín*. As emphasised by the Court, the crucial element to consider is that refusal of the right of residence must be founded on the existence of *a genuine, present and sufficiently serious threat to the requirements of public policy or of public security*. In this respect, the Court ruled that there was no ground for the refusal of the right of residence of Mr Marín. This however does not imply direct application to all cases concerning third-country nationals with criminal records that will rather be decided severally. In other words, without children in his sole custody, the judgement in *Marín* might have been the opposite.

CONCLUSION

The paper analysed current developments in the area of family reunification, with emphasis on a number of issues raised by the Court in its jurisprudence. It specifically focused on the most recent judgment in this area: Case C-165/14 *Alfredo Rendón Marín*. Family reunification cases as presented above suggest that protection of the family life of EU citizens and the right on family reunification are still observed primarily within the context of free movement rights and secondarily within the context of EU citizenship.

In the *Marín* judgment, the Court did not merely adhere to the principle established *Zambrano*, but rather raised it to a new level – arguably a higher level of protection of citizen rights by dismissing automatic refusal of a residence permit on the sole ground of a criminal record that in turn requires minor children to leave EU territory. Such development in *Marín* judgment must be considered ambitious in terms of protection of citizen rights (especially rights of minor children), which in turn raises new questions: Had the Court prioritised individual justice over legal certainty and well-established principles? Would the judgement have been the same had Mr Marín presented genuine, or present, or sufficiently serious threat to the requirements of public policy or of public security? What would prevail in such a scenario: public policy and public security or best interests of the child?

As of yet, the right to family reunification is not an autonomous right under EU law. It merely derives from free movement rights and EU citizenship rights. To exercise the right on family reunification, beneficiaries must either provide evidence of a cross-border element or pass genuine enjoyment tests. What is vital to the protection of minor children is the fact that in all judgments analysed herein, the Court prioritized children's rights, even when it denoted expanding of the well-established scope of the family reunification right. This was evident in *Zambrano*, where the Court introduced said genuine enjoyment tests and recently in *Marín*, where the Court placed the best interest of the child before public policy and public security exceptions.

Bibliography

1. Cambien, N., *Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, Columbia Journal of European Law, Vol. 15, No. 2, 2009, pp. 321-341.
2. Condiñanzi, M.; Lang, A.; Nascimbene, B., *Citizenship of the Union and Freedom of Movement of Persons*, Martinus Nijhoff Publishing, Leiden Boston, 2008.
3. Đerđa, D., *O državljanstvu Europske unije*, Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu, god. 11, 2002. : pp. 82-88
4. Geelhoed, L.A., *'De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels'*, Manunza, E. & Senden, L. (ed.), De EU: De interstatelijkheid voorbij? Nijmegen: Wolf Legal Publishers, 2006
5. Goldner, I., *Family reunification of European Community nationals*, Croatian Yearbook of European law & policy, Vol. 1. No. 1. 2005, pp. 163-202.
6. Goldner Lang, I., *Transitional arrangements in the enlarged European Union: How free is the free movement of workers?* Croatian yearbook of European law & policy, Vol. 3. No. 3. 2007, pp. 241-271.
7. Goldner Lang, I., *Sloboda kretanja ljudi u EU*, Školska knjiga, Zagreb, 2007.
8. Grubiša, D., *Lisabonski ugovor i europsko građanstvo*, Politička misao: Časopis za politologiju, Vol. 47. No. 4, 2010, pp. 185-209.
9. Guild, E.; Peers, S.; Tomkin, J.; *The EU Citizenship Directive: A Commentary*, Oxford University Press; Oxford, 2014, pp. 82-85.
10. Guild, E.; Gortázar, C., *The Reconceptualization of European Union Citizenship*, Brill Nijhoff Publishing, Leiden Boston, 2014, pp. 169-189.
11. Hanf, D., "Reverse Discrimination" in EU Law: Constitutional Aberation, Constitutional Necessity, or Judicial Choice', Maastricht Journal of European and Comparative Law Vol. 18; No. 1-2, 2011; pp. 26-61
12. Kapural, M., *Sloboda kretanja radnika u proširenoj Europskoj uniji i njezin utjecaj na Hrvatsku*, Pridruživanje Hrvatske Europskoj uniji: Ususret izazovima pregovara; treći svezak; Institut za javne financije, Zaklada Friedrich Ebert, Zagreb, 2005.
13. Krūm, K; *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, Martinus Nijhoff Publishing, Leiden Boston, 2014.
14. Kostakopoulou, D., *European Union citizenship: Writing the future*, European Law Journal, Vol. 13, No. 5, September 2007, pp. 623-646.
15. Lansbergen, A., Miller, N.; *Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution?* Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz, Zambrano v. Office national de l'emploi (ONEM)*, European Constitutional Law Review, Vol.7 ; No. 02, 2011, pp. 287-307.
16. Lenaerts, K.; Maselis, I.; Kathleen, G., *EU Procedural Law*, Oxford University Press, Oxford, 2006
17. Lord, S., *Introducing a European Legal Order*, London: Stevens and Sons, 1992.
18. Marković, T., *Prava državljana članica EGP-a i članova njihovih obitelji u okviru slobode kretanja vs. mobilnost*, Pravni vjesnik; Vol.30 No.2, 2014, pp. 285-305.

19. Militaru, I.N., *Citizenship of the European Union under the Treaty of Lisbon*, Juridical Tribune, Vol. 1, 2011. ,pp 71-82
20. Novičić, Ž., *Sloboda kretanja ljudi u pravu Evropske Unije*, Bibliid, Vol. LV, br. 1, 2003.
21. Petrašević, T., *Accelerated and urgent preliminary ruling procedure*, Preliminary ruling procedure in European Union law - cooperation of national courts with the European Court,
22. Čapeta, T.; Goldner Lang, I.; Perišin, T.; Rodin, S., *Reforma Europske unije – Lisabonski ugovor*; Narodne novine, Zagreb, 2011
23. Spaventa, E., *Case C-109/01 Secretary of State for the Home Department v. Hacene Akrich, judgment of the Full Court of 23 September 2003*, [2003] ECR I-9607, Common market law review, Vol. 42; No. 1, 2005, pp. 225-239.
24. Töttös, Á., *Family reunification rules in the European Union and Hungary*, 2014, available at: <http://migrationonline.cz/en/e-library/family-reunification-rules-in-the-european-union-and-hungary>; Accessed 28 September 2017.
25. Tryfonidou, A., *'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe'*, 2008, pp. 43-67.
26. Van Elsuwege, P.; Adam, S., *'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'Assurances soins flamande'*, Cahiers de droit européen, 2008
27. Van Elsuwege, P.; Kochenov, D., *On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, European Journal of Migration and Law No.13, 2011.
28. Van den Broucke, S.; Vanduyndslager, L.; De Cuyper, P., *The EU Family Reunification Directive Revisited, An analysis of admission policies for family reunification of Third Country Nationals in EU Member States*, 2016.

Website References

1. CRISIS, Unicef, *The Right of the Child to Family Reunification*, 2016, available at: https://www.unicef.org/eca/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf; Accessed 28 September 2017.
2. Library of Congress, *Family Reunification Laws*, 2014, available at: <https://www.loc.gov/law/help/family-reunification/eu.php>; Accessed 27 September 2017.
3. *EU freedom of movement and residence*, EUR-Lex, 2015, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33152>; Accessed 28 September 2017.
4. EU Law Analysis, Expert insight into EU law developments, *Family Reunion for Third-Country Nationals: Comments on the Commission's new guidance*, 2014, available at: <http://eulawanalysis.blogspot.hr/2014/04/family-reunion-for-third-country.html>; Accessed 28 September 2017.
5. Euroguidance Hrvatska, *Savjetovanje o mobilnosti - intervju*, Agencija za mobilnost i programe EU, available at: http://www.euroguidance-vlaanderen.be/file/view/euroguidance_web%20publ_v5%20croatia.pdf; Accessed 27 September 2017.
6. Ryland, D., *European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?*, In: 10th Jubilee International Academic Conference, 'State, Society and Economy' - Globalisation in a Contem-

porary World, 13 - 15 June 2010, Andrzej Frycz Modrzewski Krakow University, Poland available at: http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf; Accessed 28 September 2017.

List of Regulations, Acts and Court Decisions

1. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
2. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC),
3. European Convention of Human Right (ECHR)
4. Opinion of Advocate general Szpunat of 4 February 2016, Case C-165/14, *Alfredo Rendón Marín v. Administración del Estado*
5. Proposal for a Council Directive on Family Reunification, COM (1999) 638 final,
6. Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on the freedom of movement of workers within the Community
7. Royal Decree 2393/2004, of 30 December, Which Approves The Regulations Of The Organic Law 4/2000, Of 11 January, On Rights And Freedoms Of Foreigners In Spain And Their Social Integration
8. Treaty on the Functioning of the European Union (TFEU),
9. Universal Declaration of Human Rights
10. Joint cases C-64/96 and C-65/96, *Kari Uecker and Vera Jacquet v. Land Nordrhein Westfalen*, ECR I-3171
11. Case C-224/98 *D'Hoop*, ECLI:EU:C:2002:432
12. Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* ECLI:EU:C:2003:491
13. Case C-200/02 *Zhu and Chen*, EU:C:2004:639
14. Case C-33/07 *Jipa*, EU:C:2008:396
15. Case C-127/08 *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449
16. Case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124
17. Case C-145/09 *Tsakouridis*, EU:C:2010:708
18. Case C-256/11 *Dereci and Others*, EU:C:2011:734
19. Case C-356/11 *O. and Others*, EU:C:2012:776
20. Case C-86/12 *Alokpa and Moudoulou*, EU:C:2013:645
21. Case C-87/12 *Ymeraga and Others*, EU:C:2013:291
22. Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675

УДК 343.431-053.2(4-672ЕУ)

Title:

**TRAFFICKING OF
CHILDREN
IN THE EUROPEAN
UNION**

Authors:

Ksenja Pertinač, master's degree in law, Doctorate student at the Faculty of Law in Maribor, Judicial practitioner employed at the High Court in Celje, Prešernova ulica 22, 3000 Celje, Republic of Slovenia. E-mail: ksenjapertinac@hotmail.com.

The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross Border Movement of a Child in the EU (575451-EPP-1-2016-HR-EPPJMO-CHAIR), held at the J.J. Strossmayer University of Osijek, Republic of Croatia on 15-16 of March 2018

ABSTRACT

According to rough estimates, trafficking in human beings is currently enslaving 20.9 million people worldwide. It is a serious crime and one of the worst forms of violations of human rights and dignity. Human trafficking is the second-largest illegal industry in the world, and it is second in money profit right after trafficking of drugs. With regard to trafficking in children, data shows that at any moment in the world, there are 5.7 million of children forced to work in factories, plantations and brothels. The sad fact is that most individuals think that slavery has ended decades ago, but it is tragic and real that today there are more slaves in the world than at any point of human history. We must be constantly aware that children are human beings with their respective rights and dignity. Human rights are also children's rights and because of their particular vulnerability, the children need additional protection. This should be the goal of all involved handling this crime, the maximum protection of children and the maximum punishment of all the perpetrators involved in this terrible violation of children's rights. If we pursue these goals, we will achieve the optimum of the legislation, and the good effects of our work will follow.

The author of the article, through the problems of the present state in practice, seeks legislative solutions, which she thinks will optimally contribute to the improvement of the situation. Most of the time she uses the secondary analysis method when she is analyzing data collected by other researchers in this field, primary lawyers and research journalists. At the end she summarize her knowledge in optimum findings.

Key words: trafficking in human beings, trafficking in children, optimum legislation, European Union, sexual exploitation, forced labor

INTRODUCTION

According to rough estimations, trafficking in human beings is currently enslaving 20.9 million people worldwide. It is a serious crime and a serious form of human rights violation. Trafficking in human beings is the second largest illegal industry in the world and it is second in money profit right after trafficking of drugs.⁹⁰ It involves the recruitment and transportation of people, often by using force, fraud, deception or coercion for the purposes of various forms of exploitation. People can be exploited for purposes of the sex industry, housekeeping, forced labor in the industry and the use of forced criminal activity.⁹¹ It is a form of crime - the abuse of the fundamental human rights and the dignity of an individual. It involves the exploitation of a vulnerable person by whom traders act as he/she is merchandise for the purpose of gaining economic benefits. It is a form of crime, which often has a transnational character. Because it covers victims of all ages and different sexes, it is especially difficult to discover.⁹²

With regards to trafficking in children, data shows that at any moment in the world, there are around 5.7 million children forced to work in factories, plantations and brothels.⁹³ Under the general definitions of the international organizations (working) in this field and the European Union (hereinafter EU), every person under the age of 18 is considered a child.⁹⁴ The general public is inclined to believe that slavery has ended decades ago, but it is tragic and sad that today there are more slaves in the world than there were at any point in human history. Millions of child slaves, many of whom are sold by their impoverished parents for miserable payment, work in brothels, private homes and restaurants abroad, and even here in Europe and the EU.⁹⁵ As the situation itself is not sufficiently worrying, in the last 20 years the situation has worsened due to the use of digital technology, and especially because of the use of the Internet. Consequently, the capacity of criminal offenders trafficking in human beings for various types of exploitation has been greatly expanded.⁹⁶ In particular human trafficking in Europe is at a high crime level in those countries experiencing severe transit shocks in the 1990s.⁹⁷

Generally it is difficult to assess the extent of trafficking in human beings at EU level, particularly because it is related to other criminal activities and also because the national legislations on this issue are different. Within the EU, this information is collected by the

90 Yea Sallie, Human Trafficking– A Geographical Perspective, Visiting Fellow, Geodate Department of Geography, National University of Singapore, Vol. 23, No. 3, 2010, p. 2.

91 Hemmings Stacey, Jakobowitz Sharon, Abas Melanie and others, Responding to the health needs of survivors of human trafficking: a systematic review, Journal List BMC Health Services Research, King's College London, Vol. 16, No. 1, 2016, p. 2.

92 EUROPOL, Situation Report Trafficking in human beings in the EU, 2016. URL= https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings-europol.pdf. Accessed 5. June 2017.

93 Kapo Mirela, Human trafficking as a threat for the security of member states of EU, Academic Journal of Business, Administration, Law and Social Sciences, IIPCCL Publishing Graz-Austria, Vol. 3 No. 2, 2017, p.117.

94 Balan-Rusu Minodora-Ioana, Licuța Coman Varvara, Protecting Children Victims of Crimes of Human Trafficking in the EU, Journal of Danubian Studies and Research, Universitatea Danubius Galati, Vol. 3, No. 2, 2013, pp. 58 - 64.

95 Storm Allison, You can save a child from slavery, Redbook Magazine, Hearst Communications, Inc., Vol. 218, No. 3, 2012, p. 105.

96 Hughes M. Donna, Trafficking in Human Beings in the European Union: Gender, Sexual Exploitation, and Digital Communication Technologies, SAGE Open, University of Rhode Island, Vol. 4, No. 4, 2014, p.1.

97 Kapo Mirela, *op. cit.* note 5, p. 117.

Commission through Eurostat. Statistics, submitted by the Member States, show that total of 15,846 victims of trafficking in human beings were detected in the years 2013 and 2014. The most widespread form of human trafficking is still trafficking for the purpose of sexual exploitation, 67% of all recorded victims, followed by exploitation for labor purposes 21%, and the remaining 12% are recorded as victims of other forms of trade with them. As many as 76% of all victims were women and at least 15% of the victims were children, while 65% of all registered victims were EU citizens. The most frequent victims were citizens of Romania, Bulgaria, the Netherlands, Hungary and Poland. Other victims that come from countries outside the EU, most frequently came from Nigeria, China, Albania, Vietnam and Morocco. The report also shows that 4.079 criminal proceedings and 3.129 convictions for the criminal offense of trafficking in human beings were made in the EU during the period concerned.⁹⁸

Child trafficking is practiced in all countries of Europe. There is no clear demarcation between countries of origin and final destinations for victims. More than half of all of the victims' paths lead in both directions, within and out of the country. Children are transported across the borders, but the trade is also carried out inside of the countries, as data show that domestic trafficking in children is carried out in every other European country. Such is primarily carried out for purposes of sexual exploitation, but the situation is even more complicated, as children in Europe are victims of exploitation for the purpose of labor, begging, for carrying out various criminal activities and other. Due to the latter, the vast majority of European countries (37) have created specialized national bodies or bodies with the aim of inter-state coordination and implementation of the human trafficking policy. Despite the different national definitions of trafficking in human beings, the vast majority of European countries adopted its uniform definition, which is also regulated in the Protocol for the Prevention, Suppression and Punishment of Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which has been ratified by 42 European countries and EU countries.⁹⁹ In addition, all European countries have also ratified the Convention on the Rights of the Child¹⁰⁰ and Convention no. 182 on the worst forms of child labor.¹⁰¹ In the context of fighting against trafficking in human beings, there is a strong regional and sub-regional regulatory framework. Also, all countries concerned have jointly adopted the Action Plan to Combat Trafficking in human beings¹⁰² and the Addendum Addressing Special Needs of Child Victims¹⁰³ of European Directorate for Integration of Organization for Security and Co-operation in Europe (OSCE). In 2005, the Council of Europe adopted the Convention on Action against Trafficking in Human Beings,¹⁰⁴ and in the same year the European Commission presented its Report on Combating Trafficking in Human Beings.¹⁰⁵ In recent years, the EU has adopted a Plan on best practices, standards and procedures to combat trafficking in human beings and the prevention of trafficking in human beings itself, and has adopted two important work plans.¹⁰⁶

98 Komisija EU, Poročilo Komisije Evropskemu parlamentu in Svetu – Poročilo o napredku v boju proti trgovini z ljudmi, 2016. URL= <http://ec.europa.eu/transparency/regdoc/rep/1/2016/SL/1-2016-267-SL-F1-1.PDF>. Accessed 5 July 2017.

99 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Adopted and opened for signature, ratification and accession by General Assembly resolution num. 55/25, 15/11/2000.

100 Convention on the Rights of the Child - Adopted and opened for signature, ratification and accession by General Assembly resolution num. 44/25, 20/11/1989.

101 Worst Forms of Child Labour Convention, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C 182, 17/6/1999.

102 OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 12/2005.

103 Addendum Addressing Special Needs of Child Victims of Trafficking for Protection and Assistance, PC.DEC/557/Rev.1, 12/2005.

104 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16/05/2005.

105 Communication from the Commission to the European Parliament and the Council - Fighting trafficking in human beings: an integrated approach and proposals for an action plan, COM/2005/0514, 18/10/2005.

106 Council EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, Official Journal of the European Union, C 311/1, 9/12/2005.

1. TRENDS OF CHILD TRAFFICKING IN EU

Data shows that this is an area growing most intensively within the EU. According to the statistical data for years 2013 and 2014, out of 15, 846 recorded victims, as many as 2, 375 were children. The most vulnerable are children from socially and economically disadvantaged families, which are being forced by the traffickers into a developed scheme. This method requires the vulnerable persons or families to initially borrow some money from the traffickers, which later, they obviously cannot pay back. As a form of payment, traffickers then accept the sale or delivery of the child. It is necessary to recognize that children are one of the most vulnerable groups and thus are an easy target for traffickers. The latter choose to trade with them as children can easily be trafficked and are easy to replace. Trade with children is also widespread in non-migration related situations, but the latest information received, suggests that the current migration crisis has worsened the conditions since a large number of children migrants are also coming to the EU. In particular, it is problematic that a large proportion of children travel unaccompanied, or are left unaccompanied when they arrive to the EU. There are lot of problems with detecting children who are victims of trafficking in human beings. In addition, the problem of secondary victimization emerged when children are trafficked again and then treated as perpetrators of trafficking, and not as victims.¹⁰⁷

In the period from 2010 to 2012, as many as 16% of all victims of trafficking in human beings were under the age of 18, out of which 13% were girls and 3% boys. Of the registered victims, 2% were aged from 0 to 11, 17% were aged from 12 to 17, 36% of the registered victims were aged between 18 to 24, and 45% of them were over 25 years old.¹⁰⁸

1.1 Legal Framework of Child Trafficking in EU

Action against trafficking in human beings on EU level dates back to the adoption of the Framework Decision in 2002, when the Council of Europe adopted the official definition of the concept of trafficking in human beings, describing it as "serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion."¹⁰⁹

In 2011, the EU Directive on preventing and combating trafficking in human beings and protecting its victims,¹¹⁰ which replaced the previous regime, was adopted by the Council of Europe, and the EU has adopted a wider definition of trafficking in human beings, the one of the United Nations, which is enshrined in the UN Protocol to Prevent,

107 Komisija EU, Poročilo Komisije Evropskemu parlamentu in Svetu – Poročilo o napredku v boju proti trgovini z ljudmi, 2016. URL= <http://ec.europa.eu/transparency/regdoc/rep/1/2016/SL/1-2016-267-SL-F1-1.PDF>. Accessed 5 July 2017.

108 European Commission, Study on high-risk groups for trafficking in human beings - Executive summary, 2015. URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/study_on_children_as_high_risk_groups_of_trafficking_in_human_beings_-_executive_summary.pdf. Accessed 10 July 2017.

109 Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), Official Journal of the European union, L 203 , 01/08/2002.

110 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, Official Journal of the European union L 101/1, 15/4/2011.

Suppress and Punish Trafficking in Persons, Especially Women and Children,¹¹¹ referred to as the Palermo Protocol, all of which supplemented the UN Convention Against Transnational Organized Crime.¹¹²

The Palermo Protocol thus defines trafficking in persons in Article 3 as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” The main change introduced by the Palermo Protocol was that the crime of trafficking in human beings could be defined and punished as such even before the exploitation phase. Accordingly, a victim’s status could have been recognized if he/she was only exposed to one of the acts or phases defined in the said third article.

The Council of Europe later enlarged the list of acts and assets used to attract victims, namely “abduction of women for sexual exploitation, enticement of children for use in paedophile or prostitution rings, violence by pimps to keep the prostitutes under their thumb, taking advantage of an adolescent’s or adult’s vulnerability, whether or not resulting from sexual assault, or abusing the economic insecurity or poverty of an adult hoping to better their own or their family’s lot”. The Palermo Protocol has further expanded the range of forms of exploitation, but did not limit them, as it gave the legislators the possibility to include new forms. In order for the act to meet at least the minimum standards of trafficking in human beings, it must include exploitation of prostitution, forced labor or other services as slavery or similar practices, servitude or removal of organs.¹¹³

EU Directive 2011/36/ EU specified types of exploitation for the purposes of forced criminality in Article 2.3, namely “pickpocketing, shoplifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain”. Since trafficking in human beings always involves a vulnerable individual who is an exploitation entity, Article 2 of the Directive also clarified the situation of vulnerability as a situation in which the person concerned does not have any genuine or acceptable choices, but only to accept the abuse. In explanation of this article, it has been added that such vulnerability can be of any kind, whether psychic, emotional, family-related, social or economic. We can also talk about the uncertainty or illegality of the victim’s legal status or even of a reduced state of health. Exploitation can therefore be any kind of distress in which a person is forced to accept being exploited.¹¹⁴

The issues concerned, one should be aware that there may also be a situation where the victim is aware that it is being exploited. Thus, the EU Directive provides that the consent of a victim of trafficking in human beings, either intended or actual, is irrelevant, regardless of the means of coercion employed. Thus, Article 8 of the Directive advises Member States that the competent authorities do not prosecute or punish victims, even if they are possibly involved in criminal activity, since they have been forced into the latter, as a direct consequence of the coercion itself. Children are certainly the most vul-

111 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2237, Doc. A/55/383, 15/11/2000.

112 United Nations Convention against Transnational Organized Crime, Doc. A/55/383, 10-18/5/2004.

113 EUROPOL, Situation Report Trafficking in human beings in the EU, 2016. URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings-europol.pdf. Accessed 10 June 2017.

114 EUR – Lex: Access to European Union Law, Summary of legislation EU 2011/36/EU, 2011. URL= <http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32011L0036&qid=1504862802002>. Accessed 7 September 2017.

nerable category of victims in this field. This is why they were given special attention both in the Palermo Protocol and in the EU Directives. If a criminal offense of trafficking in human beings includes a child, the latter is considered a victim, even if none of the specified means have been used. In the area concerned, it is particularly problematic that there is no consensus on how to actually evaluate the exploitation of a child, especially when the act itself that has been committed is not one of the violent or exploitative type.¹¹⁵

2. CURRENT LEGISLATION PROBLEMS

In the past, a number of international and regional legal rules were adopted to prevent and combat trafficking in children, but there was a problem as all countries concerned have not ratified these rules and that is why the effective implementation of the standards is still put in question. This all is a threat to an effective childcare. The next problem is that most international standards focus only on the adult population. There is also a tendency to consider trafficking in children as a sub-question in the context of trafficking in human beings instead of being an independent and main issue which could promote and protect the rights of children at its maximum. The national legislation of individual EU Member States differs greatly from one to another. Therefore trafficking in human beings is dealing with different aspects of human rights, different spectrums of criminal law and various contents of children's rights in different countries. The definition of child trafficking is also problematic, because it is differently defined in different countries. So we can say that the legal protection of children, victims of trafficking in human beings in Europe and the EU is still not appropriate. In many countries, children are not protected from criminal prosecution for crimes committed in the framework of trafficking in human beings.¹¹⁶

2.1. Lisbon Treaty

Just a few years ago there was no reference to children in existing EU acts which could justify a more concrete intervention by the EU in this area. The EU Treaty (hereinafter referred to as the TEU) only introduced a general EU obligation to respect fundamental rights in whatever form, but of course, in accordance with its competences (formerly Article 6 (1) of the TEU). The only provision where children were explicitly mentioned was the provision on the EU's commitment to fight crime, in particular against trafficking in human beings and crimes against children, all within the so-called third pillar of the European Community. With such a loose constitutional basis, it was clear that the EU's effectiveness on protection children's rights requires changes.¹¹⁷

Thus, the human rights defenders and the defenders of the rights of the children, with great optimism, accepted the Treaty of Lisbon that was signed on 17 December 2007 and entered into force on 1 December 2009. The latter introduced many structural, procedural, institutional and constitutional changes within the EU and their purpose was to significantly enhance the capacity of the EU and the Member States to protect and promote the rights of the children.¹¹⁸ The Lisbon Treaty itself brought some good changes in

115 EUROPOL, Situation Report Trafficking in human beings in the EU, *op. cit.* note. 25. Accessed 10 June 2017.

116 UNICEF, Child Trafficking in Europe - A Broad Vision to put Children First, URL= https://www.unicef-irc.org/publications/pdf/ct_in_europe_full.pdf. Accessed 7 July 2017.

117 Stalford Helen, Schuurman Mieke, Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda, *The International Journal of Children's Rights*, University of Liverpool, Vol. 19, No. 3, 2011, pp. 381-403.

118 Stalford Helen, Schuurman Mieke, *op. cit.* note 19, p. 382.

the field of child trafficking by inserting provisions on fighting against sexual exploitation and trafficking in human beings (Article 79 (2) (d)) and Article 83 (1)) into the Treaty on the Functioning of the European Union (hereinafter TFEU). The latter were then supplemented by more general provisions of EU citizenship (Article 21 TFEU) and provisions about non-discrimination (Article 19 TFEU). These formed the basis for the far-reaching implementation of legislative provisions and judicial decisions. Prior to the adoption of the Lisbon Treaty, trafficking in children was regulated in the third pillar, but now is regulated in the chapter of the TFEU entitled "Area of freedom, Security and Justice". These provisions made it possible to adopt more effective legal measures for the purpose of detecting offenders and victims of such offenses (Article 83 (1) TFEU). They also constituted a decent base for regulating the cross-border exchange of information between relevant authorities on convicted perpetrators of human trafficking offenses. Legislation explicitly tied to the fight against trafficking in human beings has thus been further strengthened with the provisions on migration and asylum legislation. The latter formed the basis for the development of a common migration policy within the EU, but its focus shifted from the exclusive concern for the protection of external borders, border immigration and the protection of national security to the fight against trafficking in human beings and the protection of the victims.¹¹⁹

3. CHILDREN AS VICTIMS OF DIFFERENT EXPLOITATION PRACTICES

Based on an analysis of risk factors, there are types of children who are more susceptible to the risk of becoming victims of trafficking in children. There are different factors, but some are common to several categories. The general conclusion is that it is not possible to address the vulnerability of children with a single approach, since the reasons for the exploitation can vary. In this field we are talking about children victims of domestic violence, abuse and neglect; children who are part of the planned migration by their families in terms of education and training abroad; children who are left alone; we are talking about children who are without parents or other relatives that can take care of them; children victims of war, crises and natural disasters; children with physical, learning and developmental disorders and children from certain marginal communities.¹²⁰

3.1 Forced Labour

Different groups of children can be exploited for various forms of trafficking in human beings. In the EU, forced labor and the exploitation of children for sexual activities are predominant, and are affecting most of the victims. Trafficking in human beings for the purpose of forced labor or exploitation of labor force in the EU is on the rise in several Member States, with data indicating currently as much as 21% of all victims falling in this category. Member States also report increase in male victims of forced labor for the purposes of labor in the agricultural sector. Statistically, as many as 74% of all victims were males. Traffickers exploit legal gaps in the legislation in the areas of work permits, visas, labor rights and in general loopholes regarding work conditions. It is a form of exploitation that is definitely not new within the EU, and due to the economic crisis and demand for low-cost labor these numbers are on the rise. Persons who are victims of such exploitation are extremely low paid for their work, they live and work in conditions that do not even meet the minimum standards of human dignity. Domestic servitude is

¹¹⁹ Stalford Helen, Schuurman Mieke, *op. cit.* note 19, pp. 383-384.

¹²⁰ UNICEF, Combating Child Trafficking, 2005. URL= [https://www.unicef.org/publications/files/IPU_combatingchildtrafficking_GB\(1\).pdf](https://www.unicef.org/publications/files/IPU_combatingchildtrafficking_GB(1).pdf). Accessed 20 July 2017.

also a form of trafficking in human beings, which is especially difficult to detect. Primarily its victims are women and girls and the majority of these forms of human trafficking are happening in private households, so victims are often isolated from the outside world.¹²¹

Children can be sold for work on plantations, areas with mines or made to work in other dangerous conditions, such as handling dangerous substances or operating with dangerous machines. The latter are very often isolated from society and are afraid to report their exploitation to authorities. In some cases, children are victims of exploitation in the so-called tied work, when the child's family receives payment, which is composed in such a way that the costs and interest are deducted from the child's earnings, and the final amounts of payment is so miserable that it is almost impossible to pay off the debt, or to buy the child back. The International Labor Organization (hereinafter referred to as the ILO) estimates that most of so-called servants are girls. Both children and their parents are often lured in, with the promises of good education or a good job. When these children are once in the hands of the wrong people they also remain without all of their personal documents, which are taken from them, they become completely dependent on their exploiters and suffer from extremely difficult working conditions.¹²² The ILO, EU and Benelux countries have been involved in the fight against the described form of trafficking in human beings since 1958. EU also actively participates in discussions and negotiations at institutional meetings, especially in the adoption of conventions, recommendations, resolutions and other important texts.¹²³

3.2. Sexual Exploitation

Trafficking in human beings for the purposes of sexual exploitation is still by far the most widespread form of trafficking in human beings within the EU. Statistics for the period of 2013-2014 show that as many as 67% of all registered victims, are victims of this type of exploitation. It is a form that in most cases affects girls and women. Lately, there is also a trend of increasing male victims in some Member States. The majority of victims end up in the sex industry, where traffickers are increasingly turning to new forms of trafficking in human beings, especially in this area where we are talking about moving from visible forms to the less visible ones, and there is also present the abuse of the institute of self-employed persons. In countries where prostitution is legal, the offer has increased, and as a result, the value of services has decreased. In such countries, it is much easier for traffickers who want to act in accordance with applicable legislation to exploit these frameworks and consequently also exploit the victims. But there are also changes in the implementation of this activity, as the invisible forms of prostitution are being increasingly disseminated.¹²⁴ Thus the Netherlands, which in 2000 as the first European country legalized prostitution as a profession, is experiencing a rather worrying paradox, as it turning out that legal prostitution is now becoming more difficult to implement, since it is necessary to meet various conditions and strict commandments, while illegal prostitution is becoming even more illegitimate and practically impossible for study and sanctioning.¹²⁵

According to Eurostat in the period between years 2010 and 2012, two thirds of all

121 European Commission, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Report on the progress made in the fight against trafficking in human beings, 2016). URL= https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings/docs/commission_report_on_the_progress_made_in_the_fight_against_trafficking_in_human_beings_2016_en.pdf. Accessed 22 August 2017.

122 UNICEF, Combating Child Trafficking, *op. cit.* note 32. Accessed 20 July 2017.

123 International Labour Organization, ILO and EU, 2016. URL= <http://www.ilo.org/brussels/ilo-and-eu/lang-en/index.htm>. Accessed 18 August 2017.

124 UNICEF, Combating Child Trafficking *op. cit.* note 32. Accessed 20 July 2017.

125 Siegel Dina, Human trafficking and legalized prostitution in the Netherlands, Temida, Viktimološko društvo Srbije "Prometej", Vol. 12, No. 1, 2009, pp. 5-16.

registered victims were trafficked for sexual exploitation, out of which 80% were women and girls, while 19% of all registered victims were children that were less than 18 years old, while 36% were aged between 18 and 24 years. More than 1000 children who were victims of sexual exploitation were registered, of which 65% were EU citizens. The highest number of victims that are EU citizens, came from Romania, Bulgaria, the Netherlands, Hungary and Poland. Even the suspected traffickers were, in the vast majority (69%) EU citizens. Most of them were citizens of Bulgaria, Romania, Belgium, Germany and Spain.¹²⁶

3.3 Other Forms of Exploitation

Statistics for the period 2013-2014 show that other forms of exploitation account for 12% of all of the victims. These are various forms of forced begging, criminal activities, forced marriage, false marriage, resale of organs, trafficking in children or infants for adoption purposes, trafficking in women for the purposes of selling unborn babies, trafficking in human beings for purposes of cannabis production and smuggling drugs or selling them.¹²⁷ We are therefore talking about extremely creative forms of exploitation of persons, or of sophisticated ways of enslaving them. Trafficking in human organs went even so far that today, even eggs, sperm, or substitute maternity services are being traded.¹²⁸ It is also possible to detect cases where individuals are victims of multiple forms of exploitation, most cases for forced labor and sexual exploitation, or are intended as cheap labor force and at the same time they are being involved in various criminal activities. Data also show that exploiting people with physical and mental disorders is in growth. It is possible to expect that the current situation in the area of migration and refugees will lead to even higher numbers of victims, as this increases their possibilities to someday gain the right to a legitimate stay within the EU, or at least they believe it does.¹²⁹

4. ELEMENTS FOR THE ESTABLISHMENT OF OPTIMAL LEGISLATION

In Europe, different legal and politically colored concepts related to child trafficking were adopted in the past, most of which were adopted in the wider concept of combating organized crime, sexual exploitation and illegal migration. It was very often that the latter did not provide the adequate protection of the human rights of children who were victims of trafficking in human beings. The protection measures also only concerned on the so-called short-term assistance to victims, while the conceptual widespread violations of children's social, economic, cultural, civil and political rights were usually overlooked. Many vulnerable children have thus remained unprotected and the conceptual violation of their rights is happening still.¹³⁰

The first phase or a good foundation for good legislation is definitely a political will. This is particularly important for the ratification of the most important international legal instruments, the effective implementation of international rules, including the harmoni-

126 Vlada Republike Slovenije, Trgovina z ljudmi v številkah, 2016. URL= http://www.vlada.si/teme_in_projekti/boj_proti_trgovini_z_ljudmi/boj_proti_trgovini_z_ljudmi/trgovina_z_ljudmi_v_stevilkah/. Accessed 20 August 2017.

127 UNICEF, Combating Child Trafficking, *op. cit.* note 32. Accessed 20 July 2017.

128 Pop Lia, Trafficking of Human Beings – An Academic Attempt to Support the EU Actions in the Fight Against It, *Journal of Identity and Migration Studies*, University of Oradea, Vol. 6, No.1, 2012, pp. 138-145. p 139.

129 UNICEF, Combating Child Trafficking, *op. cit.* note 32. Accessed 20 July 2017.

130 UNICEF, Child Trafficking in Europe, *op. cit.* note 28. Accessed 7 July 2017.

zation of national legislations, and for the drawing up of national measures or plans of trafficking in children into other related national spectra all in the light of better childcare effectiveness.¹³¹

At EU level, the task of directing Member States' policies is led by the European Commission under the slogan "Together against Trafficking in Human Beings". They build their work on Article 5 of the European Union Charter of Fundamental Rights.¹³² The political commitment to tackling the problem of trafficking in human beings and trafficking in children is reflected in a number of initiatives, measures and funding programs within the EU, as well as outside, and the first one was established in the 1990s. Political measures are targeted both within the EU and into third countries, especially in the field of forced labor and sexual exploitation.¹³³

The policy of EU legislation is certainly aimed to protect children victims of trafficking in human beings. Mutual cooperation and multidisciplinary coordination are crucial in meeting the needs of different groups of children, including children victims of trafficking in human beings. With a goal to better protect the children, the Commission finances the monitoring of the development of child protection guidelines. EU policy therefore calls on the Member States to strengthen the child protection systems and to ensure that, if it turns out to be the best solution for a child to return to the country of origin, to do so in a safe way and in order to preserve the sustainability of such situation. It is also a long-term plan of the European Commission to develop a model of best practice on the role of caregivers and representatives of victims of trafficking in human beings.¹³⁴ Due to the large number of all actors involved, from governments, non-governmental organizations, UN organizations and the diversity of their responsibilities, coordination of an effective fight against trafficking in human beings remains a major challenge at both national and international level.¹³⁵ However, the best interest of the child should always be kept in mind.¹³⁶

Regarding children affected by trafficking in human beings, there is a high degree of lack of systematization and inconsistency in the collection, analysis and dissemination of data at national, regional and international level. The data obtained are mostly undivided by age, sex, nationality or the very form of exploitation. Where such a disorganization is not present, positive effects on understanding the child trafficking are found. It is therefore necessary to establish a single system for identifying children who have been abused or exploited.¹³⁷

In order to ensure optimal legislation, it is also necessary to involve all relevant people, since only the optimal work of the legislators is not enough. In this regard is particularly important the training of health professionals who are among the first to get in touch with the victims. In fact, they are the first in the category of "non-authority" people with whom the victims have the opportunity to meet, and therefore are also the first in a row of people that victims can trust without fear. Human traffickers are also rarely recognized by the average persons, but doctors and medical technicians are the ones who have the unique advantage to perceive this problem and then to act accordingly. But in order to know what action is appropriate, they need specific education and training. It is necessary

131 Ibid.

132 CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Official Journal of the European Union, C 326/391, 26/10/2012.

133 European Commission, Together Against Trafficking in Human Beings, 2016. URL= https://ec.europa.eu/anti-trafficking/citizens-corner-eu-actions-explained/eu-actions-explained_en. Accessed 12 August 2017.

134 European Commission, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012 - 2016, 2016. URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf. Accessed 10 August 2017.

135 UNICEF, Child Trafficking in Europe, *op. cit.* note 28. Accessed 22 August 2017.

136 U.S. Department of Health and Human Services, Determining the Best Interests of the Child, 2016. URL= https://www.childwelfare.gov/pubPDFs/best_interest.pdf. Accessed 11 August 2017.

137 UNICEF, Child Trafficking in Europe, *op. cit.* note. 28. Accessed 22 August 2017.

to realize that not only employees in the field of health need such knowledges, training and education of all persons involved in the process of detection and prevention in the field of trafficking in human beings is necessary.¹³⁸ It is also important that the entire public is monitoring and knowing indicators of phenomenon called trafficking in human beings.¹³⁹ Education programs must also target the young population so that they will also become aware of their potential in persuading the execution of this crime.¹⁴⁰

Another big problem in creating optimal legislation is the naming of the individual phenomena. Trafficking in human beings or children is an area that is subject of treatment of different bodies, agencies, sectors and individuals. Precisely because of the diversification of the area, it is even more difficult to understand the concepts or the definition of the individual phenomena. The consequence of this is the absence of a common language or terminology. Thus, a minor that is a victim of sexual exploitation, can be identified as a criminal, and as a result he/she may be detained, but may also be recognized as a victim of this form of criminal act and, as a result, can receive all health and social benefits.¹⁴¹ Not only specific concepts in the field of child trafficking, but the content of concept of trafficking in human beings is also problematic. Until 2000, the latter was not defined at all, although different international legal documents used this term.¹⁴² Another problem that we are also facing in the field of trafficking in human beings is the confusion of the concept with the smuggling of persons. These are different concepts and have different contents, so they should in no case be confused or equated.¹⁴³

A large part of the victims of trafficking in human beings are being directly or indirectly related to migrants or refugees. One of the more important novelties introduced by the Treaty of Lisbon was also the principle of solidarity. Despite that principle, the number of fatalities of migrants on the coasts of EU Member States is increasing. Migrants at sea are extremely vulnerable and suffer various forms of abuses from their smugglers, while the vast majority of them also become victims of trafficking in human beings. Member States do not want to host migrants on their territory, and therefore the principle of solidarity has not, at least in this area, come to life in all its glory.¹⁴⁴ In order to be able to realize the latter, there were recently present some speculations that EU legislation in this area needs to be radically changed, and that the provisions of the temporary protection directive¹⁴⁵ should always apply to migrants, when it is possible that they are victims of trafficking in human beings.¹⁴⁶

138 Roth Cheyna, Health workers to spot human trafficking, *Grand Rapids Business Journal*, MICHIGAN. Dept. of Community Health, Vol. 33, No. 12, 2015, pp. 18-19.

139 US Department of State, *Diplomacy in action, 15 Ways You Can Help Fight Human Trafficking*, 2017. URL= <https://www.state.gov/j/tip/id/help/>. Accessed 5 September 2017.

140 UNChronicle, *Prevention, Prosecution and Protection - Human Trafficking*, 2010. URL= <https://unchronicle.un.org/article/prevention-prosecution-and-protection-human-trafficking>. Accessed 5 September 2017.

141 Wright Clayton Ellen, Krugman D. Richard, Simon Patti, *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States - A Guide for the Legal Sector*, Institute of Medicine and National Research Council, The National Academies Press, Washington DC, 2014, pp. 6-7.

142 International Centre for Migration Policy Development, *Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member State*, 2009. URL= https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/crime/docs/evaluation_eu_ms_thb_legislation_en.pdf. Accessed 20 August 2017.

143 EUROPOL, *Situation Report Trafficking in human beings in the EU*, 2016. URL= https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings_europol.pdf. Accessed 15 August 2017.

144 Ventrella Matilde, *Recognising Effective Legal Protection to People Smuggled at Sea, by Reviewing the EU Legal Framework on Human Trafficking and Solidarity between Member States*, *Social Inclusion*, University of Wolverhampton, Vol. 3, No. 1, 2015, pp. 76-87, p. 82.

145 COUNCIL DIRECTIVE 2001/55/EC, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof *Official Journal of the European Communities*, L 212/12, 7/8/2001.

146 Ventrella Matilde, *Identifying Victims of Human Trafficking at Hotspots by Focusing on People Smuggled to Europe*, *Social Inclusion*, University of Wolverhampton, Vol. 5, No. 2, 2017, pp. 69 - 80.

The optimal legislator must also include children in the planning of the legislative text. Primarily, it would be necessary to take into account the views and interests of children in every step of the designing and planning the legislation in this field. In the future, it is necessary to consider a more holistic approach in the development of guidelines for the protection of children victims of trafficking in human beings. The strengthening of national child protection systems in the community is essential, and these systems should be designed to prevent and respond to violence, exploitation and abuse, and enable young people and children to personally grow. Such approaches enable rights of children as a central concern and encourage the participation of children in every stage, all of which allows more effective prevention for all forms of exploitation and abuse.¹⁴⁷

4.1 Prosecution and Prevention

Prosecution is the central aspect and the central strategy to combat trafficking in human beings. It is necessary to strengthen the capacity of official bodies to prosecute traffickers on a number of fronts. Thus, the law has to create, or to “conceive” a number of new criminal offenses, including trafficking in human beings, the sexual exploitation of persons, forced labor, and so-called “document of servitude” that includes the retention or destruction of identity documents, travel documents as means of keep humans in captivity or slavery. Legislation must increase penalties for perpetrators who put the victims into ambush, drive them to slavery, and then sell them to involuntary, modern-day slavery.¹⁴⁸ In practice, it has become quite clear that many victims do not identify themselves as victims of trafficking in human beings and consequently, do not want to recognize their traffickers as perpetrators of the crime, as they are scared of being deported. However, if they are already seeking for help, they often do not get it in the proper form or they are even denied it by the law enforcement agencies. The American legislator in the Act of TVPA solved this issue by introducing a special T visa that allows victims of trafficking in human beings to obtain temporary residence within the country.¹⁴⁹ Victims can receive this privilege, if they belong to a group of victims who have suffered a severe form of trafficking in human beings, and they must be willing and able to cooperate with law enforcement agencies in the investigation process and then in the law enforcement phase, and they must also suffer from a significant form of damage. Individuals who have been granted the so-called T visas may also apply for a permanent residence permit if they have stayed for at least 3 consecutive years in the US. Individuals who have suffered severe forms of trafficking and have applied for T visas and have shown their willingness to cooperate with law enforcement agencies are also eligible for a work visa and social assistance benefits. In addition to all these benefits, the Act also introduced the repayment of all the deserved assets by the convicted trafficker and the seizure of his/hers entire existing property. One of the extremely positive things of the act is the fact that victims can bring civil actions for damages against their traders and sellers and they do not have to pay lawyers and legal fees.¹⁵⁰

These are, therefore, the practices and provisions that should be at least examined within the EU, if not even enacted in the legislation. In order for the public, to be acquainted with the results of the work, it is also necessary to publish the findings which the authorities have found out through their activities.¹⁵¹ It is necessary to provide long-term support to children who have been victims of trafficking in human beings. We will

147 UNICEF, *Child Trafficking in Europe*, *op. cit.* note 28. Accessed 22 August 2017.

148 N.N., *Remedying the injustices of human trafficking through tort law*, *Harvard Law Review*, 2006, Vol. 119, No. 2574. pp. 2579-2580.

149 U.S. Department of State, *Diplomacy in action, Trafficking Victims Protection Act: Minimum Standards for the Elimination of Trafficking in Persons*, 2013. URL= <https://www.state.gov/j/tip/rls/tiprpt/2013/210553.htm>. Accessed 5 September 2017.

150 N.N., *op. cit.* note 60, pp. 2580-2581.

151 *Ibidem*, p. 2581.

achieve this with data collection, analysis and dissemination, monitoring and evaluation of programs, research and learning, international cooperation and coordination, with non-discriminatory treatments, special care of migrant children, establishment of national child protection systems, multi-sectoral approach, cooperation within the country and between countries, and as already mentioned - with the establishment of preventive measures and strategies.¹⁵² A complete chain of factors is needed, if only police officers do not have clear legal provisions how to work and prosecute criminals, due to legal loopholes, they may knowingly and involuntarily release a trafficker from their hands.¹⁵³

CONCLUSION

Children are human beings with all of their belonging rights and dignity. Human rights are also the rights of children, and because of their particular vulnerability, they need additional protection. The latter means that they must be provided with an environment that, to the greatest extent possible, provides security and prevents them from situations in which they might become potential victims of abuse.¹⁵⁴ Any abuse of the child is an extremely serious violation of the rights and dignity of children, but I believe that trafficking in children is a violation of the child's integrity in the worst possible way. We have to be aware of this and also take into account this when legislating. Every step needs to be carefully considered and then properly formulated into meaningful and optimal law provisions. Despite the fact that the EU represents a high-level of integration and is made up of highly-linked Member States, the latter are still afraid to leave the whole legislative work in this field to the legislator of EU, the European Commission. It is true that each Member State is a special case for itself, and that each has its own forms of trafficking in persons that are displayed and implemented in different ways. However, we consider that the EU is primarily the one that has to create a good legal framework and leave an appropriate margin of discretion within it, which in the individual circumstances, will be filled individually by Member States with their national and internal rules. Notwithstanding everything, the maximum protection of children involved and the maximum punishment of all involved providers of this terrible violation of children's rights should be the goal. If we pursue these, we will achieve the optimum of legislation, and the good effects of this will follow our doing.

152 UNICEF, *Child Trafficking in Europe*, *op. cit.* note 28. Accessed 22 August 2017.

153 O'Neill Maria, *The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective*, *Journal of Contemporary European Research*, University of Abertay Dundee, Vol. 7, No. 4, 2011, pp. 452 - 467.

154 European Parliament, *Violence towards children in the EU*, 2014. URL= [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA\(2014\)542139_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA(2014)542139_EN.pdf). Accessed 5 September 2017.

Bibliography

1. Balan-Rusu Minodora-Ioana, Licuța Coman Varvara, *Protecting Children Victims of Crimes of Human Trafficking in the EU*, Journal of Danubian Studies and Research, Universitatea Danubius Galati, Vol. 3, No. 2, 2013, pp. 58 - 64.
2. EUR – Lex: Access to European Union Law, *Summary of legislation EU 2011/36/EU*, URL= <http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32011L0036&qid=1504862802002>.
3. European Commission, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Report on the progress made in the fight against trafficking in human beings, URL= https://ec.europa.eu/home-affairs/sites/home-affairs/files/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings/docs/commission_report_on_the_progress_made_in_the_fight_against_trafficking_in_human_beings_2016_en.pdf.
4. European Commission, *Study on high-risk groups for trafficking in human beings - Executive summary*, URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/study_on_children_as_high_risk_groups_of_trafficking_in_human_beings_-_executive_summary.pdf.
5. European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012 - 2016*, URL= https://ec.europa.eu/anti-trafficking/sites/anti-trafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf.
6. European Commission, *Together Against Trafficking in Human Beings*, URL= https://ec.europa.eu/anti-trafficking/citizens-corner-eu-actions-explained/eu-actions-explained_en.
7. European Parliament, *Violence towards children in the EU*, URL= [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA\(2014\)542139_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA(2014)542139_EN.pdf).
8. EUROPOL, *Situation Report Trafficking in human beings in the EU*, URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings-europol.pdf.
9. Hemmings Stacey, Jakobowitz Sharon, Abas Melanie and others, *Responding to the health needs of survivors of human trafficking: a systematic review*, Journal List BMC Health Services Research, King's College London, Vol. 16, No. 1, 2016, pp. 1-9.
10. Hughes M. Donna, *Trafficking in Human Beings in the European Union: Gender, Sexual Exploitation, and Digital Communication Technologies*, SAGE Open, University of Rhode Island, Vol. 4, No. 4, 2014, pp. 1-8.
11. International Centre for Migration Policy Development, *Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member State*, URL= https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/crime/docs/evaluation_eu_ms_thb_legislation_en.pdf.
12. Kapo Mirela, *Human trafficking as a threat for the security of member states of EU*, Academic Journal of Business, Administration, Law and Social Sciences, IIPCCL Publishing Graz-Austria, Vol. 3 No. 2, 2017, pp. 109-118.
13. Komisija EU, *Poročilo Komisije Evropskemu parlamentu in Svetu – Poročilo o napredku v boju proti trgovini z ljudmi*, URL= <http://ec.europa.eu/transparency/regdoc/rep/1/2016/SL/1-2016-267-SL-F1-1.PDF>.
14. N.N, *Remedying the injustices of human trafficking through tort law*, Harvard Law Review, 2006, Vol. 119, No. 2574, pp. 2579-2580.

15. O'Neill Maria, *The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective*, Journal of Contemporary European Research, University of Abertay Dundee, Vol. 7, No. 4, 2011, pp. 452 - 467.
16. OSCE – Organization for Security and Co-Operation in Europe, *Combating human trafficking*, URL= <http://www.osce.org/combating-human-trafficking>.
17. Pop Lia, *Trafficking of Human Beings – An Academic Attempt to Support the EU Actions in the Fight Against It*, Journal of Identity and Migration Studies, University of Oradea, Vol. 6, No.1, 2012, pp. 138-145.
18. Roth Cheyna, *Health workers to spot human trafficking*, Grand Rapids Business Journal, MICHIGAN. Dept. of Community Health, Vol. 33, No. 12, 2015, pp. 18-19.
19. Siegel Dina, *Human trafficking and legalized prostitution in the Netherlands*, Temida, Viktimološko društvo Srbije "Prometej", Vol. 12, No. 1, 2009, pp. 5-16.
20. Stalford Helen, Schuurman Mieke, *Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda*, The International Journal of Children's Rights, University of Liverpool, Vol. 19, No. 3, 2011, pp. 381-403.
21. Storm Allison, *You can save a child from slavery*, Redbook Magazine, Hearst Communications, Inc., Vol. 218, No. 3, 2012, pp. 105-106.
22. UNChronicle, *Prevention, Prosecution and Protection - Human Trafficking*, URL= <https://unchronicle.un.org/article/prevention-prosecution-and-protection-human-trafficking>.
23. UNICEF, *Child Trafficking in Europe - A Broad Vision to put Children First*, URL= https://www.unicef-irc.org/publications/pdf/ct_in_europe_full.pdf.
24. UNICEF, *Combating Child Trafficking*, URL= [https://www.unicef.org/publications/files/IPU_combattingchildtrafficking_GB\(1\).pdf](https://www.unicef.org/publications/files/IPU_combattingchildtrafficking_GB(1).pdf).
25. U.S. Department of Health and Human Services, *Determining the Best Interests of the Child*, URL= https://www.childwelfare.gov/pubPDFs/best_interest.pdf.
26. U.S. Department of State, *Diplomacy in action, Trafficking Victims Protection Act: Minimum Standards for the Elimination of Trafficking in Persons*, URL= <https://www.state.gov/j/tip/rls/tiprpt/2013/210553.htm>.
27. US Department of State, *Diplomacy in action, 15 Ways You Can Help Fight Human Trafficking*, URL= <https://www.state.gov/j/tip/id/help/>.
28. Ventrella Matilde, *Recognising Effective Legal Protection to People Smuggled at Sea, by Reviewing the EU Legal Framework on Human Trafficking and Solidarity between Member States*, Social Inclusion, University of Wolverhampton, Vol. 3, No. 1, 2015, pp. 76-87.
29. Vlada Republike Slovenije, *Trgovina z ljudmi v številkah*, URL= http://www.vlada.si/teme_in_projekti/boj_proti_trgovini_z_ljudmi/boj_proti_trgovini_z_ljudmi/trgovina_z_ljudmi_v_stevilkah/.
30. Wright Clayton Ellen, Krugman D. Richard, Simon Patti, *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States - A Guide for the Legal Sector*, Institute of Medicine and National Research Council, The National Academies Press, Washington DC, 2014, p. 6-7.
31. Ventrella Matilde, *Identifying Victims of Human Trafficking at Hotspots by Focusing on People Smuggled to Europe*, Social Inclusion, University of Wolverhampton, Vol. 5, No. 2, 2017, pp. 69 - 80.
32. Yea Sallie, *Human Trafficking– A Geographical Perspective, Visiting Fellow*, Geodate Department of Geography, National University of Singapore, Vol. 23, No. 3, 2010, pp. 2-6.

УДК 347.23-053.2

Title:

CHILD PROPERTY RIGHTS - A CHILD AS A SHAREHOLDER

Author:

Zlatan Omerspahić, mag. iur., PhD student at Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Stjepana Radića 13, e-mail: zlatan.omerspahic@yahoo.com

The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross Border Movement of a Child in the EU (575451-EPP-1-2016-HR-EPPJMO-CHAIR), held at the J.J. Strossmayer University of Osijek, Republic of Croatia on 15-16 of March 2018

ABSTRACT

In this paper, the author analyses child's rights to property with special reference on the legal fact when child is registered as a shareholder in a company.

With an aim to emphasize legal specifics, which are conditioned with the fact that the child is shareholder of a company, the author gives a review of international legal framework, carried out of child's property rights. Then, a review in this paper is given through comparative method of Family Act of Republic of Croatia and Family Act of Federation of Bosnia and Herzegovina in the segment of protection child's property rights and it indicates on legal deficiencies in context of international legal standards of protection of child's property rights. In addition, the author gives an overview of another EU member's legislation.

In third part of the paper, the author analyses legal repercussion regarding the fact that a child is shareholder in company through prism of Companies Act of Republic of Croatia and fundamental shareholders rights which are reflected through the right to manage and right to achieve property interest in company. In concluding remarks, author gives final summary and evaluation of the research and points out legal solutions that should be further explored in the future with the aim of providing this area with better quality regulation.

Keywords: child property rights, corporate governance, Family Act, shareholder

INTRODUCTION

In all modern states, the rights of the child, at least declaratively, occupy a significant position in the legal system. In practice, this should mean that children, as a special category of human society, have received all the necessary protection they need in order to achieve a normal life. However, if we look at the reports of relevant international organizations such as UNICEF, we will also notice that the organizations dealing with the protection of children's rights find exactly the opposite, namely that violence and the violation of the rights of the child are more explicit.¹⁵⁵ In this regard, not a little different picture is provided by the document titled "Revision of the EU Guidelines on the Promotion and Protection of the Rights of the Child (2017)". The introductory part of this document clearly states that the reasons for adopting such an act were based on the devastating data that speak of very difficult situation of children's human rights.¹⁵⁶ According to the Strategy of the Council of Europe for the Rights of the Child (2016 - 2021) one of the main causes of this disastrous state is the economic crisis that has deeply affected children.¹⁵⁷

The fundamental international document governing the rights of the child is the Convention on the Rights of the Child, adopted in 1989 (hereinafter CRC)¹⁵⁸, which contributed to a significant step forward in the normative regulation of the whole range of rights. CRC is considered as a part of the public order because its stability at the declarative and normative level cannot be overlooked.¹⁵⁹ Despite the large number of international documents, it should be noted that these documents create, only the initial legal framework through which states, (at least if they want to be declaratively considered as states that are concerned with the rights of the child), must develop their national legislation. In the field of Family Act, national legislation has a dominant influence and importance, primarily because of the fact that due to the culture, tradition, and sometimes religion, the regulation of the rights of the child are to be strictly maintained within its sovereignty, to which every country still has the right.

However, even though many of these rules are different, we can say that they all guarantee a wide range of rights to a child based on the aforementioned Convention on the Rights of the Child. Within these rights, of course, one of the most important are the property rights of a child. The property rights of the child extend to include a wide area of the child's life, but for the purpose of this research, we will limit ourselves only to property rights that reflect on the situation when a child appears as a shareholder in a stock company. Our interest in this topic came from the insight into statistical data indicating that there are not only a few shareholders under the age of eighteen existing in the Republic of Croatia, but as much as 9062¹⁶⁰. The aim and the starting point of this paper is to explore what specifics of the company, whose shareholder is a child, can have in management

155 <https://data.unicef.org/topic/child-protection/overview/> (25.01.2018.)

156 In document "Revision of the EU Guidelines on the Promotion and Protection of the Rights of the Child" states that as many as 16,000 children die daily from causes that are mostly preventable or curable, and that every five minutes a child dies due to domestic or family violence, and that children are massively victims of sexual exploitation and abuse.

157 Council of Europe Strategy for the Rights of the Child, Section II, point 1. See: <https://rm.coe.int/168066cff8>

158 Convention on the Rights of the Child, New York, 20 November 1989. United Nations, Treaty Series, vol. 1577, p. 3. Available at https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11&chapter=4&-clang=_en

159 Hrabar Dubravka, *Nova procesna prava djeteta- europski pogled*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol.IV No.1 2013., p.65.

160 <http://www.skdd.hr/portal/f?p=100:77:::NO> (24.01.2018.)

and supervision. In addition, the aim of the paper is to investigate whether the existing legal framework, especially in Croatia and Bosnia and Herzegovina, is sufficient to protect the child as a shareholder or to introduce some additional legal mechanisms. The specific aim of the paper is to point out the provisions of the legislation of the Republics of Croatia and Bosnia and Herzegovina and its adaptability to the needs and interests of children through the prism of child protection as a shareholder of a business society. Analysis of the existing legal framework, which provides property protection for the child, leads to the hypothesis that we will attempt to prove in this work, that the child's property rights were not sufficiently processed and were not given adequate attention, although their significance is immeasurable.

1. LEGAL FRAMEWORK FOR THE PROTECTION OF CHILD PROPERTY RIGHTS

An analysis of the legal framework that guarantees the protection of children's property rights should certainly start from the most important document that regulates the human rights of children, namely the CRC, a document that was adopted by the General Assembly of the UN on 20 November of 1989. In accordance with the Annex I of the General Framework Agreement for Peace in Bosnia and Herzegovina, the Convention on the Rights of the Child is part of Bosnian and Herzegovina legal system. The Convention on the Rights of the Child was adopted 8th October 1991¹⁶¹. The Convention is significant and specific because it covers and processes the civic, political, economic, social and cultural rights of children in a unified manner¹⁶². For the property rights of the child we can say that they belong to the group of developmental ones, but on the other hand, also to the protection rights of the child, since the realization of this group of rights enables the child to develop through social segments. Additionally, they are protective because they prescribe who regulates the property rights and prescribe a series of protective measures with the aim of successfully protecting the child's property as a special category¹⁶³.

It provides that States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in this Convention.¹⁶⁴ With regard to economic, social and cultural rights, States Parties shall take such measures to the maximum extent of their available resources and, where necessary, within the framework of international cooperation.¹⁶⁵ It follows from this provision of the Convention that the Member States are not only obliged to guarantee the child's property rights, but are obliged through legislative and other measures to ensure effective application of, inter alia, economic and / or property rights. In addition, the Convention on the Rights of the Child in Article 3 sets out the general principle that all States Parties to the Convention must be guided by, which means to protect the "best interest of the child". In other words, the best interest of the child must be the primary goal in all child-related activities.¹⁶⁶ Therefore, any decision that concerns decision on the rights of the child must place the child's interest in the foreground. In addition, the provision in Article 12 is di-

161 Official Gazette of SFRJ "International contracts No: 07/1991)

162 https://www.unicef.hr/wp-content/uploads/2017/05/Konvencija_20o_20pravima_20djeteta_full.pdf, page number 2 (24.01.2018)

163 The Convention guarantees the wide scope of child rights such as: rights, survivors, development rights, protection rights, and the right to participate.

164 Article 4. Convention on the rights of the child, Y.1981

165 Article 4 Convention on the rights of the child, Y.1981.

166 See General Note on UNCRC No. 14 CRC / C / GC / 14, 2014

rectly related to the principle of the best interests of the child. It relates to the obligation that all children who have the ability of forming their own opinion must have the right to express themselves freely in all matters related to that child, and that opinion must be respected in accordance with the age and maturity of the child.¹⁶⁷ From this provision, it is clear that child's opinion must also be respected in the domain of his/hers property rights. Croatian family legislation obliges parents and other childcare providers to respect child's views in accordance with its age and level of maturity¹⁶⁸. Certainly, when talking about the right of the child to express his or her opinion, we must take care that this opinion is respected in accordance with the child's age and maturity, which will be more discussed in further parts of this work, and in the context of respecting the child's opinion as a shareholder of the economic societies.

It is very important to emphasize that the Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in Article 1 prescribed: Every natural or legal person has the right to peaceful enjoyment of his possessions.¹⁶⁹

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹⁷⁰ It is clear that European Convention in its Protocol 1 guarantees the right to property (property rights) to all natural and legal persons, including children. It is especially important to emphasize that no one has the right, except for the state in case of meeting the clearly prescribed conditions, to confiscate or limit the ownership of the property. Also, the above-mentioned provision does not mean that the state has no right to pass its own rules on the use of the right to property in accordance with its legal tradition, which certainly applies to Family Act.

The 2009 European Treaty (hereinafter: the Treaty), also referred to as the Treaty of European Union¹⁷¹ in Article 3. par. 3. states that the European Union suppresses social exclusion and discrimination, promotes social justice and protection, equality between women and men, intergenerational solidarity and the protection of children's rights.¹⁷² Thus, the Treaty stipulates the obligation of the member states to ensure a legal system that will protect the rights of the child as well as in property rights. At this point, it should be noted that Member States do this by national legislation. This situation should not be surprising. However, if we look at the exclusive competences of the European Union, we will see that family legal relations do not fall within the competence of the European Union, but the Member States.

Although the Charter of Fundamental Rights of the European Union¹⁷³ does not mention expressly property rights and their protection, it cannot be said that it does not provide or does not guarantee a range of human rights to children, from which it is clear that children have not only the right to property, but also the right to protection. In this context, it is very important to mention Article 21. This article clearly states that "age" must not be a basis for discrimination of any kind.¹⁷⁴ In the previous jurisprudence of the European

167 Article 12. UNCRC

168 Lucić Nataša, Protection of the right of the child to be heard in divorce proceedings- harmonization of Croatian law with European legal standards, Procedural aspects of EU law, Jean Monnet International Scientific Conference, 2017, p.392

169 Article 1 Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms

170 Article 1 Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms

171 Treaty of Lisbon, amending the Treaty on European Union and Treaty establishing the European Community, 2007/C, 306/01)

172 The consolidated text can be found on the link <http://www.mvep.hr/custompages/static/hrv/files/pregovori/111221-lisabonski-prociscena.pdf> (25.01.2018.)

173 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN> (29.05.2018)

174 Handbook on the Rights of the Child in European Law, European Union Agency for Fundamental Rights and Council of Europe, 2015, page 54.

Court of Human Rights, protection is provided only in the context of access to employment¹⁷⁵. However, if a situation arises in which a child is discriminated, for the purpose of exercising his property rights, it is certain that the European Court of Human Rights should take a stand and prohibit discrimination on the basis of age and in that context.

The Commission of European Family law has adopted an act called the Principles of a European Family Act Regarding Parental Responsibilities¹⁷⁶, which belongs to the domain of soft law legal rules. In Principle 3.32. it is clearly stated that the holders of parental responsibilities should administer the child's property with due care and diligence in order to preserve and, where possible, increase the value of the property.¹⁷⁷ In Article 3.23. there are also restrictions on the decision-making with the child's property, which should be considered necessary in order to have significant financial consequences for the child. The national legislations are left to determine what transactions would be with or cause a significant financial consequences. In Article 24. it is stipulated that, in terms of legal representation, it should not be taken if there is a conflict of interest between the parents of the child's property interests¹⁷⁸.

2. RIGHT TO CHILDREN'S PROPERTY THROUGH THE PRISM OF THE FAMILY ACT OF THE REPUBLIC OF CROATIA AND FAMILY ACT OF THE FEDERATION OF FBiH AND OTHER EU LEGISLATION

In this part of the paper, we will compare the two laws that regulate family relations with a comparative approach and point out possible differences and better solutions in one legislation in relation to another legislation. In addition, the comparison is important because of the fact that we compare the law of a member state of the European Union and a state that is not a member yet, and therefore it is not obligatory to apply the legal standards applied in the European Union.

In the Family Act of the Republic of Croatia¹⁷⁹ the protection of the rights of the child are given special attention and the whole (third) part of the Family Act. The basic obligations of parents in relation to the property of the child are regulated in Article 97 of Family Act of Croatia.¹⁸⁰ The basic principle in managing the property of a child is that parents should manage with a care of a good parent, which means, in some way, that parents need to manage their assets in accordance with the principle of dealing with the care of a good businessman in commercial law. The obligation of parents is to preserve the property

175 Ibid, page 54.

176 <http://ceflonline.net/wp-content/uploads/Principles-PRS-English1.pdf> (24.01.2018)

177 Point 3.32 of Principles of European Family Act Regarding Parental Responsibilities, <http://ceflonline.net/wp-content/uploads/Principles-PRS-English1.pdf>

178 More about this, Rešetar Branka, *Dijete i pravo*, Pravni fakultet u Osijeku, 2009,

179 Official Gazette 103/15

180 (1) Parents have the duty, right and responsibility to manage the child's property with the care of the responsible parent in a way to preserve and possibly increase. (2) The cost of managing the property of the child shall be borne by such property. (3) Income from the property of a child may be used only for the maintenance of a child. The property of the child can be alienated only if the parents do not have enough own funds for the child's maintenance, treatment or education, and the means cannot be provided otherwise. (4) Income from the property of the child may, in exceptional cases, be used for the treatment of parents or brothers and sisters of a child if they are not used for the maintenance, treatment and education of a child, which requires the court's approval in extra-judicial proceedings initiated at the proposal of the child or parent. (5) Parents represent the child in respect of property and property rights in accordance with the provisions of Articles 99 and 101 of this Act.

and, if possible, to increase it¹⁸¹. This means that they cannot take actions that would lead to the destruction and reduction of property.

Such proceedings would represent the conduct contrary to the above principle referred to in paragraph 1 of Article 97 of the Family Act of Croatia. The use of a child's property is very limited and can only be used for maintenance purposes, and the alienation is allowed only if parents do not have enough of their own resources, and again, for treatment, education or other needs of the child. In no case the child's property can be alienated in order to satisfy any needs of the parents, even if they do not have their own means of subsistence. Such a legal solution is in compliance with international acts requiring states that are signatories of the Convention on the Rights of the Child and other acts in order to create in the national legislation an effective mechanism for the protection of children's rights, and hence property.

When it comes to limiting parents' rights of the management of the child's property, it should be mentioned that they are required a permission for the management of the valuable property, or the decision of the Court in extra-judicial proceedings.¹⁸² In property rights, parents have an obligation to represent the child agreeably.¹⁸³ Article 101 of Family Act of Croatia regulates the representing of a child by parents when it comes to assets that are more valuable.¹⁸⁴ Family Act, which is very important in the context of the topic, clearly stipulates that assets that are more valuable also include the shares of the child¹⁸⁵. At this point, it is important to answer the question of whether the value of a share affects the estimation whether such assets are valuable or not.

Family Act in this regard does not make a distinction, and by interpreting the provisions of the Family Act we can clearly state that the possession of shares (in itself valuable assets), no matter how much they are worth in the capital market, and management of such property always requires a special legal regime. This special legal regime implies the written consent of another parent who exercises parental care and the Court's approval in non-contentious proceedings. The parent who is child's representative must obtain these two consents. The Family Act stipulates that in case that the parent representing the child cannot obtain the written consent of the other parent, the Court will ultimately decide on the previously given approval¹⁸⁶.

In any case, we can say that deciding of the Court through non-contentious proceedings is a good legal solution because it provides objective judicial protection of the child's property interests, especially in a situation where there is a disagreement of the parents. Article 132. of the Family Act regulates that the Center for Social Welfare, keeps the

181 Article 97 of the Family Act of Croatia

182 Article 98 of the Family Act of Croatia

183 Article 99 of the Family Act of Croatia

184 The representation of a child in relation to his/hers more valuable property or property rights is valid if the parent representing the child receives: 1. the written consent of the other parent who exercises parental care and

2. Court approval in non-contentious proceedings.

(2) The representation referred to in paragraph 1 of this Article shall be represented in cases of disposal and burdening of real estate, movable property entered into public registers or movable property of greater value, disposal of shares and business shares, disposing of inheritance, acceptance of gifts with the burden or deduction of offered gifts and disposal (3) The representation referred to in paragraph 1 of this Article shall also be deemed advocacy for the conclusion of a contract between a child and natural or legal persons who have the object of disposing of the future property rights of a child in connection with his sporting, artistic and other rights or similar activities. (4) The contractual obligations referred to in paragraph 3 of this Article may last up to the age of the child. D. (5) If the parent representing the child in the matters referred to in paragraph 1 of this Article cannot obtain the written consent of the other parent, the Court shall, in the out-of-court procedure on the motion a child or a parent decide which parent will represent the child in this matter and, according to the circumstances of the case, decide on the approval referred to in paragraph 1, item 2 of this Article.

185 Article 101.point 2. Family Act of Croatia

186 Article 101 point 5. Family Act of Croatia

protection of the child's property rights as a responsible body for the protection of all children's rights.¹⁸⁷ The Center for Social Welfare shall immediately investigate the case and take measures for the protection of child's rights immediately upon receipt of the report on the violation of property or personal rights of the child and inform the applicant accordingly. In addition, within the legal order of the Republic of Croatia, the protection of the property rights of a child are protected by the fact that the Law on Public Notary prescribes the obligation for the legal validity of a legal transaction that disposes of the assets of minors. Such a contract should be made in the form of a notary public act.¹⁸⁸ In this way, abuses were reduced to a minimum because an act that would not have been made with a notary public would not produce legal effects and would be null and void. It is important to emphasize that the obligation to draft a notary public document is present regardless of how valuable the property is.

The Family Act of the FBiH¹⁸⁹ in Article 264. prescribes that parents, in accordance with his /her interests, govern the property of a minor child.¹⁹⁰ The Family Act of the FBiH defined that the income from the property of a minor child can be primarily used for his/hers maintenance, treatment and education, or if another important interest of the child is required.¹⁹¹

Parents can also use the income to support family members if a parent is someone who does not have sufficient means of living or is incapable of work.¹⁹² The Family Act defines that parents can alienate or burden more valuable assets only with the approval of the competent guardianship authority.¹⁹³ In addition, it is stipulated that parents can take actions in the Court that aim to burden or alienate the children's property only with the approval of the guardianship authority.¹⁹⁴

If we enter on a more detailed analysis of the two laws, and this is interesting and important, because FBiH is a non-EU country and the other one is, we will notice some differences in the regulation of the child's property rights. The general conclusion that we can draw is that significantly better legal solutions were included in the Family Act of the Republic of Croatia. This conclusion can be primarily derived from the fact that the Family Act in Croatia regulated the statement that parents with the property of a child should manage it with the care of a good parent, while the Family Act of the FBiH states that parents managing properties are in accordance with the interests of a child. Dealing with the child's interest does not mean that parents act in accordance with the care of a good parent or, as stated in international acts, for example Convention on the Rights of the Child, parents must act in the best interests of the child. It is definitely clear that legal solution from the Republic of Croatia initially obligates a greater degree of attention in the treatment of the child's property in relation to the provisions of the FBiH Family Act. If we could say about this formulation in the FBiH Family Act that it was a reflection of the "clumsy" formulation of a legislator, we cannot say that for other gaps in the protection of property rights of a child. More specifically, in the FBiH Family Act, the alienation or burdening of the child's property is possible even in cases where parents do not have sufficient means of living and when they are incapable of work. Moreover, the child's obligation is to support such parents. However, on the other hand, the Family Act of the Republic of Croatia states that the parents can alienate or burden property only if they do not have sufficient

187 In Article 132 Family Act of Croatia defines; "Everyone is obliged to report to the Center for Social Welfare a violation of child's personal and property rights"

188 Article 53. Law on Public Notary (OG 78/93, 29/94, 162/98, 16/07, 75/09, 120/16)

189 Official Gazzete of Fedration BiH 35/05

190 The property of a minor child until his / her age, in his or her interest, is governed by the minor's parents, other than the one that the minor has acquired through work (Official Gazzete of Fedration BiH 35/05)

191 Article 265. Family Act of FBiH

192 Article 265 Family Act of FBiH

193 Article 265. Family Act of FBiH.

194 Article 265 Family Act of FBiH

means to support the child, and in no case if they do not have sufficient means to sustain themselves and realize their personal needs. By comparing these two different ways of regulating this matter, we can conclude that a much safer solution that leaves little space for abuse is the solution that is offered in the Family Act of the Republic of Croatia. The property interests of the child are clearly protected, and the alienation of property and its burden can be carried out only if it is necessary to protect the interests of the child and not any other interests. This position, as we mentioned earlier, is fully in accordance with international documents regulating this matter, for example Convention on the Rights of the Child.

In the context of the topic, it may be most important to mention that, unlike the Family Act of the Republic of Croatia, the FBiH Family Act does not define what is more valuable property for which the Center for Social Work requires the consent. The fact that the law is even more vague was also indicated by the fact that no criteria have been established for determining whether a property is valuable or not, and who in any particular case should do that assessment. On the other hand, the Croatian Family Act clearly states how much the property is worth, including the shares. Regulation in the way that is done in the Family Act of FBiH contributes to the creation of legal uncertainty regarding the protection of property rights of the child. This conclusion becomes even more accurate if we add the fact that, even if we determine which asset is valuable, the Court in a non-litigation procedure as provided for in the Family Act of the Republic of Croatia, which is another additional insecurity, does not give the consent to alienation or burden of such property.

Therefore, the Family Act of the Republic of Croatia provides better protection of the child's property rights in relation to the Family Act of the FBiH. Thus, the child as a shareholder is under better protection in Croatia, because in addition to the legal regime that protects shareholders within the Companies Act, there is an additional mechanism for protection of legal solutions Family Act. Finally, we will note that the FBiH Family Act is not compliant with the Principles of European Family Act Regarding Parental Responsibilities¹⁹⁵.

It should be emphasized, regarding the other legislation of the members of the European Union, that the Belgian Code of Civil Code clearly distinguishes between two groups of parental rights, i.e, responsibility in respect of property and the rights to the administration of the property of the children and the right to use the enjoyment of the property.¹⁹⁶

The Austrian Civil Code under section 44 defines that parents must administer a child's property with care of proper parents. They must maintain, and if possible, increase the property, unless the child's interest requires otherwise.¹⁹⁷

Czech Family Code defines that parents are responsible for preserving the property's essence until the child attains majority¹⁹⁸. Italian Codice Civile defines that parenting responsibilities include the right and duty to represent the child and to manage his or her property.¹⁹⁹

195 Companies Act of Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

196 Article 376-387 Belgium - Code Judiciaire 19 May 1998

197 Article 44. Of Allgemeines bürgerliches Gesetzbuch <http://www.wipo.int/edocs/lexdocs/laws/de/li/li053de.pdf> (20.05.2018)

198 Barbić Jakša, Društva kapitala, Organizator, Zagreb, 2013. p.52

199 Capital Market Act (NN 88/08, 146/08, 74/09, 54/13, 159/13, 18/15, 110/15, 123/16, 131/17)

3. CHILD AS A SHAREHOLDER THROUGH THE PRYSM OF TRADE LAW

Before embarking on a more detailed elaboration of the issues within this section of the paper, we will once again draw attention to the definition of the term share. There are no explicit legal definitions of the share, and, as the academician Jakša Barbić says, it would be almost impossible to determine the legal definition of the stock without some mistake²⁰⁰. Capital Market Act of the Republic of Croatia²⁰¹, which is in effect since 01.01.2018, defines shares as transferable securities, which represent a share in the capital and membership rights of the company. On the other hand, the FBiH Securities Market Act stipulates that the shares are equity securities, issued by a shareholder or other company, in accordance with the provisions of the law, which regulate the establishment, operation, management and termination of companies, and in accordance with the provisions of the Securities Market Act²⁰². Jakša Barbić defines shares as a security issued by the company, which is a part of the share capital and gives the holder the right to membership in the company, i.e. rights and obligations arising from that membership²⁰³.

It follows that the shares must be regarded as:

- a) Share capital
- b) A set of member rights and obligations of the shareholder
- c) Securities²⁰⁴

In the legal theory, it is accepted that the stock offer two types of rights to the shareholder, namely management rights, that the shareholder as a member manages and makes decisions about the business with the company; and a series of property rights, defined in several parts of the Companies Act²⁰⁵. In this regard, the academician Jakša Barbić lists the entire range of property rights that shareholders have²⁰⁶ in his paper "Right to a dividend as a fundamental property right of shareholders"²⁰⁷. With respect to human rights provisions, which protect the rights and the position of a child in the society, we can conclude that there is no reason why a child should not be allowed to be a shareholder. Moreover,

200 Barbić Jakša, *Društva kapitala*, Organizator, Zagreb, 2013. p.52

201 Capital Market Act (NN 88/08, 146/08, 74/09, 54/13, 159/13, 18/15, 110/15, 123/16, 131/17)

202 Article 7. FBiH Securities Market Law (Official Gazette of FBiH 85/08 and 109/12)

203 Barbić Jakša, *Društva kapitala*, Organizator, Zagreb, 2013. p.51

204 Ibid,

205 Article 220, paragraphs 4 and Article 223 of the Companies Act ((NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

206 The right to dividend payment (Article 220, paragraphs 4 and 223 of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09), 2. the right to pay compensation for the fulfillment of additional obligations to the company (Article 218, paragraph 1 of the Act), 3. the right of priority when registering new shares of the company (Article 308, paragraph 1 of the Law), 4. the right to payment of the share of participation in the company's share capital in case of its reduction (Article 345, paragraph 2 of the Law), 5. right to payment of the remainder after the liquidation of the company or the eventual remnants of the bankruptcy estate (Article 380, paragraph 1 of the Act), 6. the right of an external shareholder to an appropriate remuneration (Article 491 of the Law) and severance pay (Article 492 of the Law), 7. the right of shareholder who expires from the company for the purpose of joining another company to an appropriate severance pay (Article 504a, paragraph 2 of the Act), 8. the right of the shareholder who has voted in the prescribed manner against the decision to transform the joint stock company into a limited liability company in order for a company to repurchase its share and to pay an appropriate fee for it (Article 562, paragraph 1 of the Act).'

207 Barbić, Jakša, *Pravo dioničara na dividendu kao temeljno imovinsko pravo dioničara*, Zbornik Pravnog fakulteta u Zagrebu, Vol 62., No.5-6. Prosinac 2012, str. 1427

the existence of a ban of this kind would be contrary to the Convention on the Rights of the Child, thereby violating the property rights that each child has. However, it should also be emphasized that the legal fact of a child being a shareholder, i.e. an owner of a company regardless of the percentage of ownership, would require a special legal regime and a much more complex administrative procedure compared to the usual. It is also indisputable that this would affect the way a company regularly does business. For this reason, we should not be surprised that the companies, for the legal specifics that we will discuss below, are trying to avoid the situation in which a child is a shareholder of a company. These specifics can be identified in the corporate governance segment and in the part of exercising property rights as shareholders. Although these are two different groups of rights of the shareholder, they are closely linked because the level of real property rights directly depends on the management of the company that takes place through the administration.

The following review of legal specifics should start with the legal position of the child in legal transactions and the fact that a child under the age of 18 has limited ability to work and go into any contracting (unless it is a labor contract concluded by a minor older than 15)²⁰⁸. Limited business capacity, as we know, implies an approval by a legal representative. We have already noted that Family Act regulates the obligations of legal representatives when it comes to children. On the other hand, when we talk about trade-related law regulations and connect them to the protection of child's property rights, the fundamental principle to keep in mind is the principle of Article 3. of the Convention on the Rights of the Child, which imposes an obligation to always take into account the best interests of the child. This principle should be dominant not only in the development of family legislation, but also in the interpretation of other regulations, such as the Companies Act, in situations where the child is a shareholder of a company. This principle has consistently been transposed into the legislation of the Republic of Croatia through the provision that parents should represent the child's best interests when managing the property of a child, and manage the property with the care of a good parent. Another important principle to take into account is the principle of equal position in a company, which implies that shareholders have equal position under equal conditions.²⁰⁹

The Article 191. of the Companies Act, defines the accountability of the founders for the damage caused to the company due to the inaccuracy of the information they gave in connection with the establishment of the company.

The founders, according to the Companies Act, are also accountable for the management's or the executive directors of the company free disposal of the amounts paid for the company's shares²¹⁰. Additionally, the founders are held accountable if they, either deliberately or by gross negligence, damage a company with a role in matters or rights; by overtaking matters of rights or costs of founding²¹¹. As a child does not have a business capacity and is managed by a parent in accordance with the provisions of Family Act, the question arises as to who is liable for damages in the case of meeting the conditions for compensation of damages in accordance with the provision of Article 191. of the Companies Act. The Law on Obligations stipulates that anyone who causes damage, and has delectable responsibility, is obliged to compensate it, unless it is proven that the damage occurred without his fault.²¹² This means that the person who caused the damage will be considered responsible for it. Since the child as a shareholder of the company, does not perform this function actively and does not make decisions, but its parents work on its behalf, then, according to the rules of responsibility, if the child does not allow free disposal of the amounts paid for shares of the company, the parents would be responsi-

208 Article 19 and Article 20. Labour Act (NN 93/14, 127/17)

209 Article 211. of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

210 Article 191 of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

211 Article 191 of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

212 Article 8. Law on obligation of Republic of Croatia (NN 35/05, 41/08, 125/11, 78/15, 29/18)

ble for the damage. If the verdict by the final Court proved that the child as the founder caused damage to the company because of the parent's negligence, the damage should be compensated from the property of the child. However, the parents, according to the provisions of the family legislation, would also be responsible for the negligent treatment of the child's property that they had decreased. Based on this example, we can conclude that in addition to the responsibility of the shareholder or founder, if the child is a shareholder, the responsibility of the parents is also present, because they *de facto* manage the property and are responsible for its decrease.

The Companies Act defines that the members of the management and the supervisory board must lead the company's affairs with the care of a responsible entrepreneur, and protect the company's confidential information.²¹³ The Companies Act emphasizes that a member of the Management Board does not act contrary to the obligation to conduct business of the company if it is reasonable to assume that it is working for the welfare of the company when it comes to making an entrepreneurial decision, based on an appropriate information.²¹⁴ If the child is a shareholder of a company, the question arises as to whether members of the management and the supervisory board must make sure to act in accordance with the principles of the best interest of the child when managing the company, and to run the company operations in a way which would increase the child's property (through dividend payment). In other words, do the members of the board of directors and the supervisory board need to have child's best interests in mind if their leadership is to be considered that of a responsible entrepreneur? Namely, the members of the management board and the supervisory board of the company respond jointly to the damage that they commit to the company if they violate some of their obligations²¹⁵. Children are a special category, additionally legally protected because they cannot take care of their rights because of their age. All international and national legal databases are designed to protect children legally and to take care of their interests with special care.

In this sense, the provisions of the Companies Act in the context of conscientious and orderly management should be interpreted in such a way that, if a child is a shareholder in a company, then when managing that company, it must be ensured that it was managed in a way to protect best interests of the child. If this is not properly executed, the members of the board of directors and the supervisory board would be liable for the damage they inflicted on the company because they caused damage to one of its founders. The criteria for responsibility towards the founder, who is a child, are specific and much stricter than the usual ones established by the Companies Act and the Law on Obligations. Because of that, as it was pointed out earlier, there is often a tendency to avoid a situation in which a child is a shareholder, precisely due to all the legal and administrative complications. Administrative and legal complications are also noticeable due to the provisions of Article 101 of the Family Act of the Republic of Croatia, which has already been mentioned here. This article determines the obligation that the disposition of any valuable property of the child, including the shares, the parent who represents the interests of the child must obtain consent of another parent and an approval of the Court in an out-of-court procedure. This procedure can demonstrably cause a number of procedural problems in practice, which can slow down the decision-making process of the company's bodies (especially the assembly) because the shareholder who is a child requires another parent's and the Court's decision. Additionally, if it was a capital market decision, the question would arise whether the Center for Social Welfare as the competent body which protects the interests of the child (including protection from abuse by a parent or legal custodian), could be considered a competent state body, with the necessary knowledge about the capital mar-

213 Article 252 Companies Act of the Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

214 Article 252 Companies Act of the Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

215 Article 252 Companies Act of Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

ket and capable of making the right decision? For such complex transactions, in any case, expert opinion should be sought additionally in order to protect the rights of the child as much as possible.

The Corporate Governance Code has the task of establishing high standards of corporate governance and transparency in the operations of joint stock companies. A stock company that has a child shareholder in its ownership structure imposes the need to create particularly “sensitive” corporate governance codes that will ensure equity and transparency for all shareholders. If a child is a shareholder of a company, it would be necessary to include special provisions on the protection of such shareholders to the minimum in the Corporate Governance Code. In this spirit are the provisions of the OECD’s corporate governance principles, where in the third section under the heading “Equal Treatment of Shareholders” is clearly indicated that all shareholders should be able to achieve effective legal protection.²¹⁶ In this context, it is particularly important to emphasize that voting by legal representatives should take place in such a way that it is clearly established that such a vote has been agreed by the shareholders, or that it will be achieved. This means that a company that has a child as a shareholder and whose interests are represented by a legal representative should ensure that certain mechanisms were created in order to ensure that the best interests of the child were protected in such a way. Everything else would mean that the responsible person could be held liable for the harm inflicted on a child as a shareholder.

In Companies Act in Article 272. it is defined the obligation that the management and supervisory board ensure that the regular report includes the management code that the company voluntarily applies, as well as the information where this corporate governance code has been published.

It is not disputed that the Corporate Governance Code is a soft law legal rule, but if a Corporate Governance Code is adopted in a company, then its compliance is mandatory and in that sense any violation of the provisions of the code would constitute a violation that could cause damages to the company.

In direct relation with this topic, it is also the question of processing personal data of a child as a shareholder. Namely, as it is known in the EU, it has adopted the Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and the repealing of Directive 95/46 / EC (General Data Protection Regulation)²¹⁷. This Regulation prescribes specific requirements that companies must comply with when processing personal data of a child. In Recital_58 it is clearly stated that everyone needs to respect the principle of transparency which requires that any information addressed to the public or to the subject be concise, easily accessible and easy to understand, and that clear and plain language, and, where appropriate, visualization be used²¹⁸. Given that the Regulation gives special protection to children, it is clearly stated that any information and communication, where processing is addressed to a child, should be in a clear language that the child can easily understand. Although this provision refers principally to a child as a market participant or user of a service, the same standard of protection would have to be enforced when giving data and creating

216 Principles can be found on https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en (20.05.2018.)

217 REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 27 April 2016, Official Journal of European Union L. 119, page 37

218 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG (25.01.2018) Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

reports of an economic entity in which a child appears as a shareholder. Regardless of the fact that certain regulations state what reports must contain and what information they contain, if the child is a shareholder, it is necessary to implement special protection measures, and retain in official documents only those data that can prove “reasonable effort”. Everything else would mean a violation of the child’s right to the protection of personal data in a situation where the *lex specialis* regulation in this segment is in relation to other data.

CONCLUSION

We can conclude that the property rights of a child are very important segment in the context of human rights and interests that need to be protected by legal norms. When we talk about the child’s property interests, and about Family Act generally, the specificity that determines the quality of protection is the fact that unique legal system of Family Act has not yet been created in the world and in the European Union. Thus, the level of protection of the rights and interests of the child differentiate from state to state. The most obvious thing in this paper was the careful analysis of the Family Act of the Republic of Croatia on the one hand and the FBiH Family Act on the other. It was clearly pointed out that far more quality legal regulation of provisions on the protection of property rights of children in the Republic of Croatia, as a member state of the European Union, is far higher than the protection envisaged in the Federation of BiH as an entity within Bosnia and Herzegovina. In addition, the paper gives a brief overview and provisions of Family Acts of other EU member states and it can be noted that there is an equal standard of protection, as in the Republic of Croatia.

The mere fact that a child appears as a shareholder has raised questions as to whether it implies certain specificities in the business of the company. The answer to this question in the paper was given in a way that it was noted that the management and supervisory bodies of the company must manage the company with additional care, so as not to damage the property interests of the child. They should also follow the fundamental principle that the interests of the child were placed in the first place as defined and the Convention on the Rights of the Child. Additionally, special attention must be given to parents who make decisions on behalf of the child as shareholders on bodies of a company where shareholders have the right to vote and influence the business of the company. All of this causes a great number of specificities and administrative complications, and in practice, the situation in which child is a shareholder of the affiliated society is very often avoided. These specifics are reflected in the fact that in relation to the property of a child, the other parent, as well as the Court must make a decision in the non-contentious procedure, which additionally complicates the decision-making process in a company. In addition, the company must also adopt a corporate governance code that should anticipate situations in which the rights of the child as shareholders must be protected. A very sensitive issue that also entails special protection within a company is the protection of personal data of a child where only those data that are necessary can be used, which the company must submit to the competent authorities and in accordance with the relevant legislation.

Bibliography:

1. Barbić Jakša, *Društva kapitala*, Organizator, Zagreb, 2013 Year,
2. Barbić, Jakša, Pravo dioničara na dividendu kao temeljno imovinsko pravo dioničara, Zbornik Pravnog fakulteta u Zagrebu, Vol 62., No.5-6. Prosinac 2012,
3. Hrabar Dubravka, *New procedural rights of the child - European overview*, Collection of the Law Faculty in Zagreb, 2012. Year,
4. Handbook on the Rights of the Child in European Law, European Union Agency for Fundamental Rights and Council of Europe, 2015
5. Lucić Nataša, Protection of the right of the child to be heard in divorce proceedings- harmonization of Croatian law with European legal standards, Procedural aspects of EU law, Jean Monnet International Scientific Conference, 2017
6. Mona Sandbæk, *European Policies to Promote Children's Rights and Combat Child Poverty*, International Journal of Environmental Research and Public Health, 2017 Aug; 14(8): 837.
7. Bečiraj Asmira, Bakrač Ajna, Primjena Konvencije o pravima djeteta u Bosni i Hercegovini, Pravni vjesnik : časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku, Vol.30 No.2 Kolovoz 2014.

List of Regulations, Acts and Court Decisions

1. Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
2. FBiH Securities Market Law (Official Gazette of FBiH 85/08 and 109/12)
3. Act of the Czech Republic No. 94/1963 Sb. on family as amended by the Acts No. 132/1982 Sb., No. 234/1992 Sb., by the decision of the Constitutional Court No. 72/1995 Sb., by the Acts No. 91/1998 Sb. (full wording promulgated in No. 210/1998 Sb.), by the Acts No. 360/1999 Sb., No. 301/2000 Sb. and No. 109/2002 Sb
4. Belgium - Code Judiciaire 19 May 1998
5. Act of the Czech Republic No. 94/1963 Sb. on family as amended by the Acts No. 132/1982 Sb., No. 234/1992 Sb., by the decision of the Constitutional Court No. 72/1995 Sb., by the Acts No. 91/1998 Sb. (full wording promulgated in No. 210/1998 Sb.), by the Acts No. 360/1999 Sb., No. 301/2000 Sb. and No. 109/2002 Sb. (1)
6. Directive 95/46 / EC (General Data Protection Regulation)
7. Italian Codice Civil (approved by Royal Decree No. 262 of March 16, 1942, and amended up to Decree No. 291 of December 7, 2016)
8. Law on Public Notary (OG 78/93, 29/94, 162/98, 16/07, 75/09, 120/16)

9. Council of Europe Strategy for the Rights of the Child, Council of Europe, March 2016
10. Convention on the rights of the child from 1981.
11. Principles of European Family Act Regarding Parental Responsibilities
12. Family Act of FBiH (Official Gazette of FBiH 35/05)
13. Family Act of Croatia (NN 103/15)
14. OECD Principles of Corporate Governance - 2004 Edition, Misija OEBS-a u Srbiji i Crnoj Gori Sektor za ekonomska pitanja i politiku životne sredine, 2004.
15. Companies Act of Croatia ((NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
16. The General Data Protection Regulation and children's rights: questions and answers for legislators, DPAs, industry, education, stakeholders and civil society Roundtable Report 23 June 2017 Brussels, Belgium
17. Law on obligation of Republic of Croatia (NN 35/05, 41/08, 125/11, 78/15, 29/18)

Network Resources:

1. <https://www.jutarnji.hr/arhiva/najmladi-dionicar-ima-samo-7-mjeseci/3779373/>, accessed 13 January 2018
2. Konvencija o pravima djeteta Ujedinjenih Nacija URL=https://www.unicef.hr/wp-content/uploads/2017/05/Konvencija_20o_20pravima_20djeteta_full.pdf, page number 2
3. <http://www.6yka.com/novost/63523/nasilje-nad-djecom-u-porastu>, accessed 15 January 2018
4. Ugovor o Europskoj Uniji i Ugovor o funkcioniranju Europske Unije, 2010/C 83/01 URL=<http://www.mvep.hr/custompages/static/hrv/files/pregovori/111221-lisabonski-prociscena.pdf>
5. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 1 and 14*, 4 November 1950, ETS 5, available at <http://www.refworld.org/docid/3ae6b3b04.html> accessed 22 January 2018
6. UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html>, accessed 30 January 2018
7. https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en 20 May 2018.)

УДК 314.151-053.22

Title:

**CROSS-BORDER
SUCCESSION
PROCEEDINGS
AFFECTING A CHILD***

Authors:

Mirela Župan, PhD, Associate Professor at Department of Private International Law Faculty of Law Josip Juraj Strossmayer University of Osijek. Email: mzupan@pravos.hr

Marina Čepo, LL.M., PhD student in European Studies at Doctoral School of the Josip Juraj Strossmayer University of Osijek. Email: marinacepo@outlook.com

The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross Border Movement of a Child in the EU (575451-EPP-1-2016-HR-EPPJMO-CHAIR), held at the J.J. Strossmayer University of Osijek, Republic of Croatia on 15-16 of March 2018

ABSTRACT

A child can be subject to various legal relationships that have a cross-border element, and one of them is succession. Cross-border succession proceedings in the European Union are governed by Regulation (EU) No 650/2012 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 as well as the Hague Convention of 1961. However, if a child is involved, other legal sources become relevant as well, in particular Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. A child may have different roles in this process, but above all, (s)he may be a testator or a successor. In the context of the latter, if the succession proceedings take place in one Member State, and the child is habitually resident in the other, questions may arise as to representation of a child in such proceedings. Moreover, if a property settlement agreement is reached, the question arises as to which state has the authority to issue an approval of such agreement in relation to a child, i.e. to examine and determine whether it is in the best interests of the child. These issues were addressed by the Court of Justice in the proceedings brought by *Matoušková* (case C-404/14) and *Saponaro and Xylina* (C-565/16). Other EU institutions have also been occupied with the same issues in the legislative procedure aimed at amending Regulation 2201/2003, which is still ongoing. In this paper, particular attention is therefore also paid to the relevant provisions of the Proposal for amending Regulation 2201/2003. A distinction in terms of the scope of the European Union Succession Regulation in the context of children may also be relevant in relation to the application of Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. Namely, if a maintenance claim is made in the succession proceedings, the question of a qualification of that claim remains open.

Key words: cross-border succession, child, habitual residence, successor, testator.

INTRODUCTION

Intensive migration and mobility within the European Union (hereinafter referred to as “the EU”) are largely due to the movement of workers. By encouraging the freedom of movement for workers,²¹⁹ the EU has introduced into the lives of its citizens the need to move across borders. The implications of the movement of one, several or even all family members, i.e. families living separately in at least two Member States, have been studied for decades. They affect numerous private and family relationships of these workers who are often insecure in the legal sense. Hence, migration is a trigger for unification of private international law that takes place in the EU in the context of judicial cooperation in civil matters.²²⁰ Focused on the principle of mutual recognition of decisions in cross-border cases, by its secondary legislation the EU harmonises and speeds up judicial protection in cross-border proceedings. This strengthens legal certainty and mutual trust in the common judicial space. However, the EU mandate to act exists only in the area of private international law. Neither substantive nor civil procedural law are areas in which its jurisdiction is exercised and thus they remain regulated by national rules. There is a gradual expansion of the number of legal areas of private international law that are subject to unification,²²¹ and international succession law is placed at the back of that list. Regulation (EU) No 650/2012 of the European Parliament and of 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 Succession²²² (hereinafter referred to as “the EU Succession Regulation” or “Regulation 650/2012”) was adopted in mid-2012 and made cross-border succession one of these areas. The EU Succession Regulation opens up a whole series of legal issues that have not been systematically addressed so far. They may relate to the functioning of its rules as a set of standards, but also to their functioning in the context of other regulations and conventions binding to Member States. In this paper, we will look at the legal position of a child in international succession proceedings, engaging vertically the two aspects mentioned above. In international succession proceedings, the child is primarily a testator or a successor. The essence of this paper are the issues that arise when the child is a successor. It discusses which national court such succession proceedings can be brought before, what would the applicable law be, and how the effects of the decision taken are transferred abroad. This discussion opens up other issues as well. For example, if a child submits a maintenance claim in succession proceedings, its qualification refers to a delimitation in relation to 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 obligations²²³ (hereinafter referred to as “the Maintenance Regulation”). Furthermore, there are particularly interesting questions about the position and representation of the child, replacement of parental

219 Treaty on the Functioning of the European Union (consolidated text), Official Journal of the European Union C 326, 26.10.2012, Article 45(1), p. 63.

220 *Ibid.*, Article 81(1), p. 76.

221 See Sajko, K., *Međunarodno privatno pravo*. Narodne novine, Zagreb, 2009, p. 11.

222 Regulation (EU) No 650/2012 of the European Parliament and of 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, Official Journal of the European Union L 201, 27.7.2012, pp. 107-134.

223 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, Official Journal L 7, 10.1.2009, pp. 1-79.

consent and the approval of a property settlement agreement in relation to which the child is one of the successors. In this context, Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility²²⁴ (hereinafter referred to as “the Brussels II bis Regulation”) comes to the forefront. Through the case of *Matoušková v. Czech Republic*,²²⁵ the Court of Justice of the European Union in Luxembourg (hereinafter referred to as “CJEU”) has made a valuable contribution to solving the aforementioned problem. Further clarification comes with the recent *Saponaro and Xylina*²²⁶ of 19 April 2018;

Analysis is further focused on *de lege ferenda* solutions with reference to the relevant provisions of the Proposal of the European Commission to amend the Brussels II bis Regulation.²²⁷ It should be kept in mind that in all child-related proceedings it is necessary to put the best interests of the child first. Hence, in a wider context, convention law in relation to the protection of children’s rights becomes relevant, especially the Convention on the Rights of the Child.²²⁸ From a regional point of view, the European Convention for the Protection of Human Rights and Fundamental Freedoms,²²⁹ the Charter of Fundamental Rights²³⁰ and the overall sectoral policy on the protection of children’s rights within the EU²³¹ are also decisive.

1. JURISDICTION IN CROSS-BORDER SUCCESSION PROCEEDINGS

As regards its substantive scope, the Succession Regulation should include all civil-law aspects of succession to the estate of a deceased person in international cases.²³² Forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession, are only some of the issues covered.²³³ Due to limited internal competencies the Regulation harmonises only private international law rules. Hence, issues of succession in terms of substantive and procedural law are not affected by this Regulation. Therefore, national regimes remain in effect, as regards both substantive and procedural law. The Regulation does not prevent Member States from adopting certain implementing provisions to link and facilitate the implementation of

224 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, Official Journal L 338, 23.12.2003, pp. 0001-0029.

225 Case C-404/14, *Matoušková v. Czech Republic* of 6 October 2015, ECLI:EU:C:2015:653.

226 Case C-565/16, *Alessandro Saponaro, Kalliopi-Chloi Xylina* of 19 April 2018, ECLI:EU:C:2018:265.

227 Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decision in matrimonial matters and the matters of a parental responsibility, and on international child abduction (recast), Brussels, 30.6. 2016. COM (2016) 411 final, 2016/0190 (CNS) (hereinafter referred to as “Proposal to amend the Brussels II bis Regulation”).

228 Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

229 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

230 The Charter of Fundamental Rights of the EU. OJ C 326, 26.10.2012, pp. 391–407.

231 An EU Agenda for the Rights of the Child. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2011/0060 final.

232 Succession Regulation, Article 1(1).

233 See recital 9 in the Preamble to Succession Regulation 650/2012, p. 279.

these closely related and pertinent issues.²³⁴ Aware of the fact that the internal organisation of countries differs significantly, the Regulation gives a broad definition of the notion of “court”. Thus, it encompasses not only courts which, in the proper sense of the word, perform judicial functions, but also notary public and registry offices. Under the broad definition of the Succession Regulation, all these bodies are obliged to comply with its rules of jurisdiction.²³⁵ Attempts to bring the rules of the Succession Regulation closer to national systems result in implementing regulations.²³⁶ In terms of international jurisdiction, Regulation 650/2012 lays down the fundamental rule in Article 4, i.e. the court of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.²³⁷ The concept of habitual residence has been present in convention law for more than a century. Habitual residence should be a place where a person really lives, the place of his private and social activities. Although habitual residence is close to ordinary residence, the phrases “habitual” or “ordinary” residence indicate stability, so it must be more than occasional or accidental. Although in the spirit of the Council of Europe Resolution of 1972 it is acceptable to understand habitual residence as the place where the person resides for six months or a year, it is now more convenient not to look at the duration of the stay but to pay greater attention to the intensity of that stay. Furthermore, in the context of the rules on international jurisdiction, the Succession Regulation also provides for the possibility of a choice of court agreement. When the law chosen by the deceased to govern his succession is the law of a Member State, the successors may agree that a court of that Member State is to have exclusive jurisdiction to rule on any succession matter.²³⁸ Regulation 650/2012 also lays down subsidiary jurisdiction rules for the situation where the habitual residence of the deceased at the time of death is not located in a Member States. In such circumstances, the court of a Member State in which the testator’s assets are located could have jurisdiction to rule on the succession as a whole, subject to one of the additional alternative conditions. These conditions relate to the existence of the nationality the deceased had of that Member State at the time of his death or his previous habitual residence in that Member State.²³⁹ Where no court in a Member State has jurisdiction pursuant to the given criteria, the court of the Member State may, on an exceptional basis, have jurisdiction to rule on the succession. Namely, if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected, a court of a Member State which has a specific connection with the case may establish its jurisdiction. This situation would be possible exceptionally, and such a court would be used as a forum of necessity, i.e. “*forum necessitatis*”, for judicial protection. After initiating the succession proceedings before a court of a Member State, the “court” will *ex officio* decide on its jurisdiction in the said proceedings. If, after having examined the jurisdiction, it believes that it is not competent in the said proceedings in accordance with the Succession Regulation, it will declare itself as having no jurisdiction and dismiss the lawsuit. Where proceedings relating to the same case involving the same parties thereto are conducted by the courts of different Member States, all courts, with the exception of the one before which the proceedings have been initiated, shall stop the proceedings *ex officio*, pending

234 See e.g. Zakon o provedbi Uredbe (EU) br. 650/2012 Europskog parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi Europske potvrde o nasljeđivanju, NN 152/2014.

235 *Ibid.*, Preamble 20, p. 298.

236 For more details, see Beaumont, P., Fitchen, J., Holliday, J., Policy Department C: Citizens’, The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions, European Union, 2016.

237 Pursuant to Preamble 23 to Succession Regulation 650/2012, *op. cit.*, in order to determine habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should have a close and stable connection with the State concerned.

238 Succession Regulation 650/2012, Article 5(1).

239 *Ibid.*, Article 10.

the determination of jurisdiction of the court which initiated the proceedings, after which all other courts are declared as having no jurisdiction in favour of the said court.²⁴⁰ Due to a relatively short implementation period of Regulation 650/2012, the effects of succession are still being questioned in national practices, and Member States often find it difficult to interpret the provisions of this Regulation. Accordingly, two young children became part of the first case before the CJEU in relation to Regulation 650/2012 concerning the interpretation of Article 1(2)(k) and (l) and Article 31 of the Regulation. Aleksandra Kubicka is a Polish citizen who lives with her husband and their two children in Frankfurt an der Oder. The spouses are joint owners, each with a 50% share, of land on which their family home is built. Ms Kubicka wishes to include in her will a legacy by vindication, which is allowed by Polish law, in favour of her husband, concerning her share of ownership of the jointly-owned immovable property in Frankfurt an der Oder. She wishes to leave the remainder of the assets that comprise her estate in accordance with the statutory order of inheritance. Since German law does not recognise a legacy by vindication, the notary's assistant refused to draw up such a will on the ground that creation of a will containing such a legacy is contrary to German legislation. Since Ms Kubicka's appeal to the notary was not upheld, she brought an appeal before the Regional Court in Poland, which decided to stay the proceedings and to refer the question to the CJEU for a preliminary ruling to clarify whether Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 should be interpreted as permitting refusal to recognise the material effects of a legacy by vindication, as provided for by succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect. The Court has ruled that Article 1(2)(k) and (l) and Article 31 of Regulation 650/2012 should be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy by vindication, provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that Regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.²⁴¹ This is surely only the first of many requests to be referred to the CJEU in relation to the interpretation of provisions contained in the Succession Regulation until patterns for solving such doubts occurring in national practices are created. Amount of incoming applications before the CJEU relating to this regulation is huge.²⁴²

1.1. Scope of Article 1(2) (b) of the EU Succession Regulation 650/2012 and its impact on Cross-Border Succession Proceedings with a Child as a Successor

Succession proceedings are in principle concluded quickly and efficiently. When cross-border succession proceedings involve a child as a successor, the situation will not be so simple. In this case, the succession issues overlap with parental responsibility issues, which are regulated by the Brussels II *bis* Regulation. Moreover, the legal capacity of natural persons²⁴³ and succession shall be excluded from the scope of Regulation 650/2012 and of

240 EU Regulation on Succession and Wills, Commentary, Sellier European Law Publishers, A.L.C. Caravaca A. Davi, H.P. Mansel (eds.), The EU Succession Regulation. A Commentary. Cambridge 2016.

241 Case C-218/16, *Kubicka*, ECLI:EU:C:2017:755.

242 CJEU rendered its judgments also in cases: C-20/17 Vincent Pierre Oberle of 21 June 2018; C-558/16 Mahnkopf of 1 March 2018; C-218/16 *Kubicka* of 12 October 2017; C-294/15 Mikołajczyk of 12 October 2016.

243 Succession Regulation 650/2012, *op. cit.*, Article (1)(2)(b).

the Brussels II *bis* Regulation, respectively.²⁴⁴ The question then arises whether representation of the child and the necessary approval of a property settlement agreement issued by a parent of a minor or his/her guardian and required by the succession proceedings should be treated as a measure relating to the exercise of parental responsibility in terms of Article 1(1)(b) of the Brussels II *bis* Regulation or as a measure relating to succession, which then falls within the scope of the EU Succession Regulation 650/2012. The determination of the authorities of the Member State responsible for deciding on the approval and the property settlement agreement in the context of the succession proceedings will ultimately depend thereon. As two regulations that have the same legal force overlap, it is necessary to analyse their substantive fields of application in more detail. When interpreting the provision of Article (1)(2)(b) of the EU Succession Regulation 650/2012 laying down that the legal capacity of natural persons shall be excluded from the scope of that Regulation, it is important to emphasise that it is indeed excluded from the scope of that Regulation but without prejudice to the capacity to inherit²⁴⁵ and substantive validity of dispositions of property upon death.²⁴⁶ In cross-border succession proceedings, the child may appear as a successor, and (s)he *ex lege* has no legal capacity.²⁴⁷ The child therefore has the capacity to inherit, but his/her will shall be expressed by his/her legal representative or guardian.²⁴⁸ The legal capacity and applicable law are excluded from the scope of the Succession Regulation, and accordingly, they remain within the scope of national private international law. Who will represent the child depends on the substantive rules of the State whose law is applied and the answer to this question should be sought in national private international law.

1.2. Scope of Article 1 of Article 1 of Brussels II bis Regulation and its Impact on Cross-Border Succession Proceedings with a Child as a Successor– de lege lata

The Brussels II *bis* Regulation governs jurisdiction in matters relating to divorce, legal separation or marriage annulment, the attribution, exercise, delegation, restriction or termination of parental responsibility,²⁴⁹ regardless of the court²⁵⁰ or tribunal before which the proceedings are conducted. This Regulation is binding and directly applicable in the Member States and as such it prevails over national law.²⁵¹ The scope that is very close to the 1996 Hague Convention relating to measures for the protection of children requires a more detailed delimitation.²⁵² As regards the property of the child, the Brussels II *bis* Regulation should apply only to measures for the protection of the child, i.e. the designation and functions of a person or body having charge of the child's property, representing or assisting the child, to represent and assist the child and to manage keeping or disposing of the child's property, and the administration, conservation or disposal of the child's property.²⁵³ Measures relating to the property of a child which do not relate to the protection of a child shall continue to be governed by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil

244 Brussels II *bis* Regulation, Article 1(3)(f).

245 Succession Regulation 650/2012, Article 23(2).

246 *Ibid.*, Article 26.

247 In the Republic of Croatia, conditions for acquiring legal capacity are stipulated by the Civil Obligations Act, consolidated text, NN Nos. 35/5, 41/08, 125/11, 78/15, Article 18.

248 *Ibid.*, Article 18(4).

249 So Brussels II *bis* Regulation, Article 1(1)(b).

250 *Ibid.*, Article 2(1).

251 For more details, see Practice Guide for the Application of the Brussels IIa Regulation, General Introduction, p. 5.

252 Župan, M., Chapter 1, in: Honorati 2017, 16-19.

253 See Preamble 7 to the Brussels II *bis* Regulation.

and commercial matters.²⁵⁴ Article (1)(1)(b) stipulates the application of the Brussels II *bis* Regulation with regard to matters of the exercise of parental responsibility. This is also governed by paragraph 2(e), which stipulates that matters of the exercise of parental responsibility may refer to measures for the protection of the child relating to the administration, conservation or disposal of the child's property. However, Article 1(3)(f) stipulates that the Brussels II *bis* Regulation does not refer to succession. The key question here is the issue of cross-border succession proceedings with a child as a successor - should representation of the child in cross-border succession proceedings be treated as a measure for the protection of the interests of minors in terms of Article (1)(1)(b) or as a measure within the meaning of Article (1)(3)(f) of the Brussels II *bis* Regulation, which excludes succession from the scope of that Regulation?²⁵⁵

2. CJEU CASE LAW

The aforementioned problems in cross-border succession proceedings and the need for delimiting the issue of succession from the issue of representation and the approval of the agreement governing disposal of the child's property were presented to the CJEU in Case C404/14 *Matoušková v. Czech Republic*. Recently CJEU had ruled again on child related issues in a cross-border successions proceedings in C- 565/16 *Saponaro and Kalliopi-Chloi Xylina*.

2.1. Case C404/14 MATOUŠKOVÁ v. CZECH REPUBLIC

By decision of 27 April 2010, the court in Brno commenced succession proceedings concerning the estate of Ms Martinus who died in the Netherlands on 8 May 2009 and Ms Matoušková, a notary, was authorised to act as court commissioner of the Municipal Court in Brno. Ms Matoušková started to work on the succession proceedings and established that the deceased was a citizen of the Czech Republic who was living in Brno (Czech Republic) at the time of her death and that her spouse and two minor children were resident in the Netherlands. The proceedings ran smoothly and on 14 July 2011 the successors concluded an agreement on the sharing-out of the estate. However, a turnaround in the proceedings was observed on 2 August 2012, when the surviving spouse stated that, at the date of her death, the deceased had been actually habitually resident in the Netherlands and that she had merely registered permanent residence in the Czech Republic, which was not consistent with the real situation. Furthermore, he also stated that succession proceedings were already ongoing in the Netherlands, and submitted an attestation to that effect, dated 14 March 2011. In the light of the new situation, the court dealing with guardianship matters returned the file to Ms Matoušková without an examination of the substance of the dispute, on the ground that the minor children were long-term residents outside the Czech Republic, stating that it could not decline jurisdiction or refer the case to the Supreme Court in order to determine the court having jurisdiction in that case. In view of that fact, Ms Matoušková applied directly to the Supreme Court asking it to designate the court with local jurisdiction to decide the matter of the approval of the agreement on the sharing-out of the estate at issue in the main proceedings. In those circumstances, the Supreme Court decided to refer a question to the CJEU for a preliminary ruling, i.e. the referring court asked whether in the given case the Brussels II *bis* Regulation shall be

²⁵⁴ 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), Official Journal of the European Union L 351, 20.12.2012, pp. 1-32.

²⁵⁵ If representation of a child and consent and the approval required in cross-border succession proceedings were treated as a measure within the meaning of Article 1(3)(f) of Regulation 2201/2003, it would automatically mean that those issues fall within the scope of Succession Regulation No 650/2012.

applied and interpreted as meaning that the approval of an agreement on the sharing-out of an estate constitutes a measure for the protection of the interests of minors, falling as a result within the scope of that Regulation, or whether the approval of such agreement constitutes a measure relating to succession, and as such, it shall be excluded from the scope of the Brussels II *bis* Regulation based upon its definition stating that its scope does not include succession.²⁵⁶ By virtue of literal interpretation of the Brussels II *bis* Regulation the proceedings would be divided into two states, i.e. on the one hand, a Member State where the succession proceedings are being conducted, and on the other, a Member State in which a child is habitually resident.²⁵⁷ It should be emphasised that the concept of habitual residence of a child is a new challenge for the court. It is practically very difficult to distinguish between habitual residence of a child and habitual residence of persons exercising parental responsibility, especially when it comes to newborns or young children who cannot establish their habitual residence independently. It is therefore indisputable that habitual residence of a minor will, as a rule, be dependent on the habitual residence of a person exercising parental responsibility. Therefore, in terms of the habitual residence of a child, an acceptable hypothesis is that it is a mixed concept of law and fact. The habitual residence of a minor will, as a rule, be dependent, requiring a projection of situations in which the habitual residence of a child may differ from that of his or her parents exercising parental responsibility. If only parents reside for a certain period of time in State A and in this way willingly change their place of residence, and if the child resides in that state only for a short period of time and continues to reside in the state where they are all habitually resident, the question arises as to whether it is justified to tie the child's residence to that of his parents. Another typical situation is when a child leaves a joint habitual place of residence to go to school in another country. The question is which element should prevail, i.e. does the fact suffice that most of the time the child resides in that other country, or is the fact that the child is not integrated into the social life of that country a sufficient condition to take into account the mere factual situation and create an artificial connection with the legal system of the country in which the child is just being educated? The third situation is related to adolescents who would independently decide to change their place of residence such that, for example, they leave the parent they usually live with to live with a parent they normally do not live with. In order to assess whether a new habitual residence is established in such new situation, it is necessary to consider the totality of the factual situation and to assess whether, according to the age and maturity of the child, it is justified to accept his/her will to change. As the Regulation does not define, but leaves the concept of habitual residence as a factual concept, an official authority is to determine where the child's habitual residence really is.²⁵⁸ The CJEU has clearly interpreted the concept of the habitual residence of a child²⁵⁹ and thus facilitated its application to the competent authorities, which, in the context of the application of the Regulation, must ensure systematicity and uniformity of practice guaranteeing legal certainty.²⁶⁰

According to the assessment provided by the CJEU, an approval of an agreement on the sharing-out of the estate concluded on behalf of a minor by his/her guardian, should be considered a measure directly linked to the legal capacity of a natural person,²⁶¹ or a measure relating to the exercise of parental responsibility within the meaning of Article 1(1) (b) of the Brussels II *bis* Regulation, which, by its very nature, enters into the framework of activities aimed at protecting and assisting the minors, and hence the court concludes

256 So the Brussels II *bis* Regulation, Article 1(3)(f).

257 *Ibid.*, Article 8(1).

258 Beaumont, P., Holliday, J., Recent developments on the meaning of "habitual residence" in alleged child abduction cases, in: Private International Law in the Jurisprudence of European Courts - Family at Focus, M. Župan, ed., Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Osijek, 2015. (pp. 39-50); Limante, A., Kunda, I., Chapter 3. In Honorati, C. (ed.) Jurisdiction in matrimonial matters, parental responsibility and abduction proceedings. A Handbook on the Application of Brussels IIa Regulation in National Courts. Giappichelli - Peter Lang, Torino, 2017. (pp. 61-93).

259 See Case C-523/07 *A.*, (2009) ECR I-02805 and Case C-497/10 *PPU Mercredi*, (2010) ECR I-14309.

260 Župan, M., Europski prekogranični obiteljski postupci, in: Petrašević, T., Vuletić, I., eds., Procesno-pravni aspekti prava EU, Pravni fakultet Osijek, 2016. (pp. 144-145).

261 For more details, see the judgement in *Schneider* case C386/12, EU:C2013:633, point 26.

that in the present case the said Regulation shall be applied, regardless of the need for the approval required in the succession proceedings. Furthermore, the CJEU concludes that Succession Regulation 650/2012 is *ratione temporis* not applicable in the main proceedings, but even if it were applicable, it still believes that the issuance of an approval is to be considered a measure for the protection of the child relating to the administration, conservation or disposal of the child's property within the framework of the exercise of parental responsibility.²⁶² The decision of the CJEU was based upon Article 12(3) of the Brussels II *bis* Regulation. Accordingly, the courts of the Member State are responsible for proceedings relating to parental responsibility²⁶³ if there is a substantial connection of the child with that Member State, and if the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child. Furthermore, the CJEU considers that legal capacity and related representation issues should be assessed pursuant to one's own criteria, by an independent method, rather than as questions referred for a preliminary ruling that depend on the relevant legal actions. Thus, appointing an official guardian for minor children and supervising his/her activities are so closely related that it is not appropriate to apply different rules on jurisdiction, which would differ depending on the area to which the legal action in question relates. Therefore, the CJEU believed that the approval of an agreement on the sharing-out of the estate concluded by a guardian on behalf of minor children constitutes a measure relating to the exercise of parental responsibility, within the meaning of Article 1(1)(b) of the Brussels II *bis* Regulation and thus falls within the scope of that Regulation, and not a measure relating to succession, within the meaning of Article 1(3)(f) thereof. Here the CJEU followed the opinion of the Advocate General Juliana Kokott.²⁶⁴ As pointed out by the CJEU in its judgement, in the case of the approval of an agreement on the sharing-out of an estate concluded by a guardian on behalf of minor children, which is a prerequisite for this agreement stipulated by the law of the Member State to be considered valid, Article 12(3) of the Brussels II *bis* Regulation may provide the foundation for making a decision on the jurisdiction of the court before which succession proceedings are conducted for the purpose of approving the agreement on the sharing-out of an estate. Such deviation from the general jurisdiction of the court of the Member State in which the child is habitually resident as referred to in Article 8 of the Brussels II *bis* Regulation is possible, but only if the aforementioned conditions have been met.

2.2. SAPONARO and KALLIOPI-CHLOI XYLINA

CJEU recently had a chance to provide interpretation in relation to child related cross-bordered successions proceedings in the Saponaro and Kalliopi-Chloi Xylina. This request for a preliminary ruling initiated by Greece court raises issues of both family and successions areas. In concrete, parents of a Greek and Italian nationality, living with their child (holding solely Greece nationality) in Rome, sought to renounce the inheritance on behalf of their daughter. Parents initiated proceedings before Greek court, as Greece is the country where the deceased grandfather had been living and where his burdened estate is located. It is notable that grandfather whose inheritance is at stake died on May 10, 2015. The national court first of all declared that the case at stake is outside temporal scope of application of the Successions Regulation. Pursuant to Article 83 the Regulation applies to succession of a persons who die on or after 17 August 2015.

The Court however invoked the Brussels II a, with several open questions. Since a child clearly held Italian habitual residence, as well as is entire family, Greek court doubted over its international jurisdiction to deal with the matter. It actually requested an interpretation of the Article 12(3) of Brussels IIbis Regulation providing for prorogation of international jurisdiction.

262 In terms of Article 1(1)(b) and Article 1(2)(e) of the Brussels II *bis* Regulation.

263 With the exception of those referred to in Article 1(12) of Regulation 2201/2003.

264 Opinion of the Advocate General Juliana Kokott at the sitting on 25 June 2015 in Case C-404/14, point 51.

The arguments of the CJEU indicated to a holistic approach to interpretation of functioning of regulations with overlapping/tight connected subject matter. The Court thus argued for prorogation of jurisdiction, holding that joint lodging of proceedings by the parents before the courts of their choice is an unequivocal acceptance by them of that court. CJEU referred to the best interest of a child in general, concretizing it to the facts of the case. Several objective factors were identified by the court: residence of the deceased at the time of his death was in the Member State of the chosen courts; location of the assets that were the subject matter of the succession were in the Member State of the chosen courts; liabilities of the succession were situated in the Member State of the chosen courts. Since more objective factors coincided with the chosen Member State, and "there is no objective argument that the prorogation of jurisdiction was liable to have a prejudicial impact on the child's position, to the conclusion that that prorogation of jurisdiction is in the best interests of the child."²⁶⁵

2.3. Acceptability of the CJEU Interpretations, or searching for a New Solution?

After delivery of the judgement in the case of *Matoušková*, justification and purpose of this solution have been questioned. Namely, if we take into account that EU policy aims to ensure horizontal protection of children's rights, realisation of one of the fundamental postulates, i.e. the protection of the best interests of the child, comes to the forefront. Based upon the understanding of many theorists in private international law, it is realised through a fast and efficient process of judicial child protection.²⁶⁶ Since through this *Matoušková* case the CJEU calls for the implementation of two proceedings in two Member States, it can hardly be said that it is in pursuit of the best interests of the child in terms of the aforementioned. In this decision, the Court opens up the possibility of having recourse to the prorogation of jurisdiction provided for in Article 12(3), by which it is possible to "merge" the proceedings for issuing the approval of the agreement governing disposal of the child's property and the succession proceedings. Recent *Saponaro* case confirmed that such a scenario is possible. Moreover, that case clearly indicated that interpretation of the CJEU is guided by the best interests of a child.

However, besides these rare situations where prorogation would work, the adequacy of the default rule established by *Matoušková* needs further investigation. In accordance with the fact that the court responsible for administering the succession proceedings has no authority over the issue of the exercise of parental responsibility, the court of the Member State where the child is habitually resident shall issue such type of consent, which shall be taken into account by the court before which the succession proceedings are conducted.²⁶⁷ The Proposal of the European Commission to amend the Brussels II *bis* Regulation brings a number of changes in the area of parental responsibility.²⁶⁸ One of these areas also affects a change in terms of facilitating and speeding up the proceedings when it comes to making judgements in relation to the same matter by two different courts due to non-jurisdiction, such as cross-border succession when a child is a succes-

²⁶⁵ Case C-565/16, para 40.

²⁶⁶ Župan, M., *The Best Interests of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?*, in: *The United Nations Convention on the Rights of the Child: taking stock after 25 years and looking ahead*, Leiden, Boston: Brill/Nijhoff, 2017, pp. 213-229.

²⁶⁷ Similarly, the court also confirmed in Case C-215/15 V. I. Gogova v. I. D. Iliev, ECLI:EU:C:2015:710, Judgment of the Court of 21 October 2015, paragraph 35.

²⁶⁸ Drventić, M., "New trends in european family procedural law", in: Duić, D., Petrašević, T. (eds.) *Jean Monnet International Scientific Conference "Procedural aspects of EU law" EU and Comparative Law Issues and Challenges Series (ECLIC) – issue 1*, Faculty of Law Osijek, 2017, pp. 424-447.

sor in the proceedings. Other instruments, in particular other EU regulations in the field of family law and international instruments such as the Hague Convention of 1980²⁶⁹ and the Hague Convention of 1996,²⁷⁰ have been considered in the Proposal, given the importance of their application in the area of European family and civil law. A new provision of the Proposal of the European Commission to amend the Brussels II *bis* Regulation stipulates that, if the outcome of the proceedings before the competent body of a Member State which has no jurisdiction under the Brussels II *bis* Regulation depends on a decision on an incidental question falling within the scope of that Regulation, it should not prevent the competent authority from making a decision in that case. Accordingly, the authority that has competence in the succession proceedings shall have the possibility of appointing a guardian *ad litem*, who will represent the child in the ongoing proceedings, regardless of whether (s)he has jurisdiction in the sphere of parental responsibility within the framework of the Brussels II *bis* Regulation. Any such decision on an incidental issue shall only have an effect in the said proceedings.²⁷¹ Accordingly, in the Proposal of the European Commission to amend the Brussels II *bis* Regulation, Article 12 has been changed such that the title *Prorogation of Jurisdiction*²⁷² was deleted, i.e. it has become Article 10 in the Proposal of the European Commission to amend the Brussels II *bis* Regulation and is now entitled Choice of Court for Ancillary and Autonomous Proceedings.²⁷³ Article 10(1) of the Proposal of the European Commission to amend the Brussels II *bis* Regulation implies that the courts of a Member State have jurisdiction in relation to parental responsibility in proceedings where the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, if the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the latest at the time the court is seised, or, where the law of that Member State so provides, during those proceedings, and if the jurisdiction is in the best interests of the child.²⁷⁴ The jurisdiction conferred in such way shall cease as soon as the proceedings have led to a final decision.²⁷⁵ This change enables the court competent to conduct the succession proceedings, after determining that one of the successors in the proceedings is a minor, to appoint a special guardian for the child and continue the proceedings, instead of staying the proceedings and asking the court of the Member State where the child is habitually resident to issue the approval and consent. This would mean, for example, that upon death of the testator who was habitually resident in the Republic of Croatia, after having established jurisdiction, the inheritance proceedings are initiated under the Inheritance Act²⁷⁶ and the Center for Social Welfare is invited to appoint for the child, who is habitually resident in another Member State, a special guardian who will represent the best interests of the child in the proceedings. In such cases, the courts should clearly state in their decisions the basis for the assumption of jurisdiction in matters relating to parental responsibility.²⁷⁷ However, the situation is not entirely straightforward with this scenario either. This solves the question of merging jurisdiction, but

269 The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Si. I. MU No. 7/91 (the Republic of Croatia became a party to the Convention pursuant to the Notification of Succession of 8 October 1991 – NN MU 4/94).

270 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 of 5 June 2008, Official Journal of the European Union, L 115 /36, 11.6.2008.

271 See Preamble 22 to the Proposal to amend the Brussels II *bis* Regulation.

272 Brussels II *bis* Regulation, Article 12.

273 Proposal to amend the Brussels II *bis* Regulation, Article 10.

274 *Ibid.*, Article 10(3), pp. 19-20.

275 *Ibid.*, Article 10(4).

276 Zakon o nasljeđivanju, pročišćeni tekst, Narodne novine br. 48/03, 163/03, 35/05, 127/13, 33/15, od 01. travnja 2015. godine.

277 See Case C-256/09, Bianca Purrucker v Guillermo Valles Perez [2010] ECR I-7353

it is still necessary to determine the applicable law under the provisions of the 1996 Hague Convention. It will again refer to the law of the country in which the child is habitually resident to determine who is actually authorised to represent the child.²⁷⁸ In cross-border succession, the problem is due to the fact that the law of different states regulates succession issues in various ways. No succession arrangement in the EU is the same or completely different, but it is sufficiently different to bring about problems occurring in the practice that must be singled out. Since the succession issue is the matter of national law, and given cultural, historical and developmental differences in their creation, there is no tendency towards their unification at EU level. However, the Succession Regulation is the closest step to what the EU has done in terms of succession, setting a clear boundary and giving the Member States much jurisdiction in this area. What is crucial at this point is the emphasis on differences in succession systems of Member States that determine orders of succession differently, leading to a different set of successors, as well as not giving equal rights to the successor in every EU Member State. This raises the question whether the offspring, spouses, and other close relatives of the testator would have been given more or less rights than those they had received if the testator's habitual residence at the time of his/her death was in another Member State. It follows that their rights depend on the succession arrangements of the Member State in which the deceased was habitually resident at the time of death, which, *inter alia*, leads to the possibility of manipulation. What would happen if a person with Croatian citizenship, who has contracted a serious illness and does not live with his lawful wife but with his sister who takes care of him, established his habitual residence in the Netherlands, and drew up a will stating that, in addition to his wife and children, he left all his property to his sister. Later on, a non-marital child of the testator appears, who has been adopted in the meantime and lives with the adopters in Belgium, demanding his/her rights to his/her father's estates. In such and similar cases, there are a number of problems that may arise, such as the issues of different arrangements aimed at limiting the freedom to dispose of property upon death, different national regulations equalising the rights of marital and non-marital children, differences in procedures establishing paternity in the Member States and different arrangements of rights of adopted children to inherit from their biological and adoptive parents. In accordance with Dutch law, only the descendants of the deceased are entitled to statutory succession,²⁷⁹ which means that the marital children of the testator would in this case be entitled to the right to part of the property belonging to them legally, but the spouse would not have that right; however, under Croatian law, the spouse would be entitled to that right if the testator were habitually resident there at the time of death. Furthermore, what will happen if Dutch law does not permit a non-marital child to inherit from a testator or if that is possible if paternity is established, and the statutory deadline for establishing paternity has expired? If paternity were confirmed and marital and non-marital children were treated equally in Dutch law, the issue of regulating the rights of adopted children to inherit from biological parents remains unsolved. Is the adopted child considered to have any legal relationship with the biological parent after adoption, and accordingly, the right to inherit? Does the law of that Member State entitle the adopted child to inherit from biological parents and, if the child is entitled to that right, does it mean that (s)he would lose the right to inherit from his/her adoptive parent(s)?

In addition to the above listed problems, the issues of diverse legal systems also occur in cross-border succession proceedings involving a child in terms of the following issues: establishing the age suitable for making of the will, prescribing the type and form of the will, orders of inheritance, which have not been treated equally in all EU Member States, or determining the time of transfer of the estate to testators, dealing with testator's debts, as well as numerous other clashes of laws that often appear in the domain of international succession law,²⁸⁰ for which a solution should be found.

278 Župan, M., *Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996.*, in: Rešetar, B. (ed.), *Pravna zaštita prava na (zajedničku) roditeljsku skrb*. Osijek, 2012, p. 214.

279 https://e-justice.europa.eu/content_succession-166-nl-hr.do?member=1, Retrieved 24 October 2017, 12:45 pm

280 Varadi, T., *et al, op. cit.*, p. 338.

3. MAINTENANCE CLAIMS IN SUCCESSION PROCEEDINGS

Pursuant to Article 1(2)(e) of Succession Regulation 650/2012, maintenance obligations shall be excluded from the scope of that Regulation, but as set forth below, other than those arising by reason of death. It is known that the issues relating to maintenance of family members are regulated by the Maintenance Regulation and the scope of that Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity.²⁸¹ What is important for the purpose of delimiting the scope of the said two regulations is certainly to define maintenance obligations by reason of death, because in this case, instead of the Maintenance Regulation, the Succession Regulation shall be applied, whose scope includes such maintenance obligations. Maintenance obligations upon death are obligations that did not exist before death and are often functionally equal to statutory succession for persons close to the deceased or are assigned to persons who are not entitled to the necessary part.²⁸² Accordingly, the law designate as applicable in the succession proceedings treats such maintenance obligations as the requirements persons close to the deceased may have against the estate or the successors.²⁸³ Thus, the law applicable to maintenance obligations determines whether there exists and under what conditions an obligation after the death of the maintenance creditor, while the law applicable to succession determines whether and to what extent the maintenance obligation is due to death and whether it can be transferred. The maintenance claim is treated just like any other claim concerning the estate and the beneficiaries. The law applicable to succession determines whether the claim will be filed against the estate or the beneficiary and whether the beneficiary is entitled to the right to compensation from other beneficiaries.²⁸⁴

CONCLUSION

Following the analysis and discussion in this paper, it can be concluded that the matter of succession in the EU is regulated by the Succession Regulation, which provides guidelines on succession proceedings. The Regulation stipulates that Member States in which the deceased was habitually resident at the time of death shall have jurisdiction to decide on the succession as a whole. The Regulation harmonises only private international law related regulations and relies on national regimes in terms of both substantive and procedural law. Diversity in succession arrangements of Member States leads to numerous open issues that are slowly beginning to emerge in national practices, such as gaining different rights in relation to the same matter in different Member States. Since the legal capacity of natural persons is excluded from the scope of the Succession Regulation and the child *ex lege* has no legal capacity, the question arises as to representation of the child in this case. Thus the child has the capacity to be a successor, but instead of him/her, his/her will be expressed by his/her legal representative or guardian, and in so doing, in addition to the Succession Regulation, the Brussels II *bis* Regulation becomes relevant as well because it concerns the issues of the exercise of parental responsibility. Since succession is excluded from the scope of Brussels II *bis* Regulation, there have been some doubts in practice as to the interpretation of Article 1 of the Regulation and its delimitation from the scope of the Succession Regulation. Having presented the problem to the CJEU through the case of *Matoušková v. Czech Republic*, the CJEU issued a judgment that solved this legal problem by stating that the approval of a property settlement agreement is to be regarded as a measure for the protection of a child and thus automatically falls within the

281 See Preamble 11 to Maintenance Regulation 4/2009, p. 139.

282 The EU Succession Regulation, A Commentary, Cambridge University Press, 2016, p. 93.

283 Succession Regulation 650/2012, Article 23(2)(h).

284 The EU Succession Regulation, A Commentary, *op. cit.*, pp. 93-94.

scope of the Brussels II *bis* Regulation, and accordingly, the court of the Member State in which the child is habitually resident shall have jurisdiction. The grounds of jurisdiction in matters of parental responsibility established in the Brussels II *bis* Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity,²⁸⁵ and such jurisdiction does not always guarantee that the child's destiny will actually be decided upon by the most appropriate court because the criterion of proximity and the best interests of the child are not always correlated.²⁸⁶ Since in its ruling the CJEU declared that Article 12(3) of the Brussels II *bis* Regulation may be used as the basis for determining the jurisdiction of the court before which the succession proceedings are conducted, provided that the required conditions are met, since the treatment of two different courts in two different Member States does not preserve the best interests of the child. In accordance with that, the Commission noted the need for amending the Brussels II *bis* Regulation to provide to the court of the Member State in which the succession proceedings are conducted to adopt, in relation to the said proceedings only, the approval of a property settlement agreement in such proceedings, by appointing a special guardian to the child who will represent the child's interests. Since maintenance obligations, other than those arising by reason of death, are excluded from the scope of the Succession Regulation, there is a need for delimiting its scope from the scope of the Maintenance Regulation. The law applicable to maintenance obligations, determines whether there an obligation exists and under what conditions it exists after the death of the maintenance creditor, while the law applicable to succession determines whether and to what extent the maintenance obligation is due to death and whether it can be transferred. Concerning the Succession Regulation itself, it is reasonable to expect problems in national practices related to the interpretation of certain provisions of the Regulation, but it has certainly facilitated international succession proceedings.

285 See Preamble 12 to the Brussels II *bis* Regulation.

286 For more details, see Beaumont, P.: *Jurisdiction of Cross-Border Cases and Recognition and Enforcement of Judgements in Family Matters*, Latvia, 2010, p. 14.

Bibliography

1. Beaumont, P.: *Jurisdiction of Cross-Border Cases and Recognition and Enforcement of Judgements in Family Matters*, Latvia, 2010.
2. Bergquist, U., et. al. *EU Regulation on Succession and Wills, Commentary*, Sellier European Law Publishers, 2016.
3. Caravaca Alfonso-Luis Calvo, Davì A., Mansel Heinz-Peter, *The EU Succession Regulation, A Commentary*, Cambridge University Press, 2016.
4. Drventić, M., "NEW TRENDS IN EUROPEAN FAMILY PROCEDURAL LAW", in: Duić, D., Petrašević, T. (eds.) *Jean Monnet International Scientific Conference "Procedural aspects of EU law" EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC) - ISSUE 1*, Faculty of Law Osijek, 2017.
5. Limante, A., Kunda, I., Chapter 3. In Honorati, C. (ed.) *Jurisdiction in matrimonial matters, parental responsibility and abduction proceedings. A Handbook on the Application of Brussels IIa Regulation in National Courts*. Giappichelli - Peter Lang, Torino, 2017. p. 61-93.
6. Rauscher, T.: *Parental Responsibility Cases under the new Council Legislation „Brussels IIa“*, *European Law Forum*, No. I-2005.
7. Sajko, K., *Međunarodno privatno pravo*, Narodne novine, Zagreb, 2009.
8. Uzelac, A., Rešetar, B., *Procesni položaj djeteta i zastupanje djeteta u sudskom postupku*, in: Rešetar, B. (eds.), *Dijete i pravo*, Pravni fakultet, Osijek, 2009.
9. Varadi, Tibor, et al., *Međunarodno privatno pravo*, 10th Edition, Pravni fakultet Univerziteta u Beogradu, JP "Službeni glasnik", Beograd, 2008.
10. Župan, M. "The best interest of the child – a guiding principle in administering cross border child related matters?", in: T. Liefgaard and J. Sloth-Nielsen (eds.) *The United Nations Convention on the Rights of the Child. Taking Stock after 25 Years and Looking Ahead*. Brill | Nijhoff, 2017. (213-229)
11. Župan, M. Chapter 1: Introduction, in: Honorati, C. (ed.) *Jurisdiction in matrimonial matters, parental responsibility and abduction proceedings. A Handbook on the Application of Brussels IIa Regulation in National Courts*. Giappichelli - Peter Lang, Torino, 2017. (pp. 1-37)
12. Župan, M., *Europski prekogranični obiteljski postupci*, in: Petrašević, T., Vuletić, I., eds., *Procesno-pravni aspekti prava EU*, Pravni fakultet Osijek, 2016. (pp. 125-167)
13. Župan, M., *Određivanje međunarodne nadležnosti u obiteljskopравnim stvarima*, in: Garašić, J. (ur.), *Europsko građansko procesno pravo – izabrane teme*. Narodne novine Zagreb, 2013. (pp. 147-171)
14. Župan, M., *Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996.*, in: Rešetar, B. (ur.), *Pravna zaštita prava na (zajedničku) roditeljsku skrb*. Osijek 2012. (pp. 199-222)

Regulations, Acts and Court Decisions

1. An EU Agenda for the Rights of the Child, OJ C 43/34, 15.2.2012.
2. 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 of 5 June 2008, Official Journal of the European Union, L 115/36, 11.6.2008.
3. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Si. I. MU No. 7/91 (the Republic of Croatia became a party to the Convention pursuant to the Notification of Succession of 8 October 1991 – NN MU 4/94)
4. The Hague Convention of 13 January 2000 on the International Protection of Adults.
5. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.
6. Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.
7. Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326, 26.10.2012, p. 391–407.
8. Treaty on the Functioning of the European Union (consolidated text), Official Journal of the European Union C 326, 26.10.2012.
9. 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), Official Journal of the European Union L 351, 20.12.2012.
10. Regulation (EU) No 650/2012 of the European Parliament and of 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, Official Journal of the European Union L 201, 27.7.2012.
11. 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, Official Journal of the European Union L 338, 23.12.2003.
12. 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, Official Journal of the European Union, 10.1.2009., L 7/1
13. Ustav Republike Hrvatske, pročišćeni tekst, Narodne novine br. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/
14. Obiteljski zakon, pročišćeni tekst, Narodne novine br. 103/15
15. Zakon o nasljeđivanju, pročišćeni tekst, Narodne novine br. 48/03, 163/03, 35/05, 127/13, 33/15, od 1. travnja 2015. godine

16. Zakon o parničnom postupku, pročišćeni tekst, Narodne novine br. 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.
17. Zakon o provedbi Uredbe (EU) br. 650/2012 Europskog parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi Europske potvrde o nasljeđivanju, NN br. 152/14.
18. Zakon o obveznim odnosima, pročišćeni tekst, Narodne novine br. 35/5, 41/08, 125/11, 78/15.
19. Practice Guide for the Application of the Brussels IIa Regulation. Directorate-General for Justice (European Commission) 2016. <https://publications.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed>
20. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decision in matrimonial matters and the matters of a parental responsibility, and on international child abduction (recast), Brussels, 30.6. 2016. COM (2016) 411 final, 2016/0190 (CNS)
21. Case C-523/07 A., (2009) ECR I-02805
22. Case C-218/16, *Kubicka*, ECLI:EU:C:2017:755.
23. Case C-256/09, *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-7353
24. Case C404/14 *Matoušková v Czech Republic*, ECLI:EU:C:2015:653
25. Case C-497/10 PPU *Mercredi*, (2010) ECR I-14309.
26. Case *Schneider* C386/12, EU:C2013:633
27. Case C-215/15 V. I. *Gogova v I. D. Iliev*, ECLI:EU:C:2015:710
28. Opinion of the Advocate General *Juliana Kokott* at the sitting on 25 June 2015 in Case C-404/14.
29. Case C-565/16, *Alessandro Saponaro, Kalliopi-Chloi Xylina* of 19 April 2018

Online Sources

1. Eurostat, Retrieved from http://ec.europa.eu/eurostat/statisticsexplained/images/c/c8/Immigration_by_citizenship%2C_2015_%28%C2%B9%29.png, 10 October 2017.



Centre for South East European Law
School Network (SEELS)

Ss. Cyril and Methodius University/
Iustinianus Primus Faculty of Law

Bul. "Goce Delcev" 9b
1000 Skopje/Macedonia
Email: centre@seelawschool.org

Phone:
+389 2 31 25 177
+389 2 32 27 549

<http://www.seelawschool.org>