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STUDIES IN LAW

5th International Conference of PhD Students and Young Researchers

HOW DEEP IS YOUR LAW? BREXIT. TECHNOLOGIES. MODERN CONFLICTS

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FOREWORD BY THE ORGANISERS

We are delighted to present you already the fifth edition of international conference papers of the PhD students and young researchers. This year the international conference is once again devoted to very challenging and many different discussions raising topic “How Deep is Your Law? Brexit. Technologies. Modern conflicts”. The topic is devoted to analyse events and problems which could shape and influence the legal, political and economic future of many regions of the world and the topics are relevant not only for lawyers but also for representatives of other professions. Themes of presentations span from legal problems to trigger Brexit to possible effects of Brexit for Eastern European countries; from protection of privacy in social networks to challenges of E-waste; from hybrid wars to impact of counterterrorism for human rights in Africa.

Conference papers are presented by PhD students and young scholars from Belarus, Belgium, Estonia, France, Germany, Italy, Latvia, Lithuania, Poland, Russia, Spain, Ukraine and United Kingdom. This shows that in 2014 established International Network of Doctoral Studies in Law by Vilnius University Faculty of Law, Frankfurt am Main J.W. Goethe University Faculty of Law, Paris Nanterre University Faculty of Law and Lodz University Faculty of Law and Administration already created an international platform to develop academic and scientific activities, to enhance quality of doctoral studies in law and to help the interchange of information and ideas among PhD students and professors.

We hope that while we wait for the next year conference, this edition of papers will be a perfect way to deepen knowledge in many relevant aspects of law for scholars, students and practitioners in different fields of interest.

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HOW HYBRID IS MODERN WARFARE?

Alaa Al Aridi¹

Abstract

Analyzing the evolution of warfare² in nature and character has been captured by analysts and policy makers in different fields, military, politically and legally. With the new forms of warfare and the emerging role of new actors with strong ability to destabilize an order in any state, combined with other Hybrid tactics and means, Hybrid Warfare (hereinafter HW) theory and its unique features made it one of the most important topics to be analyzed and examined.

Therefore, the main purpose of this paper is to highlight the legal challenges that are imposed by HW means as Law plays a cardinal role in regulating war, and in drawing the line between war and peace. HW creates a challenge in contemporary conflicts for what law is applicable, and what is permissible or not permissible with the lack of clear characterization of the conflict, whether it is civil unrest, proxy war, or armed conflict. In this matter, policy makers struggled to grasp what Hybrid threats means, and the legal challenges it impose.

Keywords: Hybrid Warfare, Hybrid Threats, Armed Conflict, Non-State Armed Groups, International Law.

Introduction

Contemporary Conflicts occurring mainly in the Middle East and eastern Ukraine, in addition to other conflicts or internal unrest in areas such as Somalia, Armenian-Azerbaijan borders, Cyber-attack against Estonia, Georgian conflict, Yemen civil war and many other areas, clearly highlighted that conventional wars are no longer a fashion. New means added to old forms of wars created a new form that was defined as a HW. Those old means of non-state armed groups, terrorism, Guerrilla and Proxy warriors were blended with other non-military means and the development of technological weapon systems to create Hybrid warriors and means based on covert tactics with lack of clear attribution based on deniability. Modern HW no longer applies regular and irregular forces in different areas of the conflict as separate efforts, but now combines them in a single domain.³

Eventually, a shift in warfare by character and nature created a challenge to international peace and security, as such forms been employed to serve the interest of adversaries in several cases around the world, and role of Hybrid warriors has increased in a wide manner. Undoubtedly, Marco Sassòli has pointed out, "by definition, at least half the belligerents [...] are non-State armed groups"⁴. As an example, Hezbollah with huge arsenal faced Israeli attack in south Lebanon 2006, Attacks against Estonia 2007 (Nashi Youth Activist Group), Georgia conflict 2008, Ukraine strife that summarizes a foggy situation of conflict between national government against separatists or Russian ultra-nationalists that might be proxy fighters or as well Russian troops pitting Ukraine against Russia crystallizing It to an international armed dispute, and ISIS that is considered a powerful non-state armed actor capable of conquering territory and using conventional, unconventional and

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² Warfare has been used by military scholars to describe physical conduct of war or the fighting and violent aspects of war.

³ Hugo Miguel Moutinho Fernandes, The New Wars: The Challenge of Hybrid Warfare, Revista de Ciências Militares, Vol. IV, No 2, November 2016, p.52

⁴ Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law," International Humanitarian Legal Studies, 2010, vol. 1, no. 1, p. 5.

terrorism, therefore fitting into the definition of a hybrid threat⁵. Such wars which is primarily national and supra-national, there is no territory which cannot surpass⁶.

What is Hybrid Warfare?

The Term HW has no consistent definition so far, it could include irregular and conventional tactics in battle space, new generation means of war, and non-military means for strategic objectives⁷. This term became more important after the annexation of Crimea, yet that doesn't mean that such tactics are new, for example, The Japanese invasion of Manchuria in 1931 offers some striking parallels with the Russian invasion of Crimea in 2014, as Japan by that time denied the existence of war. Japan combined large-scale military operations with non-military means, including instigating civil unrest, organizing armed gangs and supporting armed separatists⁸. But what is new after the Ukrainian conflict is that this model has high level of integration and coordination as well the speed for which hybrid threats can evolve into HW.⁹ In this manner, the U.S. secretary of defense named it A Known Unknown¹⁰. But in all cases a decent descriptive characterization of what HW means can be as a centrally designed, coordinated and controlled¹¹, with use of covert and/or overt tactics, military and non-military means, conventional force, economic pressure to intelligence and cyber operations, applying coercive and subversive methods, supported by insurgents or disguising state to state aggression behind the mantle of humanitarian intervention such as protecting minorities¹².

HW as a concept that has been evolving recently, especially in gray areas expanding in several conflict zones around the world, mainly in Middle East after what so called Arab Spring, moreover in areas such as Somalia, Yemen, Eastern Ukraine, Moldova and many others, threatens the international security and Peace that is fundamental according to relations between states.

HW was highlighted by Frank Hoffman's study¹³: The Rise of Hybrid war, conflict of 21'st century defining it as a military strategy blending conventional, irregular tactics and cyber warfare, terrorism and criminal behavior within a battle space to obtain political objectives. And the main problem is that this strategy includes the engagement of State and non-state actors following violent contest for political advantages throughout hostile forces using Hybrid warriors hidden in civilian population, creating a transnational threat that should be a high priority area of discussion¹⁴. Notably the term was used in an article on Russian military thinking published in February 2013 by General Valery Gerasimov, the Chief of General Staff of the Russian Federation's Armed Forces, where he describes how armed conflicts have adopted new methods and how the conventional geopolitical paradigm is outdated, and where he reveals Russia's vision on the new modern warfare strategies known as 'non-linear warfare'¹⁵

⁵ Hugo Miguel Moutinho Fernandes, Ibid. p. 51.

⁶ The Ukrainian conflict is a threat to Baltic States (Lithuania , Estonia and Latvia)

⁷ This understanding is echoed in the [Wales Summit Declaration](#) issued by the Heads of State and Government of the member countries of NATO on September 5, 2014:

⁸ Report of the Commission of Inquiry, League of Nations Doc. C.663.M.320, 66-83 ,Oct. 1, 1932

⁹ Col. Tomasz K. Kowalik and Dominik p. Kankowski, Hybrid warfare a Known Unknown, New Eastern Europe , 4 July 2016.

¹⁰ Ibid..

¹¹ European External Action Service, Food-for-Thought Paper "Countering Hybrid Threats", 8887/15 (May 13, 2015).

¹² Russian hybrid warfare is recognizable by : unjustified concentration of troops at the borders, large scale military exercises based on offensive scenarios , deniability of Russian troops in a conflict zone and any kind of support to separatists , provocative maneuvers at airspace borders

¹³ Frank Hoffman stated that we are entering a multiple types of warfare taking variety of forms.

¹⁴ Munich Security Council broadened the Hybrid concept to include Diplomatic, information, Military, economic, financial, intelligence and law enforcement.

¹⁵ Hugo Miguel Moutinho Fernandes, Ibid. p. 57- 58

One of the HW means is what is so called Law-fare defined by Dunlop back in 2001: “A strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective¹⁶. Using law as a means of warfare is not novel but plays an important role by states to undermine the ability of targeted state to react, such means based on deniability, as Russia claimed that in Crimea there are no Russian troops in order to avoid any legal implications or response¹⁷ As Modern Hybrid war doesn't only challenge international peace and security, but also undermines current legal framework or at least creates kind of confusion for what would be the law applicable . The question of the 1994 so-called Budapest Memorandum illustrates law-fare¹⁸, especially in the statement of the Russian Ministry of Foreign Affairs in March 2015¹⁹.

Contemporary conflicts such as in Ukraine, lead us to argue that today's HW has potential to transform the strategic calculations of potential belligerents increasingly sophisticated and deadly²⁰, Same regarding ISIS groups that transformed in the conflict in Syria to powerful armed group with capabilities to impose its threat internationally.

In other words, A hybrid threats can also be understood as the employment of a comprehensive approach by an adversary. In this interpretation, hybrid threats are not solely military threats, but they combine effectively political, economic, social, informational and military means and methods²¹. Adversaries who pose a hybrid threat employ a comprehensive approach with the speed and ability normally associated with unity of command²². As Sun Tzu once said: “To subdue the enemy without fighting is the supreme excellence”.²³

Is HW new? The answer is NO. I agree with Benjamin Wittes in his article “What is Hybrid Conflicts?” as he argued That what is being described under the rubric of hybrid conflict isn't really new²⁴, and despite the fact that this term is used very often recently and examined by Frank Hofmann, S. Reeves and many others, but history back to the Peloponnesian wars at 5th century BC²⁵, proved that such forms of wars has been used excessively, but on the other hand, I disagree with Wittes that in contemporary conflicts such warfare doesn't pose serious challenges and /or confusion especially legal ones. I will elaborate that in this article.

¹⁶ C. Dunlop, Law fare today: A Perspective , Yale Journal of International Law Affairs , 2008, p. 146.

¹⁷ Aurel Sari , Hybrid warfare , Law and Fulda Gap, University of Exeter , 2017, p.26-27

¹⁸ Ibid.

¹⁹ Foreign Ministry Spokesman Alexander Lukashevich answers a media question about the situation around the Budapest Memorandum, March 12, 2015, he argued that: In the memorandum, we also undertook to refrain from the threat or use of force against Ukraine's territorial integrity or political independence. And this provision has been fully observed. Not a single shot was fired on its territory ... The loss of Ukraine's territorial integrity has resulted from complicated internal processes, which Russia and its obligations under the Budapest Memorandum have nothing to do with. Ibid, p.3.

²⁰ Sacha Dov Bochmann and Andres B. Munoz Mosquera, Lawfare and Hybrid Warfare – How Russia is using the law as a weapon , The operational Law Quarterly- Center for Law and Military operations , Vol. 26, No. 1, 2015.

²¹ Joint Framework on countering hybrid threats a European Union response, European Commission , Brussels, 6.4.2016

²² Supreme Allied Commander, Europe & Supreme Allied Commander, Transformation, Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats, 1500/CPCCAM/FCR/10-270038 & 5000 FXX 0100/TT-6051/Ser: NU0040 (Aug. 25, 2010).

²³ The Art of War, Sun Tzu. The Book of Lord Shang, (Wordsworth Editions Limited, Hertfordshire, 1998), p. 25.

²⁴ Benjamin Wittes , What is Hybrid Conflict?, Law fare Blog , 11 September 2005, <https://lawfareblog.com/what-hybrid-conflict>.

²⁵ Murrey, W. and Mansur, P. Hybrid Warfare: Fighting Complex Opponents from the Ancient Time to Present. New York: Cambridge University Press, 289-307

Hybrid warfare and Hybrid Threats:

International law uses the term Armed Conflict instead of war, Such conflicts can be International armed conflict in accordance to common article 2 of the Geneva convention 1949²⁶, or Non-international armed conflict which in view of Article 1 of Additional Protocol II seems a narrower requirement has been assigned to NIAC²⁷, and defined as an armed conflict between governmental forces and non-state actors or between the armed groups²⁸.

Firstly, It is important to differentiate between Hybrid threats which is phenomenon resulting convergence and interconnection of several elements together, and Hybrid conflict which has higher intense of a covert use of armed forces blended with other non-military means, and reaching the final level that is HW, in which a state or non-state actor resort to overt use of armed forces in addition to non-military means. In my opinion, The challenge that is imposed by such forms in contemporary conflicts is the rapid escalation that a hybrid threat can cause towards a conventional warfare using same means²⁹, and the range and the blended attempts to switch from a level to another in a short period of time, by increasing or decreasing the intense of the conflict according to the interest of the adversary, and playing on the borderline of peace and war situations.

As mentioned before, a new form of a conflict or warfare doesn't mean that traditional legal instruments are inapplicable or insufficient to regulate it. The main issue is just trying to characterize it and put it in its right legal framework. As an example, the involvement of NSA in an armed conflict with clear attribution or not to a state is regulated by the LOAC, whether it was international or non-international armed conflict, and in a previous study I have made about the role of Non State actors in armed conflict and the challenge of modern technologies in contemporary conflicts, led me to a conclusion that is uncontroversial about the capability of international legal instruments to regulate such phenomena, By the Law of Armed conflict, or Jus ad bellum in cases of use of force as it might create more confusion in this area as whether a state stands behind or attacks that amount to an armed ones. Therefore in this matter, IHL binds the NSA according to the customary and conventional laws, as well the Court opinio juris with different explanation of such compliance. But the main challenge of HW is that the "centre of gravity" it targets is country's population³⁰, which puts the IHL as an example in a big challenge when it is blended with other non-military forms. In particular of some forms of conflicts, proxy fighters can be mixed with civilians with the absence of military uniform as regulated by LOAC³¹, such rule plays an important role in the Principle of distinction which is cardinal in IHL, this includes the use of indiscriminate weapons that IHL governs too in NIACs. My personal view that HW doesn't undermine the rules of IHL and changes shall not be adopted in its rules as those principles was made to tackle any case or development in warfare.

Similarly, If we examine Cyber warfare, which is warfare of politically motivated attacks conducted in cyberspace through cyber means and methods, mainly targets official websites and networks, disrupt or disable

²⁶ See as well Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (Protocol I) , Article 1(4), 8 June 1977. And ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT94- 1-A, 2 October 1995, para. 70. (Tadic case) that defined such form as the following: "An armed conflict exists whenever there is resort to armed force between states".

²⁷ The definition came as the following : "an NIAC is in which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" Additional Protocol II, art. 1, para. 1.

²⁸ Common article 3 of the GC 1949.

²⁹ Understanding hybrid Threats European Parliament Publications, June 2015 , [http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/564355/EPRS_ATA\(2015\)564355_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/564355/EPRS_ATA(2015)564355_EN.pdf).

³⁰ Andis Kudors, Hybrid War- A new Security challenge for Europe, Latvijas Republikas Saeima , June 2015.

³¹ Additional Protocol I to the Geneva Conventions, under art.44, para.7 provides: "In accordance with the generally agreed practice of States, members of regular armed forces shall wear their uniform."

essential systems, steal or alter classified data, cripple financial systems among many other possibilities³². Cyber warfare creates a novel issue challenging international law, mainly on the means of interpretation of IHL and Jus ad bellum. And it is important to bear in mind that those two issues are distinct in way of discussion and interpretation. And so far we have not witnessed a full range cyber war based solely on cyber means, but we have witnessed cyber-attacks that didn't amount to an armed attack, as an example Stuxnet though it targeted an infrastructure in Iran's centrifuges but it didn't escalate to an armed attack, even though in my opinion it could especially that the consequences of such attack could be reflected to target civilians even those living the targeting state. Therefore, cyber has been used as a mean below the threshold of armed attack.

Although Several problems and complications of the UN charter arise in accordance to cyber-attacks, mainly for the following statements: 1- The charter was written in 1945 long before such attacks ever imagined, where it only covered the traditional kinetic conflicts "TKC". 2- Lack of clarity to key terms definitions in the charter in the difference between Use of force, Threat of force and armed attack. 3- The issue of inconsistency, for what would constitute an armed attack in cyber space, if it didn't cause physical damage economical threat or loss.

In other words, according to article 2(4) of the UN Charter which is of Jus cogens nature³³, any state-sponsored cyber operations qualifying as a use of force against another state would fall under general prohibition of this article, triggering by that an international armed conflict. While cyber operation that didn't reach to the limit of use of force are as well prohibited by customary principle of non-intervention and represents lawful countermeasures in response to internationally wrongful acts not reaching the threshold of an armed conflict. Injured states by cyber operations amounting to level of an armed conflict permit it to use its right to self-defense through means prohibited generally by the charter, the resort to force. Moreover, cyber operations that threaten international peace and security or any acts of aggression allow the Security Council to take feasible measures. Important to note that, even minor acts of interstate force fall under the general prohibition of art 2(4)³⁴.

But the main problem in HW is the issue of attribution and state responsibility, as in cyber space it is complicated, due to technological limitations and the involvement of non-state actors, it is almost impossible to attribute, beyond any doubt, a cyber-attack to a specific country.³⁵ In all cases, any cyber-attack with attribution to a state held by de jure or de facto actors triggers a state responsibility that requires countermeasures as self-defense or even further steps by the Security Council as a threat to peace and security (Chapter VII) UN Charter, according to principle of non-intervention which is derived from a fundamental principle of International law, that is Sovereignty³⁶. Otherwise it can be dealt with by law enforcement and that what experts in the Tallinn manual recommended for states to strengthen their domestic laws and ability to counter any cyber threats against the state or from the state against others. Hybrid Warriors or the states covertly sponsoring them creates an ability to engage in activities that promote deniability and inability to contribute responsibility, activities that fall under what NATO for example considers as response threshold. Also hybrid threats leads to integrated result that would be illegitimate, and as mentioned before, mingling the categories of civilians and combatants. If we take Terrorism as one of the scenarios, in particular ISIS, its activities clearly challenge the cardinal principles of international law with overt actions targeting civilians, bombings and publicly holding the responsibility without any deniability, that

³² Margaret Rouse, Cyber Warfare, www.techtarget.com, May 2011.

³³ See discussions by the International Court of Justice in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US), 1986 ICJ Rep. 14, paras 187-191 (27 June) (hereinafter Nicaragua). On the jus cogens nature of the norm, as well Draft Articles on the Law of Treaties, Report of the International Law Commission, 18th Session [1996] II ILC Yearbook p 247.

³⁴ The International Court of Justice in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US), ICJ Rep. 14, paras 187-191, 27 June 1986.

³⁵ Understanding Hybrid Threats, Ibid.

³⁶ Tallinn Manual, Ibid, Rule 1.

is not the case in other contemporary conflicts where deniability is the main form. For this we have seen that responses to ISIS crimes were legally justified by states using several legal arguments³⁷.

How deep are the Legal Challenges?

According to the EU in its joint Report on countering hybrid threats challenge is imposed by the rapid ability to respond through law enforcement means before such threats transform to a control of territory or conventional war. On the other hand taking article 5 of the North Atlantic Treaty as an example, we have noticed that it is clearly triggered if any attack was carried out by conventional forces against the territory of an allied nation, including terrorist attack such as the September 11 2001 attack that targeted USA³⁸. But it wasn't clear whether attacks that are below the threshold of armed attack could trigger this article³⁹, and this as well the same issue of the article 51 (self-defense) and article 2/4 of the United Nations Charter, that requires an armed attack to occur to be triggered. While non-armed threats below the threshold might trigger article 4 of NATO Treaty requiring non-forceable counter measures⁴⁰.

So in the case of new means and methods to conduct a warfare, the question is whether our current norms in particular the LOAC capable of effectively dealing with the legal challenges?. Every definition of HW proves that conventional and unconventional means of warfare are conducted, but as mentioned before it is not new as we have seen for decades full spectrum operations that dealt with such blended forms of warfare. There are hybrid threats (use of proxies, Cyber posing legal challenges that has been discussed in details by Tallinn manual, information warfare and propaganda, terrorism ...etc.) . How do we think about law in this regard, if all those means taking place in an armed conflict (IAC, or NIAC) then LOAC is applicable, and how other means of law interconnect and interplay to regulate such war.

Important to note, HW below the threshold of armed conflict obliges the states to use its armed forces in non-kinetic operations that it was not trained for. For instance, Russia recently is exploiting legal threshold of an armed attack combined with deniability of operations that creates confusion and undermines a unified response as well. The broader challenge to the legal order itself is that Russia is a major power and member of Security Council yet not complying with the international law. In fact, I agree with Dr. Rita Siemion (Human Rights First) that HW not only creates problem to LOAC, as it is obvious that if such tactics operating below the threshold then LOAC doesn't apply, therefore, no right to engage in force. In this matter, State responsibility and/or jus ad bellum needed to be assessed too⁴¹. Dr Siemion argues as well that some recommends a combination between law enforcement and law of armed conflict as a response for hybrid threats but according to her, and I agree with this too, that this is dangerous to the LOAC especially when states use this as an excuse to deploy weapons in Legitimate under the LOAC to be used in the context of law enforcement.⁴²

In other words, HW constitutes use of force mixed with other means, and any use of force in international relations is regulated by the UN Charter, rules and principles of armed conflict are laid down as well by the IHL and Human rights law . Even hybrid threats that don't reach the level of an armed conflict are regulated by Human

³⁷ Al Aridi, A. An interdisciplinary approach to combat ISIS: legal, political, and socio-economic. *Interdisciplinary approach to law in modern social context: 4th international conference of PhD students and young researchers*: conference papers. Vilnius: Vilnius universiteto leidykla, 2016, p. 26-36. ISBN 978-6094-59-693-3

³⁸ Press Release (2001)124, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

³⁹ Article 5 also signals that action below the threshold of an armed attack will not necessarily meet with a collective response, see Aurel Sari, Hybrid warfare , Law and Fulda Gap, Ibid, p. 31.

⁴⁰ Ibid, p.32 ,or see See Omer Yousif Elagab, The Legality of non-forcible Counter Measures in International Law (1988). Elisabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Counter Measures, 1984.

⁴¹ Rita Siemion, Law of Armed Conflict in an Era of Hybrid War, International Legal Counsel Speech at the Law, Ethics and National Security (LENS) conference, Feb 2016.

⁴² Ibid.

rights law and other specific policy areas. Yet the main challenge is that such forms of war blur the dividing line between war and peace⁴³.

Hybrid threats that operate under reaction threshold and reaching the level of armed conflict that triggers article 51 (self-defense) creates confusion, as an example regarding article 5 of the North Atlantic Treaty wherein the Parties “agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.” The critical element is the concept of “armed attack,” borrowed from Article 51 of the UN Charter. To remain under the political and military reaction threshold envisaged in Article 5 of the North Atlantic Treaty, HW must remain under the corresponding legal threshold of armed attack⁴⁴.

What interests our subject here though, in order to finalize this examination of HW with regard to LOAC criteria, is to observe that when it comes to means and methods of combat, there is nothing new under the sun: In other words, a supposedly new method like so-called HW may be addressed with “classical” tools from the LOAC such as the good old principles of distinction, humanity etc., mitigated with military interest and avoidance of unnecessary suffering. The only courses of action in HW that would escape the net of LOAC norms are ones that would fall not under international law, albeit remain governed by the domestic body of law⁴⁵. The difficulty rather lies with characterization of the type of conflict caused by HW. Various rules will apply according to the international or non-international type of the armed conflict. HW might even create doubts as to whether the armed conflict would exist as such, or would remain at the stage of internal tensions. The aim of HW consists precisely of blurring the basic limits drawn by the law, thus rendering uncertain the legal recourse.

The legal challenges that HW pose are multifaceted and the legal response must be multifaceted too .and I do agree with the approach, proposed by M. Hnatovskyi – to divide artificially the conflict into two different legal precedents: internal armed conflict (Ukraine v. DNR/LNR) and international armed conflict (Ukraine v. Russia)⁴⁶. And I will add that in contemporary conflicts it is important to legally response by hybrid legal means, that would be by dealing with every case according to the means used and then framing it in the applicable law that regulates the case. That would blur the aim of adversaries, that use blended covert means, to be achieved.

Conclusion

As a summary, HW has been recently a key topic especially after the annexation of Crimea, Russian Hybrid tactics were assessed by other states that might have similar scenarios especially Baltic states (Latvia, Lithuania and Estonia). The blended conventional and unconventional means of war, combined with military and non-military means should be assessed in a multifaceted legal manner too. Threats or attacks that amount to an armed attack are regulated by the current legal instruments including IHL, jus ad bellum, and an interplay between those laws in areas of conflict has its effective role . Other countries use a wider array of centrally directed influence to achieve national interest challenging the international law, But thought we see that such means are not new, as HW might be the norm of conflict rather than being an exception.

As a result, we conclude that although such form of war might be new in some areas and challenging, but that doesn't mean the end of conventional means of war, and nor the laws applicable to armed conflicts is incapable of regulating it. And the according to the confusion for the international and domestic laws, the only way to deal with Hybrid tactics is by Interdisciplinary legal measures dealing with every threat solely and responding to it. Such tactics must be assessed by the results the adversary aims to achieve not only examining the threats,

⁴³ Aurel Serai, *Ibid*, p.34.

⁴⁴ Aurel Sari, *Legal Aspect of Hybrid Warfare*, Law-fare Blog, 2 October 2015.

⁴⁵ Jean-Michel Baillat, *Hybrid Warfare, A New Challenge to the Law of Armed Conflict* , NATO Legal Gazette , Issue 37, October 2016, p. 44.

⁴⁶ Vitalii Vlasiuk, *Hybrid War, International Law And Eastern Ukraine*, European Political and law Discourse , Vol. 2, Issue 4, 2015, p.16.

as the main aim is to destabilize an order or control by different means that could be followed after by conventional armed conflict.

The main legal challenge would be and I do agree with Dr. Aurel Sari in, is the response from states, especially in alliance such as NATO, to threats below the threshold of an armed attack. Non-forcible measures such as surveillance, targeting in the territory of other states would create some violations to the Human rights that would be invested later by the adversary in justifying overt responses, such as protection of minorities. This issue could be a hint for further legal research in this scope.

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THE FUTURE OF UBER, THE FUTURE OF THE SHARING ECONOMY. JUDGMENT POSSIBILITIES AND THEIR CONSEQUENCES IN CASE C-434/15 “ASSOCIATION PROFESSIONAL ELITE TAXI VS. UBER SYSTEMS SPAIN, S.L.”

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Abstract

The goal of this paper is to demonstrate and discuss the possible definitions of services provided by Uber. This problem will soon be recognised by the CJEU in a request for preliminary ruling in the case C-434/15 “Asociación Profesional Elite Taxi vs Uber Systems Spain, S.L.”² These services could be defined either as a transport service, electronic intermediary services or information society services (or ‘hybrid services’). Each possible definition of Uber's services has wide ranging consequences for the development of sharing economy which will be analysed below.

This paper comprises of 7 parts. Part 1 – where I briefly explain the service. In parts 2 and 3 I will discuss each of the possible definitions of Uber’s services and compare it to the established meanings of the concepts of a transport service, an electronic intermediary service and an information society service in European Law, paying particular attention to the basic rules of the European Single Market, especially freedom of movement of services. In part 4 it will seek to show the likely consequences of the possible judgements of CJEU for the European economy and especially sharing economy. Part 5 of this paper will discuss a model sharing economy regulation and show how such services are regulated nowadays, focusing on the example of USA and Estonia. In part 6 I will briefly try to demonstrate that another problem of sharing economy development, rising threat to social security and welfare.

In summary, awareness of the significance of this case is of primary importance for the future of sharing economy in the EU and possible social clashes triggered by the development of sharing economy. The opinion of CJEU can be predicted to be a landmark judgement in adjudicating on either limiting or spreading the development of sharing economy.

Keywords: EU law, single market, sharing economy, e-commerce, transport services

Introduction

The market for technologies based on sharing economy model is growing rapidly in the European Union. According to the European Commission's data, the development of this sector could generate €160-572 billion for the European economy.³ Hence, the collaborative economy will play an unappreciated role in multiplying the prosperity of our region. On the other hand, the bloom of this sector causes political and social clashes, for example, the brutal protest of French taxi drivers in 2015. These problems could be partially solved by the so called judgement in Uber Spain in which the CJEU will define Uber's services. The Commercial Court No 3 of Barcelona sent a request for a preliminary ruling to the CJEU whether is it “a mere transport activity, or an electronic intermediation or information society service.” Each possible choice has

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²Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015 — Asociación Profesional Élite Taxi v Uber Systems Spain, S.L., Case C-434/15.

³European Commission, *A European agenda for collaborative economy*, [2016] <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, p. 1.

vast consequences for the future of Uber in the EU as weak as for the future sharing economy sector in Europe.

1. About the service

Firstly, it is necessary to establish what services are provided by Uber. In this case I will be explaining the UberPop service, which is provided by non-professional drivers without a taxi licence.⁴ Generally, the service is comprised of two elements provided by two independent partners – Uber executes the “linking” between the driver and the rider thanks to the designed mobile app and the driver performs the carriage service. It is an “activity carried out for profit [...], consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — [...] «intelligent telephone and technological platform» interface and software application — which enable them to connect with one another.” Below I will demonstrate the possible definitions of this service according to the EU law and consider the possible consequences of each of the proposed definitions.

2. Technology or taxi. Vast consequences of each choice

Firstly, defining these services as an information society service [hereinafter: ISS] allows the service to benefit from the rights conferred by freedom of services. This point of view was expressed by Uber and supported by the governments of Estonia, the Netherlands, as well as the European Commission and EFTA Surveillance Authority.⁵ ISS is defined in Article 1(1)(b) of the Directive (EU) 2015/1535⁶ and in the Article 2(a) of Directive 2000/31/EC European Parliament and of the Council⁷ [hereinafter: E-Commerce Directive].

Hence, ISS is „any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.” For these definitions:

1. „at a distance” means that the service is provided without the parties being simultaneously present,
2. „by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
3. „at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

At first glance, Uber's services are an ISS, by reference to the definition above. Firstly, they are provided for remuneration. Secondly, they are provided at a distance, without the simultaneous presence of both parties. Thirdly, they are provided by electronic means, because it is necessary to use a mobile app to use this service. Lastly, to purchase this service an individual request is needed, submitted via an app.

“Uber can be described as an online “market making” platform, in that it connects producers (in this case drivers) with consumers (riders) and facilitates their interactions and exchanges. In other words, Uber does not create value by performing transport services, but by enabling direct interactions between two

⁴[https://en.wikipedia.org/wiki/Uber_\(company\)](https://en.wikipedia.org/wiki/Uber_(company)), accessed: 2017-04-09.

⁵M. Franklin, 'Uber urges EU judges to treat it as an 'intermediary,' not a transport service', <http://mlexmarketinsight.com/editors-picks/uber-urges-eu-judges-treat-intermediary-not-transport-service/>, accessed: 2017-10-9.

⁶European Parliament and Council Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1 (codification).

⁷European Parliament and Council Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 ('Directive on electronic commerce').

distinct categories of users. Like other platforms, such as eBay or Airbnb, Uber's platform is also two-sided in that the two-sides that the platform connects (partner-drivers and riders) are linked by «indirect network effects» in that a large number of drivers benefits riders, and vice-versa.⁸

Furthermore, CJEU stated in Joined Cases *R.L. Trijber and J. Harmsen*⁹, that to define this service as a “service in the field of transport, including port services, falling within the scope of [Title VI of Part Three of the FEU Treaty]” pursuant to Article 2(2)(d) of Directive 2006/1238¹⁰ [hereinafter: Services Directive], it is necessary to recognise the main purpose of the service. Hence, it could be said that the main purpose of Uber's service is to provide linkage between the driver and the rider.¹¹

On the other hand, in the case *Grupo Itevelesa*¹² CJEU stated that, “services in the field of transport” mean “not only any physical act of moving persons or goods from one place to another by means of a vehicle, aircraft or waterborne vessel, but also any service inherently linked to such an act.”¹³ The concept of “service in the field of transport” has a broader meaning than “transport services” according to the Recital 21 of the Services Directive. Hence, the Uber's service could be recognised as “ancillary” to the “act of transport”¹⁴, because Uber's app is used to find a driver. Hence, according to this point of view Uber creates value not only “by enabling direct interactions between two distinct categories of users” and the main purpose of this service is to purchase a transport service and not the only the connection.

Nonetheless, it should be borne in mind that the above mentioned case refers to roadworthiness tests for motor vehicles, so a service carried out only in transport industry. Providing a connection between purchasers of a service and their sellers is acknowledged as a one of the distinctive characteristics of services based on the sharing economy model.¹⁵ Hence, it finds its application not only in the “transport-related” case of Uber, but in every collaborative economy service.

To sum up, “Uber's part” of the service is an ISS according to the Article 1(1)(b) of the Directive 2015/1535 and Article 2(a) of the E-Commerce Directive and also the main purpose of the service. Nonetheless, this service is also “ancillary” to the transport service provided by a partnered driver. This point of view, one of ‘hybrid nature’ is considered by governments of Ireland, France and Spain who said that Uber's service is in part a ISS and in part a transport service. Notwithstanding, they also admitted that it had to be regulated by transport law.¹⁶

3. Is Uber an intermediary platform?

The definition of an electronic intermediary service is not regulated by the EU law. Nonetheless, in the E-Commerce Directive three situations are indicated when the liability of an ISS provider is excluded under some conditions:

1. *mere conduit* (Article 12 of E-Commerce Directive) “that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, [...] the service provider is not liable for the

8D. Geradin, 'Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case', [2016] SSRN 9-10. Same: C. Chapla, 'Regulating the Sharing Economy at the Legal Frontier: The Case of Uber in the European Union', [2017] S-VE ULWP 17 9-10.

9*R.L. Trijber and J. Harmsen*, Joined Cases C-340/14 and C-341/14, [2015] E.C.R. I-0000, § 51.

10European Parliament and Council Directive (EC) 2006/123 on services in the internal market [2006] OJ L376/36.

11See D. Geradin *supra* note 8 8-12, C. Chapla *supra* note 8 9-10.

12*Grupo Itevelesa*, Case C-168/14, [2015] E.C.R. I-0000, § 46.

13*Id.* § 41.

14*Id.* § 46.

15V. Katz, 'Regulating the Sharing Economy', [2015], 30 BTLJ 1067, 1070-1071.

16M. Franklin, *supra* note 5.

information transmitted.”

2. caching (Article 13 of E-Commerce Directive) “that consists of the transmission in a communication network of information provided by a recipient of the service, [...] the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request.”

3. hosting (Article 14 of E-Commerce Directive) “that consists of the storage of information provided by a recipient of the service, [...] the service provider is not liable for the information stored at the request of a recipient of the service.”

The above mentioned situations however, describe the case of a passive provider. According, to the opinion of the European Commission, the fact that a platform provides facilities other than the connection, like payments, ratings, etc., does not decide whether such a platform is an intermediary platform or not, and it should be assessed on case-by-case basis.¹⁷ Notwithstanding, Uber has some control over users and providers – for instance, it has the power to ban some drivers due to misconduct.¹⁸ Hence, services provided by Uber are rather not the electronic intermediary service according to the third preliminary question.

4. Consequences of each choice – strict regulating or not

a) as an Internet Society Service

Without a doubt defining Uber's service as an ISS or a transport service will have vast consequences for the possible development this undertaking, and broadly the entire sector of the sharing economy. Nonetheless, if we look deeper into the possible restrictions, it is likely that the same should be demanded from Uber's drivers and regular taxi drivers. It should be borne in mind that a party to this case is not Uber B.V.¹⁹, based in the Netherlands, but a subsidiary company – Uber Systems Spain, S.L. This undertaking performs only an auxiliary activity of marketing and support, not recognised as an ISS. So, the examination of Member State measures is not involved with the rights conferred by freedom of establishment, like is expressed in question 3, but with the freedom to provide services exercised by Uber B.V.

Firstly, it is necessary to find the 'cross-border' element of Uber's services which allows to apply rights resulting from freedom to provide services. The place at which provider is established is defined in the Recital 37th of the Services Directive as: “the place at which a service provider is established should be determined [...] according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period.” In this case, the provider of Uber's service is located in the Netherlands - Uber B.V. which provides the connecting of drivers and riders and charges the payments. Hence, even if the rider and driver are in the same country, all the necessary activities to perform the services are accessed by a Dutch company Uber B.V.²⁰ Nevertheless, “the ECJ has never ruled in that situation crossing borders brings a service, but neither has foreclosed the possibility.”

At first glance, if Uber will be defined only as an ISS, the possible Member States measures could be barely restricted due to the fact that it enjoys the rights conferred by Article 56 TFEU and the E-Commerce Directive. It is necessary to explain why the above mentioned legal acts are used in this case. ISS falls within the scope of the Services Directive, but the question of measure is covered by *lex specialis* to this act, the E-

¹⁷European Commission, *supra* note, 9. *Contra* Claire Chapla, *supra* note 8, 11.

¹⁸V. Katz, *supra* note 15, 1106-1107.

¹⁹*Id.*, 7-8, 16.

²⁰See C.Chapla, *supra* note 8, 13-16.

Commerce Directive.²¹ Hence, in this case national measures must not be pursuant to Article 9 of the Services Directive but to Article 3(4) of the E-Commerce Directive. Notwithstanding, in this case it is allowed to use the the same demands as in case of regular 'service' according to the 'conceptual proximity' between Article 9 of the Services Directive and Article 3(4) of the E-Commerce Directive.²² Due to this fact, it is also allowed to apply CJEU case law about freedom of providing services.

Hence, Article 3(4) of E-Commerce Directive says that: "Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

- (a) the measures shall be:
 - (i) necessary for one of the following reasons:
 - public policy [...]
 - the protection of public health,
 - public security, including the safeguarding of national security and defence,
 - the protection of consumers, including investors.
 - (ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives.
 - (iii) proportionate to those objectives."

According to the Article 56 TFEU "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended." Nonetheless, Article 52(1) TFEU (which is applied to the freedom of providing services according to the Article 62 TFEU) says that it is allowed to impede national measures, but they must fulfil the following conditions²³ which are explained below:

1. they must be applied in a non-discriminatory manner.
2. they must be justified by imperative requirements in the general interest.
3. they must be suitable for securing the attainment of the objective which they pursue.
4. they must not go beyond what is necessary in order to attain it.

Demanding similar requirements of non-professional drivers who are performing as for taxi drivers service could be justified. Such injunctions, which could be imposed on Uber company are for instance, adequate age, no criminal record, adequate insurance and an periodic inspection and licensing requirements.²⁴ The requirements of road safety and consumer protection fulfil the premise of "imperative requirements in the general interest".²⁵ They are directly indicated in the Article 3(4)(i) as a "protection of public health", "public security" and "protection of consumers". In my opinion, lack of adequate safety requisites will undeniably threaten the safety of riders and other road users. "Consumers and users of sharing economy practices might also be reluctant to participate in these activities if they are not provided with minimum of guarantees - for example, that they will arrive safe and sound at their destination in case of Uber

21 European Commission, *Quick guide to the Services Directive*, http://ec.europa.eu/growth/single-market/services/services-directive/in-practice/quick-guide_en, accessed: 2017-04-06.

22 D. Geradin, *supra* note 8, 17.

23 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94 [1995] E.C.R. I-4165, § 37.

24 See, The Council of The District of Columbia, Vehicles-for-Hire Innovation Amendment Act of 2014 [2014] D.C. Act 20-489.

25 See, D. Geradin *supra* note 8, 17.

[...].²⁶ It is important that the only reason to impose these measures is protection of rights, which is much more important than the personal interest of the service provider. Hence, it is not justified to use of such a requirements to protect local markets.

b) as transport service

According to the Recital 21th of the Services Directive transport services “including urban transport, taxis and ambulances as well as port services” are excluded from the scope of the Services Directive. The ECJ in Case *Eventech Ltd v The Parking Adjudicator*,²⁷ confirmed that taxi services are regulated by the law of individual Member States.

Notwithstanding, defining Uber's services as transport services will not allow the state to discriminate this company when compared to a local conveyer. Because in my opinion if Uber fulfils the requirements for taxi drivers it should be allowed to act as a taxi corporation. Moreover, CJEU has clearly noted in Case *Yellow Cab Verkehrsbetriebs* that, “the objective of ensuring the profitability of a competing bus service, as a reason of a purely economic nature, cannot, in accordance with settled case-law, constitute an overriding reason in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.”²⁸ “Absolute bans and quantitative restrictions of an activity normally constitute a measure of last resort. They should in general only be applied if and where no less restrictive requirements to attain a legitimate public interest objective can be used.”²⁹ Hence, even if Uber is not protected by freedom to provide services it doesn't mean, that a state could impede it carrying out business activities at their own discretion. Moreover it is important to note, that nowadays strict limits on taxi licences are not justified by reasons of public order but are used as a tool to protect the traditional taxi industry.³⁰

Nonetheless, it should be borne in mind that, not every requirement imposed on Uber is because of a protectionist reason. The company should fulfil safety and consumer protection requirements. Hence, in some cases the company is not operating on a local market because it does not meet the requirements for taxis. For instance, Uber said that, the company would move out of Denmark according to the new law which recognised smartphone as a fare meter and required seat sensors.

5. How to regulate the novelty?

Sharing economy services are something new for the economy and therefore for the legal order. The service provided by Uber is neither a traditional ISS like for example “online sellers of goods and services, Internet Service Providers or search engines”³¹, nor “just” a transport service. The novelty of services based on the sharing economy model is evidenced by a few factors.³² Firstly, they operate thanks to intermediary platforms where providers can offer their services to purchasers. Secondly, it is mostly a peer-to-peer market where non-professional people who are performing the services traditionally covered by professionally qualified workers. Likewise, it is rather a short-term, than long-term market. Thirdly, sharing platforms allow to reduce the costs of transactions thanks to an easy access and standardised services. Each company

26S. Ranchordas, 'Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy' , [2015] 16 MJoLST 414, 447.

27 *Eventech Ltd v The Parking Adjudicator*, C-518/13 [2015] ECLI:EU:C:2015:9.

28 *Yellow Cab Verkehrsbetriebs v. Landeshauptmann von Wien*, C-338/09 [2010] E.C.R. I-13927.

29 European Commission, *supra* note 3, 4.

30D. Geradin, *supra* note 8, 15-16.

31D. Sparas, 'EU regulatory framework for e-commerce WTO Workshop', Geneva 18th June 2013, https://www.wto.org/english/tratop_e/serv_e/wkshop_june13_e/sparas_e.pdf, page 5, accessed 2017-04-6.

32V. Katz, *supra* note 15, 1070-176.

provides the connection in a specialised branch of the services market. Additionally, sharing economy allows to connect customers and offerers on a, so far, unparalleled scale -we can offer to share almost everything.³³ “Uber, Airbnb, Lyft and other forms of sharing economy are innovative forms of sharing underused facilities. The sharing economy presupposes two elements: the existence of physical “shareable goods that systematically have excess capacity» and sharing attitude or motivation”.³⁴

In my opinion, especially the fact that these services are performed mostly by non-professionals explains the fact that regulations are necessary. It makes the risk of failure bigger than when a service is performed by a professional. The rule *violenti non fit iniuria* is not a primary rule in this case. In my opinion, even bearing in mind the rule of freedom of contract, higher risk cannot be compensated by lower price of service, if this risk is not covered by adequate insurance.³⁵ It is important to protect the recipients of such services also due to ease of obtaining them and the large scale of turnover for goods and services. “We trust that all participants will abide the rules of the game and we use peer-review as a control mechanism. However, peer-review of other users might come too late in certain cases.”³⁶

It is discussed, whether sharing platform should be defined as a service provider - in case of Uber as a common carrier. According to the growing role of internet-enabled services and their indispensability in social life, some services provided by a sharing platform could be recognised as a utilities. “Uber is the invisible platform that provides an essential service, on demand and scale, analogous to water, electric, and telecommunications providers.”³⁷ Hence, on such a utility provider additional obligations are imposed, like duty of non-discrimination and consumer protection with heightened liability.³⁸ Notwithstanding, the majority of jurisdictions excluded TNCs from the category of common carriers, but relieved a duty of non-discrimination.³⁹ Nonetheless, the exemplary duty of common carrier means providing insurance to drivers (hence, form of heightened liability) is required from TNCs.

Likewise, it is problematic who should be the utility provider in such a relationship? In sharing economy model there are three, not two parties – intermediary platform, provider of service and user of service. Hence, duties of 'traditional' service provider should be split between the platform and provider.⁴⁰

It is necessary to create new law which will be a *modus vivendi* between the stimulating the growth of sharing economy and on the other hand, meeting the needs of consumer protection and public order. It should be borne in mind, that competition which does not follow social security and safety requirements it rather a race to the bottom than social progress. In my opinion such a regulation should to fulfil at least three conditions:

1. To regulate personal requirements to driver (age, no criminal background)
2. To regulate technical requirements to the car
3. To impose on TNCs liability for accidents (demanding an adequate insurance)
4. To distinguish additional and constant activity per sharing platform

The examples of American cities and states, but also Estonia, show that it is possible to reconcile these conflicting needs. First of all, by creating regulations specifically designed for this sector were enacted

33S. Ranchordas, *supra* note 26 417, European Economic and Social Committee, OPINION European Economic and Social Committee Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European agenda for the collaborative economy [COM(2016) 356 final], 2016, 3.

34S. Ranchordas, *supra* note, 416.

35See R. Sachs, 'The Common Carrier Barrier: An Analysis of Standard of Care Requirements, Insurance Policies, and Liability Regulations for Ride-Sharing Companies', [2016] 65 DPLR.

36S. Ranchordas, *supra* note 26 467.

37K. Werbach, *supra* note, 138.

38Id., 148-153.

39V. Katz, *supra* note 15, 1088.

40S. Ranchordas, *supra* note 26 especially pages 420-421, 455.

by District Columbia in October 2014 “Vehicles-for-Hire Innovation Amendment Act of 2014.”⁴¹ According to this act :

1. Uber driver must be at least 21 years old,
2. Uber driver must have no criminal background,
3. Uber driver must have no sexual offender background,
4. Uber driver must have clear driving history and have their vehicles inspected one time per year
5. The “vehicle-for-hire company”⁴² must be registered by D.C. Taxicab Commission to perform their activities on D.C. Area.
6. “A private vehicle-for-hire company or operator shall maintain a primary automobile liability insurance policy that provides coverage of at least \$1 million per occurrence for accidents involving a private vehicle-for-hire operator at all times when the operator is engaged in a prearranged ride.”⁴³

Such an Act was also enacted in Colorado in June 2014 as Transport Network Companies Regulation.⁴⁴ Further, similar demands comprise the Rules of Transportation Network Companies, enacted by California Public Utilities Commission⁴⁵ in September 2014. To operate in California TNC must fulfil 28 rules such as:

1. „Obtain a license from the CPUC to operate in California.
2. Require each driver to undergo a criminal background check.
3. Establish a driver training program.
4. Implement a zero-tolerance policy on drugs and alcohol.
5. Hold a commercial liability insurance policy that is more stringent than the CPUC’s current requirement for limousines, requiring a minimum of \$1 million per-incident coverage for incidents involving TNC vehicles and drivers in transit to or during a TNC trip, regardless of whether personal insurance allows for coverage.
6. Conduct a 19-point car inspection.”

Likewise, Chicago enacted the tiered regulation⁴⁶ which makes a distinction between “ordinary” providers and those who are providing services with high volume. The need for such a distinction was noticed by the European Commission which suggested a distinction between “trader-like”-provider and “prosumer-like”-provider, what could allow to regulate services of the first type of provider pursuant to EU consumer law.⁴⁷ Such a distinction should be based on: frequency of services, profit-seeking nature and level of turnover.

It is important that Uber is subject to duties specified in this bill, not only the drivers, especially when it comes to the liability. „However, if something goes wrong with sharing practice, customers might be better protected if Uber could be held liable.”⁴⁸

41The Council of The District of Columbia, *supra* note 27.

42Id., Point 16B, “Private vehicle-for-hire company” means an „organization, including a corporation, partnership, or sole proprietorship, operating in the District that uses digital dispatch to connect passengers to a network of private vehicle-for-hire operators.”

43Id., Section 20j-3 character (a).

44 Colorado General Assembly, Transportation Network Companies Regulation, [2014] SB14-125. <http://www.legispeak.com/bill/2014/sb14-125>.

45California General Assembly, Public Utilities Code – PUC Division 2. Regulation of related businesses by the Public Utilities Commission [3901 - 5513] (Division 2 enacted by Stats. 1951, Ch. 764.) CHAPTER 8. Charter-Party Carriers of Passengers [5351 - 5444] (Chapter 8 added by Stats. 1961, Ch. 2146.)

46V. Katz, *supra* note 15, 108.

47European Commission, *supra* note 3, 5, 9-10.

48S. Ranchordas, *supra* note 29, 460.

Estonia was the first European country which adopted new the Public Transport Act⁴⁹ in February 2015 where questions of TNCs were regulated. Hence, provider of “occasional services” must fulfil such a requirements as: having a license, to be registered as a commercial or non-commercial entity, has clear criminal records.⁵⁰ Nevertheless, this regulation does not impose any duties on TNCs, especially it does not establish a rule for one's liability which helps to protect the riders in case of accident. Now Estonia is debating the amendment to Public Transparency Act, but only to provide (what is naturally a good step) better transparency in case of fares and identification of driver.⁵¹

6. Will the main problems be solved by the “Uber case”?

Identifying Uber’s (especially UberPop) services as a either ISS or transportation service or 'hybrid' service will not solve the essential problem of services based on sharing economy model.

It should be borne in mind that, sharing economy supersedes traditional economy based on relationships regulated by labour law. In a discussion about regulating Uber we forget about the final service provider's rights. In the initial period the goal of sharing economy was to use an excess of the workforce. Now it is mostly about 'using' this model in situations where people provide work. Therefore, it becomes a part of so called 'gig economy' where “temporary, flexible jobs are commonplace and companies tend toward hiring independent contractors and freelancers instead of full-time employees.”⁵²

It is important to distinguish two situations. First, when, as in this example, drivers are on the occasion sharing their cars to earn some money. And second, when it is these people's regular work. In the second situation they are deprived of worker's rights, like for example minimal wage or social insurance. This question was recognised by English court in a suit against Uber by two drivers.⁵³ According to the judges of the Labour Tribunal of London Uber is not a service provider but driver's employer, so it is obliged to pay minimum wage, overtime, holiday and sick leave. This is not only a question of Uber but also other similar undertakings. Also a meal delivery company Deliveroo was faced with strike of their contrahents.⁵⁴ Hence, the government has imposed the duty to pay minimum wage until the Court or HM Revenue and Customs defines them as self-employed.⁵⁵

This problem shows another 'hybrid nature' of Uber's (and broadly, sharing economy's) corporation. Hence, rapid growth of the sharing economy based companies, without recognising 'factual' service providers will inevitably threaten the level of worker's rights.⁵⁶ We need to remember that the single market “[...] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress [...]”.⁵⁷ Thus, without protection for workers, the development of sharing economy will lead to decay of social cohesion of the European society. These questions must be on the mind of the European legislators and judges when

49Riigikogu, Public Transport Act, RT I 2000, 10, 58.

50Id., § 41.

51D. Geradin, *supra* note 8, 18.

52<http://www.investopedia.com/terms/g/gig-economy.asp>, accessed: 2017-04-09.

53J. Hodges, J. Kahn, 'Uber Loses U.K. Ruling, Entitling Drivers to Minimum Wage', <https://www.bloomberg.com/news/articles/2016-1028/uber-loses-london-lawsuit-over-drivers-rights-law> firm-says, accessed 2017-04-05.

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56A. Asher-Scharpio, 'Against sharing', <https://www.jacobinmag.com/2014/09/against-sharing/>, accessed 2017-04-05.

57 Article 3.3 of the Treaty on European Union [1992], OJ L 293/93.

regulating the sharing economy sector⁵⁸.

Conclusions

The goal of this paper was to consider possible understandings of Uber's service according to the EU law (parts 2-3) and its possible consequences for the existence of the service in the European economy (part 4). Defining this service seems to be difficult, due to the fact that it has the feature both ISS and transport service. Thus, it is necessary to enact special regulation which will eliminate the "grey area" and explain the nature of Uber's service. In my opinion such a regulation will need to contain requirements for personal features of driver, regulate technical requirements to the car, impose liability on TNCs for accidents and distinguish additional and constant activity per sharing platform (point 5-6). Nonetheless, it is also important to consider the problem relations between providing services on sharing platform and labour law relations and protect the rights of service's provider (point 7).

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⁵⁸This problems were considered in: European Commission, *supra* note 3, pages 11-13, and European Economic and Social Committee, *supra* note 29, 9-10.

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FIGHTING SMUGGLERS WITHOUT NEIGHBOURS: WHAT LEGAL FRAMEWORK FOR POST-BREXIT UK?

Juliette Bouloy¹

Abstract

Because of its sharply evolving nature and growing adverse impacts, the fight against migrant smuggling has been increasingly considered as a high priority, over the past then years, by the institutions of the European Union (EU). In order to adequately respond to this complex phenomenon, they have adopted a comprehensive approach based on migration, security and external affairs measures. Until very recently, taking part in carrying out these measures was deemed “vital” by the United Kingdom (UK). However, leaving the EU means in principle abandoning those measures. Besides, it remains critical for the EU to preserve an enhanced cooperation with a partner that owns significant leadership and considerable material resources in that matter.

Thus, this article aims to analyse to what extent a future ‘Brexit’ agreement may meet both the UK’s and the EU’s operational needs to fight against smugglers. Even though the very characteristics of migrant smuggling require the closest possible cooperation between the UK and its European neighbours, it appears inevitable that there will be practical and ideological limits to their future relationship. Only an arrangement that goes further than the existing agreements between the EU and third countries might provide a suitable framework on cooperation in police and criminal justice.

Keywords: migrant smuggling, immigration law, transnational organized crime, policies on border checks, asylum and immigration, cooperation in police and criminal justice, Europol, European Arrest Warrant, Frontex, EUNAVFOR MED.

Introduction

“Migrant smuggling” means the facilitation of a person’s illegal entry into a State of which the person is not a national or a permanent resident. Helping to cross the State’s physical borders in breach with the latter’s immigration law is traditionally depicted as a crime against the State.

Although this phenomenon has a rather long history, the smugglers’ motivations and *modus operandi* have significantly evolved over the last decades. The term “smugglers” includes diverse actors with different levels of professionalization, such as criminal groups, specialists in corruption and counterfeiting, militias, petty offenders and ordinary citizens who may have humanitarian motives. They offer various services, such as provision of information, document counterfeiting, transportation, harbouring, etc. In Europe, two main reasons, massive waves of immigration and the decision to close borders, have triggered a growing demand for smuggling services which makes it a very lucrative activity, increasingly taken on by transnational organized crime networks². Driven by profits, these networks seek to offer low cost services that may put the

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² Institute for Security Studies, Paper 289, *Survive and advance – The economics of smuggling refugees and migrants into Europe*, November 2015.

health and lives of concerned migrants into great risk³. This has resulted in rising death toll: according to the International Organization for Migration, 9,546 migrants have died or disappeared in the Mediterranean sea since 2015⁴. Therefore, fighting against migrant smuggling has been increasingly considered as a high priority, over the last ten years, by the institutions of the European Union⁵.

The EU's political and legal response takes into account the complexity of such a phenomenon by enshrining the fight against migrant smuggling in policies on migration, security and external affairs. The EU Action Plan against migrant smuggling⁶ adopts a comprehensive approach and specifically refers to both the European Agenda on Migration⁷ and the European Agenda on Security⁸.

Whereas the United Kingdom partially takes part in the EU's common policies on asylum and immigration, it is one of the largest contributors to, and greatest users of, most EU's tools to cooperate in policing and criminal justice⁹. Two years ago, some of these tools were in fact considered "vital" by Theresa May, the then Home Secretary, now the Prime Minister and a key figure in the UK's exit from the EU (the so-called Brexit)¹⁰. Indeed, reaching a "deep and special partnership" in the fight against crime has consistently appeared to be one of the Government's top two overarching objectives in the forthcoming negotiations on the Brexit¹¹. Besides, it remains critical for the EU to preserve an enhanced cooperation with a partner that possesses significant leadership and considerable material resources in that matter.

Notwithstanding this mutual interest, the House of Lords underlines that "it seems inevitable that there will be practical limits to how closely the UK and the EU-27 can work together on police and security matters if they are no longer accountable to, and subject to oversight and adjudication by, the same supranational institutions"¹². This article aims to analyse to what extent a future Brexit agreement may meet both the EU's and the UK's operational needs to fight against smugglers. It reviews the main relevant tools and institutions and looks at the opportunities for maintaining or replacing them. Even though this subject attracted very low level of attention during the referendum campaign, it highlights one of the reasons why the UK still needs its neighbours and, why this legal issue must stay a "vital" interest to preserve in its future relationship with the EU-27.

1. The general legal framework

³ United Nations Office on Drugs and Crime, Issue Paper, *A short introduction to migrant smuggling*, 2010, p. 2.

⁴ IOM, Missing Migrants Project, 'Latest Global Figures', <http://missingmigrants.iom.int/latest-global-figures> (accessed 13 April 2017).

⁵ See e.g. Special meeting of the European Council, Statement, 23 April 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> (accessed 10 April 2017).

⁶ Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Action Plan against migrant smuggling (2015-2020)*, adopted in Brussels on 27 May 2015, COM(2015) 285 final.

⁷ Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, adopted in Brussels on 13 May 2015, COM(2015) 240 final.

⁸ Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*, adopted in Strasbourg on 28 April 2015, COM(2015) 185 final.

⁹ HM Government, *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, published on 9 May 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521926/The_UK_s_cooperation_with_the_EU_on_justice_and_home_affairs_and_on_foreign_policy_and_security_issues.pdf (accessed 10 April 2017).

¹⁰ The Daily Telegraph, "Fight Europe by all means, but not over this Arrest Warrant", 9 November 2014, <http://www.telegraph.co.uk/news/politics/conservative/11216589/Theresa-May-Fight-Europe-by-all-means-but-not-over-this-Arrest-Warrant.html> (accessed 10 April 2017).

¹¹ European Council, *United Kingdom notification under Article 50 TEU*, Brussels, 29 March 2017, XT 20001/17, p. 3.

¹² European Union Committee, HL Paper 77, *Brexit: future UK-EU security and police cooperation*, 7th Report of Session 2016-17, published on 16 December 2016, <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/77/77.pdf> (accessed 10 April 2017), p. 13.

The EU's legal framework on the facilitation of unauthorized entry, transit and residence was adopted in 2002, shortly after the conclusion of a multilateral agreement on migrant smuggling at international level¹³. This legal framework is composed of the Directive 2002/90/CE defining the facilitation of unauthorized entry, transit and residence, and of the Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (the so-called "Facilitator's Package")¹⁴. The UK opted out of the Directive 2002/90 but opted in to the Framework Decision 2002/946. As a consequence, it modified its domestic legislation on illegal immigration in November 2002, "to make provision about international projects connected with migration"¹⁵.

According to the "Facilitator's Package", migrant smuggling involves intentionally assisting a person who is not a national of a EU Member State to enter, or transit across, the territory of a Member State in breach of the immigration laws of the State concerned¹⁶. The Member State must take the measures necessary to ensure that the offence is punishable by effective, proportionate and dissuasive criminal penalties¹⁷. This regime applies across the EU and each Member State is required to criminalise migrant smuggling where committed in breach of the immigration laws of any other Member State.

The UK's domestic legislation complies with the "Facilitator's Package". Under section 25 of the Immigration Act 1971, a person commits an offence if he intentionally does an act, whether inside or outside the UK, which facilitates the commission of a breach or attempted breach of immigration law by an individual who is not a citizen of the European Union. The offence is punishable by a maximum term of imprisonment of fourteen years¹⁸.

Even though the UK opted out of the Framework Decision 2002/946 in 2014, those provisions have not been modified and are still in force. The "block opt-out" from about 130 pre-Lisbon police and criminal justice measures, including the Framework Decision in question, was carried out because the UK did not accept to give the European Commission and the Court of Justice of the European Union (CJEU) a larger role than what had been foreseen when those measures were first agreed under the pre-Lisbon framework¹⁹. This shows that the British Government did not refuse *in principle* any cooperation on migrant smuggling. Actually, the Block-out Decision emphasizes its wish to work closely with EU-partners in order to "prevent illegal immigration coming through Europe"²⁰. The House of Lords recently published a report specifically scrutinising the efficacy of the EU Action Plan against migrant smuggling ahead of the European

¹³ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000, United Nations, *Treaty Series*, vol. 2241, p. 507, Doc. A/55/383. 143 Parties.

¹⁴ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, pp. 17–18. Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, pp. 1–3.

¹⁵ Nationality, Immigration and Asylum Act 2002 c. 41.

¹⁶ Directive 2002/90, article 1(1).

¹⁷ Framework Decision 2002/946, article 1(1).

¹⁸ Immigration Act 1971 c. 77, s.25, 'Assisting unlawful immigration to member State'. mod. Nationality, Immigration and Asylum Act 2002 c. 41 Pt 7 s.143. Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 c. 19 s.1(1). UK Borders Act 2007 c. 30 s.30(1). Immigration Act 2016 c. 19 Sch.14 para.2.

¹⁹ HM Government, *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*, July 2013, Cm 8671, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf (accessed 10 April 2017).

²⁰ *Ibid*, pp. 96-97.

Commission's own review of the legislation on migrant smuggling, seeking to influence the development of related policies and draft laws proposed by the EU institutions²¹.

All these elements acknowledge the ambiguous position of the UK: opting out, on the one hand, of the EU legal framework related to migrant smuggling and not being subject to oversight and adjudication by the relevant supranational institutions of the EU, while putting considering importance, on the other hand, on having some input in the related EU's decision-making process. This tension is at the heart of what is at stake in the Brexit, including the future EU-UK relationship regarding the most significant institutions and tools that currently underpin intra-EU cooperation on migrant smuggling.

2. The specific tools and institutions

As mentioned above, the UK exercised a "block opt-out" from about 130 pre-Lisbon police and criminal justice measures in 2014. Meanwhile, the UK decided to rejoin 35 of those same decisions, accepting that the full jurisdiction of the CJEU and the enforcement powers of the European Commission would apply regarding these 35 decisions²². Back then, Theresa May warned that a failure in opting back in to those 35 measures "would seriously harm the capacity of [the UK's] law enforcement agencies to keep the public safe"²³. Most of these measures are relevant to fight against migrant smuggling. We chose to present some of them considering the following criteria: adequacy to respond to migrant smuggling, UK's use of, UK's contribution to, evidence that they should be retained or properly replaced.

Europol is the EU's law enforcement agency. It operates on the basis of the Decision 2009/371/JHA²⁴ in to which the UK opted back in 2014. It assists EU Member States in their fight against "serious international crime", in particular against people smuggling²⁵. Specific tools are put in place for this purpose such as the Europol Information System (EIS) which gathers information on criminals from across the EU. For instance, the UK's Cabinet Office reports a related case that took place in January 2016. The EIS cross-matched Belgian and Polish data to identify a transnational organised crime network linked to the UK. This information enabled the UK's National Crime Agency to locate a Ukrainian national living in London. Then, simultaneous arrests took place in Belgium and in the UK, including the arrest of the network's boss. It was estimated that this group smuggled up to fifty migrants into the UK each week²⁶. More recently, the European Migrant Smuggling Centre (EMSC) was established. It incorporates the Joint Operational Team *Mare* to combat migrant smuggling in the Mediterranean sea and disrupt networks operating from Turkey, Libya and North Africa²⁷. In 2016, the EMSC initiated 2,057 new cases and identified 17,459 new suspected migrant

²¹ European Union Committee, HL Paper 46, *EU Action Plan against migrant smuggling*, 4th Report of Session 2015-16, published on 3 November 2015, <https://www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/46/46.pdf> (accessed 10 April 2017), p. 3.

²² HM Government, *Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union*, July 2014, Cm 8897, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf (accessed 10 April 2017). Further details in: European Union Committee, HL Paper 159, *EU police and criminal justice measures: The UK's 2014 opt-out decision*, 13th Report of Session 2012-13, published on 23 April 2013, <http://www.parliament.uk/documents/The-UKs-2014-Opt-Out-Decision1.pdf> (accessed 10 April 2017).

²³ HC Deb, 10 November 2014, cols 1224, 1228, 1229, cited in: *Brexit: future UK-EU security and police cooperation*, p. 9.

²⁴ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121, 15.5.2009, pp. 37–66.

²⁵ <https://www.europol.europa.eu/about-europol> (accessed 10 April 2017).

²⁶ *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, p. 4.

²⁷ <https://www.europol.europa.eu/about-europol/european-migrant-smuggling-centre-emsc> (accessed 10 April 2017).

smugglers (that is 24% more than in 2015, before it was established)²⁸. Europol is thus a key actor of the EU's response to migrant smuggling.

According to its government, the UK is the greatest user of Europol²⁹. A future membership or an alternative arrangement to cooperate with Europol appears more important than maintaining any other pre-Lisbon measures the UK re-joined in 2014³⁰. The National Crime Agency further asserts that a cooperation with Europol based on the same types of arrangements already existing with non EU-members would not be sufficient to meet the UK's needs³¹: on the one hand, the strategic co-operation partnerships with Turkey, Russia and Ukraine imply no transmission of personal data. on the other hand, the operational co-operation partnerships with Canada, the United States of America, Australia, Switzerland, Norway and Colombia allow no access to the management board of Europol³². The UK's government seems though willing to emphasize the special relationship "that has been built up through [its] years of being full members of Europol and the EU" in order to reach a closer agreement³³.

Evidence gathered by the House of Lords to question that opportunity points out two main hurdles. First, a full membership to Europol would be problematic in the sense that Europol is accountable to EU institutions. An acceptance of the CJEU's jurisdiction seems barely compatible with the Brexit spirit. Moreover, an operational participation in Europol as a third country would require that the UK's data protection framework remains equivalent to EU standards. Given that the data protection is enshrined in the EU's Charter of Fundamental Rights, the 'equivalence requirement' would continue to apply in the future, as EU law was amended, even if the UK had no say in those changes anymore³⁴.

Two main factors can nonetheless work in favour of the UK. The UK is the second-largest contributor in Europe to the EIS and leads on "four or five" on the 13 European Multidisciplinary Platform against Criminal Threats (EMPACT) projects³⁵. The changing nature of transnational crime issues involves that more and more of them start beyond the EU's borders but impact the EU³⁶. From this point of view, a privileged cooperation with the UK might prove more valuable for the EU-27.

The **European Arrest Warrant** (EAW) is a judicial decision issued by a Member State that allows the arrest and surrender by another Member States of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence. It is grounded on the principle of mutual recognition of judicial decisions between Member States and improves the extradition of individuals between them³⁷.

Since 2004, over 7,000 individuals accused or convicted of a criminal offence were extradited from the UK to other Member States under an EAW. About 1,000 individuals were extradited from EU Member States to the UK to face prosecution³⁸. In the recent case, mentioned above, of the migrant smuggling transnational network disrupted in both Belgium and the UK, the boss Marian Shkirko was arrested in London and is currently in the process of being extradited to Belgium under an EAW³⁹. Considered its adequacy regarding

²⁸ EMSC, First Year Activity Report, January 2016-January 2017, p. 6.

²⁹ *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, p. 4.

³⁰ *Brexit: future UK-EU security and police cooperation*, Q 11.

³¹ *Ibid*, Q 13.

³² *Ibid*, Q 20.

³³ *Ibid*, Q 28.

³⁴ *Ibid*, Q 2, Q 7, Q 8, Q 10.

³⁵ *Ibid*, Q 2, Q 11, Q 19.

³⁶ *Ibid*, Q 23.

³⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190*, pp. 1-20, article 1.

³⁸ *Ibid*, p. 3.

³⁹ *The UK's cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, p. 4.

law enforcement, the EAW was one of the 35 pre-Lisbon police and criminal justice measures the UK rejoined in 2014⁴⁰.

Maintaining the EAW is still considered as “absolutely vital” by the UK⁴¹. According to the Government, the existing alternatives to the EAW are not yet sufficient to meet the UK’s needs. Operating under the EAW is described as “three times faster and four times less expensive”⁴² than under the 1957 Council of Europe Convention on extradition⁴³. The related disadvantages would be borne not only by the UK but also by the EU-27. Furthermore, given that it is not a member of the Schengen border-free area, there is no guarantee that the UK could reach an extradition agreement similar to that the EU negotiated with the Norway and Iceland in 2001⁴⁴. The nationality exception under article 7 of the agreement in question can create a loophole that makes extradition a less effective process than the under the EAW, both on the UK’s and EU’s side. Whereas the House of Lords identifies the precedent set by Norway and Iceland as “the most promising avenue for the Government to pursue”, it does not recommend that the inclusion of such a clause in a future agreement should be negotiated⁴⁵.

Frontex is the European Border and Coast Guard Agency. It was established by the Regulation (EC) 2007/2004⁴⁶ and operates on the basis of Regulation (EU) 2016/1624⁴⁷. This agency provides for monitoring migratory flows, developing and operating information systems that enable swift and reliable exchanges of information regarding emerging border-management risks, illegal immigration and return⁴⁸. Although the UK does not fully take part in Frontex⁴⁹, it has an obvious interest in preventing illegal immigration coming through Europe⁵⁰. Its contribution in terms of data sharing and expertise is, on the other side, valuable for the EU.

EUNAVFOR Med is a EU naval force operation that both Europol and Frontex interact with. The EU Council established it in order to disrupt “the business model of human smuggling in the Southern Central Mediterranean”⁵¹. The operation seeks to undertake “systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers” and to train the Libyan coastguards to that end⁵². In November 2015, the United Nation Security Council supported it by authorizing Member States to inspect, on the high seas off the coast of Libya, vessels suspected of migrant smuggling, and to seize and dispose of the vessels that are confirmed being used for migrant smuggling⁵³. This exceptional measure regarding the common Law of the sea is considered successful by most observers and contributed to the

⁴⁰ *Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union*, p. 6.

⁴¹ *Brexit: future UK-EU security and police cooperation*, Q 50.

⁴² *Brexit: future UK-EU security and police cooperation*, p. 37.

⁴³ European Convention on Extradition, adopted in Paris on 12 December 1957, ETS No. 024.

⁴⁴ *The UK’s cooperation with the EU on justice and home affairs, and on foreign policy and security issues*, p. 3.

⁴⁵ *Brexit: future UK-EU security and police cooperation*, p. 38.

⁴⁶ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, pp. 1–11.

⁴⁷ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, p. 1.

⁴⁸ <http://frontex.europa.eu/about-frontex/mission-and-tasks/> (accessed 10 April 2017).

⁴⁹ Regulation (EU) 2016/1624, article 44, article 51.

⁵⁰ *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*, p. 94.

⁵¹ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122, p. 31, article 1.

⁵² *Ibid.* Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), JO L 162, p. 18, article 1(1).

⁵³ UN Security Council, Resolution 2240 (2015), *Maintenance of international peace and security*, adopted on 9 October 2015, S/RES/2240 (2015), §§ 7-8.

reduction of the level of migrant flow in the concerned area⁵⁴. The UN Security Council extended it in October 2016⁵⁵.

The UK actively participates in EUNAVFOR Med, making a warship HMS *Entreprise* available and using the listening post based in Cheltenham. It possesses considerable leadership, experience and material resources in this area and was the initiator of the UN Security Council's related intervention⁵⁶. As far as a future EU-UK cooperation in both Frontex and EUNAVFOR Med is concerned, the mutual interest appears obvious. A specific obstacle to a mutual, comprehensive and coherent collection of intelligence might though be the transmission of personal data. As long as the 'equivalence' in protection standards is required by the CJEU, the UK's legislation would have to align with the EU's relevant standards.

Conclusions

So far, the UK's has been fashioning a personal response to migrant smuggling while building upon existing EU structures. Evidence confirms that it "has been a leading protagonist in shaping the nature of cooperation on police and security matters under the auspices of the European Union"⁵⁷, which constitutes a major asset in forthcoming negotiations on a future UK-EU cooperation in the fight against migrant smuggling. Two main hurdles, the jurisdiction of the CJEU and the transmission on personal data, need to be addressed during the negotiation process in order to reach a satisfying agreement on that matter. It might otherwise result for both sides in a loss of effectiveness of the fight against smugglers.

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⁵⁴ See e.g. Council of the EU, Cover note from European External Action Service, *EUNAVFOR MED Op SOPHIA - Six Monthly Report 22 June - 31 December 2015*, 28 February 2016, EU RESTRICTED, WikiLeaks, <https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf> (accessed 10 April 2017), p. 11.

⁵⁵ UN Security Council, Resolution 2312(2016), *Maintenance of international peace and security*, adopted on 6 October 2016, S/RES/2312 (2016).

⁵⁶ UN Security Council, Meeting Record, *Maintenance of international peace and security*, 7531st meeting, 9 October 2015, S/P V.75, p. 3.

⁵⁷ *Brexit: future UK-EU security and police cooperation*, p. 13.

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WHEN, WHY AND WHOM DO WE TRUST – HOW TO ACHIEVE TRUST BUILDING RELATIONS BETWEEN THE EU JUDICIAL SYSTEMS¹

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Abstract

The paper, including overview of relevant legal literature and practice, mainly focuses on mutual trust as the legal principal in the EU. Because of its vague meaning one clear definition could not be distinguished. The paper seeks to examine the reasons why this principle has become so important in the legal relations, especially in the EU, what are the criteria defining it and what are the limits of mutual trust. Finally, paper seeks to distinguish four steps in order to strengthen mutual trust between judicial systems in the EU.

Keywords: mutual trust, judicial system, judiciary

Introduction

Communities often develop endogenous mechanisms to facilitate interactions between their members and to preserve the autonomy of their members without a need for recourse to exogenous institutions such as the law. In the last decades the principle of mutual trust is one of the most discussed ones. For example, mutual trust in the employment relations is essential and central among the indicia that distinguishes an employment relationship from other commercial relationships.³ Or deep problems of trust are indicated in the growing scope of online transactions because the Internet was built on a foundation of trust and its evolution has given away this foundation. This transition is problematic, because it is unclear what can replace trust.⁴ Trust is also regarded as one essential source of social order because those who trust are more honest and happier.⁵

Legal academia had neglected the question of trust for a long time. However, this has changed when courts and lawmakers began to actively raise social capital by generating trust through law.⁶ The European Union (hereinafter – the EU) institutions have emphasized the connection between one of the most important concepts of the integration method – mutual recognition – and the presence of mutual trust between EU Member States. Confidence and mutual trust – *confiance mutuelle* in French and *gegenseitiges Vertrauen* in German – have been part of the semantics of the EU law at least since 1979.⁷ Only recently, the European Court of Justice (hereinafter – ECJ) reaffirmed in Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights that mutual trust is at the heart of the EU and is a "fundamental premiss" of the European legal structure.⁸ The "principle of mutual trust" has developed into a "legal" principle which has

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³ Riley J. Siblings but not twins: making sense of „mutual trust“ and „good faith“ in employment contracts, 36 *Melb. U. L. Rev.*, 2012-2013, p. 525.

⁴ Hurwitz J. Trust and online interaction, 161 *U. Pa. L. Rev.*, 2012-2013, p. 1597

⁵ Cross F. B. Law and Trust. 93 *GEO. L. J.* 1457 2004-2005, p. 1480-1481

⁶ Wischmeyer T. Generating Trust Through Law? Judicial Cooperation in the European Union and the „Principle of Mutual Trust“, 17 *German L. J.* 339 2016, p. 340.

⁷ Council, Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by Mr. P. Jenard, 1979 *O.J. (C 59)* 1-65, p. 46.

⁸ Opinion 2/13, EU:C:2014:2454, paragraph 168.

been codified in the EU secondary law and has been referred to in over 100 decisions of the ECJ and opinions of the Advocates General since 1998.⁹

This paper intend to overview the mutual trust relations between the EU judicial systems, and seek possible answers to the questions, why do we need mutual trust, how it may be described and how it should be strengthened. Attention is paid to the project “Supreme Courts as guarantee for effectiveness of judicial systems in EU” (hereinafter – the Project) co-funded by the European Commission and elaborated in collaboration among the Supreme Court of Latvia, Curia of Hungary, Supreme Court of Lithuania, Supreme Court of Spain, University of Antwerp and University of Ljubljana.

1. Why do we need mutual trust?

The need for trust arises only when something of some value is at risk. The increasing independence from family members and at the same time increasing global dependence on trust spurs both our interests in and our need for trust. Nation’s well-being is conditioned by the level of trust inherent in the society¹⁰, which differ in the degree to which their members extend it.

The majority of the EU citizens believe that there are large differences between national judicial systems in terms of quality, efficiency and independence, and a considerable number of the EU citizens do not even trust their own national justice system.¹¹ One of the most important purposes for which mutual trust is deployed is linked to the elimination of differences between national justice systems in the name of trust building (the logic being that if all national systems were perfectly equal trust would not be an issue).

The level of trust in a society can be influenced by the existence, the performance, and the content of legal rules, because trust is often the product of an active and voluntary decision, and the result of a specific way of structuring and ordering the social world.¹² Law can minimize the disadvantageous consequences of trusting behaviour despite the fact that the loss of trust in the society has been frequently associated with or attributed to the growth of law and legalization of relationships. Countries with greater reliance on the rule of law have higher levels of trust.¹³

In the field of judicial cooperation, ECJ and the European legislature have actively taken ownership of the trust-generating faculty of legal rules by developing a legal principle of mutual trust. It is recognized that mutual trust is intimately connected with the category of mutual recognition, which was an essential element in creating the internal market and was soon considered as an ideal tool for establishing what has become the area of freedom, security and justice (hereinafter – AFSJ).¹⁴ Mutual trust should help to minimize the differences between national justice systems through building a system of mutual recognition without *exequatur*, based upon shared information and mutual understanding or a harmonized civil code for enforcement directed by European legislation.¹⁵

⁹ Wischmeyer T. Generating Trust Through Law? Judicial Cooperation in the European Union ant the „Principle of Mutual Trust“, 17 German L. J. 339 2016, p. 342

¹⁰ Cross F. B. Law and Trust. 93 GEO. L. J. 1457 2004-2005, p. 1459-1460.

¹¹ European Commission, Flash Eurobarometer 385, “Justice in the EU”, Report conducted by TNS Political & Social at the request of the European Commission, Directorate-General for Justice (DG JUST), Survey co-ordinated by the European Commission, Directorate- General for Communication (DG COMM “Strategy, Corporate Communication Actions and Eurobarometer” Unit), November 2013.

¹² Wischmeyer T. Generating Trust Through Law? Judicial Cooperation in the European Union ant the „Principle of Mutual Trust“, 17 German L. J. 339 2016, p. 346

¹³ Cross F. B. Law and Trust. 93 GEO. L. J. 1457 2004-2005, p. 1459-1460.

¹⁴ Wischmeyer T. Generating Trust Through Law? Judicial Cooperation in the European Union ant the „Principle of Mutual Trust“, 17 German L. J. 339 2016, p. 349

¹⁵ Andenas M. National paradigms of civil enforcement: mutual recognition or harmonization in Europe?, 17 Eur. Bus. L. Rev., 2006, p. 537.

Despite these great purposes of the principle of mutual trust it is still unclear how it may be described. Is it an idea, a goal or some organizational method? „Mutual trust” – what does concept includes, does this term comes from social sciences and has no legal meaning, or is a term with extra-legal roots that has acquired a legal dimension?

2. What is the principle of mutual trust about?

Trust is studied in most of the social science disciplines, including history, philosophy and political sciences. It is important to note that there is not one overarching definition of trust, but that trust takes upon different meanings and forms in the various disciplines.

“The whole EU legal system ... is based on mutual trust”.¹⁶ But there is no document setting out a shared understanding of mutual trust scope and fundamentals.

In ordinary life mutual describes something such as an interest which two or more people share. Trust is typically described as the reliance on another person or entity. Trust can be attributed to relationships between people, but also to relationships within and between social groups and entities. Thus mutual trust is a shared belief that different persons can depend on one another to achieve a common goal. Coming back to the principle of mutual trust in judiciary cooperation within the EU it is already answered in the first section of this paper why it is needed and what is the common purpose of using it – creation of the AFSJ. Starting with the assumption that all Member States share the value of “justice” and enforce “the rule of law”, it is possible for the EU to fulfil its promise laid down in the Article 3(2) of the Treaty on European Union to “offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured” only by building this area on mutual trust of the Member States in each other’s administration of justice and enforcement of the rule of law.

There are identified four core elements (or indicators) of trust clarifying what it entails in judiciary cooperation in the EU¹⁷:

1. *The willingness to take risks* or the idea that trust refers to an attitude involving a willingness to place the fate of one’s interests under the control of others. However giving someone trust to perform an act is based not only in the goodwill of that person but also in her competence to perform the action.
2. In a trusting relationship, which at minimum consists of two parties, a trustor and a trustee, both parties can be assumed *to be 'purposive'*, meaning that they both aim to satisfy their interests. The decision to entrust one’s interests to others is usually based on the belief that the fulfilment of that trust will make the trustor better off.
3. If everyone we interact with were trustworthy, there would be no problem of trust. The use of trust often refers to the entire trusting relationship, both the trusting and the trustworthiness. There can be many different reasons why someone (this includes groups and entities) is perceived as trustworthy. The danger of betrayal can be reduced by improving *the amount and quality of information available about cooperation partners, the facility and effectiveness of monitoring the party to be trusted*. It is also influenced by such pragmatic considerations as remedies for breaches of trust¹⁸, because even if law does not eliminate vulnerability but merely reduces it.
4. In order to make valid, and more importantly, meaningful statements about trust between the EU Member States it always has to be specified *to what 'action' exactly* this trust refers. Those areas

¹⁶ European Commission, Press Release “Building Trust in Justice Systems in Europe: ‘Assises de la Justice’ Forum to Shape the Future of EU Justice Policy”, 21 November 2013

¹⁷ Willems A. Mutual Trust as a Term of Art in EU Criminal Law: revealing its Hybrid Character. European Journal of Legal Studies

¹⁸ Cross F. B. Law and Trust. 93 GEO. L. J. 1457 2004-2005, p. 1466.

requiring mutual trust include¹⁹: first, where the implementation of the EU law depends on a functioning, trust-based relationship between different national administrations or judicial institutions.²⁰ second, where the EU institutions depend on the cooperation of national institutions.²¹ or third, where the EU organs operate within a larger international context.²²

Normative approach treats trust as a mechanism of cooperative actions based on the common norms.²³ Trust may also be the result of political will of parties undertaking the joint initiative, and it must also reflect a readiness to enhance cooperation stemming from faith in a reliable and responsible approach of all participants to the agreed objectives and targets.²⁴

The subjective scope of trust refers to a range of subjects involved. It can be state authorities as well as judicial authorities of other countries. This trust can also be invoked in reference to vertical relations, namely between state authorities and individuals. The main idea of judiciary cooperation in the EU is that every individual should have the same high level of confidence in the protection of law within every Member State, irrespective of nationality.

The objective scope of mutual trust depends on the parties who are under consideration at given moment, the nature of their interdependence and the type of cooperation. Trust can refer to the functioning of the national judiciary or the observance of the rule of law.

The successful application of the principle of mutual recognition and trust to the internal market requires a fair balance between "individual freedom" and "public interest".²⁵ Neither the free movement of judicial decisions, nor the fundamental rights of the persons concerned by those decisions are absolute.²⁶ So the free movement of judgments in civil and commercial matters is not absolute but must comply with fundamental rights. Mutual trust and deference among national courts cannot lead to a situation that is detrimental to fundamental procedural rights.²⁷ Thus there are some limits of mutual trust, which may also help to determine its meaning.

3. Where are the limits of mutual trust?

¹⁹ Wischmeyer T. Generating Trust Through Law? Judicial Cooperation in the European Union and the „Principle of Mutual Trust“, 17 German L. J. 339 2016, p. 352

²⁰ For a reference to the principle of mutual trust, see Opinion of Advocate General Geelhoed in *Keller v INSS*, C-145/03. EU:C:2005:17. paragraph 18. in the context of the European social security system. Opinion of Advocate General Maduro in *Rewe Zentralfinanz eG v Finanzamt Köln-Mitte*. C-347/04. EU:C:2006:350, paragraph 46, in the context of the common tax policy. Opinion of Advocate General Trstenjak in *Commission v Germany*, C-442/08, EU:C:2010:167, paragraph 63, in the context of the Customs Union. *N.S.*, *supra* note 53, at paras. 78-80, 83, in the context of the Common European Asylum System.

²¹ With regard to the preliminary reference procedure cf. the Opinion of Advocate General Mazák in *Melki & Abdeli*, C-188/10 and C-189/10, EU:C:2010:319, para. 64.

²² See the Opinion of Advocate General Sharpston in *Ruiz Zambrano v ONEm*, C-34/09, EU:C:2010:560, paragraph 147 (describing of the cooperation between the ECJ and the European Court of Human Rights in Strasbourg, as governed by the "spirit of cooperation and mutual trust"). see also the remarks of the President of the Federal Constitutional Court of Germany in Andreas Voßkuhle. *Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175 (2010).

²³ Fisher M. Mutual trust in European Criminal Law. University of Edinburgh School of Law Working Paper Series, 2009/10, p. 13.

²⁴ Sulima A. The normativity of the principle of Mutual trust between EU Member States within the emerging European criminal area. *Wroclaw Review of Law, Administration and Economics*, 2013, p. 75.

²⁵ Möstl M. Preconditions and Limits of Mutual Recognition, 2010, 47 *Common Market Law Review* 405,

²⁶ Lenaerts K. The principle of mutual recognition in the area of freedom, security and justice, at the fourth annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015

²⁷ *Ibid*

Trust by its own nature is a dynamic phenomenon and will always contain an element of risk. The level of already achieved trust varies significantly in certain areas of cooperation, policy or even concrete legal instruments.²⁸

Mutual trust "is still not spontaneously felt" by many judges, and the practice of judicial cooperation could even be defined as mutual "distrust".²⁹ Trust afforded to the foreign judgment cannot be grounded on any detailed expectation in relation to the application of the substantive law. Rather, trust relates to the proper administration of justice on an abstract level by the foreign court. In general, only minimum standards of such proper administration of justice by the foreign court are reviewed under a public policy control³⁰ which is a limit of mutual trust.

Public policy exception can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which the enforcement is sought or of a right recognised as being fundamental within that legal order.³¹ National public policy must be consistent with the EU public policy.³² A mere difference in civil law or procedure is simply not enough to invoke the public policy defence.³³

Since the EU is based on the "commonality of values" which includes respect for fundamental rights, the EU public policy constitutes a core nucleus of values with which all Member States must comply.³⁴ Many of the fundamental values are therefore common, or become such in time and through joint legal instruments. However the EU is fully aware that some of its current Member States do not comply with the values and standards, which are so vigorously insisted upon with regard to candidate and potential candidate countries and the enforcement machinery available to force Member States to comply with the common values and principles of the EU is not very strong.³⁵ That is why mutual trust should have its limits in order to ensure the fundamental rights and the smooth functioning of internal market. Only a judgment which meets certain requirements can 'enjoy' free circulation based on mutual trust.³⁶

²⁸ Sulima A. The normativity of the principle of Mutual trust between EU Member States within the emerging European criminal area. *Wroclaw Review of Law, Administration and Economics*, 2013, p. 76.

²⁹ Wischmeyer T. Generating Trust Through Law? Judicial Cooperation in the European Union and the „Principle of Mutual Trust“, 17 *German L. J.* 339 2016, p. 342.

³⁰ Weller M. Mutual trust: in search of the future of European Union private international law, *Journal of Private International Law*, 11:1, 2015, p. 69.

³¹ ECJ judgments in *Krombach*, C-7/98, EU:C:2000:164, para. 37. *Renault*, C-38/98, EU:C:2000:225, para. 30. *Apostolides*, C-420/07, EU:C:2009:271, para. 59, and *Trade Agency*, C-619/10, EU:C:2012:531, para. 51.

³² Lenaerts K. The principle of mutual recognition in the area of freedom, security and justice, at the fourth annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015

³³ Beaumont P., Johnston E. Can Exequatur be abolished in Brussels I whilst retaining a public policy defence?, 6 *J. Priv. Int'l L.*, 2010, p. 254.

³⁴ *Ibid*

³⁵ Spreeuw M. Do as I say, not as I do. The application of mutual recognition and mutual trust, 8 *Croatian Y. B. Eur. L. & Pol'y*, 2012, p. 506, 511.

³⁶ Zilinsky M. Mutual Trust and Cross-Border Enforcement of Judgments in civil matters in the EU: Does the step-by-step approach work?, *Neth Int Law Rev*, 2017, p.

4. How to strengthen mutual trust?

The principle of mutual trust is a constitutional principle³⁷. Thus it is possible to discuss about its narrower or broader description, its limits, but it should be implemented. The question is how to better achieve mutual trust between judicial systems in the EU in order to ensure the AFSJ and fundamental rights of the EU citizens.

Building trust relations between EU judicial systems is the last but not the first step of mutual trust. The authorities which apply the law, should have confidence not only in the legal systems of the other Member States, but they should have confidence in the effects of the functioning of these systems, in the judgements and decisions issued by foreign bodies, as well as in the legitimization and competence of these organs to undertake certain actions.³⁸ All of these situations require each interested party to possess knowledge about other participants. Trust in fact constitutes a conviction that other Member States will comply with the agreed-upon rules.³⁹ The trustor must know not only the attitudes and qualities that make the trustee trustworthy, but also that the trustee is invested in the success of the trust relationship. Rules governing the knowledge of the potential trustor on the attitudes and qualities of the potential trustee's trustworthiness or on the institutional setting in which trust may be acquired may influence the level of trust. Institutions live by and through their rules, which are not only legal rules and sanctions for violations. Part of the trust in these institutions is therefore based on how well or consistently they fulfil the rules.⁴⁰

The goal of the Project was to open a new page in a mutual dialogue among the Supreme Courts of the EU, to share the knowledge, best administration and case management practices, to know better not only the legal rules of civil, criminal or administrative procedure, but also the internal rules, which are applied in each country seeking to ensure the essential task of the Supreme Courts to safeguard legal certainty and legal uniformity and to contribute to the development of law.

Quality, independence and efficiency are some of the essential parameters of an "effective justice system". An effective justice system is a fundamental right and it also raises society's trust. The internal market cannot be successful if there is no mutual understanding and trust in the justice systems of other EU Members States⁴¹.

In this paper there are distinguished four steps that may help to strengthen mutual trust between the judicial systems in the EU and implement "effective justice system".

4.1. *Internal trust of the court*

Successes and failures of institutions are often described as being dependent on the mutual trust of their respective stakeholders. That is why first of all trust should be build inside the institution, the court. Running a court is becoming similar to running a business and traditional management insights have also found their way into institutions of the public sector. Respect for individual and respect for institutional values involves balancing the claims of personal autonomy with the goals and mission of the institution. That's why the clear organizational system, distribution of functions, collaboration among the colleagues of the same

³⁷ Lenaerts K. The principle of mutual recognition in the area of freedom, security and justice, at the fourth annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015

³⁸ Fisher M. Mutual trust in European Criminal Law. University of Edinburgh School of Law Working Paper Series, 2009/10, p. 13.

³⁹ Ibid, p. 17-18.

⁴⁰ Wischmeyer T. Generating Trust Through Law? Judicial Cooperation in the European Union and the „Principle of Mutual Trust“, 17 German L. J. 339 2016, p. 347.

⁴¹ European Commission, Quality of Public Administration. A Toolbox for Practitioners (abridged version, Publications Office of the European Union 2015),p. 102

and different levels and open communication may help to construct mutual trust within the institution and to make an image of it as a trustworthy one.

The Project showed that the judicial systems are consisted not only of the judges but also of the different members of administration, responsible for allocation, preparation of cases, legal researches and reports of the courts and many other functions which help to implement effective justice.

Administration of the courts is thus a broad term and encompasses the management of workloads, finances, infrastructure, human resources and communications.⁴² In order for the court management to be successful and attain the desired goals, all members of the organisation should share and internalise the same norms and values. These norms, values and assumptions will influence how they perceive their environment and how they will act within the organisation.⁴³ A shared vision provides a source of motivation and helps everyone to remain focused.⁴⁴ Good communication with everyone affected is therefore essential when introducing changes.⁴⁵

Each administration should have a leader because leaders determine the culture of their organisation and they must ensure that the organisation's norms and values are protected and developed.⁴⁶ The leader must be an advocate of the newly introduced practices and must exercise leadership by building consensus and organisational support among the members of the court community, which is, of course, essential for the changes to succeed in attaining the desired goals.⁴⁷

To ensure changes are brought to a good end it is very important to have an effective governance structure. Defining the tasks and assigning each to specific staff members is not only important for getting things done, it is also important to identify the target groups for training and forums in which to exchange experiences and good practices.⁴⁸ Proceduralisation of activities makes these activities a natural step to follow in the workings of the court. Instruments, for example, guidelines on how cases will be allocated, guidelines on how the court will interact with the media, training modules on the electronic case management system, and documents that record the agreed timeframes, are practical tools that should be used when managing the court.⁴⁹

Mutual trust depends also on budgetary issues—how much individual Member States are willing to pay for the quality of their justice system, for example prisons, legal aid, etc.⁵⁰ Courts cannot operate efficiently with inadequate human and material resources.⁵¹ It is an important task of the central authorities to create the material and institutional conditions under which credibility and mutual respect become the most valuable public goods supplied by the supranational polity.⁵²

⁴² Council of Europe, Committee of Ministers Recommendation (95)12 of 11 September 1995 on the management of criminal justice

⁴³ Popelier P. Management of Legislation in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe. A Comprehensive Guide for Scholars and Practitioners*, Hart Publishing, 2017, p. 56

⁴⁴ Steelman D. C. Improving Caseflow Management: A Brief Guide, National Center for State Courts, 2008, p. 14-16 and 26-27

⁴⁵ Ibid

⁴⁶ Christensen T., Laegreid P., Roness P. G. and Rovik K. A. Organization Theory and the Public Sector. Instrument, Culture and Myth, Routledge, 2007, p. 47-48

⁴⁷ Steelman D. C. Improving Caseflow Management: A Brief Guide, National Center for State Courts, 2008, p. 4-5

⁴⁸ Popelier P. Management of Legislation in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe. A Comprehensive Guide for Scholars and Practitioners*, Hart Publishing, 2017, p. 66-67

⁴⁹ Ibid, p. 65

⁵⁰ Alegre S. Mutual Trust - Lifting the mask, in LA CONFIANCE MUTUELLE DANS L'ESPACE PENAL EUROPEEN 41, 45 (Gilles de Kerchove & Anne Weyembergh eds., 2005).

⁵¹ Consultative Council of European Judges (CCJE), Opinion no 11 (2008) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions

⁵² Majone G. Mutual Recognition in Federal Type Systems, in A. Mullins and C. Saunders (eds), *Economic Union in Federal Systems* (Sydney: Federation Press, 1994), p. 20.

The results of the Project showed that judges of the Supreme Courts are supported by research assistants, law clerks or special research and documentation units. However courts should be careful not to allow research assistants to make the decision, since this would compromise the right to a lawful judge.

The case law of the Supreme Courts should be clear and consistent. The judgments should be well reasoned and drafted in a clear language.⁵³ Decision-making requires time and effort. However proceedings that are too intimidating, too time-consuming or too difficult to understand jeopardise the right to an effective justice system. The main parameters used by the EU Justice Scoreboard to measure the efficiency of justice are the length of proceedings (disposition time),⁵⁴ clearance rate⁵⁵ and number of cases pending.⁵⁶

The Project showed that in order to improve the administration of the court, there should be made a concrete and clear organizational structure, the division of functions, time-frames for different procedures and inspirational leaders who can motivate the others, keep the internal culture and help all the institution to implement the goals settled. The second step in strengthening mutual trust could be made when the internal trust of the court is built and the principle of “all for one and one for all” works.

4.2. Trust among national institutions

Trust among national institutions should be built in order to demonstrate that all the judicial system and the public governance system in general is seeking the same purpose – the best implementation of fundamental rights and ensurance of human interests, keeping the right balance between the individual and society.

National judicial system should be build on the same principals as mentioned above, when the internal trust of the court was commented. First of all, the common values and the purposes should be well communicated and understood by all judiciary community. Secondly, there should be a leader from the big L, who is working for and with all the judicial system, who has an authority because of his professional and personal competences, achievements and attitudes, who is able to make a strategy for improvement of the system, to convince others and to stand for it despite any winds of change. Usually the judicial system is big enough and it is difficult to administrate, that is why clear administration procedures are needed and an adequate financing must be ensured.

The Project showed that the Supreme Courts play an important role in building trust among national institutions. Not only because the judgments of the Supreme Court should be followed by the lower instance courts, but also because usually it is the first one, which implements novelties and is like a star for the others to follow. Also it plays an important role in the training of judges through periodical meetings, seminars, conferences, guidelines. Sharing knowledge and experiences, listening to judges from the lower instance courts and giving them trust first in order to receive it back helps in building trustworthy relations between the courts of the national system.

Here is an example of good practice - in the Netherlands, some of the Supreme Court judges have been appointed as “contact judges” and must ensure there is a good relationship between the Supreme Court

⁵³ Consultative Council of European Judges (CCJE), Opinion no 11 (2008) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions

⁵⁴ The disposition time is the number of unresolved cases, divided by the number of resolved cases at the end of the year, multiplied by 365 days.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - The 2016 EU Justice Scoreboard (Publications Office of the European Union 2016), p. 6

⁵⁵ The clearance rate is the ratio of the number of resolved cases to the number of incoming cases. It measures whether a court is keeping up with its incoming caseload.

⁵⁶ Ibid.

and a specific Court of Appeals. There is also a programme in place that allows for lower instance court judges to undertake an internship at the Supreme Court.

Nowadays, when the rhythm of life is so intense, electronical data bases and trainings on-line help a lot to keep institutions in touch and to provide adequate information on time. Safeguarding the right to access to an effective justice system thus requires that citizens, lawyers and judges have access to the legislation as well as the case law, but the online availability of judicial decisions could place the privacy rights of individuals at risk and jeopardise the interests of companies.⁵⁷ Electronic exchange of information should be faster and more cost-efficient compared to paper-based communication. The Project showed that in the vast majority of countries there is a central case law database.

Cooperation with academia in order to get higher quality judicial decisions is still questionable. The Project showed that the majority of the Supreme Courts generally do not cooperate with universities, research institutions or individual researchers in conducting various research projects. The most common way for the Supreme Court to cooperate with academia seems to be organising, facilitating or participating in conferences. Such relations make judicial system more open to society, promote the work at the courts and help to attract the best professionals who trust to become a part of organized well and worthy judicial system.

One of the hardest trust building elements among national institutions is cooperation with other branches of government – legislative and executive. First of all, there should be constructive relationships. Secondly, all the branches should not forget for whom they are working and one side willing to change attitudes towards the other should reconsider the negative attitudes they have about one another. The Project showed that the Supreme Courts offer comments on proposed laws, judges may be involved in working groups or committees, however, it should be ensured that the courts are not engaged in public policy debates and the judiciary remains independent of the influence of the legislature and executive.

Further an attention should be paid at the triangle of trust among the courts and authorities, the political level, and the general public.⁵⁸

4.3. Trust between courts and the society

State institutions work not for themselves or to keep created legal systems but for the people, that's why the communication with the society at the moment is one of the core elements in building mutual trust. When and what information should be provided? Does the society need to know everything? Should the courts inform it and explain their decisions to it? These are the questions that have to be answered communicating with social media.

Communication by the judiciary is important, as it contributes to the accessibility of justice. Also it is an image-making tool. How the judiciary is perceived by the public is crucial to any democratic State, bound by the rule of law. Justice must not only be done, but must also be seen to be done. The public perception of the judiciary is thus very important, especially since public perceptions also influence the society's trust in the judiciary.⁵⁹

⁵⁷ Consultative Council of European Judges (CCJE), Opinion no 6 (2004) to the attention of the Committee of Ministers of the Council of Europe on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement

Consultative Council of European Judges (CCJE), Opinion no 14 (2011) to the attention of the Committee of Ministers of the Council of Europe on justice and information technologies (IT)

⁵⁸ Salazar L. Réflexions sur le rôle de la Cour de Justice des Communautés européennes dans l'instauration de la confiance mutuelle entre magistrats: le trianale nécessaire, in LA CONFIANCE MUTUELLE DANS L'ESPACE PENAL EUROPEEN 157 (Gilles de Kerchove & Anne Weyembergh eds., 2005).

⁵⁹ Moran L. J. Managing the News Image of the Judiciary: The Role of Judicial Press Officers, 2014, Oñati Socio-Legal Series, p. 799, 804

There is a great variety of approaches to courts' communication in Europe.⁶⁰ The Project showed that in most countries judges are not allowed (by law or ethically) to comment on their own cases. Most countries have created the position of a spokesperson with the role of speaking for and on behalf of the judiciary.

Courts should communicate about activities they organise and about general information regarding the justice system (e.g. information on the length of proceedings, and explaining general principles of the justice system, such as the presumption of innocence). Access to justice requires presenting simple, understandable and accurate information to society. Also very important part of communication is information provided on the judgements. Usually all anonymized judgements are available in online database but also press releases are published to inform the society about them. Press releases are a widely used method of communication. It depends on the country and judiciary system whether the society is informed about all the judgements brought by the Supreme Courts or only in the cases that raise important questions of law or attract media attention or public interest. Also information is disseminated on the Supreme Courts' websites.

Expectations of the court users and other stakeholders are becoming increasingly important in court management. To understand people's expectations, courts should receive feedback (e.g. through surveys or meetings) and cooperate. The Project showed that many Supreme Courts do not have formal channels and procedures through which feedback can be received. One of the ways of receiving feedback on the functioning of the court is through complaints and the majority of Supreme Courts examine complaints.

Communication is a powerful tool, but it should be used with caution because it may not only improve but also damage the relationship between the society and the judiciary.⁶¹ The courts therefore have to find a balance between communicating their message accurately and communicating in a way that their message will actually reach the target audience because "an understanding of how the judicial system works is undoubtedly of educational value and should help to boost public confidence in the functioning of the courts".⁶²

4.4. Trust among the judiciary systems in the EU

Finally when three first floors are strong enough the sound about the trustworthy country and its judicial system is spread all around and it may be expected that the other Member States are not only well informed about the legal rules of concrete country but they are also sure for what purposes and how these rules are applied. The reason for trusting the administration of justice by foreign courts is not (so much anymore) comity amongst the states but the individual's right to access to justice in due time and without disproportionate effort in international cases⁶³.

Jeuland E. and Sotiropoulou A. The Role of Communication in the French Judicial System, 2012, International Journal for Court Administration, 1, p. 1

⁶⁰ Chrétien L., de Peretti-Schlomoff A. and Viguiet Y., Judicial Communication and Professional Ethics. Renewing the Relationship between the Judiciary and the Public (Themis Competition 2015 – Semi-Final D – Team France 4, European Judicial Training Network (EJTN) 2015), p. 5

⁶¹ Chrétien L., de Peretti-Schlomoff A. and Viguiet Y., Judicial Communication and Professional Ethics. Renewing the Relationship between the Judiciary and the Public (Themis Competition 2015 – Semi-Final D – Team France 4, European Judicial Training Network (EJTN) 2015) 10

⁶² Consultative Council of European Judges (CCJE), Opinion no 7 (2005) to the attention of the Committee of Ministers of the Council of Europe on justice and society

⁶³ Weller M. Mutual trust: in search of the future of European Union private international law, Journal of Private International Law, 11:1, 2015, p. 70.

Mutual trust is only legitimised if fair trial is guaranteed. The concepts of mutual trust and fair trial are not well defined. To increase mutual trust, harmonised (minimum) standards of procedural law, along with judicial training and intensified communication, are to be further developed.⁶⁴

Conclusions

Mutual trust has become a binding principle for the smooth functioning of internal market helping to ensure fundamental rights. Because of the common interest of the judicial systems to build the AFSJ they have willingness to take risks in recognising the judgements of the other Member States in the agreed areas. However, in order to trust one another the prompt information about the cooperation partners should be provided.

Under the results of the Project there were distinguished four steps strengthening mutual trust between the judicial systems in the EU. The ground is the trustful relations within the national institution, following the trust among different national courts, legislative and executive power and academia and coming to the need of communication with the society in order to ensure the accessibility of justice and the image of the courts as the trustworthy institutions.

The Project showed that the problems met by the Supreme Courts are similar but their solutions differ because of the organizational, administrative, financing issues, the leaders and the culture of the Member States. The Project made it possible to know the reasons of these differences and to understand them without loss of trust in one another.

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REPARATIONS FOR CONFLICT DISPLACEMENT: THE APPROACHES OF INTERNATIONAL ADJUDICATIVE BODIES IN LIGHT OF THE EMERGING 'RIGHT NOT TO BE DISPLACED'

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Abstract

Today, the global mass displacement of people – in which armed conflict is a major factor – stands at record levels. Given its notable and accelerating prevalence, mass displacement can be considered a feature of modern conflicts, with far-reaching implications. However, the scope of a right to reparation for those displaced in armed conflict remains uncertain, not least because of gaps in the primary protective rules prohibiting displacement in such contexts.

In traditional international humanitarian law, displacement was largely viewed as an unfortunate side-effect of hostilities, and therefore only regulated in specific instances. However, it has been argued that international humanitarian law may be developing towards a more general independent prohibition on displacement caused by unlawful acts. Such a development - consistent with the emerging 'right not to be displaced' in the complementary body of human rights law - would entail state responsibility (and therefore, a potential right to reparation) for a more comprehensive range of displacement situations than those currently explicitly addressed in IHL.

Against this background, and given the legally recognized mutual interaction between IHL and IHRL, this paper aims to examine how responsibility and reparations for conflict-related mass displacement have been addressed by international and regional human rights (quasi-)judicial mechanisms. Such mechanisms are a valuable indicator of potential developments in the law, as they play an increasing role in armed conflict situations and – unlike IHL implementation mechanisms – are capable of interpreting the law in concrete cases. Further, given that protracted displacement is now considered to be the norm, it is relevant to understand how international and regional approaches may contribute to development of the law and affect the legal position of displaced people seeking reparation, in a context where domestic remedies are likely to be more elusive. The aim of the analysis is to determine whether the case law of these bodies supports the view that the law of armed conflict is developing further in the direction of the emerging 'right not to be displaced'.

Keywords: displacement. international humanitarian law. international/regional judicial mechanisms. reparations. right not to be displaced

Introduction

Currently, the global number of displaced people stands at levels unprecedented since the end of World War II, and continues to grow, with armed conflict being a major contributor to the situation.² Indeed, given the widespread prevalence of conflict-related displacement, it can be said that displacement has become a notable feature of modern conflicts, with far-reaching implications.

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² UNHCR, 'Global Trends: Forced Displacement in 2015' (Geneva: United Nations 2016) 5 – 7. Internal Displacement Monitoring Centre (IDMC), 'Global Report on Internal Displacement 2016' (Geneva: IDMC/Norwegian Refugee Council 2016) 7.

Traditionally, the starting point of IHL is that displacement is an unfortunate side-effect of conflict, which is sometimes necessary for the protection of civilians. Accordingly, in the applicable body of international humanitarian law (IHL), civilians do not benefit from a general protection from displacement.³ Rather, displacement as such is only explicitly prohibited by IHL treaties and customary rules in limited instances.⁴ Two significant gaps can be identified in these rules. Firstly, displacement resulting from international armed conflict (outside of occupation) is not explicitly regulated.⁵ Secondly, internal displacement in non-international armed conflict is only explicitly prohibited where it has been ordered. Thus, the causation of internal displacement through the conduct of hostilities – even through coercive acts – is not addressed.⁶ These gaps may have consequences on the level of protection – a crucial issue in the current context of mass global displacement - as well as reparation, which is likely to become a growing concern flowing from this context in the coming years.

It has been claimed that IHL may be developing towards filling these lacunae by recognizing responsibility for displacement caused by acts which are unlawful under IHL.⁷ It has also been claimed that the rules narrowly prohibiting the ordering of internal displacement in non-international armed conflicts are already being interpreted more broadly.⁸ Such claims would appear to be consistent with the more comprehensive, emerging 'right not to be displaced' doctrine in the complementary body of international human rights law (IHRL),⁹ and may therefore indicate the evolution of IHL under the influence of IHRL on this subject matter. Despite their apparent resonance with IHRL, these potential developments in IHL do not appear to have been examined in light of the practice of international and regional human rights mechanisms. However, the decisions of adjudicative fora such as the regional human rights courts and the UN treaty bodies – which are increasingly called upon to apply the law to concrete cases in armed conflicts, and are able to take IHL into account to varying extents - could give valuable indications of potential normative developments affecting IHL.¹⁰

This paper therefore aims to analyze the case law of international and regional human rights adjudication fora to determine whether it supports claims that the limited IHL prohibitions on displacement are in the process of developing towards a more comprehensive notion of protection and reparation, in line

³D.J. Cantor, 'Does IHL Prohibit the Forced Displacement of Civilians During War?' [2012] *International Journal of Refugee Law* 4, 841 – 842.

⁴ See Geneva Convention relative to the Protection of Civilian Persons in Time of War [1949] 75 UNTS 287 (GC IV), Article 49. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts [1977] 1125 UNTS 609 (AP II), Article 17. J.-M. Henckaerts & L. Doswald-Beck, 'Customary International Humanitarian Law: Volume I – Rules' (Geneva: ICRC/Cambridge University Press 2005), Rule 129, available at <https://www.icrc.org/customary-ihl/eng/docs/v1>.

⁵M. Jacques, 'Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law' (Cambridge: Cambridge University Press 2012) 26.

⁶J. Willms, 'Without Order, Anything Goes? The Prohibition on Forced Displacement in Non-International Armed Conflict' [2009] *International Review of the Red Cross* 875, 548.

⁷Henckaerts & Doswald-Beck (n4) Rule 129 (Commentary: 'Prevention of Displacement').

⁸Willms (n6) 554 – 564. V. Bílková, 'Towards a General Right to Reparation for Internally Displaced Persons?' *Czech Yearbook of Public & Private International Law* [2011] 105 - 109.

⁹See e.g. M. Stavropoulou, 'The Right Not to Be Displaced' [1994] *American University International Law Review* 3, 689 - 749. M. Morel, 'The Right not to be Displaced in International Law' (Cambridge: Intersentia 2014). Guiding Principles on Internal Displacement (GPID), UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, Addendum, Principle 6.1.

¹⁰J.-M. Henckaerts, 'Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum' [2007] *Human Rights and International Legal Discourse* 1, 104 - 106. T. Pfanner, 'Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims' [2009] *International Review of the Red Cross* 874, 309 – 313.

with the 'right not to be displaced' doctrine. The case law investigation will be preceded by an initial background analysis of the current state of IHL prohibitions on displacement, claims regarding their ongoing development, and the potential theoretical interplay of these IHL rules with IHRL (with particular focus on the emerging 'right not to be displaced' doctrine).

Overall, this paper aims to shed light on whether and how the complementary field of human rights may be supplementing or clarifying IHRL with regard to gaps in protection from displacement. Given that protracted displacement has been recognized as the new norm,¹¹ this analysis will also serve to better understand the approaches of international mechanisms on this issue, as they may have an important role to play in further developing standards of responsibility and reparation in situations where domestic remedies currently appear elusive.

1. Protection from displacement in international humanitarian law

Under IHL, displacement related to armed conflict is only explicitly prohibited in three cases:¹²

- 1) Deportation or forcible transfer of protected persons within or from an occupied territory.¹³
- 2) Ordering displacement in non-international armed conflict.¹⁴
- 3) Causing external displacement in non-international armed conflict for reasons related to the conflict.¹⁵

Under international criminal law, deportation and forcible transfer are further prohibited when committed in the context of a crime against humanity, i.e. a widespread and systematic attack on a civilian population, with knowledge of the attack.¹⁶

As can be seen, there is no express prohibition or restriction on displacement resulting from international armed conflict outside the context of occupation. This appears to be borne out by the International Court of Justice's approach in the *Armed Activities* case, where mass displacement caused by hostilities was not considered as a violation of international law in itself, over and above the underlying violations which caused the displacement.¹⁷ This state of affairs has been referred to as a "legal gap in the existing protection regime".¹⁸ Furthermore, internal displacement in non-international armed conflicts is also only dealt with rather narrowly in IHL, as treaty and customary rules only address such displacement where it is 'ordered'.¹⁹

Given the traditional view of displacement as an inevitable side-effect of armed conflict, these omissions in the primary protective rules are certainly not unintentional. In this sense, it must be acknowledged that there are important arguments as to why an overly broad prohibition on conflict-related displacement could upset IHL's balance between military necessity and civilian protection, ultimately to the detriment of civilians. Indeed, although displacement related to hostilities is not viewed as an independent

¹¹ N. Crawford, J. Cosgrave, S. Haysom & N. Walicki, 'Protracted displacement: uncertain paths to self-reliance in exile' (London: Overseas Development Institute 2015) 5.

¹² The removal of non-nationals from the own territory of a party to the conflict and the transfer of detained or interned persons will not be addressed in the current scope, as they are considered to be legally and factually distinct from mass displacement linked to hostilities, which is the focus of this paper.

¹³ GC IV, Article 49. Henckaerts & Doswald-Beck (n4) Rule 129A.

¹⁴ AP II, Article 17(1). Henckaerts & Doswald-Beck (n4) Rule 129B.

¹⁵ AP II, Article 17(2).

¹⁶ Rome Statute of the International Criminal Court [1998] 2187 UNTS 90, Article 7(1)(d)

¹⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 ICJ Reports 168, para. 208 – 209. 211. 219.

¹⁸ Jacques (n5) 26.

¹⁹ AP II, Article 17(1). Henckaerts & Doswald-Beck (n4) Rule 129B. cf. AP II, Article 17(2), which prohibits external displacement more broadly.

violation of IHL, protection is presumed to flow from the general principle of distinction and prohibitions on certain methods of warfare.²⁰ However, as current high levels of displacement most likely indicate a broader disregard for these basic principles of IHL,²¹ it may be argued that the current legal situation does not adequately recognize the gravity and prevalence of conflict-driven displacement, resulting in insufficient legal protection and obstacles to reparation for large numbers of people displaced by conflict.²² Thus, the question can certainly be raised as to whether the law is developing – or should develop – to address the causation of displacement through hostilities in a more direct way, albeit in a more nuanced manner than through a blanket ban.²³

2. Potential developments

There are already some indications of potential directions for evolution in the direction of addressing displacement caused by hostilities more directly. The commentary to the ICRC Customary IHL Study indicates that there is growing support in state practice for ‘the duty of parties to a conflict to prevent displacement caused by their own acts, at least those acts which are prohibited in and of themselves’.²⁴ In support, the commentary refers to the Guiding Principles on Internal Displacement, the most widely endorsed articulation of a ‘right not to be displaced’.²⁵ In addition, regarding the specific situation of internal displacement in non-international armed conflicts, Willms argues – based on the practice of States and the International Criminal Tribunal for the former Yugoslavia – that the prohibition on ‘ordering’ such displacement has indeed already taken on a broader interpretation which encompasses the causation of internal displacement through coercion.²⁶ Going even further – based on soft law instruments, regional treaties and national legislation – Bílková suggests that there is an emerging general right to reparation for internally displaced persons.²⁷

The above claims – explicitly or implicitly – seem to indicate developments in the direction of a more comprehensive notion of protection from (and reparation for) conflict-related displacement, in line with the emerging IHRL notion of a ‘right not to be displaced’. The following section will further examine the potential interaction between IHL and IHRL on this subject matter, with particular reference to the emerging ‘right not to be displaced’.

3. The potential interplay between IHL and IHRL in light of the emerging ‘right not to be displaced’

Potential influence of the emerging ‘right not to be displaced’

The relationship between IHL and IHRL is generally recognized as one of concurrent application, complementarity and mutual reinforcement, with the *lex specialis* principle applying as a means of resolving

²⁰ Cantor (n3) 841 - 842.

²¹ J. Kellenberger, ‘The ICRC’s response to internal displacement: strengths, challenges and constraints’ [2009] International Review of the Red Cross 875, 478.

²² It is generally accepted that reparation presupposes the breach of a primary rule of international law – see e.g. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147 of 16 December 2005 (Annex), Articles 2(b) and 31.

²³ See e.g. Cantor (n3) 846.

²⁴ Henckaerts & Doswald-Beck (n4) Rule 129 (Commentary: ‘Prevention of Displacement’).

²⁵ GPIID (n9) Principle 6.1.

²⁶ Willms (n6) 554 – 564.

²⁷ Bílková (n8) 105 – 109.

contradictions.²⁸ This relationship is not determined at the level of the overall body of law to be applied, but rather in a more nuanced manner according to the subject matter at hand.²⁹ This can be observed in the ICJ's distinction between matters which may exclusively concern IHL or IHRL respectively, and matters which may concern both bodies of law and require both to be taken into account, subject to *lex specialis*.³⁰ Sassòli further refines this categorization of interactions, adding that IHRL may also update, clarify or prevail over IHL in cases where its rules are more detailed, specific or current.³¹ Other writers propound a cumulative approach, by which a new rule is synthesized from the IHL and IHRL rules' common denominator.³²

On the subject matter of protection from displacement, the emerging doctrine on the 'right not to be arbitrarily displaced', which is rooted in diverse provisions of human rights treaties and explicitly expressed in soft law,³³ posits that all people have the right not to be arbitrarily displaced from their homes or places of habitual residence.³⁴ In contrast to the current body of IHL outlined in the previous section, the point of departure of this doctrine is one of general, comprehensive protection. The interaction of this perspective with IHL could develop IHL further to address the abovementioned gaps in legal protection system, in recognition of the gravity of being forced to leave one's home, and the existing situation of mass displacement. However, by qualifying the prohibited displacement as 'arbitrary', the doctrine still leaves room for the nuanced, context-specific interpretation required by the specificities of armed conflict, as arbitrariness – i.e. lack of justification in terms of the applicable international law - would still need to be interpreted with reference to IHL. Therefore, displacement which is incidental to lawful actions in hostilities - or necessary to protect civilians – would still be permissible in principle.³⁵

Given the claims regarding potential development of IHL in the direction of a more comprehensive notion of protection from displacement, it would appear to be most likely that the emerging relationship between IHL and IHRL on the subject of displacement caused by hostilities is one where IHRL clarifies or updates earlier or less detailed IHL rules.³⁶ However, while such an interaction of IHL and IHRL on the subject matter of displacement is theoretically possible, it has not yet been specifically tested in light of the case law of international human rights (quasi-)judicial mechanisms.

²⁸ *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Reports 226, par. 25. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (advisory opinion) (*Wall*) [2004] ICJ Reports 136, par. 106. C. Droege, 'Elective Affinities? Human Rights and Humanitarian Law' [2008] *International Review of the Red Cross* 871, 520 – 524.

²⁹ See H. Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' [2007] *Berliner Online-Beiträge zum Völker- und Verfassungsrecht*, 5, available at www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/kriegerh/berliner_online_beitraege/Nr3_Krieger/index.html.

³⁰ *Wall* (n28), par. 106.

³¹ M. Sassòli, 'Le droit international humanitaire, une *lex specialis* par rapport aux droits humains ?' in A. Auer, A. Flückiger & M. Hottelier (eds), *Les droits de l'homme et la constitution, Etudes en l'honneur du Professeur Giorgio Malinverni* (Geneva : Schulthess 2007) 389 - 392.

³² R. Kolb & S. Vité, 'Le droit de l'occupation militaire : perspectives historiques et enjeux juridiques actuels' (Brussels : Bruylant, 2009) 443. H.-J. Heintze, 'On the relationship between human rights law protection and international humanitarian law' [2004] *International Review of the Red Cross* 856, 795.

³³ Morel (n9) 283.

³⁴ Morel (n9) 352. GPID (n9) Principle 6.1.

³⁵ On the permissible exceptions to prohibitions on displacement in IHL and IHRL, as well as their interplay, see D. Casalin 'A Time and a Place for Everything: Interaction between International Humanitarian Law and Human Rights Norms Prohibiting Arbitrary Displacement', in S. Smis, P. De Hert, M. Holvoet (eds) *Convergences and Divergences between International Human Rights Law, International Criminal Law and International Humanitarian Law* (Antwerp: Intersentia, 2017 - forthcoming).

³⁶ See Sassòli (n31) 389 – 392.

Potential influence of international human rights case law

Given the close and substantive connection between IHL and IHRL outlined above, it appears that examining the treatment of armed conflict situations by human rights bodies can provide insight into potential normative developments which may influence the content of IHL itself. Indeed, IHRL mechanisms are increasingly being used as *de facto* surrogate implementation mechanisms for IHL, particularly in the area of individual or collective reparation claims. This can be attributed to the overlap in material scope between the two bodies of law, coupled with the broad availability of individual complaints procedures via IHRL-based mechanisms, and the absence thereof in the realm of international IHL implementation mechanisms.³⁷ In this process, human rights bodies have increasingly been incorporating IHL into their work, or at least recognizing the possibility of doing so.³⁸

Although human rights bodies' navigation of the IHL/IHRL relationship has been subject to criticism, the fact remains that they are currently among the only international fora where individual claims relating to violations of international law in armed conflict can be heard, and where the relevant law can be tested through application to concrete cases. As such, their case law can provide indications of potential normative developments affecting IHL itself. The following section therefore aims to analyze such case law dealing with conflict-related displacement, in order to determine whether the development of IHL under the influence of IHRL – in the direction of a more comprehensive protection from and reparation for conflict-related displacement - is supported by concrete (quasi-)judicial decisions on the subject of displacement caused by hostilities.

4. The approach of international human rights adjudicative mechanisms to reparations for conflict displacement

Aim and approach

The aim of this case law analysis was to determine whether and how IHL rules on the prohibition of conflict-related displacement may be developing in light of complementary IHRL, thus further testing claims outlined earlier in this paper regarding IHL's potential development on this topic. The approach taken towards this objective was to seek out decisions of international and regional human rights adjudicative bodies regarding cases of conflict-induced displacement falling outside of existing IHL prohibitions. Such decisions were then assessed systematically to determine whether they viewed displacement as an independent violation of IHRL (distinct from any underlying unlawful acts), and whether this appeared to have any specific effect on the reparations decision. In light of the recognized relationship between IHRL and IHL, the analysis thus sought to investigate whether case law supports claims that IHL rules on prohibition of displacement are broadening towards a more comprehensive concept of protection and reparation, in line with the emerging IHRL 'right not to be displaced' doctrine.

Selection of mechanisms

In light of the recognized substantive relationship between IHL and IHRL, and in order to ensure broad geographic coverage, the mechanisms considered for selection were those implementing the most widely

³⁷ Henckaerts (n10) 104 – 106.

³⁸ E.g. *Bámaca-Velásquez v. Guatemala*, Inter-American Court of Human Rights (IACtHR), Judgment (Merits), 25 November 2000, 107 – 109. *Hassan v. UK*, ECtHR, App. No. 29750/09, 16 September 2014, par. 102. UNHRC, 'General Comment 29: States of Emergency (article 4)', CCPR/C/21/Rev.1/Add.11 (2001), para. 3, 9, 11 & 16.

ratified international human rights treaties. In order to be able to draw insights on potential normative developments from specific decisions applying the law, this category was further narrowed down to mechanisms capable of interpreting the law and making final recommendations or orders in individual cases, i.e. (quasi-)judicial mechanisms. In order to ensure the relevance of case law, only those mechanisms were considered which implement treaties protecting the main rights that may be violated by an act of displacement, as outlined in legal literature.³⁹ Thus, the mechanisms ultimately considered were: the African Commission on Human and People's Rights (ACommHPR), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the Human Rights Committee (HRC), and the Committee on Economic, Social and Cultural Rights (CESCR).⁴⁰

Selection of cases

Initially, a sample was gathered of all case law from the selected mechanisms which dealt with conflict-induced displacement. This sample was assembled based on keyword and category searches of official and academic databases, as well as references in relevant legal literature on armed conflict, reparations and displacement.⁴¹ The initial criterion for inclusion was that the cases should deal substantively with facts amounting to conflict-related displacement, i.e.:

- the facts of the case should reveal that the applicant left her/his home involuntarily (i.e. the applicant was displaced)
- the displacement should appear to be directly related to a context of armed conflict
- this displacement should form the basis of at least part of the complaint
- the causing of the displacement should have been evaluated on the merits

Regarding the second criterion, i.e. the context of armed conflict, this was determined from the facts of the case, from factors such as: the characterization of the situation as such by the human rights body, one of the parties or observers cited in the case. and/or the presence of armed groups using force against State security forces and/or other groups. and/or reference to IHL by parties or the the human rights body. As the focus of the analysis was on mass displacement, cases were excluded where displacement was due to individualized reasons, e.g. the involvement of a family member in an opposition group.⁴²

Regarding the fourth criterion, this entailed that cases were excluded if they were ruled as inadmissible, e.g. owing to the non-exhaustion of local remedies or lack of temporal jurisdiction,⁴³ or if the component relating to forced displacement could not be examined on the merits for procedural reasons.⁴⁴

In a second phase, the sample of cases was subject to further selection, to ensure that the decisions ultimately assessed would be capable of supplementing existing IHL rules, rather than merely confirming them. Cases were thus excluded where their factual bases appeared to coincide with the existing IHL treaty or customary prohibitions – e.g. deportation or forcible transfer in or from occupied territory,⁴⁵ or ordering internal displacement or causing external displacement in a non-international armed conflict.⁴⁶ Likewise,

³⁹ E.g. Stavropoulou (n9) 735 – 737.

⁴⁰ Ultimately, no CESCR decisions met the criteria to be included in the initial sample.

⁴¹ E.g. Bílková (n8), Morel (n9). Pfanner (n10). D. Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds) *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Antwerp: Intersentia 2005) 191-223.

⁴² E.g. *Chitay Nech et al. vs Guatemala*, IACtHR, Judgment, 25 May 2010.

⁴³ E.g. *İçyer v. Turkey*, ECtHR, App. No. 18888/02, Decision (Admissibility), 12 November 2006. *Ostojic v. Croatia*, ECtHR, App. No. 16837/02, Decision (Admissibility), 6 September 2002.

⁴⁴ E.g. *Pueblo Bello Massacre v. Colombia*, Inter-American Court of Human Rights, Judgment, 31 January 2006.

⁴⁵ E.g. *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, ACommHPR, Comm. No. 227/99, 29 May 2003.

⁴⁶ E.g. *Menteş & others v. Turkey*, ECtHR, App. No. 58/1996/677/867, Judgment, 28 November 1997.

cases were excluded where the court's own considerations strongly indicated that the facts took place in the context of an international crime.⁴⁷ Cases were further eliminated where the findings of responsibility were not based on the act of displacement itself, but on associated factors such as the prevention of return⁴⁸ or the fairness of subsequent compensation proceedings.⁴⁹

Categorization of cases

Finally, following the selection process outlined above, the remaining cases were classified to facilitate analysis of which area IHL they would potentially be capable of interpreting or clarifying. Firstly, remaining cases were classified according to whether they dealt with international or non-international armed conflict contexts. Secondly, they were further matched to the gaps in the law discussed earlier in this paper.

Thus, the first category (Category A) consisted of cases in international armed conflict outside the context of occupation. Only one case – dealing with displacement caused by threats of violence in the context of international armed conflict - matched this description.⁵⁰

The second category (Category B) consisted of cases of internal displacement in non-international armed conflict which were not the result of an order, but of coercive conduct. In practice, these cases entailed displacement because of acts which were directed at civilians (e.g. deliberate property destruction & killing), but where there was no direct order to leave. This category included conflict-related massacre cases adjudicated by the IACtHR in contexts such as Suriname, Colombia and El Salvador.⁵¹ a number of ECtHR cases on south-eastern Turkey where it was found that homes were deliberately burned.⁵² and the ACommHPR's adjudication of mass forced displacement during attacks on civilians in Darfur.⁵³

The third category (Category C) included cases in non-international armed conflicts where people were forced to leave their homes because of hostilities that were not clearly directed at civilians. These included cases of aerial bombings in Colombia⁵⁴ and Chechnya,⁵⁵ as well as cases in south-eastern Turkey where the burning of houses was not conclusively established as deliberate.⁵⁶

⁴⁷ E.g. *Río Negro Massacres v. Guatemala*, IACtHR, Judgment, 4 September 2012, par. 179.

⁴⁸ E.g. *Cyprus v. Turkey*, ECtHR, App. No. 25781/94, Judgment, 10 May 2001. Such situations would in principle be covered by Henckaerts & Doswald-Beck (n4) Rule 131.

⁴⁹ E.g. *Dunayev v. Russia*, ECtHR, App. No. 70142/01, Judgment, 24 May 2007

⁵⁰ *Vojnović v Croatia*, HRC, Communication 1510/2006, 28 April 2009.

⁵¹ *Moiwana Community v. Suriname*, IACtHR, Judgment, 15 June 2005. *Mapiripán Massacre v. Colombia*, IACtHR, Judgment, 15 September 2005. *Ituango Massacres v. Colombia*, IACtHR, Judgment, 1 July 2006. *Massacres of El Mozote and nearby places v. El Salvador*, IACtHR, Judgment, 25 October 2012.

⁵² *Selçuk & Asker v. Turkey*, App. Nos. 23184 - 23185/94, Judgment, 24 April 1998. *Dulaş v. Turkey*, App. No. 25801/94, Judgment, 30 January 2001. *Ayder & others v. Turkey*, App. No. 23656/94, Judgment, 8 January 2004.

⁵³ *Sudan Human Rights Organisation (SHRO) & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, ACommHPR, 279/03-296/05, 27 May 2009.

⁵⁴ *Santo Domingo Massacre v. Colombia*, IACtHR, Judgment, 30 November 2012.

⁵⁵ *Esmukhambetov & others v. Russia*, App. No. 23445/03, Judgment, 29 March 2011. *Kerimova & others v. Russia*, App. Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 & 5684/05, Judgment, 3 May 2011. *Khamzayev & others v. Russia*, ECtHR, App. No. 1503/02, Judgment, 3 May 2011.

⁵⁶ *Akdivar & others v. Turkey*, ECtHR, App. No. 21893/93, Judgment, 16 September 1996. *Özkan & others v. Turkey*, ECtHR, App. No. 21689/93, Judgment, 6 April 2004.

Analysis of cases

The selected cases were systematically analyzed in light of the following questions, which aimed to shed light on the potential contribution of the cases to interpreting or developing IHL on the issues of prohibition of and reparation for displacement:

1. Does the court's analysis of the facts single out the causing of displacement as an independent (potential) violation of IHRL?
2. Can the court's allocation of responsibility for the displacement be distinguished from responsibility for underlying facts which in themselves would constitute IHL violations? (e.g. property destruction, denial of return)
3. Is displacement specifically considered in the awarding of reparations?

Findings

In analyzing the Category A case in light of the questions, it was found that the departure of the applicant from his home was indeed viewed as an independent violation of IHRL.⁵⁷ It was deemed to be arbitrary because it was caused by duress and discrimination linked to the conflict. However, the unlawfulness of the eviction itself was clearly distinct from that of the underlying discrimination.⁵⁸ It was also distinct from any potential violation of IHL, since the IHL of international armed conflict does not contain any specific prohibition on displacement outside of the context of occupied territory. No impact was perceived on the reparations recommendations, which remained very general.⁵⁹

In examining the Category B cases – i.e. cases of coerced internal displacement during hostilities in non-international armed conflict – it was found that the fact of being forced to leave one's home was generally represented as a violation independent from underlying potential IHL violations such as property destruction and/or attacks on civilians. This could particularly be observed in the IACtHR's specific consideration of displacement as a violation of freedom of movement.⁶⁰ In ECtHR cases, this was not as pronounced, but forced departure was generally differentiated from the physical destruction of houses.⁶¹ The ACommHPR also distinguished forced displacement (and responsibility for this) from associated violations.⁶²

With regard to responsibility for displacement, this was clearly distinguished from responsibility for underlying violations by the Inter-American Court, again mainly through consideration of the right to freedom of movement. However, the Court repeatedly specified that displacement could not be considered separately from the context of the underlying violations.⁶³ This would appear to support the ICRC Customary Study's suggestion that any developing rule prohibiting displacement in hostilities could most likely not extend further than displacement caused by acts which are anyway prohibited by IHL. At the same time, this also addresses concerns regarding the potential for such a rule to create an excessive imposition on military necessity, since the underlying causes of displacement in these cases generally appeared to entail violations that could anyway not be justified in terms of military necessity (e.g. attacks directed at civilians). In the case law of the ECtHR, the differentiation between responsibility for displacement and its underlying causes was again not as clear, as forced departure was generally combined with other underlying facts to find a violation.⁶⁴ In terms

⁵⁷ *Vojnović* (n50) par. 8.6.

⁵⁸ *Vojnović* (n50) par. 8.7.

⁵⁹ *Vojnović* (n50) par. 10.

⁶⁰ *Moiwana* (n51) par. 108 - 111. *Mapiripán* (n51) par. 186. *Ituango* (n51) par. 204. *El Mozote* (n51) par. 186 - 187, 403(5).

⁶¹ *Selçuk & Asker* (n52) par. 77 - 79, 86 - 87. *Dulaş* (n52) par. 60. *Ayder* (n52) par. 109 - 111, 119.

⁶² *SHRO/COHRE* (n53) para. 177, 190, 205, 216, 224.

⁶³ *Mapiripán* (n51) par. 186. *Ituango* (n51) par. 234 - 235. *El Mozote* (n51) par. 195.

⁶⁴ *Selçuk & Asker* (n52) par. 77 - 79. *Ayder* (n52) par. 109 - 111, 119. *Dulaş* (n52) par. 60.

of reparations, the African and Inter-American case law again appears to take a different approach from the European case law. In the former body of case law, displacement appears to have been a specific consideration in the reparations decisions, leading to orders directly addressing the situation of displaced persons (e.g. ordering the states concerned to create conditions for safe return, and to pay compensation for the suffering caused by displacement).⁶⁵ This approach was not consistently applied in the European case law.⁶⁶ In particular, the ECtHR has been reluctant to order restitution in the form of return, rather preferring to leave the responsible state free to determine its manner of compliance.⁶⁷

The Category C cases dealt with situations that fall into the largest IHL gap discussed in this paper – i.e. displacement caused by hostilities not clearly directed at civilians. Again, the European and Inter-American approaches differed. The IACtHR, albeit in its only case in this category, again viewed displacement as an independent violation of the right to freedom of movement, as well as considering reparations specific to the situation of displaced persons.⁶⁸

The remainder of cases in this category were from the ECtHR. In contrast to the approach taken in Category B cases, where the actions causing displacement were clearly aimed at civilians, the act of displacement did not emerge clearly in these cases as a violation distinct from the underlying destruction of property.⁶⁹ This lack of clear differentiation between displacement and property destruction was carried over into the reparations decisions, which barely refer to any form of reparation directly addressing the situation of displacement - with the exception of one case, where restitution was refused.⁷⁰

Conclusions

Already from the selection of cases for Category A, it became clear that there has been too little international human rights case law relating to international armed conflicts (other than in potential situations of occupation) to allow conclusions to be drawn from this source regarding the development of state responsibility for displacement caused by unlawful acts in hostilities. This does not mean that such a development cannot be deduced from other sources⁷¹ - only that it has not yet been tested by international human rights mechanisms. Interestingly, the case in this category did provide indications that IHRL may be capable of going further than current IHL regarding displacement in international armed conflict, as it held a state party to an international armed conflict responsible for failing to protect a resident on its territory from conflict-related displacement caused by private actors. This appears to be a possibility for filling a legal gap regarding the protection of a state's own nationals in an inter-ethnic conflict.⁷² However, as this category consisted of only one case – decided by the Human Rights Committee, which is noted for its reticence to refer to IHL⁷³ – it is difficult to draw conclusions about potential general implications for IHL.

What emerges most clearly from the analysis of the Category B cases was that the responsibility of States for internal displacement in non-international armed conflict goes beyond the ordering of displacement to encompass coercion through unlawful acts as well. Thus, the case law of international (quasi-)judicial

⁶⁵ *Moiwana* (n51) par. 186 – 187, 195(c) – 196, 197(b). *Mapiripán* (n51) par. 313. *Ituango* (n51) par. 404. *El Mozote* (n51) par. 345 – 346, 384. *SHRO/COHRE* (n53) par. 229(5).

⁶⁶ *Dulas* (n52) par. 97, 100, 103. c.f. *Ayder* (n52) par. 159.

⁶⁷ *Selçuk & Asker* (n52) par. 125.

⁶⁸ *Santo Domingo* (n54) par. 255 – 268, 301, 323.

⁶⁹ *Esmukhambetov* (n55) par. 174. *Kerimova* (n55) par. 304 - 305. *Khamzayev* (n55) par. 216 - 220. *Akdivar* (n56) par. 88. *Özkan* (n56) par. 406.

⁷⁰ *Esmukhambetov* (n55) par. 219.

⁷¹ For an overview of potential support in doctrine, see *Casalin* (n35).

⁷² *Jacques* (n6) 254.

⁷³ D. Weissbrodt, 'The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law' [2010] *University of Pennsylvania Journal of International Law* 4, 1232 – 1244.

mechanisms appears to support earlier findings in this regard,⁷⁴ although it does not appear to go as far as a general right to reparation,⁷⁵ as that human rights mechanisms work on the basis that reparation presupposes a violation of international law.⁷⁶ This does in fact appear to reveal a development of the law further in the direction of the more comprehensive concept of the 'right not to be displaced', and relevant decisions of the IACtHR indeed referred explicitly to this concept.⁷⁷

As for Category C – mainly ECtHR cases stemming from displacement which may have been incidental to hostilities – no clear conclusions can be drawn regarding the view that displacement caused by unlawful acts is emerging as an independent IHL violation. This is mainly due to the limited number of cases in this category and their lack of distinction between the facts of displacement and property destruction. The exception in this category – i.e. an IACtHR decision influenced by the 'right not to be displaced'⁷⁸ – is not sufficient to support the emergence of any general rule. However, this does not mean that support cannot be found in other sources for a broader view of protection from and reparation for displacement in hostilities, nor that such a case cannot serve as inspiration for future developments.

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⁷⁴ See Willms (n6) 554 – 564.

⁷⁵ Cf. Bílková (n8) 105 – 109.

⁷⁶ See Bílková (n8) 102.

⁷⁷ E.g. *Mapiripán* (n51) par. 187.

⁷⁸ *Santo Domingo* (n54) par. 255.

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COMMUNICATION STRATEGIES FOR SUPREME COURTS IN TODAY'S DIGITAL WORLD

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Abstract

Communication by the judiciary is important, as providing general information about the justice system contributes to the accessibility of justice. Communication influences society's trust in the judiciary. Not only because interaction with the public helps people to understand and accept the decisions rendered by the judiciary, but also because communication is also an image-making tool. The public's perception of the judiciary is based on the information it receives.

The judiciary is, however, not the most influential judicial image-maker, as the media play an important image-making role. Sometimes the media however misinform society. Therefore today it is believed that the judiciary itself should actively inform the public. In this paper we will specifically focus on communication by Supreme Courts.

New technologies and social media offer Supreme Courts new possibilities to communicate with society. The question rises if these modern communication methods are suitable for communication by the judiciary. Based on existing research and a survey sent out to all Supreme Courts of the EU, best practices regarding the use of social media and websites by the Supreme Courts are identified.

Keywords: Court management, communication, social media, access to justice, transparency

Introduction

Effective justice systems play a crucial role for upholding the rule of law and the European Union's fundamental values. Quality, independence and efficiency are some of the essential parameters of an 'effective justice system' and are used in the EU Justice Scoreboard to analyse the functioning of all EU Member States' judicial systems.

Together with the Supreme Courts of Latvia, Hungary, Lithuania and Spain, as well as with the University of Ljubljana, the University of Antwerp analysed the performance of the Supreme Courts in the European Union inventorying the best practices for managing Supreme Courts. By drafting a best practice guide for managing Supreme Courts this research project aims to increase the administrative and judicial capacity of the Supreme Courts and thus increasing the effectiveness of judicial systems.

In order to gather these best practices, the state of the art of the existing research has been established and a survey has been sent to 39 Supreme Courts of the EU, of which the following 26 responded: the Supreme Court of Austria (AT), the Supreme Administrative Court of Austria (AT(A)), the Supreme Court of Belgium (BE), the Supreme Court of Cyprus (CY), the Supreme Court of the Czech Republic (CZ), the Supreme Court of Estonia (EE), the Supreme Administrative Court of Finland (FI), the Federal Administrative Court of Germany (DE), the Curia of Hungary (HU), the Supreme Court of Ireland (IE), the Supreme Court of Italy (IT), the Supreme Court of Latvia (LV), the Supreme Court of Lithuania (LT), the Supreme Administrative Court of Lithuania (LT(A)), the Supreme Court of Luxembourg (LU), the Supreme Court of the Netherlands (NL), the Supreme Court of Poland (PL), the Supreme Administrative Court of Poland (PL(A)), the Supreme Court of Portugal (PT), the Supreme Administrative Court of Portugal (PT(A)), the Supreme Court of Romania

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(RO), the Supreme Court of Slovakia (SK), the Supreme Court of Slovenia (SL), the Supreme Court of Spain (ES), the Supreme Court of Sweden (SE) and the Supreme Administrative Court of Sweden (SE(A)). All this information was analysed and used to prepare the best practice guide and this research paper.

New technologies and social media offer Supreme Courts new possibilities to communicate with society. The rise of such modern communication methods does not necessarily imply that they are suitable for communication by the judiciary. In this paper we will focus on two aspects of the best practice guide, namely on best practices regarding the use of social media and on best practices regarding the Supreme Courts' websites.

After we have made some general remarks about the existing research on this topic and the survey results, we formulate some recommendations, which are illustrated with best practices found at the Supreme Courts that participated in the survey.

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1. What is communication?

The *Oxford English Dictionary* defines communication as '*the imparting or exchanging of information by speaking, writing, or using some other medium*'. It is derived from the Latin word *communicare*, which means 'to share' or 'to make common'. By communicating, people want to make certain information common. to share their knowledge. The same applies to communication by the judiciary.

It is important to decide on what to communicate about and to whom. As Merethe Eckhardt, Director of Development at the Danish Court of Administration, emphasised, judgments are the courts' core business, it is their 'claim to fame', so this is primarily what the courts should inform society about.³ The judiciary might want to communicate to the media and the public about cases that raise the public's interest to ensure that the public is informed correctly. In the context of providing summaries of decisions, Merethe Eckhardt emphasised that they are provided in cases that might not be the most important from the legal point of view, but that are significant for society. In other words, courts should keep the expectations of their target audience in mind when drafting a communication policy and deciding on what to communicate about, while also striking a balance between the audience's expectations and communicating the message accurately.⁴

In addition to information on judgments, courts should also communicate about activities they organise and about general information regarding the justice system (e.g. information on the length of proceedings, and explaining general principles of the justice system, such as the presumption of innocence).

Before communicating, every court should develop a vision on communication to ensure they are clear about what they want to communicate, to whom (keeping in mind your audience's expectations), and how to do this so that your message will reach the desired audience to the best extent possible (e.g. via a short Facebook post or through a press release on the court's website). We refer again to the basic principles of court management discussed in the introduction to this report, where we underlined that the expectations of the court users and other stakeholders are becoming increasingly important in court management. To understand people's expectations, courts should receive feedback (e.g. through surveys or meetings) and cooperate. This also applies when developing a communication policy.

² DG Justice-project: "*Supreme Courts as guarantee for effectiveness of judicial systems in the European Union*"

³ M. Eckhardt, 'Strengthening public relations at courts: new communication tools and trends' (13 October 2016, Fourth Annual International Conference on Courts and Communication) <www.youtube.com/watch?v=OG9xptD5RLM&feature=youtu.be> accessed 1 February 2017.

⁴ M. Eckhardt, 'Strengthening public relations at courts: new communication tools and trends' (13 October 2016, Fourth Annual International Conference on Courts and Communication) <www.youtube.com/watch?v=OG9xptD5RLM&feature=youtu.be> accessed 1 February 2017.

2. Why should Supreme Courts communicate?

Communication by the judiciary is important, as it contributes to the accessibility of justice. Indeed, the foundation for access to justice is the information provided to citizens and businesses about general aspects of the justice system. Accessibility of justice is a worthy goal and not least because it improves the quality of the justice system.⁵ Full, accurate and up-to-date information about proceedings is also fundamental to guaranteeing access to justice as stipulated in Article 6 ECHR.⁶ Furthermore, interaction with the public also helps people to understand and accept the decisions rendered by the judiciary.⁷ Communicating with the public and the media to inform society is therefore, without doubt, a worthy goal.

In addition to communication being designed to inform the public, communication is also an image-making tool. The public bases its perception of the judiciary on the information it receives. How the judiciary is perceived by the public is crucial to any democratic State, bound by the rule of law. Justice must not only be done, but must also be seen to be done. The public perception of the judiciary is thus very important, especially since public perceptions also influence the public's trust in the judiciary.⁸

The judiciary is, however, not the most influential judicial image-maker, as the media play an important image-making role.⁹ The freedom of expression, a cornerstone of democratic societies, requires the judiciary 'to create the conditions necessary to enable the media to fulfil the crucial roles they play in keeping the public informed'.¹⁰

Trust in the judiciary is strongly based on how proceedings are reported in the media. For a long time, it was strongly believed that it was not only unnecessary but also inappropriate for the judiciary to engage in the public debate, as it was considered that any comment risked undermining judicial independence and authority. It was thought that the judiciary should only communicate through its decisions,¹¹ and explaining these decisions to the media was not deemed necessary.

⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - The 2016 EU Justice Scoreboard* (Publications Office of the European Union 2016) 17 <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf> accessed 17 November 2016.

⁶ Consultative Council of European Judges (CCJE), Opinion no 14 (2011) to the attention of the Committee of Ministers of the Council of Europe on justice and information technologies (IT) <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2011\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2011)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)> accessed 2 January 2017.

⁷ L. Chrétien, A. de Peretti-Schlomoff and Y. Viguier, 'Judicial Communication and Professional Ethics. Renewing the Relationship between the Judiciary and the Public' (Themis Competition 2015 – Semi-Final D – Team France 4, European Judicial Training Network (EJTN) 2015) 5 <www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_France4.pdf> accessed 12 October 2016.

⁸ L. J. Moran 'Managing the News Image of the Judiciary: The Role of Judicial Press Officers' [2014] *Oñati Socio-Legal Series*, 799, 804 <<http://opo.iisj.net/index.php/ols/article/view/320/473>> accessed 17 November 2016.

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⁹ L. J. Moran 'Managing the News Image of the Judiciary: The Role of Judicial Press Officers' [2014] *Oñati Socio-Legal Series*, 799, 799 <<http://opo.iisj.net/index.php/ols/article/view/320/473>> accessed 17 November 2016.

European Network of Councils for the Judiciary (ENCJ), 'Justice, Society and the Media. Report 2011-2012' (ENCJ, 2012) 2 <www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf> accessed 12 October 2016.

¹⁰ 'The Judiciary and the Media in the Netherlands', 2 <www.rechtspraak.nl/SiteCollectionDocuments/The-Judiciary-and-the-Media-in-the-Netherlands.pdf> accessed 17 November 2016.

¹¹ L. Chrétien, A. de Peretti-Schlomoff and Y. Viguier, 'Judicial Communication and Professional Ethics. Renewing the Relationship between the Judiciary and the Public' (Themis Competition 2015 – Semi-Final D – Team France 4, European Judicial Training Network (EJTN) 2015) 1 <www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_France4.pdf> accessed 12 October 2016.

Research has already been undertaken regarding factors that impact the capacity of journalists to report on court and judicial activity. This research shows that there has been a decline in the number of journalists with specialist knowledge of the law in general and of the courts in particular. As L. MORAN pointed out, *'the shrinking labour force and loss of expertise raise questions about the capacity of journalists that remain to fully understand court and judicial activity, identify key issues and concepts and produce news reports that are sufficiently accurate'*.¹² Moreover, strong competition has led to a loss of interest in the subtle nuances of facts and legal principles and to more sensational reports. The Supreme Court of Latvia explicitly indicated that insufficient legal knowledge of journalists and a high percentage of personnel turnover in the media indeed form a barrier to communication.

Today, it is no longer considered inappropriate and unnecessary for judges to participate in the public discussion. On the contrary, it is believed that the judiciary should actively inform the public in order to guarantee access to justice and make judicial decisions understandable and acceptable. Moreover, the media sometimes misinforms the public, while at the same time society also has a right to be correctly informed about the functioning of the judiciary and the justice system.¹³

When communicating with the public, the judiciary must ensure full and correct public disclosure through the objective and impartial representation of the relevant facts.¹⁴ Special attention should also be paid to the respect of certain fundamental rights (such as the presumption of innocence), the impartiality of judges and the dignity and authority of the judiciary. Communication by the judiciary should thus obey certain rules to avoid harm to the above-mentioned principles.¹⁵

3. How can Supreme Courts communicate?

There are several ways for the judiciary to communicate with society given modern technologies. Courts may use the more traditional ways of communicating by issuing press releases or by disseminating information via a (judge-) spokesperson.¹⁶ In this paper we will focus on communication by Supreme Courts via modern technologies, so through the use of websites and social media. The *Supreme Administrative Court of Lithuania* and the *Curia of Hungary* expressly indicated that they consider their up-to-date websites as an important strength in their communication strategy.

An even more modern way to communicate is the use of social media. The use of social media by the judiciary is still a relatively new phenomenon. We will therefore go into a little more detail regarding this subject.

We have examined these different approaches and established best practices, keeping these goals and principles in mind: informing the public correctly to ensure access to justice and an understanding and

¹² L. J. Moran 'Managing the News Image of the Judiciary: The Role of Judicial Press Officers' [2014] *Oñati Socio-Legal Series*, 799, 803 <<http://opo.iisj.net/index.php/osls/article/view/320/473>> accessed 17 November 2016.

¹³ European Network of Councils for the Judiciary (ENCJ), 'Justice, Society and the Media. Report 2011-2012' (ENCJ, 2012) 2 <www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf> accessed 12 October 2016.

¹⁴ European Network of Councils for the Judiciary (ENCJ), 'Justice, Society and the Media. Report 2011-2012' (ENCJ, 2012) 15 <www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf> accessed 12 October 2016

¹⁵ L. Chrétien, A. de Peretti-Schlomoff and Y. Viguier, 'Judicial Communication and Professional Ethics. Renewing the Relationship between the Judiciary and the Public' (Themis Competition 2015 – Semi-Final D – Team France 4, European Judicial Training Network (EJTN) 2015) 5-6 <www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_France4.pdf> accessed 12 October 2016.

¹⁶ Consultative Council of European Judges (CCJE), Opinion no 7 (2005) to the attention of the Committee of Ministers of the Council of Europe on justice and society <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2005\)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2005)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)> accessed 2 January 2017.

acceptance of judicial decisions, while maintaining respect for the fundamental rights of the parties involved, the impartiality of judges and the dignity and authority of the judges.

4. Social media and the judiciary

4.1 Social media use by the judiciary

According to the European Network of Councils for the Judiciary, social media offers the judiciary an opportunity to interact with the public in new ways, which promotes transparency, interactivity and collaboration. Complex and difficult legal arguments and decisions cannot be captured in a tweet or Facebook post, which are usually quite short.¹⁷ As mentioned in the introduction, the court therefore has to find a balance between communicating their message accurately and communicating in a way that their message will actually reach the target audience. Through a link in these social media posts, for example, people can be directed to the website of the court where the issues are discussed more extensively.

After long discussions about social media presence, the Court of Justice of the European Union started to use Twitter to reinforce its external communication policy. They not only tweet about judgments, but also about the progress of a case (e.g. when an important case is brought before the Court).¹⁸

4.2 Social media use in courtrooms

The growth of social media also raises questions about the use of it by visitors (such as the press) to the courtroom. Indeed, social media is not only a new means to publish judgments and information, it also enables journalists and citizens to tweet or post directly from the court. Social media thus impacts on the activities of judges and courts in an electronically connected community, where the user of the system can, and will, respond directly to how justice is being administered.¹⁹ By doing so, they could disrupt proceedings. Although this is an interesting topic, it falls outside the scope of this research project. The survey did not ask about the use of social media during hearings of the Supreme Court, since it focused on communication by the judiciary rather than its response to certain types of communication by the public.

4.3 Social media use by judges

Use of social media by individual judges and other court staff in their private lives concerning private matters cannot be forbidden, given the freedom of speech.²⁰ Judges should, however, take the importance of their role into account and respect the general ethical rules imposed on their office by the legislator and the disciplinary authorities.

5. Survey results

¹⁷ P. D. Schulz and A. J. Cannon, 'Trial by Tweet? Findings on Facebook? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts' [2013] *International Journal for Court Administration*, 1, 4 <<http://doi.org/10.18352/ijca.5>> accessed 12 October 2016.

¹⁸ W. Valasidis, 'Strengthening public relations at courts: new communication tools and trends' (13 October 2016, Fourth Annual International Conference on Courts and Communication) <www.youtube.com/watch?v=YHBRT73qQu4&feature=youtu.be> accessed 1 February 2017.

¹⁹ J. Gibson, 'Social Media and the Electronic 'New World' of Judges' [2016] *International Journal for Court Administration*, 1, 2 <<http://doi.org/10.18352/ijca.199>> accessed 12 October 2016.

²⁰ European Network of Councils for the Judiciary (ENCJ), 'Justice, Society and the Media. Report 2011-2012' (ENCJ, 2012) 9 <www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf> accessed 12 October 2016.

5.1 Website

The survey results show that Supreme Courts often use their websites to disseminate information. All Supreme Courts that participated in the survey have a website. The information provided through the websites varies. It may concern general information about the Court, information about events that the Court organises, judgments issued by the Court, among other kinds of information.

In Slovenia, the public can post questions on the Supreme Court's website. On the website of the *Supreme Court of Lithuania*, people can comment on the press releases.

The *Supreme Court of Spain* has a transparency web portal where every citizen may consult several data. These data include the structure of the Supreme Court, the professional profiles of all the judges of the Court and of the consultants of the technical cabinet, economic and financial figures such as the official vehicles at the judges' disposal, the judges' salaries, how to visit the Courts' Hall of Justice, open door activities, the most recent case law of the Court etc.

Some Supreme Courts also publish guidelines on their websites.

The *Supreme Court of the Czech Republic*, for example, publishes practical guides on its website on how to use the case law database, and provides forms that can be used to request information or complain about the length of proceedings or the behaviour of Court personnel. The *Supreme Court of Romania* has a guide for parties in civil and penal matters.

The *Curia of Hungary* has made short, five-minute videos on the handling of case files, personal attendance at court hearings and other topics relevant to parties involved in lawsuits, journalists or anyone interested in the activities of the supreme judicial forum. These videos are available on the Curia's website and contain easy-to-understand information in plain language suitable for laypersons.

The communication advisors and press judges of the *Supreme Court of the Netherlands* have drafted press guidelines, which are available on the website of the Supreme Court and offer practical information on the media and the judiciary.²¹ This information includes the circumstances in which audio and/or visual recording is allowed, which persons may be recorded and whether journalists may send text messages during a hearing. The press guidelines thus clarify what the press should expect of the staff of the courts and regulates a number of practical matters.

5.2 Social media

4.2.1 Social media use by the judiciary

Some Supreme Courts have started to use social media. A minority of Supreme Courts have a Twitter account (CZ, NL, LT(A)), a LinkedIn account (CZ, SK), a YouTube channel (EE) and/or a Facebook account (EE, NL, PL, LT(A)).

In addition, Lithuania has centralised YouTube and Facebook accounts through which all Lithuanian courts can communicate. These accounts are administered by the National Court Administration of Lithuania. The courts submit information to the latter and it then decides what to post. There is ongoing discussion in Lithuania on what is better: a centralised social media presence for all courts or separate accounts for the different courts. Centralised communication (i.e. communication for the court system as a whole) usually leads to one Court or a separate entity being responsible for communication. In this situation, courts usually speak in one voice and style. Decentralisation means that every court communicates on its own. This may lead to different styles, models and methods of communication and even contradictions in the news, values,

²¹ 'Press Guidelines 2013' <www.rechtspraak.nl/SiteCollectionDocuments/Press-Guidelines.pdf> accessed 18 November 2016.

etc. communicated. This could in turn reduce the effectiveness and quality of communication. Nevertheless, an overly centralised system may be unable to grasp the specifics of certain courts. This is why Lithuania has opted for a mixed system. Basically, communication is centralised in the National Court Administration of Lithuania, but the courts undertake some communications themselves, if necessary, with the help or advice of the National Court Administration of Lithuania.

Most Supreme Courts have no social media presence. The *Supreme Court of Ireland* explained that it is not active on social media because the advantages do not outweigh the risks of negative, inaccurate, incomplete or insulting information, disrespect or excessive criticism.

The *Supreme Administrative Court of Poland* noted that it had contemplated using social media, but decided against it, as, in the Court's opinion, while social media is an integral part of everyday life, it should be used wisely, with an adequate role already being fulfilled by the Court's website.

Although the *Supreme Court of Portugal* does not use social media, its press division does monitor the different social media in order to identify opinion trends related to the Court's activity.

One of the key features of social media is interactivity.²² However, the survey results show that although some Supreme Courts use social media, the majority of them do not respond to comments made by other users. One could therefore question the added value of the use of social media. Further research should be done to examine whether or not these social media channels reach beyond the audience of the court's website. Only with this information can a reasoned conclusion with regard to the use of social media by courts be made.

5.2.2 Social media use by judges

As emphasised by the *Supreme Courts of Italy and Poland*, all judges need to take into account the general ethical rules applicable to them when using social media, whether it be for court-related matters or for private matters.

In addition, specific regulations are in force in Estonia, Slovakia, Lithuania and Latvia to regulate the use of social media by individual judges who aim to comment on court-related matters.

The *Supreme Court of Slovakia* has an internal directive on informing the public on judicial decisions, which is applicable when a judge expresses their view on rulings of the Court via a private profile. This directive requires that the judge informs the management of the Court on their intention to make rulings public.

The *Lithuanian* courts have published a handbook, 'Manager of Judicial Communications', which is intended for judges and court employees. This handbook makes recommendations on how judges and other court staff should communicate through private channels.

The *Estonian Judges' Code of Ethics* explicitly regulates this topic. It states that in relations with the public and the press, the judge shall avoid expressing their personal views on cases under scrutiny and shall not expose their family life to the press.

²² P. D. Schulz and A. J. Cannon, 'Trial by Tweet? Findings on Facebook? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts' [2013] *International Journal for Court Administration*, 1, 2 and 4 <<http://doi.org/10.18352/ijca.5>> accessed 12 October 2016.

European Network of Councils for the Judiciary (ENCJ), 'Justice, Society and the Media. Report 2011-2012' (ENCJ, 2012) 9 <www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf> accessed 12 October 2016.

6. Recommendations

As established in this paper, communication by the judiciary is an important element of an effective justice system. The Consultative Council of European Judges states that *'the development of democracy in European states means that the citizens should receive appropriate information on the organization of public authorities (...). Furthermore, it is just as important for citizens to know how judicial institutions function'*.²³ Moreover, the European Commission highlights that the foundation for access to justice is the information provided to citizens and businesses about general aspects of the justice system.²⁴

Based on existing research and the survey results we have formulated some recommendations with regard to websites and the use of social media by Supreme Courts to conclude this paper. These recommendations are illustrated with best practices we have identified in the responses given by the Supreme Courts in the survey.

Host a website which contains general information about the court as well as more practical information and press releases

Every Supreme Court needs a website. This website should also be part of a national portal website that refers interested parties to the separate websites of the individual courts. In this way, every court administers its own website and can decide what to publish and in which form, while interested parties can still find all the information by going to the portal website that then refers them to the website of the court they are looking for.

This website should not only contain general information on the role and tasks of the Supreme Court, but also press releases and practical information about visiting the Court, house rules, upcoming events, and so on. In order to reach even more people through its website, the Supreme Court should make the most essential information (such as the role and tasks of the Supreme Court, the main procedural rules, as well as practical information about visiting the Court) also available in English.

For reasons of transparency, the allocation rules and the agenda of the Supreme Court must be made publicly available on the website of the Court. Also for reasons of transparency and in order to enable people to assess whether they find a procedure before the Supreme Court effective, information regarding the length of the proceedings and information regarding the procedure costs must be available.

To make justice more accessible, the creation of practical guidelines is especially encouraged. Parties are often represented by an attorney in procedures before the Supreme Court. Not only these parties but also others could benefit from these guidelines. They could provide information on how to behave when visiting the Court, on how to access and use the case law database, or on rules relevant to the press, for example.

The *Supreme Court of Slovakia*, for example, indicated that its website could be further improved by providing answers to frequently asked questions, which could be considered as a sort of guideline.

Some Supreme Courts already have very elaborate websites.

²³ Consultative Council of European Judges (CCJE), Opinion no 7 (2005) to the attention of the Committee of Ministers of the Council of Europe on justice and society <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2005\)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2005)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)> accessed 2 January 2017.

²⁴ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - The 2016 EU Justice Scoreboard* (Publications Office of the European Union 2016) 17 <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf> accessed 17 November 2016.

The website of the *Supreme Administrative Court of Poland*, for example, includes the judgments and resolutions of the Supreme Court, preliminary references submitted by Polish administrative courts (linked to preliminary rulings of the Court of Justice of the EU), a schedule of conferences, seminars, meetings and other events in which the president, vice-presidents and judges of the Court participate, Court statistics, the annual report on the activities of administrative courts, information on the costs of court proceedings and interviews given by the judges of the Court.

The *Supreme Court of the Netherlands* also has a very active website, which is a part of the judiciary's general website. The Supreme Court website includes general information about the work of the Court, answers to 'Frequently Asked Questions', and summaries of the most important cases. Moreover, the Supreme Court also provides some practical information for visitors, as well as guidelines for the press. The website even has an English section that describes the role and tasks of the Supreme Court. This section also contains English summaries of important cases adjudicated by the Supreme Court.

The *Curia of Hungary* recently renewed its website, including very elaborate English-language content with up-to-date press releases, summaries of important decisions, reports on the Curia's uniformity activities and information on the leaders, structure and functioning of the Court. Moreover, extracts from the Curia's yearbooks and summaries of articles published in a special online law journal, *Forum Sententiarum Curiae*, have also been made available in English for a broader international audience.

If social media are used, develop a strategy and policy

Further research should be done regarding the potential audience that might be reached through the use of social media by courts, in order to determine whether the use of social media indeed contributes to better communication by the judiciary with society.

Social media may be used by the Supreme Court itself. If the Supreme Court decides to use social media, it is important to develop a strategy and policy, including target groups and goals for the use of each form of social media. This strategy should also clarify who might be responsible for the administration of these social media accounts, if and how the Court will respond to negative comments, whether the Court will respond to questions asked on social media and other potential issues.

The European Network of Councils for the Judiciary has emphasised that all posts must be meaningful and respectful, providing comments that inform, educate and engage citizens. Simply reposting press releases on social media is not recommended.²⁵

Do not use private channels of communication for Court-related activities

Judges or other legal staff should not use private channels of communication (e.g. Facebook or Twitter) on topics related to the Court's activities, to prevent them being perceived as partial. They are, however, allowed to use social media regarding private matters, taking into account the general ethical codes.

²⁵ European Network of Councils for the Judiciary (ENCJ), 'Justice, Society and the Media. Report 2011-2012' (ENCJ, 2012) 11 <www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf> accessed 12 October 2016.

Conclusions

In the Digital Age also Supreme Courts computerize. The survey results show that most Supreme Courts indeed use a website to disseminate information. The use of social media by the judiciary on the other hand is still a quite new and rare phenomenon. Supreme Courts encompass these new forms of technology, but often use them improperly and not to its fullest capacity. For example, if courts make use of social media they do not use the interactivity of these media.

Further research should be done regarding the potential audience that might be reached through the use of social media by courts, in order to determine whether the use of social media indeed contributes to better communication by the judiciary with society. In any case, if Supreme Courts decide to use social media, they should develop a strategy and a policy, including target groups and goals for the use of each form of social media.

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THE IMPACT OF BREXIT ON THE NEW, POST-BREXIT ENGLISH CONTRACT LAW. AN ATTEMPT TO DEFINE ENGLISH CONTRACT LAW *DE LEGE FERENDA*

Adrian Cop¹

Abstract

Brexit came as a shock to all the Member States and EU Institutions. For now, it is difficult to foresee its consequences. When the UK finally makes the decision to exercise the article 50 of the TUE, questions regarding the real effects of UK's exit from European Community will arise. For lawyers, Brexit brings a lot of questions, regarding different areas of law. The one that will be raised in this article is: what will Brexit mean for English contract law?

Now, it is impossible the answer this question with any certainty, since the explicit consequences of Brexit remain unknown. We don't know the scale of the "UE - UK break - up". It is only possible to assume, that one of three following ways will be chosen: either the relation between UK and EU will be set as an "almost a full membership" or as "partial membership" or as a full exclusion. Clearly, this choice will greatly influence upon the status of English contract law and the impact that Brexit would have on English contract law.

The fact is, that despite some attempts to legislate the law of contract or its part, such as the Principles of European Contract Law, the EU did not have the absolute power in relation to unification of contract law and as a result each Member States has its own national contract law that is only partially limited by the EU law in a form of Directives or Regulations.

The aim of this paper is to broadly outline the worst case scenario - the possible impact of a complete exclusion of the United Kingdom from the European Union. In order to asses this impact, a distinction between different possible Brexit effects upon English contract law will be drawn.

The first one is the impact of Brexit upon existing contracts and the possibility of their frustration. This point will especially relate to consumer contracts and employment contracts. At this point it is essential to answer the questions, relating to the status of all existing contracts when they will be frustrated. Will the non - discriminatory rule play a role? What about a "choice of law clause", in the event of the dispute, which nowadays is very popular clause in contracts? The second impact relates upon particular types of contract, their possible new regulations and enforceability after the Brexit. Since the EU has competences to strictly regulate the Member States legislation on certain parts of law of contracts, after Brexit it may no longer be the case

Keywords: Brexit, UK, English contract law, the Great Repeal Bill

Introduction

As the British citizens voted to leave the European Union on 23-th of June 2016, both political and legal worlds were shocked. Lawyers had to adjust to the political reality of the new situation and politicians had to become lawyers really quickly. News all over the world were discussing Brexit, UK and referendum. Each television, radio, newspaper was inflecting the article 50 of the Treaty on European Union (TEU), the

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fundamental provision which governs the process of taking a Member State out of the EU. In case of Brexit, it has been the subject of hours of political and legal debate, discussions and finally a momentous decision of the Supreme Court and the English Parliament.²

The extent of the impact of the Brexit on contract law will depend on the precise way of an exit and, more importantly, on the model of interaction and communication between the UK and the EU. Brexit may vary from full membership, partial membership - probably in a form of European Economic Area (EEA) and European Free Trade Association (EFTA) membership, to a so-called 'hard Brexit' in the form of abiding the rules on international law as well as certain international treaties. As mentioned above, between these the full membership and hard - Brexit sits the more fluid option in the form of bilateral agreements that would cover various areas to a greater or lesser extent.³

On the last days of March, the British Government issued a co-called "Great Repeal Bill" which should serve as a roadmap to the future Brexit. Its main goal is to transform the EU *acquis communautaire* into UK law. The decision what to keep, repeal or amend will belong to the Government or Parliament during the stages of negotiations. In the light of the provisions of the Great Repeal Bill, especially regarding the rule of supremacy of the UK law over EU law provisions, it is possible to assume, that UK, all in all, might decide on the so-called hard Brexit. This view, is however only preparatory, since the consequences of real Brexit will appear during the withdrawal negotiations. Therefore, a question arises, regarding Brexit's impact on existing contracts.

The idea of this paper is to broadly outline the worst case scenario - the possible impact of a complete withdrawal of the United Kingdom from the European Union and its legal consequences. In order to assess this impact, a distinction between different possible effects upon Brexit on English contract law will be shown.

1. Thoughts on Brexit on the basis of article 50 of TEU

In the news, there is a lot of talk about exercising art. 50 of the TEU, however not many really discuss its formal provisions or requirements that must be fulfilled, in order to withdraw from the EU. In my opinion, it is essential to discuss it briefly.

At first, it must be underlined, that any Member State that decides to withdraw from the EU can do it in accordance with its own constitutional requirements, which is particularly important in case of UK, due to the lack of a written constitution. Therefore, UK can withdraw from the EU using a simple law passed by Parliament without any need for changes in the constitutional provisions.

The whole process begins, when a Member State decides to withdraw from the EU, then it shall notify the European Council of this intention. The whole process of withdrawal, especially the negotiations, reaching the conclusion agreement with that State (that should be negotiated in accordance with Article 218(3) of the TFEU), setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union shall be conducted in accordance of the guidelines provided by the European Council.

The withdrawal (conclusion) agreement shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

In relation to the Treaties, they shall cease to apply to the withdrawing State from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification to the European Council about the withdrawal intention, unless the European Council, being in agreement with the withdrawing Member State, unanimously decides to extend this period.⁴

² M.Mankabady, D.R. Brown, *Brexit: Breaking up is hard to do*, Best Review, January, AM Best Company Inc.2017, 1.

³ M.Schillig, *Corporate Law after Brexit*, King's Law Journal, 2016, Vol. 27, No. 3, 431-433.

⁴ Consolidated version of the Treaty on European Union, Official Journal C 326, 26/10/2012 P. 0001 - 0390.

It is safe to assume, that the length of Brexit will depend on the date of the execution of the article 50 of TEU and it will probably take longer than the two years as specified in the article 50. The complexity of negotiations as well as the variety and the amount of issues that will have to be discussed, might delay the start of negotiations and prolong the withdrawal process. In fact, since last year's referendum took place and the withdrawal process has started on the end of March 2017 r., British Government bought themselves almost a year for preparations.⁵

As mentioned above, UK does not have a formal, written constitution. Thus, in order to withdraw from the EU, the Parliament must pass a special law.⁶ However, it must be stressed, that the UK Parliament has no formal role in overseeing the negotiation of treaties (although it can delay or even, in the case of the House of Commons, block ratification).⁷

2. The Great Repeal Bill

The whole idea of the Great Repeal Bill (later called "GRB") is to introduce a roadmap in order to transform the EU *acquis communautaire* into UK law. The decision regarding what laws and regulations will be kept, changed or repealed belongs to the Government or UK Parliament.

In order to assess the importance of the GRB, it is essential to mention the European Communities Act 1972⁸ (later called "ECA"). Under its provisions, UK incorporates EU law into the domestic legislation and provides the supremacy of the EU law rule. ECA also states, that the UK domestic courts will abide the rulings of the Court of Justice of the European Union.

Due to the nature of the EU law, some EU laws (EU regulations) apply directly without the need for domestic implementation legislation, while others need to be implemented in the UK law through domestic laws. Also, domestic legislation other than the ECA, gives effect to some of the UK's obligations under EU law.

The first step, that the British Government will undertake is to repeal the ECA in order to maximise the clarity of the law that is applicable in the UK, and to stress the fact that UK's exit from the EU means that from now on, the UK law, not EU law, is a supreme law.

The act of repealing the ECA would lead to confusion and the appearance of big holes in the UK legal system, due to the nature of some EU laws that were directly applicable into the UK's legal system. If the ECA is repealed, EU law will cease to be legally binding in the UK once it leaves the EU. To avoid this, the GRB is set to convert directly-applicable EU laws into UK law. The same will apply to other, non - directly applicable laws that usually have been implemented into UK legal system, by using provisions of ECA that allows ministers and other administrations with powers to make secondary legislation. In the event of the repealment, all of this legislation made under ECA would become legally void. Thus, the whole idea of the GRB is to preserve the binding laws in order to implement the EU obligations, while UK is still a member of European Union.

The main idea of the GRB is, unless and until domestic law is changed by legislators in the UK, legal rights and obligations should where possible, be the same after Great Britain leaves the EU as they were

⁵ C. Bernard, *Law and Brexit*, *Oxford Review of Economic Policy*, Vol. 33, Number 81, 2017, S4-S6.

⁶ *European Union (Notification of Withdrawal) Act 2017*, dated 16.03.2017.

⁷ J. Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law*, Cambridge University Press, 2013, 168-170.

⁸ *European Communities Act 1972 (previously known as the European Communities Bill) - an Act of the Parliament of the United Kingdom, legislated for the purpose of accession of the United Kingdom to the European Communities. and for the incorporation of European Union law into the domestic law of the United Kingdom. The act has given legal authority for EU law to have effect as national law in the UK. It has been amended several times to give legal effect to the following EU Treaties, such as Single European Act, the Maastricht Treaty and most recently the Treaty of Lisbon.*

before. However, EU regulations will not be directly transferred into UK law regulation by regulation. Instead the Bill will make clear that EU regulations – as they applied in the UK the moment before the withdrawal from EU – will be converted into domestic law and will continue to apply until legislators in the UK decide otherwise.⁹

In relation to the EU treaties, due to the fact, that much of the regulations of the treaties will become irrelevant, since Great Britain leaves the EU, those treaties will have only a supplementary role and should serve as support in interpretation of the EU laws, still preserved and binding in UK.

While discussing Brexit and its terms, there is a question regarding supremacy of the law. Since the genuine idea is that UK law will prevail, the question regarding the applicable laws during the transition period arises. GRB states, that, if a conflict arises between EU derived law and new primary legislation passed by British Parliament, then newer legislation will take precedence over the EU derived law that have been retained. However, in the case, when a conflict arises between two pre-exit laws, one which is an EU derived law and the other, that is not EU law, then the EU derived law will continue to take precedence over the other pre-exit law.¹⁰

3. Brexit's impact upon existing contracts

In light of the provisions of the GRB, especially regarding the rule of supremacy of UK law over EU law provisions, it is possible to assume, that UK, all in all, might decide on the so - called hard Brexit. This view is however only preparatory, since the consequences of real Brexit will appear during the withdrawal negotiations. Therefore, a question arises, regarding Brexit's impact on existing contracts.

The impact upon existing contracts can take a variety of different forms. The nature of EU law draws a distinction between commercial and consumer contracts. To begin with commercial contracts, a question must be stated, whether the withdrawal from the European Union should be seen a "cause" that frustrates existing contracts? Since English courts are not usually keen to acknowledge that a contract is repealed through frustration, especially without a dire cause, withdrawal from the European Union seems as a significant reason to do so. It looks very probable that in UK, many parties to a contract, especially in the case of a long term contracts, entered into them on the basis that the UK would remain within the European Communities and which will grant them unrestricted access to the EU common market might frustrate such contracts. This is extremely vital in the case of supply contracts, goods and services, since they usually cross borders various times before a final product is being produced. Almost none or very few contracts include provisions designed to be exercised in case of Brexit, which on one hand is quite obvious, due to the fact, that a withdrawal of UK could not be foreseen.¹¹

As a result, it is very probable, that one or more parties to a long term contract will not be aroused by the idea of continuing the performance of such a contract. Therefore, its further performance will most likely be discharged by frustration. The fact is, that the test for frustration in English law is difficult to apply in practice and its applicability will vary between different types of contracts.¹²

⁹ *Legislating for the United Kingdom's withdrawal from the European Union, White Paper, Presented to Parliament by the Secretary of State for Exiting the European Union by Command of Her Majesty, March 2017, Cm 9446, 14.*

¹⁰ *Ibidem, 18.*

¹¹ *It is also considered and used in practice, that force majeure clauses often provide against the possibility of insurrection, Brexit presupposes a legal rather than a violent, revolution. Another possible difficulty which is emerging is the very distinct possibility of a precipitous decline in the value of sterling.*

¹² *The doctrine of frustration applies when, after the contract has been made, certain events occur that render its performance impossible, illegal or radically different from the ones agreed upon by the parties. It is a must, that these events are not due to the act, default or omission of either of the contracting parties, nor must they be anticipated by the parties. Obviously, the parties are allowed to protect themselves in a way of providing the possibility (in a form of different clauses) to frustrate the*

At this point, it is essential to mention, after Catharine MacMillan¹³, that the same problem arises in relation to those contracts that have been entered into after the referendum result. This applies to the issue of a foreseeable event, whether can it be seen as a "frustrating event", under the provisions of the English law. As the Coronation cases¹⁴ have shown, in the doctrine of frustration, even if the results of various claims upon different contracts curbs on the same issue, it is not likely to result in the harmonious results. It appears highly likeable, though, that some of these contracts will be repealed by frustration with the result that are stipulated in the Law Reform Act 1943¹⁵.

The second type of contracts - the consumer contracts - are agreements that have been entered into in order to protect the consumers due to various consumer Directives. Whether these protections are repealed or negated by Brexit is still a question regarding the terms of the "UK - EU divorce". However, it might be argued that the protection granted by the certain EU laws, especially Directives on consumer rights¹⁶ or unfair contract terms¹⁷ are the implied terms within the existing contracts. The weakness of this type of interpretation is that such terms and their applicability would solely depend upon the implicit assumptions of the contracting parties.

Most consumer protection Directives act in "invisible" way for a layman consumer, who is unaware of their protection. The position at the time of writing this paper, based on the Great Repeal Bill is, that there will not be an abrupt withdrawal from consumer protection Directives, however it is highly possible, that the British Parliament will address the situation of consumer protection on new UK terms after Brexit is completed. It is important to acknowledge, that before Brexit, the idea of passing a piece of legislation dealing with consumer contracts was unnecessary, since the courts could resolve these contractual issues in a

contract if an unexpected event occur. The most obvious examples are 'force majeure' clause or 'hardship clause' that are concluded in a contract. Since, there are no definitions of those clauses in English contract law, they must be individually defined in each contract. Also, a detailed procedure that will be adopted by the parties if such event occurs will be included in the contract. Another possibility for the parties is to include a so - called 'intervener clause, which gives a third party authority to resolve the dispute between them and by extension – avoid foreseeable judicial proceedings. In the content of this paragraph, parties simply choose to clearly stipulate terms under which certain risks are being borne by them, including responsibility for insuring against occurrence of such events.

As mentioned above, the doctrine of frustration might be exercised, when it is "impossible" for the contract to be performed. Usually, it is due to: destruction of the subject matter of the contract (see. Taylor v Caldwell (1863), death or incapacity in contracts for personal services (see. Condor v Barron Knights (1966)) or unavailability of the subject-matter (see Bank Line Ltd v Arthur Capel & Co Ltd (1919), as well as in a situation, where the common purpose for which the contract was entered into may no longer be realized (see the Coronation cases). Finally, a contract may be frustrated because its performance has become illegal (see. Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943]).

It is worth stressing, that the issue of frustration of contract appears also in the doctrine of common mistake, where the courts are very reluctant to rule in favor of this contracting party, that merely wishes to escape a contract that has simply proved to be a bad bargain (see. Davis Contractors Ltd v Fareham UDC [1956]).

¹³ C.MacMillan, 'English Contract Law and the Great War: The Development of a Doctrine of Frustration' (2014) 2 Comparative Legal History, 278.

¹⁴ The "Coronation cases" were a group of appellate opinions in English law, arising out of contracts, made for accommodation for viewing the celebrations due to the coronation of King Edward VII and Queen Alexandra. In general, those contracts were voided on the ground of frustration of purpose. Certain contracts which did not mention that the purpose was to view the Coronation celebration were upheld. The most famous cases, but not limited to are: Krell v Henry [1903] 2 K.B. 740, Chandler v Webster [1904] 1 KB 493 and Herne Bay Steamboat Co v Hutton [1903] 2 K.B. 683.

¹⁵ The Law Reform (Frustrated Contracts) Act 1943 - an Act of the Parliament, which establishes the rights and liabilities of parties involved in frustrated contracts. The Bill amended previous rules on the complete or partial return of pre-payments, where a contract is deemed to be frustrated, as well as introducing a concept that valuable benefits - other than financial benefits - may also be returned.

¹⁶ The Directive on Consumer Rights (2011/83/EC), Official Journal of the European Union, L 304/64, 22.11.2011

¹⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal of the European Communities, L 95/29, 21.4.1993 .

amicable manner, based on Directives, EU law and jurisprudence. This situation will probably change after Brexit, since it might not be satisfactory from the political point of view to base the consumer protection only on the case law.

A second potential impact upon existing contracts and quite possibly the one chosen after a hard Brexit, concerns the choice of law clause. Many parties to the commercial contracts in other Member States, currently choose English law as the governing law of their contract. Present Rome I regulation¹⁸ sets the rules determining the governing law of contractual obligations, that are applied in contractual relations by EU Member States. Parties autonomy set in Article 3 of Rome I provides, with certain exceptions, that the said contract will be governed by the law chosen by the parties.

It is worth reminding, that Rome I was framed upon the premise of British membership of the European Union, and thus within the judicial framework of the European Court of Justice and in light of Brexit, it may possible, that the European Union would find it suitable to amend its relevant provisions.¹⁹ If Rome I were to be altered to grant a contractual party the autonomy to the extent, that a choice of jurisdictions only within the European Union were allowed, this change will surely render the choice of English law as unenforceable, within the contracts concluded by the non-British parties.

4. The impact upon types of contracts

While discussing Brexit, it is important to consider the its impact upon particular types of contract, Due to the amount of contracts and the limit of this paper, this part of the paper will be limited to certain and only the most important types of contract.

There are two types of contract that have attracted a significant EU legislation which forms the basis for English law: consumer contracts and employment contracts. It is important to underline what the effect of a hard Brexit would have the biggest influence on these contracts.

To start with the employment contract, EU legislation regarding this particular area of contracts has been largely focused on preventing non-discrimination on the grounds of nationality, equal treatment on the grounds of sex, age, education, employment protection or health and safety issues at work. It is deemed that this part of law would be strongly affected by Brexit, especially due to the reasons of the control of human migration. On the other hand, there is a question regarding the free movement of goods and the free movement of workers that cannot co-exist without each other. The fact is, that those issues were the main reasons for Brexit and most likely in case of it, the British government would not be bound by EU law any longer, which most likely would mean that those laws- judicial and legislative - which allow nationals of other Member States to freely enter the United Kingdom and reside here to pursue an economic activity, will probably not be retained.²⁰

Other forms of regulation of employment contracts will probably still be binding after Brexit, since their origins lie within the grounds of English law. However, it is less certain if more detailed provisions would still be binding. For example, questionable is, whether the protection of temporary agency workers as to the amount of hours they work or the amount of the holiday time will be upheld or changed. We can only assume that those regulations of employment contracts will likely be changed in the following years after Brexit, however it is impossible to foresee both the nature and the extent of change, which will depend upon the economic and political changes in the UK and in the world.

While talking about the post Brexit changes in UK law, Lucinda Miller²¹ made a very interesting point, stating, that the development of EU contract law is in part, through consumer protection Directives, divided

¹⁸ Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177.

¹⁹ C.MacMillan, *The Impact of Brexit upon English Contract Law*, *King's Law Journal*, 2016, Vol. 27, No. 3, 423.

²⁰ V.Bogdanor, *Brexit, the Constitution and the Alternatives*, *King's Law Journal*, 2016, Vol. 27, No. 3, 321- 322.

²¹ L.Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2011), 50.

into two groups, the early Directives that regulate either specific types of contract or particular methods of marketing and selling, and the later Directives regulating the very substance of the contract with the intention to change the substance of English contract law. Again, the legal faith of these laws will lie within the UK Parliament, but I strongly believe, *a contrario* to Lucinda's Miller position, that those laws will be upheld after Brexit, especially through the political reasons. Some laws, through lobbying and political pressure will be changed, but British citizens, at the end of the day, want to have the same laws as they had, while still being in the European Community, especially when those laws will be changed for the worse from their perspective. Again, legal status of particular regulations will be decided during the EU - UK negotiations, however, despite the hard - Brexit announcements, I strongly believe, that the rights and obligations of the consumers and some part of employment contracts will stay the same.

Conclusions

Britain's departure from the European Union begins a big revolution in both UK and EU legal and political systems and as well as in the respective contract laws. There is a lot of talk about closing the mutual co-operation between Member States and in future, accepting a transnational conception of contract law which will provide and harmonize EU citizens with common contract law. However, due to Brexit, this is the future that the UK and English contract law will probably not participate in.

On the last days of March, after article 50 of TEU was formally triggered, the British Government issued a co - called "Great Repeal Bill" which should serve as a roadmap to the future Brexit. Its main goal is to transform the EU *acquis communautaire* into UK law. The decision what laws to keep, repeal or amend will belong to the Government or Parliament during the stages of negotiations. In the light of the provisions of the Great Repeal Bill, especially regarding the rule of supremacy of the UK law over EU law provisions, it is possible to assume, that UK, all in all, might decide on the so - called hard Brexit. This view, is however only preparatory, since the consequences of real Brexit will appear during the withdrawal negotiations. Therefore, a question arises, regarding Brexit's impact on existing contracts and UK legal system.

With regard to the English contract law, its applicability after Brexit will vary from the type of contract. In relation to the long term contracts, it is very probable, that one or more parties will not be aroused by the idea of continuing the performance of such a contract and its further performance will most likely be discharged by frustration. In relation to the employment contracts, EU legislation - that will in particular be changed after Brexit - is largely focused on preventing non-discrimination on the grounds of nationality, equal treatment on the grounds of sex, age, education, employment protection or health and safety issues at work. Due to the reasons regarding the control of human migration and social benefits, the main reasons for Brexit and most likely in case of it, the British government would no longer be bound by EU law, which most likely would mean that those laws— both in judicial and legislative area that allow nationals of other Member States to freely enter the United Kingdom and reside here to pursue an economic activity, will not be retained.

At the end, it is essential to underline, that Rome I regulation, that is applicable between the parties in civil and trade matters, grants a contractual party the autonomy to the extent, that a choice of jurisdictions within the European Union is allowed. After Brexit, this provision will surely be rendered and the choice of English law, that is so popular nowadays, will probably be unenforceable, within the contracts concluded by the non-British parties.

Due to the stage of the withdrawal negotiations, it is only possible to speculate on the real consequences of Brexit on English contract law and the existing contracts. Some consequences, in my opinion, can be foreseen, as e.g. employment and consumer laws in contracts, others, relating to trade or financial areas, will strongly rely on withdrawal negotiations and the election of a new British government.

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CRIMINAL LIABILITY FOR TERRORISM IN EUROPEAN UNION IN THE CONTEXT OF THE ULTIMA RATIO PRINCIPLE

Aušra Dambrauskienė¹

Abstract

Despite the consensus of the international community that terrorism is serious criminal offence, attempts to criminalise various or any conducts of terrorism actions not always lead to the desirable purpose – to prevent the criminal acts of terrorism, but to the contradiction of the principles of criminal liability, as the last resort (*Ultima ratio*), as accepted in criminal law, *inter alia*, European criminal law. By means of the requirements of the European Criminal Policy (hereafter ECP) principles, especially – the *ultima ratio* principle, this paper analyses legal regulation on criminal liability for terrorism in the European Union (hereafter EU). The paper argues that the criminalisation of any conducts, related with terrorism actions, devoid of any discernible link to any risk of a fundamental interest has not yet been fully valid and legitimate. Moreover, the problem of over-criminalisation complicates the application of criminal liability (criminal law) and poses a threat of unjust prosecution and punishment. Therefore, criminal law, being the strongest remedy of the state's social control, becomes questionable and dangerous both for the individual to whom this remedy is applied and the general public. So this paper does not emphasise that it is necessary to decriminalize terrorism or some of its conducts in general but attempts to encourage further discussions on this issue.

Keywords: terrorism, criminal liability, *ultima ratio* principle

Introduction

The relevance of the problem of terrorism is visible for a long time, especially in recent years. However despite the consensus of the international community that terrorism is serious criminal offence, attempts to criminalize the various or any conducts of terrorism actions not always lead to the desirable purpose – to prevent the criminal acts of terrorism, but to the contradiction of the principles of criminal liability, as accepted in criminal law, *inter alia*, European criminal law.

The necessity of the reasonable criminal policy on the European level and so called “European Criminal Policy” has arisen with the entry into force of the Lisbon Treaty, which sheds new light on the potential scope of EU criminal law (article 83 of the Treaty on the Functioning of the European Union (hereafter TFEU)² and two landmark cases of the European Court of Justice³). It means that the opportunities offered by the Lisbon Treaty are used with regard to the multiple and increasing challenges modern criminality poses to the EU, including particularly serious forms of cross-border crime or offences at the expense of European public money.

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² Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union [2016] OJ C 202. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.202.01.0001.01.ENG&toc=OJ:C:2016:202:TOC.

³ *Commission of the European Communities v Council of the European Union*, Case C-176/03 [2005] ECR I-07879 and *Commission of the European Communities v Council of the European Union*, Case C-440/05 [2007] ECR I-9128.

However, it must be applied with appropriate prudence. Criminal law is not an end in itself, and it carries much specificity, which the legislator summarised as follows: “(...) criminal penalties (...) demonstrate social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law”⁴. Therefore, only when criminal law is in line with our common European values and principles, and only when EU legislation in this field has a clear added value over national action, it will be legitimate and credible⁵.

The normative and theoretical framework of EU criminal legal quality control – the Charter of Fundamental Rights (especially articles 49 and 50 – the maxims of *nulla poena sine lege* and *ne bis in idem*) and the European Convention for the Protection of Human Rights and Fundamental Freedoms – as well as the academics initiatives – requirements of the European Criminal Policy principles, published in the “Manifesto on European Criminal Policy” (especially – the *ultima ratio* principle) – provide the measures to evaluate all EU legislation and Member States’ implementing measures with this yardstick, both *a priori*, if and when it is making legislative proposals, and *ex post*, when it is monitoring implementation.

According to this framework legal doctrine examines existing EU legal acts or concrete proposals for future acts, on purpose to check whether the legal acts are in line with the demands of the mentioned requirement or whether amendments are advisable. One of existing EU legal acts – the Framework Decision 2002/475/JHA and amending decision (2008/919/JHA) on combating terrorism – and one of amendments – the Directive on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism – are the object of this paper in the same manner too. The purpose of this paper is to evaluate the criminal legislation on criminal liability for terrorism in the European Union, to make a common analysis in respect of the requirements of the European Criminal Policy principles – the *ultima ratio* principle.

1. Legal basis of the criminal liability for terrorism in EU

In line with the conclusions of the Tampere European Council in 1999⁶, which identified terrorism as one of the most serious violations of fundamental freedoms, human rights and of the principles and following the action plan endorsed by the extraordinary European Council meeting on 21 September 2001⁷, Council Framework Decision 2002/475/JHA on combating terrorism⁸ was adopted to more effectively tackle terrorism. The achievement of a legal framework common to all Member States, and in particular, of a harmonised definition of terrorist offences, has allowed the counter-terrorism policy of the European Union to develop and expand.

In accordance with the multiplication of activities of public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism, amending decision (2008/919/JHA)⁹ was adopted, which provides for the criminalisation of offences linked to terrorist activities through reducing the dissemination of those materials which might incite persons to commit terrorist attacks.

⁴ See Recital no 3 of Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law [2008] OJ L 328.

⁵ V. Reding, ‘European Criminal Law Review (EuCLR) Preface’ [2011] 1 EuCLR 5-6.

⁶ See Tampere European Council 15 and 16 October 1999 presidency conclusions. Available at http://www.europarl.europa.eu/summits/tam_en.htm.

⁷ See Conclusions and plan of action of the extraordinary European council meeting on 21 September 2001. Available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/140.en.pdf.

⁸ Council Framework Decision 2002/475/JHA on combating terrorism [2002] OJ L 164. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32002F0475>.

⁹ Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L 330. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0919>.

Framework Decision 2002/475/JHA and amending Framework decision 2008/919/JHA criminalize certain terrorist acts, including in particular the commission of terrorist attacks, participation in the activities of a terrorist group, including financial support to these activities, public provocation, recruitment and training to terrorism, as well as rules on aiding and abetting, incitement and attempt of terrorist offences.

In the concrete the decisions require each EU country to:

— criminalize preparatory acts as offences linked to terrorist activities (public provocation to commit a terrorist offence, recruitment and training for terrorism and theft, extortion or forgery with the aim of committing terrorist offences).

— criminalize inciting or aiding or abetting, as well as attempting to commit certain types of offences.

— establish criminal liability for legal persons and set rules and thresholds for penalties and sanctions.

— establish jurisdiction regarding terrorist offences when the offence is committed in its territory or on board a vessel or aircraft flying its flag.

— establish jurisdiction if the offender is one of its nationals or residents, the offence is committed for the benefit of a legal entity established in its territory or the offence is committed against the EU country's people or institutions or against an EU institution based in that country.

— establish jurisdiction in cases when it refuses to hand over or extradite a person suspected or convicted of a terrorist offence.

— cooperate with other EU countries and decide which one takes jurisdiction when multiple countries are involved in a given case.

— adopt measures to ensure appropriate assistance for victims' families.

Therefore, this framework decision (2002/475/JHA) and amending decision (2008/919/JHA) require EU countries to align their legislation and introduce minimum penalties regarding terrorist offences. The decisions define terrorist offences, as well as offences related to terrorist groups or offences linked to terrorist activities, and set down the rules for transposition in EU countries.

2. Theoretical background of the reasonable criminal policy in EU

The importance of the protection of and respect for fundamental rights of citizens and the rule of law in EU counter-crime activities, as well as in Member State's, first came on the scene in the Stockholm Programme of 1 December 2009¹⁰, which sets political priorities and defines actions to realise the area of freedom, security and justice over the next five years. In its Action Plan implementing the Stockholm Programme, the Commission notes, also for the first time, that “[t]he Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another.”¹¹. Depending on this position it needs to overturn a till then prevailed tendency in the practice of the EU in the field of criminal law to achieve security, absent a correlative assessment of the impact on civil liberties and principles emanating from the rule of law.

Such inconsistency had prompted a number of criminal law professors in Europe to launch the so-called European Criminal Policy Initiative (hereafter ECPI), an international research group consisting of 14 university professors from ten Member States of the European Union, as well as come up with a “Manifesto on European Criminal Policy”¹² presented in late 2009¹³. The said group advocates that the exercise of crime policy through criminal law rules requires both democratic legitimization and respect for the rule of law to the

¹⁰ Council of the European Union The Stockholm Programme – An open and secure Europe serving and protecting the citizens [2009] 17024. Available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017024%202009%20INIT>.

¹¹ See COM (2010) 171 final [2010], Action Plan Implementing the Program, p. 3.

¹² European Criminal Policy Initiative The Manifesto on European Criminal Policy [2009] ZIS 697-747. Available at www.zis-online.com.

¹³ The new edition in [2011] 1 EuCLR 86-103.

utmost degree, while security itself can only be achieved alongside liberal principles. It is stated that there is an opportunity to realize the declared political priority to respect civil liberties and the rule of law in the Union through ECPI's initiatives in the field of criminal law¹⁴.

Thus the Preamble of the Manifesto states: "(...) This Manifesto reflects the dynamics of European integration, calling attention to the fact that substantive criminal law and criminal procedure law are increasingly becoming the focus of European legislation. At present, European legal instruments used for the harmonisation of criminal legislation already exert influence on the existing national legal frameworks of substantive criminal law and criminal procedure law. Due to the amendments brought about by the Lisbon Treaty this tendency will be even stronger in future. (...) The Manifesto Group is convinced that Europe needs a balanced and coherent concept of criminal policy based on a number of fundamental principles (as listed below). These principles should be recognised as a basis for every single legal instrument which deals with or which could influence criminal law. The European legislator has to justify the relevance of its proposals in relation to the principles and standards of good governance. The criminal law principles constitute an integral part of the shared European criminal law tradition and can be derived from the normative structure of the European Union (EU)".

Therefore, the Manifesto on European Criminal Policy exposes the general principles, which are completely rooted in and therefore in conformity with European law, such a requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt (*mens rea*), the principle of legality, the principle of subsidiarity or the principle of coherence (The first part). The Manifesto also contains a critical approach to existing legal acts or concrete proposals for future acts, on purpose to check whether the legal acts mentioned here are in line with the demands of the Manifesto or whether amendments are advisable (The second part, which may be even more important for practical use).

It means that Manifesto sets the principles, which should determinate when the European Legislature may require Member States to employ criminal law rules, and under which circumstances it shall define a criminal act and provide for the appropriate sentence. These principles are common and could be applicable to examine existing EU legal acts or concrete proposals for future acts, on purpose to check whether the legal acts are legitimate or whether amendments are advisable.

3. Criticism of the legal regulation in the context of the *ultima ratio* principle

As mentioned above, Manifesto exposes the general principles, which are completely rooted in and therefore in conformity with European law, inter alia, the *ultima ratio* principle, which means that the European legislator may only demand that an act be criminalised if it is necessary in order to protect a fundamental interest, and if all other measures have proved insufficient to safeguard that interest. Only if this condition has been satisfied can criminal law be regarded as 'necessary' and in conformance with the European principle of proportionality. This is also due to the fact that criminal sanctions entail social stigmatisation which significantly affects citizens' rights, including the rights expressed in the EU Charter of Fundamental Rights. Furthermore, excessive use of criminal sanctions and criminalisation leads to a decline in the efficiency of criminal law. Bearing in mind the principles of good governance, it is the responsibility of the European legislative bodies to justify their use of criminal sanctions as the last resort of social control¹⁵.

As the other principles exposed in Manifesto the *ultima ratio* principle can and should be guideline for a reasonable legislation as regards criminal policy aspects. As such it (and other principles) can be used to examine already enacted and proposed legal acts in respect of their justification on a criminal policy level.

¹⁴ M. Kaijafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' [2011] 1 EuCLR 10.

¹⁵ European Criminal Policy Initiative The Manifesto on European Criminal Policy [2011] 1 EuCLR 88.

The examination points out the practical relevance and urgency of the requirements of the European Criminal Policy principles. In the light of this Manifesto points out the weak spots of already existing EU legislation that need a correction pursuant to mentioned guidelines of Manifesto (including the *ultima ratio* principle).

The Manifesto Group emphasizes that there are still examples showing that the European legislator does not continuously pay attention to the principle of *ultima-ratio* and that he ignored the justification required by the principle of good governance. This example namely is the amending Framework Decision 2008/919/JHA on combating terrorism. The criticism of this legal act focuses on the criminalisation of conduct that is committed before the actual commission of a terrorist offence. The Manifesto refers to the requirement to classify the following conduct as offences linked to terrorist activities: the public provocation to commit a terrorist offence, the recruitment and training for terrorism, as well as the aiding or abetting, inciting and attempting. According the Manifesto Group the European legislator leads the Member States to a criminal law that tries to prevent even mere dangers for legally protected interests. The provisions criminalize conduct only leading to a criminal attitude of other persons or only supporting such attitude (super-pre-preventative criminal law). Such extended criminal liability abandons the requirement of even an abstract danger for a legally protected interest and hence is not compatible with the European principle of proportionality (and derived from that the principle of *ultima ratio*) which is an essential guideline for criminal policy. As long as a certain conduct does not even constitute a present danger for legally protected interests, its criminalisation is not necessary. In any case the European legislator should give – in accordance with the principle of good governance – a detailed justification why he did not impose a less severe measure, such as increasing monitoring of the internet or obligating operators of websites¹⁶.

According to M. Kaiafa-Gbandi with particular regard to the activities of the EU – especially after the Treaty of Lisbon, recognizing its competence in both harmonizing criminal law rules of Member States and establishing rules of its own (article 83 TFEU) – the application of the *ultima ratio* principle is anything but certain, particularly when it comes to the approximation of criminal law rules in Member States. The stricter or broader a criminal rule is, the more pressing the need for justification – and indeed through empirical data – that criminalisation was indeed the last resort¹⁷. A case in point would be crime with a cross-border dimension (article 83(1) TFEU). It means that the mere reference to “particularly serious” crime in the text of the said article is not ample to guarantee respect for the *ultima ratio* principle. indeed, even in the field of particularly serious crime (e.g. terrorism), one cannot exclude the possibility that there were other – milder – means, which were not employed in criminalizing the conduct in question. And namely the Framework Decision 2008/919/JHA on combating terrorism extensively opts for the criminalisation of a broad array of acts, including “recruitment” and “training” of terrorists through the Internet, as opposed to introducing restraints to those administering the respective websites. The said framework-decision directs Member States to adopt criminal law rules anticipating potential risks to fundamental interests, thus criminalizing conduct which merely generates or supports criminal intent of third persons. in so doing, it contributes to the establishment of a pre-preventive criminal law¹⁸. Such premature application of criminal rules, devoid of any discernible link to any risk of a fundamental interest¹⁹ – even on an abstract level – runs contrary to the *ultima ratio* principle as well as the principle of proportionality as accepted in European law. To the extent that a given act does not pose a significant, clear risk to interests worthy of protection, criminal suppression thereof

¹⁶ Ibidem 94.

¹⁷ M. Kaiafa-Gbandi, ‘The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law’ [2011] 1 EuCLR 18.

¹⁸ M. Kaiafa-Gbandi, “Terrorismusbekämpfung in der Europäischen Union und das vor-präventive Strafrecht: Neue Vorgaben für strafbare Taten nach dem Rahmensbeschluss 2008/919/JI” [2010] FS für W. Hassemer 1165 et seq.

¹⁹ Ibidem 1171-1172, 1176-1177.

cannot find justification, much less when milder means to address the problem were overlooked²⁰. Thus full respect to the *ultima ratio* principle would require a number of other important steps, even in those cases where criminal law does appear to be the last resort. The necessary prerequisites to ensuring genuine respect for the *ultima ratio* principle are adopting milder means as a matter of priority, as well as justifying criminal suppression as a last resort based on empirical data, coupled with the principle of good governance²¹.

So it is talking about the scope of criminal liability for terrorism. Going after terrorists, often means “fighting the unknown”. But instead of predating criminal responsibility the unknown needs to be identified. In refusing such identification current criminal law turns into a soft law reflecting actual social needs by preventing a future wrong. It means that current criminal law on terrorism overextends appropriate borders in criminalizing chains of preparations. Punishment is carried out for “thinking different” by way of pre-crime (planning and preparing the commission of terrorism), just symbolizing the wrong, but not the essence, and runs the risk to interfere individual rights at highest price by selling the liberal basic order of democracy. So the need for early investigation is clear, but nothing more urgent than to forestall further terrorist actions. Even if criminal responsibility is predated in order to identify the unknown, it has to base on behaviour, which can be understood as disorder outside the offender’s interim sphere to qualify as criminal wrong. This applies to suspected terrorists and also to all other suspects of crime²². Therefore the main challenge in criminalizing terrorism and its conducts is to ensure the effectiveness of the criminal law provisions but not to violate the fundamental rights of citizens or the fundamental principles of criminal law²³.

It is worth to say that the transposition of the relevant provisions into national law of Framework Decision 2002/475/JHA has been the subject of several implementation reports²⁴, including the report of September 2014 on the implementation of the amendments introduced by Framework Decision 2008/919/JHA²⁵. The 2014 implementation report was supported by an external study looking not only into the transposition by the EU Member States of Framework Decision 2008/919 JHA into national legislation, but also carrying out an assessment of the implementation of the legal framework adopted by the EU Member States to combat terrorism in practice. The study included an evaluation of the changes introduced in 2008, concluding that these changes were relevant and efficient to the objectives. A common understanding of terrorist-related crimes like public provocation, recruitment and training to terrorism have ensured that especially cross-border cases are dealt with more efficiently. More specifically, the study concluded that most stakeholders considered that the new offences helped them tackle the preparatory stages of terrorist activities. In general, the amendments introduced in 2008 were seen as useful in helping to combat the changing nature of the terrorist threats faced by EU Member States. From a law enforcement and judicial point of view, the study concluded that cases related to the new offences involving more than one Member State could be handled more efficiently because of a common approach to criminalising offences²⁶. On this point of view could be seeing that the study emphasizes only the influence of the framework-decision on the cooperation and deal in terrorism cases between EU Member States, but not the influence of the framework-

²⁰ M. Kaijafa-Gbandi, ‘The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law’ [2011] 1 EuCLR 18-19.

²¹ Ibidem 21.

²² L. Wörner, ‘Expanding Criminal Laws by Predating Criminal Responsibility – Punishing Planning and Organizing Terrorist Attacks as A Means to Optimize Effectiveness of Fighting Against Terrorism’ [2012] German Law Journal, vol. 13, no. 9, 1037.

²³ V. Tadros, ‘Justice And Terrorism’ Fall [2007] New Criminal Law Review, vol. 101, no. 41. J. T. Parry, ‘Rights and Discretion in Criminal Procedure’s “War on Terror”’ [2008] Ohio State Journal of Criminal Law, vol. 6, no 1, 332–333. D. M. Gantar, ‘Criminalizing the Armchair Terrorist: Entrapment and the Domestic Terrorism Prosecution’ [2014] Hastings Constitutional Law Quarterly, vol. 42:1, 160.

²⁴ Reports from the Commission based on Article 11 of the Council Framework Decision on combating terrorism: COM(2004)409 final [2004] and COM(2007) 681 final [2007].

²⁵ COM(2014) 554 final [2014].

²⁶ Ibidem.

decision on the criminality of terrorism in general. It is not clear whether the number of terrorism crimes has decreased or increased during the implementation of the framework-decision. So it is unfair to speak about relevance and efficiency of the changes to the objectives, especially when the attacks carried out on European soil in the course of 2014, 2015, 2016 and 2017, e.g. when the terrorist threat has grown and evolved in recent years.

In summary need to say that criticism of the framework decisions on combating terrorism (especially amending Framework Decision 2008/919/JHA) focuses on provisions, which criminalize conduct that is committed before the actual commission of a terrorist offence (pre-preventive and super-pre-preventative criminal law) (e.g. the public provocation to commit a terrorist offence, the recruitment and training for terrorism, as well as the aiding or abetting, inciting and attempting). Such conducts don't even constitute a present danger for legally protected interests, only an abstract danger, therefore it's not compatible with the European principle of proportionality (and derived from that the principle of *ultima ratio*) also their criminalisation is not necessary, particularly when it was the less severe measures, such as increasing monitoring of the internet or obligating operators of websites. This issue is related also with the EU competence to harmonize the criminal law rules in Member States (article 83 TFEU). In this sense even in the field of "particularly serious" crime like terrorism (article 83(1) TFEU) could be other – milder – means, which could be employed on combating the conduct. It means that the mere reference to "particularly serious" crime in the text of the article 83(1) TFEU is not ample to guarantee respect for the *ultima ratio* principle.

4. The new regulation and issues

In consideration of the need to implement relevant international standards and obligations (in the UN Security Council Resolution (UNSCR) 2178(2014) on threats to international peace and security caused by terrorist acts adopted on 24 September 2014²⁷, UNSCR 2249(2015) of 20 November 2015 and UNSCR 2199(2015) of 12 February 2015²⁸, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism of 2015²⁹, the Financial Action Task Force (FATF) Recommendation on the criminalisation of terrorist financing (Recommendation No. 5)³⁰) and address the evolving terrorist threat, European Commission presented a Proposal for a Directive of the European Parliament and of the Council

²⁷ Available at http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf. In which (operative paragraph 6) UN Member States are required to ensure that their domestic laws and regulations establish serious criminal offences sufficient to prosecute and to penalize in a manner duly reflecting the seriousness of the offence: a) travel or attempted travel to a third country with the purpose of contributing to the commission of terrorist acts or the providing or receiving of training. b) the funding of such travel and c) the organisation or facilitation of such travel.

²⁸ Available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf and [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20(2015)). Which urge Member States to intensify their efforts to stem the flow of foreign terrorist fighters to Iraq and Syria and to prevent and suppress the financing of terrorism.

²⁹ Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047c5ea>. Which requires the criminalisation of the following acts: participation in an association or group for the purpose of terrorism (Article 2), receiving training for terrorism (Article 3), travelling or attempting to travel for terrorist purposes (Article 4), providing or collecting funds for such travels (Article 5) and organising and facilitating such travels (Article 6).

³⁰ The FATF Recommendations as well as the accompanying interpretative note. Available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf. Which provide that "countries should criminalise terrorist financing on the basis of the Terrorist Financing Convention, and should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts".

on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (hereafter Directive, Proposal) on 2 February 2015³¹.

Commission states in the Explanatory memorandum of the Proposal that the existing rules need to be aligned taking into account the changing terrorist threat Europe is facing. This includes adequate criminal law provisions addressing the foreign terrorist fighter phenomenon and risks related to the travel to third countries to engage in terrorist activities but also the increased threats from perpetrators who remain within Europe. More coherent, comprehensive and aligned national criminal law provisions are necessary across the EU to be able to effectively prevent and prosecute foreign terrorist fighters-related offences and to respond in an appropriate manner to the increased cross-border practical and legal challenges. Framework Decision 2002/475/JHA does not explicitly require the criminalisation of travel to third countries with terrorist intentions, nor does it explicitly requires the criminalisation of being trained for terrorist purposes. Furthermore, the Framework Decision 2002/475/JHA currently only requires criminalisation of terrorist financing to the extent that funding is provided to a terrorist group but not e.g. if provided to all offences related to terrorist activities, including recruitment, training or travelling abroad for terrorism. Therefore Framework Decision 2002/475/JHA needs to be reviewed³².

Eventually on 15 March 2017, the European Parliament and the Council of the European Union have adopted the Directive (EU) 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA³³ having regard to the mentioned proposal from the European Commission.

Thereby to respond to the evolving terrorist threat, the Directive strengthens and updates the existing Framework Decision 2002/475/JHA, in particular, as it criminalizes: 1) travelling for terrorist purposes, to counter in particular the phenomenon of foreign terrorist fighters (for example travel to conflict zones with the purpose to join the activities of a terrorist group or travel to a EU Member State with the purpose to commit a terrorist attack will be made punishable). 2) the organisation and facilitation of such travels, including through logistical and material support, for example the purchase of tickets or planning itineraries. 3) receiving training for terrorist purposes, e.g. in the making or use of explosives, firearms, noxious or hazardous substances mirroring the already existing provision of knowingly providing such a training. 4) providing or collecting funds with the intention or the knowledge that they are to be used to commit terrorist offences and offences related to terrorist groups or terrorist activities. The Directive will also complement the current legislation on rights for victims of terrorism. The Directive envisages also enhanced rules for exchange of information between the Member States related to terrorist offences gathered in criminal proceedings.

Depending on this the EU Legislature goes forward and criminalizes much more pre-preventive and super-pre-preventative conducts related with terrorism actions. It also raises doubts with regard to provisions of the Directive compatibility with the requirements of the European Criminal Policy principles, especially – the *ultima ratio* principle. The Directive directs Member States to criminalize acts such as receiving training for terrorism and travel for terrorist purposes, as well as organising or facilitating such travel anticipating potential risks to fundamental interests, thus criminalizing conduct which merely generates or supports criminal intent of third persons. Such premature application of criminal rules, without significant, clear risk to interests worthy of protection – even on an abstract level – runs contrary to the *ultima ratio* principle as well as the principle of proportionality. Furthermore during the negotiations draft texts were made publicly available for comments, which were received by several fundamental rights organisations (Amnesty

³¹ European Commission Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism 2015/0281 (COD) [2015] COM(2015) 625 final.

³² Ibidem.

³³ Directive (EU) 2017/541 of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88.

International, the International Commission of Jurists and the Open Society). Overall, the comments stressed the need for adequate human rights safeguards, sufficient legal clarity both in terms of criminalised behaviour (*actus reus*) and intentions (*mens rea*) and clarification of obligations under international humanitarian law³⁴. Thus such a rash criminalisation complicates the application of criminal liability (criminal law) and poses a threat of unjust prosecution and punishment. Moreover, criminal law, being the strongest remedy of the state's social control, becomes questionable and dangerous both for the individual to whom this remedy is applied and the general public.

Talking about milder means to address the problem it is welcomed the efforts to prevent radicalisation leading to violent extremism and terrorism. It's not only the remedies of the prevention provided for a set in the Directive such as the rules for exchange of information between the Member States. The Commission also has established the RAN (the Radicalisation Awareness Network) Centre of Excellence which supports a large network of local practitioners, facilitates the exchange of practices and expertise, consolidates know how and identifies and develops best practices, concrete guidance and tailor made support services. EU legislation already exists on the information exchange between the competent national authorities in the field of security and the fight against terrorism, namely Council Framework Decision 2006/960/JHA³⁵, Decision 2008/615/JHA (Prüm-Decision)³⁶, particularly in combating terrorism and cross-border crime and the Decision 2005/671/JHA³⁷, which foresee the obligation for Member States to create national contact points and exchange spontaneously information where there are reasons to believe that the information could assist in the detection, prevention or investigation of terrorist offences. Thus according to Lucia Žitňanská, minister for Justice of Slovakia, "It is a common understanding between the Parliament, the Council and the Commission that a comprehensive response to the evolving terrorist threat have to include effective measures on prevention of radicalisation and an efficient exchange on information on terrorist offences."

In summary need to say that EU counter-crime policy cannot be exercised in a fragmented fashion, absent a systematic set of aims to facilitate reasonable and balanced action against crime, and definitely not without a complete understanding of the extent and depth of the impact which criminal punishment entails on citizens' fundamental rights, as has been the case with EU action in the field of criminal matters to this day³⁸.

Conclusions

The foundations of a foreseeable, reasonable, and balanced EU counter-crime policy, particularly one that is effectuated by means of criminal repression, can only derive from the fundamental principles of criminal law, as presented in the Manifesto on European Criminal Policy, governing when and under which circumstances the European Legislature may require Member States to employ criminal law rules, define a criminal act and provide for the appropriate sentence. When applied in the light of the protection of and respect for fundamental rights of citizens and the rule of law, and given the severity of criminal sanctions, these principles clearly turn EU criminal law into an instrument of last resort.

Criticism of the effective framework decisions on combating terrorism focuses on pre-preventive and super-pre-preventative criminal law provisions, which criminalize conduct that is committed before the actual

³⁴ European Commission Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism 2015/0281 (COD) [2015] COM(2015) 625 final.

³⁵ Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L 386.

³⁶ Council Decision 2008/615/JHA on the stepping up of cross-border cooperation [2008] OJ L 210.

³⁷ Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences [2005] OJ L 253.

³⁸ M. Kaijafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' [2011] 1 EuCLR 10.

commission of a terrorist offence (e. g. the public provocation to commit a terrorist offence, the recruitment and training for terrorism, as well as the aiding or abetting, inciting and attempting), because it doesn't even constitute a present danger for legally protected interests, only an abstract danger, therefore it's not compatible with the European principle of proportionality (and derived from that the principle of *ultima ratio*) also their criminalisation is not necessary, particularly when it was the less severe measures.

The issue of over-criminalisation is related also with the EU competence to harmonize the criminal law rules in Member States (article 83 TFEU) especially with the "particularly serious" crime (article 83(1) TFEU) and means that the mere reference to "particularly serious" crime is not ample to guarantee respect for the *ultima ratio* principle. In this sense the excessive use of criminal sanctions and criminalisation leads to a decline in the efficiency of criminal law. It is visible especially in recent years, when the terrorist threat has grown and evolved.

The provisions of the new Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism criminalizes more pre-preventive and super-pre-preventative conducts related with terrorism actions (such as receiving training for terrorism and travel for terrorist purposes, as well as organising or facilitating such travel) and it also raises doubts with regard to compatibility with the requirements of the European Criminal Policy principles, especially – the *ultima ratio* principle. The Directive directs only to potential risks to fundamental interests, thus criminalizing conduct which merely generates or supports criminal intent of third persons. Such premature application of criminal rules, without significant, clear risk to interests worthy of protection – even on an abstract level – runs contrary to the *ultima ratio* principle as well as the principle of proportionality. Also such a rash criminalisation complicates the application of criminal liability (criminal law) and poses a threat of unjust prosecution and punishment, as well as attempts on the fundamental rights of citizens.

The manner to bring an issue to a close is to take consideration to remedies of the prevention of the criminality of terrorism (to identify the "unknown"), as well as milder alternative means to criminal law such as increasing monitoring of the internet or obligating operators of websites, exchanging of information between the Member States, exchanging of practices and expertise, consolidating know how and identifying and developing best practices.

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EUROPE'S STRUGGLE WITH ACCOMMODATING RELIGIOUS DIVERSITY OF IMMIGRANT GROUPS

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Abstract

Europe is grappling with the issue of how and to what extent religious diversity should be accommodated. This contentious issue has been exacerbated by the influx of immigrants of diverse religious affiliation, and by increasing violent terrorist attacks (in France, Belgium, Germany and other parts of the world) by people claiming to perform these attacks in the name of Islam – the religion of most of the new European immigrants. The struggle has been continuing in recent court cases over refusals to accommodate religious symbols such as headscarves and crosses, and participation in school swimming lessons. Tensions around the immigration of Muslim minorities are increased by political events such as Brexit and the recent election of Donald Trump as President of the United States of America.

It is argued that the European approach to dealing with religious diversity is symptomatic of religious nescience that can only serve to bolster totalitarian secularism and add to further confusion and discomfort about religious diversity. Consequently, the European public sphere has become a battle ground between totalitarian secularism and violent religious groups. It only aggravates the already unstable situation as both are advancing a speculative view of religion.

This paper, although arguing that full acceptance and celebration of religious diversity will be most in line with the moral principles of human dignity, seeks to find a compromise by suggesting an interpretation of religious accommodation (at the least) in a way that does not adhere to totalitarian secularism as a reaction to fear (against a speculative view of religion). Hence, it is argued that totalitarian secularism is not a democratic response to religious diversity and is therefore inappropriate for its accommodation in Europe.

Keywords: Religious diversity, religious accommodation, totalitarian secularism, immigration, jihad.

Introduction

Tensions around religious diversity in Europe are partly centred on the immigration of Muslim (and other religious) minorities to Europe. This is evident from recent European court cases over refusals to accommodate religious symbols such as headscarves, and participation in swimming lessons. Tensions surrounding the immigration of Muslim (and other religious) minorities are exacerbated by political agendas, events such as Brexit, and recent violent attacks by terrorist organisations in France, Belgium, Germany and other areas of the world.

It is argued that the European approach to dealing with religious diversity is symptomatic of religious nescience. Such religious nescience has bolstered a form of secularism that is different to the structural form of secularism evident in most European countries – namely, totalitarian secularism.² It is argued that this totalitarian form of secularism adds to further confusion and discomfort about religious diversity in Europe. As a result, the European public sphere has become a battle ground between totalitarian secularism and

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² It should be noted that not all forms of secularism are totalitarian. Just as any religion can be totalitarian, so can ideologies, such as secularism, also be totalitarian.

violent religious groups, with the situation being aggravated by rash arguments and speculative views of religion.

The first part of this paper discusses the various court cases and events that are giving rise to the perception that Europe is struggling to accommodate the religious diversity of immigrant groups. These cases are also indicative of religious nescience or ignorance in Europe about the inherent nature of religion. It is placed (and should be seen) within the context of recent violent terrorist attacks that fuel ignorant presumptions about the nature of religion. This part highlights inconsistencies between different court rulings, and inconsistencies and loose (and wild) arguments and justifications with regard to religious diversity in European society. Such inconsistencies and vague justifications, it is argued, are indicative of totalitarian secular assumptions about religion and neutrality. The second part of this paper investigates the reasons for Europe's inability to accommodate religious diversity, let alone accept or celebrate it. This analysis is based on the types of arguments used in the mentioned court cases and the political context within which these cases are set. The investigation concludes that religious nescience and misunderstanding set off a counterreaction, namely totalitarian secularism. The final part of this paper suggests an alternative method of dealing with religious diversity in Europe (and not only pertaining to immigrants). It presents the "accommodation" of religious diversity as a compromise, but argues that the approach that is most in line with human dignity is the one that actively recognises and celebrates religious diversity.

1. Recent court cases, political events and violent attacks

On 14 March 2017 the European Court of Justice upheld that employment rules may bar religious dress in Belgium even if the employer is a private employer. In the case from Belgium, *Achbita v. G4S Secure Solutions NV*,³ the European Court of Justice decided that the private company G4S (registered in Belgium) did not discriminate against its employees by prohibiting them to wear any visible signs of their political, philosophical or religious beliefs in the workplace, or engage in any observances of those beliefs. The Court held that 'Article 2(2)(a) of Council Directive 2000/78/EC⁴ of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking...does not constitute direct discrimination based on religion or belief within the meaning of that directive.' In effect the court stated that the 'neutral' regulations of the company served the legitimate aim of maintaining neutrality in the company and in relation to the customers of the company. Hence, the prohibition of the headscarf was based on the objective of maintaining 'neutrality'.

This decision is confusing in light of the decision by the European Court of Human Rights to allow a woman working at British Airways to wear a cross around her neck.⁵

³ CJEU, March 14, 2017. The employees at this private company had to provide reception services for customers in both the public and private sectors.

⁴ Article 2 of the Directive states: '1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. 2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1. (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary...'

⁵ *Eweida and Others v. The United Kingdom*, application nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgement Strasbourg, 15 January 2013, Final 27 May 2013.

In January 2017, the European Court of Human Rights decided in *Osmanoğlu and Kocabaş v. Switzerland*,⁶ that the children of two Muslim parents (who are Swiss nationals fully integrated into Swiss society), cannot be exempted from compulsory swimming lessons (based on the Islamic requirements of modesty in dress for Muslim women) because they need to be socially integrated into secular values of modesty. Hence, the arguments pertaining to religious accommodation in education and the workplace and elsewhere have ranged sporadically between social integration into secular values and neutrality. Both these principles (social integration into secular values and secular neutrality) suggest a preference for certain doctrinal principles of secularism as opposed to a religiously diverse private and public society.

These cases should be understood within the context of the current political climate in Europe. Besides the recent terrorist attacks (claimed by the *Islamic State (IS)*) in London,⁷ Belgium,⁸ France⁹ and Germany¹⁰, the European response to these attacks tend to be increasingly negative towards immigration and increasingly nationalistic. This can be seen in the controversial French presidential election (François Fillon),¹¹ right-wing propaganda in Belgium,¹² Brexit and the recent presidential election in the United States of America.

The main arguments of these cases include issues of neutrality (as a principle of secularism) and social integration of secularism values (such as the “neutral” public sphere). It is argued that the arguments of neutrality and social integration are indicative of totalitarian secular approaches undermining democracy and notions of religious diversity accommodation.

2. Europe’s religious nescience and totalitarian secularism

Heiner Bielefeldt states that in European countries especially there are negative connotations to religion in general – for example, religious bigotry, moralistic complacency, community pressures, violence and fanaticism.¹³ Bielefeldt further warns that the popularity of these ideas should not be underestimated in Europe.¹⁴ These views of religion are increasingly popular as a response to recent violent terrorist attacks perpetrated in the name of religion.

Many in Europe see religion as inherently ‘radical’ or ‘fundamentalist’. It is argued that this view of religion is symptomatic of religious nescience about the nature of religion and is hence misleading. According to Charles Glenn, the inherent nature of religion is that those who believe and practise it should belief its

⁶ Application No. 29086/12, Eur. Ct. H.R., (2017).

⁷ Alice Ross, Nadia Khomami and Claire Phipps. *London attack: police seize three vehicles after armed raid in Birmingham – as it happened*. 24 March 2017. The Guardian. <https://www.theguardian.com/uk-news/live/2017/mar/24/london-attack-police-terrorist-khalid-masood-live?page=with%3Ablock-58d4c727e4b007e8557ef10d> (accessed 28 March 2017).

⁸ *Timeline of the Brussels attacks*. 22 March 2016. The Guardian. <https://www.theguardian.com/world/ng-interactive/2016/mar/22/where-the-brussels-attackers-struck> (accessed 28 March 2017).

⁹ Alan Yuhas, Matthew Weaver, Bonnie Malkin & Kevin Rawlinson. 15 July 2016. *Nice attack: truck driver named as France mourns 84 killed in Bastille Day atrocity – as it happened*. The Guardian. <https://www.theguardian.com/world/live/2016/jul/14/nice-bastille-day-france-attack-promenade-des-anglais-vehicle> (accessed 28 March 2017).

¹⁰ *Germany attacks: What is going on?* 30 December 2016. <http://www.bbc.com/news/world-europe-36882445> (accessed 28 March 2017). Also see, Melissa Eddy & Alison Smale. 20 December 2016. *Germany Releases Berlin Attack Suspect as ISIS Claims Involvement*. The New York Times. https://www.nytimes.com/2016/12/20/world/europe/berlin-attack-christmas-market.html?_r=0 (accessed 28 March 2017).

¹¹ *Who will be France’s president in 2017?* 7 December 2016. BBC NEWS <http://www.bbc.com/news/world-europe-38220690> (accessed 28 March 2017).

¹² Right-wing propaganda is being spread in Belgian post boxes. The Gazette of the right-wing “Vlaams Belang” is a good example of this.

¹³ H. Bielefeldt, *Misperceptions of Freedom of Religion or Belief* [2013] 35 HUM. RTS. Q. 33, 49.

¹⁴ *Ibid.*

tenets.¹⁵ Bruce Hunsberger states that ‘fundamentalist’ religion means ‘the belief that there is one set of religious teachings that clearly contains the fundamental, basic, intrinsic, essential, inerrant truth about humanity and deity. that this essential truth is fundamentally opposed by forces of evil which must be vigorously fought.’¹⁶ In this sense, all major religions and all religious adherents will be ‘fundamentalists’ or ‘radical’ from a European perspective. Deeply held religious convictions in one inerrant truth will ‘inevitably seem strange and threatening to those with no personal experience of them’¹⁷ – and inevitably also seem ‘radical’. Additionally, ignorance about the true nature of religion makes a negative perception even more negative when violence is committed in the name of religion.

However, even if the nature of religion is inherently fundamentalist (from a European perspective) it does not mean it is dangerous. The belief in one truth, the hope that others believe in it too, and the religious distinctiveness that it creates are in itself not negative, threatening, intolerant or dangerous. It is the misunderstanding that these elements of religion are in themselves threatening that creates religious nescience in Europe. Such religious nescience arises because inherent elements of religion are incorrectly equated with how certain religious persons wish to relate their religious distinctiveness to society (for example through violent jihad) – hence a general angst towards religion is created. What is forgotten is that any ideology, and not only religion, can be deeply held as an inerrant truth. This does not render the ideology dangerous.

Misunderstanding of the nature of religion, combined with violent crimes committed in the name of religion, has caused fundamentalist reactions in itself, namely totalitarian secularism. But what does totalitarian secularism mean? It is not argued that secularism as such is undesirable. Various forms of secularism exist and not all of them have the effect of excluding religion from the public sphere completely. On the contrary, there are types of secularism that are open and flexible towards religion.¹⁸ In such cases, secularism is a mode of governance aiming to find the optimal balance between respect for moral equality and respect for freedom of religion, belief and conscience. It will not take exception to the mere presence of the religious in the public sphere, but will accept and promote the inclusion of different religions.¹⁹

Totalitarian secularism refers to the doctrinal form of secularism where secularism becomes a political objective in itself, aimed at excluding religion from the public sphere.²⁰ In cases such as these, the law that governs the public sphere is dominated by loaded concepts that are deeply antagonistic, whether it is realised or not, to the involvement of religion in the public sphere – for example the assumption that social integration is threatened by ‘radical’ religions, or that neutrality means the absence of religious symbols and their distinction from the public sphere. This is for instance the problem with French laws that have placed a ban on wearing the full-face veil in public.²¹

Totalitarian secularism is (pretentiously) distinguished from any particular religion by its apparent neutrality.²² While totalitarian secular arguments purport to be impersonal, rational and neutral, they are

¹⁵ C.L. Glenn, *Secularism and the Challenge of Muslim Integration in Europe* (forthcoming).

¹⁶ B. Hunsberger, *Religion and Prejudice: The role of Religious Fundamentalism, Quest and Right-Wing Authoritarianism* [1995] 51 J. OF SOC. SCI. 113, 114.

¹⁷ C.L. Glenn, *Secularism and the Challenge of Muslim Integration in Europe* (forthcoming).

¹⁸ J. Maclure & C. Taylor, *Secularism and the Freedom of Conscience*. Originally published as *Laïcité et liberté de conscience. Les Éditions du Boréal*, translated by Jane Marie Todd (England, Canada: Harvard University Press 2011), 28.

¹⁹ *Ibid.*, p. 34.

²⁰ I.T. Benson, *The attack on Western religions by Western law: Re-framing Pluralism, Liberalism and Diversity* [2013] 6 IJRF 111, 111-112.

²¹ S. Ferrari, *Religion in the European Public Spaces: A Legal Overview*, in *Religion in Public Spaces: A European Perspective*, edited by S. Ferrari and S. Pastorelli (England: Ashgate 2012), 150-151.

²² R. Mohr, *The Christian origins of secularism and the rule of law*. In *Law and Religion in Public Life: The contemporary debate*, edited by R Mohr & N Hosen (New York: Routledge 2011), 34.

usually presented in a mode appropriate to that impersonality.²³ As such they are not neutral but instead loaded with presuppositions about the correct position of religion in society and the means and nature of social integration.

Currently, such a form of secularism is shared by many of those who shape public opinion and government policy in Europe (for example France and increasingly Belgium and Germany).²⁴ Totalitarian secularism exacerbates the image of Islam and other 'radical religions' as being a threat to public peace and interest. Such a form of secularism also demonstrates fear of religious adherents who believe strongly in their religious values. Totalitarian secularism views a strong religious identity as threatening and does not appreciate that a strong religious identity is an inherent part of being a religious adherent. This form of secularism, partly as an overreaction to immigration and the problem of terrorism, renders Europe unable to deal with diversity and the presence of Islam in Europe.²⁵

It renders Europe unable to deal with religious diversity because it can only perceive and judge religion from the perspective of a secular doctrine. It cannot provide recognition or respect for the identity and human dignity of a person embedded in a religion and belief consisting of any values other than secular values. Inherent requirements and beliefs of religion, such as wearing the headscarf, are equated with intolerance and antagonism, not acknowledging that it is rather an inherent belief representing the religious conscience and human dignity of a Muslim woman. Totalitarian secular doctrine of neutrality cannot perceive the value of sincerely held beliefs other than its own. It views such beliefs as antagonistic rather than as part of the religious conscience of the religious adherent. A good example of such totalitarian secularism is the prohibition of the headscarf in certain areas of public life, politically justified as support for women's rights (even if some women wear such head coverings out of their own religious convictions and sense of modesty).²⁶ Totalitarian secularism immediately perceives religious distinction as antagonistic to its own beliefs. Such an insensitive view of religion represents a failure to recognise each person for his or her unique identity, and perceives identity formation (and the recognition of identity) through a secular lens only.

3. An accommodative approach in favour of religious diversity

The final part of this paper suggests an alternative method of dealing with the religious diversity within Europe (and not only pertaining to immigrants). It argues that the approach most in line with human dignity is one that actively recognises and celebrates religious diversity within the boundaries of democracy (hence equality, freedom and human dignity). Such acceptance and celebration extend further than mere accommodation of religion subject to a secular interpretation of the public sphere and neutrality. In light of the overemphasis on the 'secular' neutral public sphere and social integration into 'secular' values, an approach is advocated that will recognise religious diversity in instances beyond (non-neutral and doctrinal) secular values aiming to dictate the nature of the public sphere. Totalitarian notions of secularism that set doctrinal standards for the public sphere while pretending to be neutral fall short of truly accommodating religious diversity. In fact, it discriminates against those who are religiously distinct. Although religious claims may be foreign to the non-religious, it does not mean that they are less valuable or should be alienated. Identity formation and human dignity are affected by the notion whether persons are recognised, or not recognised, for who they are. Charles Taylor calls this the *Politics of Recognition*.²⁷ Therefore, the human dignity of religious persons is affected by whether their religious distinctiveness is actively recognised as

²³ A. Macintyre, *After Virtue* (Notre Dame: University of Notre Dame Press 1984), 8.

²⁴ C.L. Glenn, *Secularism and the Challenge of Muslim Integration in Europe* (forthcoming).

²⁵ *Ibid.*

²⁶ H. Bielefeldt, *Misperceptions of Freedom of Religion or Belief* [2013] 35 HUMAN RIGHTS QUARTERLY 33, 63.

²⁷ C. Taylor, *The Politics of Recognition*. In *Multiculturalism: Examining the Politics of Recognition*, edited by A Gutman (New Jersey: Princeton University Press 1994), 25-73.

equally worthy in society. This means that a totalitarian secular sense of neutrality that rids society of religious distinctiveness and refuses to recognise a person's religious distinction in the public sphere will violate the human dignity of a person.

Taylor acknowledges that there are other cultures and that we have to live together.²⁸ Accordingly, he argues for a principle of *equal worth*, namely that it is "...reasonable to suppose that cultures that have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time – that have, in other words, articulated their sense of the good, the whole, the admirable – are almost certain to have something that deserves our admiration and respect, even if it is accompanied by much that we have to abhor and reject."²⁹ Perhaps one could put it another way: it would take a supreme arrogance to discount this possibility a priori. There is perhaps after all a moral issue here. We only need a sense of our own limited part in the whole human story to accept the presumption. It is only arrogance, or some analogous moral failing, that can deprive us of this."³⁰

The equal worth and value of other modes of thinking (such as various religions) besides secular values should be recognised and acknowledged.³¹ It is not democracy if a religion is only recognised and given the right to exist in the public sphere once it can defend and prove itself against totalitarian secular interpretations of social integration pretending to be neutral while it is not.

Paul Feyerabend also asserts that there is no objective reason (if that is possible) for preferring Western secular values to other traditions in adjudicating the public sphere. Feyerabend adds that it is difficult to imagine what such reasons might be: "Are they reasons that would convince a person, or the members of a culture, no matter what their customs, their beliefs or their social situation? Then what we know about cultures shows us that there are not 'objective' reasons in this sense."³² According to Feyerabend, objective reasons do not exist and the choice of objectivity is a measure in itself personal.³³ However, totalitarian secularism pretends that such objectivity and neutrality exist and offers its own non-neutral values to establish the parameters of such "neutrality".

Conclusion

Religious nescience and violent attacks in the name of religion have exacerbated totalitarian secular reactions against religious diversity in the European public sphere. Such totalitarian secularism expects religion to rid itself from its inherent nature in order to fit the secular doctrinal assumptions of what social integration and neutrality should look like.

On the contrary, different Western, liberal, religious, non-religious and non-Western beliefs need active affirmation and *recognition* by the state in promoting human dignity and equality. Recent European court cases and nationalistic tendencies have reacted against religious distinctiveness as though it poses a threat to European societal values of secularism. Some forms of secularism are totalitarian in the sense that they present themselves as being neutral and an objective yardstick to determine the nature and parameters of the public sphere. Furthermore, totalitarian secularism pretends to know what a socially integrated person looks like and then creates several hoops through which religious persons should jump before being affirmed and recognised as equal human beings in the public sphere.

²⁸ C. Taylor, *The Politics of Recognition*. In *Multiculturalism: Examining the Politics of Recognition*, edited by A Gutman (New Jersey: Princeton University Press 1994), 72.

²⁹ *Ibid*, p. 72-73.

³⁰ *Ibid*, p. 73.

³¹ *Ibid*, p. 63-68.

³² P. Feyerabend, *Farewell to Reason* (New York: Verso 1987), 297.

³³ *Ibid*.

Totalitarian secularism is therefore argued to be an undemocratic and intolerant way of dealing with religious diversity in the European public sphere. What is argued for instead is active affirmation and recognition of religious diversity as an assertion of the equality and human dignity of all persons, irrespective of their ideological or religious affiliation.

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WHAT DOES THE BREXIT MEAN FOR INSOLVENCY?

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Abstract

This paper analyses the consequences of the post Brexit situation for international insolvency law in the event when no additional agreements or arrangements by signing the withdrawal agreement under the article 50 of Treaty on the European Union have been concluded to regulate different areas of law, including international insolvency law. Such a situation will have an effect on the way of the recognition of the EU Member State's judgment in the UK and vice versa, as well as on insolvency proceedings where a company is established in the UK but its' administrative seat is in other EU Member state, by causing legal uncertainty. Furthermore, this research focuses on most possible solutions which can be made in order to avoid such consequences.

Keywords: Brexit, Insolvency law, European Insolvency Regulation (Recast), jurisdiction, recognitions of judgments

Introduction

Economic globalisation has brought an international element in almost every area of our society and without any doubt it has made the impact on law. Notwithstanding, in general, insolvency law as being mostly based on national legal systems has their own different insolvency regimes in each EU Member State, however its' particular aspects have a cross-border element which is regulated by supranational law. It has to be noted that the reliable regulation on insolvency proceedings is one of the most important element to any market-based economy².

After earlier unsuccessful attempts to regulate cross-border insolvency cases at the European level³, finally the Regulation (EC) 1346/2000 on insolvency proceedings (hereinafter – the original EIR) was adopted which shortly after entering into force on 31 May 2002 was started to be used by national courts without further being stopped⁴.

The original EIR was followed by the Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters changed by the Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter – the Brussels I Regulation) as well as the original EIR being changed by the Recast Regulation (EU) 2015/848 on insolvency proceedings that will be applied from 26 June 2017 (hereinafter – the Recast EIR).

Taking into account that the UK is one of the main 'player' in cross-border insolvency proceeding, all these EU regulations are essential to this country. Historically, the UK mostly opposed to regulate such an area at the EU level. However, when at last the original EIR was adopted and the UK had to apply this

¹ PhD in Law at the Faculty of Law of the Department of Private Law at Vilnius University, with a dissertation on "The Current Situation and the Protection of Creditors' Interests in Relationship with the Bankruptcy Trustee in Lithuanian Law". The main areas of interest: Lithuanian insolvency law, creditor interests in insolvency proceedings, comparative and international insolvency law, banking law.

² D.W. Arner, 'Financial stability, Economic growth, and the Role of Law' (New York: Cambridge University Press 2007) 156.

³ Before enacting the original EIR the Istanbul Convention on Certain International Aspects of Bankruptcy was prepared to regulate, in general, the same field.

⁴ P. Mankowski, 'The European World of Insolvency Tourism: Renewed, But Still Brave?' [2017] NILR 3.

regulation mandatory, also it liberalised its national regulation and became more attractive to both legal and natural persons by allowing them to open insolvency proceedings easier⁵. Therefore, the UK not only purified the issue of insolvency tourism and COMI migration but also became 'an insolvency brothel'⁶.

However, the 23 June 2016 referendum on membership of the UK in the European Union raises bigger concerns than the above-mentioned issues. As the Insolvency Regulation and the Brussels I Regulation cover the most problematic areas in international insolvency law as the jurisdiction for opening insolvency proceedings, recognition and the enforcement of judgments in insolvency proceedings, after the Brexit the UK courts' decisions in insolvency proceedings would not be automatically recognized in other EU Member States under the Insolvency Regulation and would not be enforced under the Brussels I Regulation.

As agitators for the Brexit have not thought about the forthcoming consequences for the UK, the outbreak of Brexit raises a question whether the EU is prepared for it too⁷. Therefore it is important to evaluate the current regulation that could be applied in case no settlement is negotiated by signing the withdrawal agreement under the Article 50 of the Treaty on the European Union, and assess possible ways which can be chosen.

What is going to be if there are no agreements?

As it was mentioned above, the main legal acts regulating insolvency cases are both the original EIR with the recast version of it and the Brussels I Regulation. After the Brexit will come into force and the UK will acquire the status of the third state, the UK will lose the possibility to benefit from those regulations as well as from the international treaties signed by the EU by using its exclusive external competence⁸ and judgments made by the Court of Justice of the EU. It is possible that the UK will retain the application of the EIR, Brussels I Regulation and other EU legal documents because of both its' own and the EU needs. Taking into account that the UK does not want to lose the current status and that the EU is not orientated narrowly to the exceptional needs of particular EU Member States but it more focuses on the wider cooperation which is essential for the modern insolvency law⁹.

However, it is worth to mention the fate of international insolvency proceedings from a hypothetical perspective where no transitional agreements are signed¹⁰. In such case, the recognition and enforcement

⁵ As P. Mankowski expressed the story of the EIR 2000 has mainly been a story of the creations and inventions of the English insolvency industry (P. Mankowski, 'The European World of Insolvency Tourism: Renewed, But Still Brave?' [2017] 64 NILR 1 p. 104) where UK offered, as for example, better conditions to natural persons to bankruptcy proceedings, the Scheme of Arrangement for still solvent but meeting financial difficulties businesses as well as expressed more favourable attitude to the liability of managers and shareholders against creditors and other stakeholders. For example, to compare with other countries UK offers personal bankruptcy proceedings in less than 12 months, when the term of personal bankruptcy proceedings in Ireland are 12 years, in Germany – 7 years, in Lithuania – 3 years (and also only from 1 March 2013), as well as with ensuring anonymity about the proceedings (What is Bankruptcy Tourism? Article available at: < <http://bankruptcyfromabroad.co.uk/bankruptcy-resources/bankruptcy-tourism/>>).

⁶ M. Herman, 'Abuse of pre pack deals 'could turn Britain into an insolvency brothel'', [2010], article available at: < <https://www.thetimes.co.uk/article/abuse-of-pre-pack-deals-could-turn-britain-into-an-insolvency-brothel-9zls9qt0xt7>>. A. Sakoui, 'Bankrupt Europeans are flocking to London', [2010], article available at: <https://www.ft.com/content/6f9338e6-ac7d-11df-8582-00144feabdc0>>.

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⁸ B. Hess, 'Back to the past: BREXIT und das europäische international Privat- und Verfahrensrecht' [2016], article available at: <<https://www.mpg.de/10815136/brexit-eu>>.

⁹ L.C.Pineiro, 'Brexit and International Insolvency beyond the Realm of Mutual Trust' Working Paper No. [2017], paper available at: <http://www.abdn.ac.uk/law/documents/CPIIL_Working_Paper_No_2017_1.pdf>.

¹⁰ Existing measures to retain the application of the EIR and Brussels I Regulation to the UK are also questionable and are discussed in the III part of this Article.

of these judgments given that new solutions are not be found will depend on legal regulation which can be applied as follows:

1) The UNCITRAL Model Law on Cross-Border Insolvency (1997) and other soft law instruments provided by this agency. Although these instruments by nature is not as mandatory as the EIR, but they clearly are shaping international insolvency across the world¹¹. Their content including rules on jurisdiction, recognition, enforcement and cooperation are similar to those in the EIR however they differ on the application field¹². The UNCITRAL Model Law has been already implemented in the UK by the Cross Border Insolvency Regulations of 2006, which is likely to be the main source of law in the international insolvency after the EIR Recast ceases to be applied in the UK. However, the drawback of this instrument is that the UNCITRAL Model Law is adopted only in few EU Member States where it could replace the EIR. The INSOL Europe offered to the EU to adopt those rules. This suggestion was made before the referendum for the Brexit and now is becoming more important in nowadays situation. However, such an adoption of the UNCITRAL Model Law into the EU legal system as a binding instrument could be considered as exceeding goals of the EU and at the same time infringing the sovereignty of EU Member States¹³

2) The Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters¹⁴, the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁵ and the Rome Convention on the law applicable to contractual obligations¹⁶ which were signed by separate countries, inter alia, the UK. Those Conventions were superseded and replaced by their further versions with titles the Brussel I Regulation, the Lugano Convention¹⁷ and Rome I Regulation¹⁸ which were adopted by the EU and accordingly to these regulations the UK made some relevant amendments in its national law. Therefore, it raises the question whether those primary versions of above-mentioned conventions could be applied after the Brexit will be finished¹⁹.

3) The Hague Convention on Choice of Court Agreements²⁰ that could be applied in case of the Scheme of Arrangement and recognition and enforcement of them in EU Member States.

4) Bilateral agreements that were concluded between the 1930 and 1960s. There is an agreement between the UK and Germany concluded in 1960 with the aim of limiting the obstacles to the judgement

¹¹ L.C.Pineiro, 'Brexit and International Insolvency beyond the Realm of Mutual Trust' Working Paper No. [2017], article available at: <http://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2017_1.pdf>.

¹² Countries that adopted the UNCITRAL Model Law are Romania (2003), Poland (2003) (both prior to their respective EU Membership), Great Britain (England, Wales and Scotland, 2006, Northern Ireland, 2007), Slovenia (2008) and Greece (2010) and EU Member states that member states that have amended their domestic laws along the same lines as EIR such as Germany, Spain, Belgium, and apparently, The Netherlands (L.C.Pineiro, 'Brexit and International Insolvency beyond the Realm of Mutual Trust' Working Paper No. [2017], article available at: <http://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2017_1.pdf>).

¹³ B. Wessels, 'Should the EU adopt the UNCITRAL Model Law on Cross-Border Insolvency?' [2016], article available at: <<http://bobwessels.nl/2016/10/2016-10-doc12-should-the-eu-adopt-uncitral-model-law-on-cross-border-insolvency/>>.

¹⁴ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

¹⁵ Lugano convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1988] OJ L 319/9.

¹⁶ Rome Convention on on the law applicable to contractual obligations [1980] OJ C027.

¹⁷ Lugano onvention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.

¹⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

¹⁹ More about it see A. Dickinson, 'Back to the Future - the UK's EU Exit and the Conflict of Laws, [2016] paper of the Conference Post Brexit: The Fate of Commercial Dispute Resolution in London and on the Continent.

²⁰ Hague Convention on Choice of Court Agreements (30 June 2005).

recognition which at the time of signing was a modern treaty.²¹ The UK and Belgium convention providing for the reciprocal enforcement of civil and commercial judgments that was signed in 1934 and should be revisited after 80 years²².

Although the list of those legal documents does not seem very short but they are barely to be sufficient. First of all, the amount of countries in which those legal documents could be applied are not covering all the EU Member States, moreover, they are not applied to all fields that are regulated by the EIR and Brussels I Regulation. That leads to issues related to the recognition of EU Member State's judgment in the UK and vice versa, as well as the insolvency of companies that are registered in the UK but in fact having their administrative offices and acting in any other Member State.

In the first case, foreign insolvency procedures seeking the recognition in the UK would be able to rely on section 426 of the Insolvency Act 1986 (for Ireland²³) and the Cross Border Insolvency Regulations of 2006 (which incorporated the UNCITRAL Model Law into English legislation) and the common law to seek the recognition and assistance of the English court, but would not benefit from the automatic recognition possible under the EIR. As taking the example of the recognition of German judgments in the UK, it can be considered that they will be surely recognised in the UK as its regulation is freer in comparison with the German regulation, however, the contrary situation could be less easy²⁴. By the German analogy, it is thought that the judgments of Lithuanian courts in insolvency proceedings would be recognized also. Notwithstanding, that it is likely that in most cases the judgements of EU Member States will be recognised in the UK, however the Brexit still triggers legal uncertainty as making this procedure more complicated and time-consuming.

In the second case, although the recognition of EU Member States' judgments in the UK does not seem very sensitive and problematic, the reverse situation with the recognition of the UK judgments in other Member States raises more questions and have different consequences, firstly, for the procedures as an administration procedure, company voluntary arrangement, winding-up and administrative receivership which are included in the Annex A of both the original and recast EIR, secondly, the other consequences occur for the Scheme of Arrangement (hereinafter – the SoA) which is not the part of the EIR. Therefore, these consequences shall be discussed separately.

With the enforcement of the Brexit the judgments in relation to an administration procedure, company voluntary arrangement, winding-up and administrative receivership in the UK insolvency proceedings will stop to be recognized *ipso iure*. After the Brexit the recognition of the judgments in insolvency proceedings will be based on the national rules. As for example, in cases of German²⁵ or Lithuanian²⁶ law, national courts of these countries will be obliged at least to evaluate the jurisdiction of the UK judgment under the their national legal rules. Most possibly that no other legal acts would be applied in such a situation. Considering other EU Member States, the UNCITRAL Model Law (that is adopted only by few countries) as well as bilateral agreements could be applied under which the recognition of judgments could be more secure in comparison with national law. However, both the UNCITRAL Model Law and the above-mentioned bilateral

²¹ Hess, 'Back to the past: BREXIT und das europäische international Privat- und Verfahrensrecht' [2016], article available at: <<https://www.mpg.de/10815136/brexit-eu>>.

²² B. Wessels, 'Brexit and Insolvency: A View from the Continent', [2017], article available at: <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/08/brexit-and-insolvency-%E2%80%93-view-continent>>.

²³ This section is applied for the Commonwealth countries, hence, in the case of the EU, it could be applied for Ireland if it re-joins this organisation (it was a member until 1949).

²⁴ It is assumed that German insolvency proceedings should, in general, be recognized (R. Freitag, S. Korch, 'Gedanken zum Brexit – Mögliche Auswirkungen im Internationalen Insolvenzrecht', [2016] 37 ZIP 39, 1853).

²⁵ R. Freitag, S. Korch, 'Gedanken zum Brexit – Mögliche Auswirkungen im Internationalen Insolvenzrecht', [2016] 37 ZIP 39, 1854.

²⁶ Lietuvos Respublikos civilinio proceso kodeksas [2002] Valstybės žinios 36-1340, 810 str.

agreements have to be assessed taking into account that even the UNCITRAL Model Law does not ensure such wide rights for creditors as the EIR does.

The situation becomes even more complicated when the SoA has to be recognized in other EU Member States. As it was mentioned before, the SoA judgment could not be recognized under the EIR. Also, it is considered that the SoA, in general, is not the judgment, therefore, it could not be recognized under the Brussels I Regulation²⁷. Such an explanation is justified by analysing legal rules of different countries²⁸. This assessment of the SoA, as not justifying to be the judgment, means that the other way to recognize it in EU Member States would be to treat it as an agreement for which contract law is applied.

In the third case, from the moment when the UK effectively leaves the EU, the UK companies operating in other EU Member States will no longer be able to benefit from the freedom of establishment, i.e. the condition of freedom of establishment under which the companies' legal form of the UK may be recognized and act in accordance with the law of establishment despite the fact that the place of administration is in the other EU Member State (incorporation theory which is derived from this freedom) will cease to be applied. This means that if a company is established in the UK, but has its administrative seat in France or Germany, that company will no longer be the subject of the UK jurisdiction but the subject to the corporate laws of France and Germany as these laws are applied according to the company's administrative seat²⁹. This is especially relevant to the assessment of particular forms of companies which are unique for the UK and have few legal requirements for their establishment. Therefore, in practice these companies are established under the UK law however, their administrative seats is located abroad. Although, this is more important to corporate law but there is no doubt that it will have an affect also on insolvency law. First of all, as a result companies established in the UK and having the legal status of 'Limited Company' or 'Public Limited Company', for example under the German law would be recognized as the partnership with a full liability of partners. Secondly, the insolvency proceedings opened in the UK, as the country of establishment, barely would be recognized with regard to the requirement that insolvency proceedings have to be opened in the country where the company should be established, in this case in the country where the administration seat is located.

Hence, as the above-mentioned agreements, conventions and other legal instruments do not cover a lot of legal questions and despite the fact that the British Government assured that all the EU rules will be transposed to the UK domestic law³⁰ the situation when the UK court's judgment should be recognized, if any it is possible, and enforced in any country of the continental Europe, would be the examination with a legal fragmentation and basically based on national law of each EU Member State³¹. This situation will cause delays, legal uncertainty and additional costs, thus, it would be a step back to the too formal procedures or to the considerable legal uncertainty³².

What can be done to make it better?

²⁷ Even recognition of the SoA under the Brussels I Regulation is contested by some opinions because of the lack to declare the SoA to be finished as a judgment (K. Baird, R. Tett, C. Balmond, and others, 'Brexit: What does it Mean for Restructuring and Insolvency?' [2016], article available at: < <https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/brexit-what-does-it-mean-restructuring-and-insolvency>>).

²⁸ The case of Germany see R. Freitag, S. Korch, 'Gedanken zum Brexit – Mögliche Auswirkungen im Internationalen Insolvenzrecht', [2016] 37 ZIP 39, 1854-1855.

²⁹ C. Thomale, 'Regulatory competition in a post-Brexit EU' [2016], article available at: <<http://conflictoflaws.net/2016/regulatory-competition-in-a-post-brexit-eu/>>.

³⁰ See *The United Kingdom's exit from and new partnership with the European Union* (UK Gov, 2017) 1.1.

³¹ K. Baird, R. Tett, C. Balmond, R. Beckwith, and others, 'Brexit: What does it Mean for Restructuring and Insolvency?' [2016], article available at: < <https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/brexit-what-does-it-mean-restructuring-and-insolvency>>.

³² B. Hess, 'Back to the past: BREXIT und das europäische international Privat- und Verfahrensrecht' [2016], article available at: <<https://www.mpg.de/10815136/brexit-eu>>

The previous part of this paper confirms that no other existing measures can safeguard the UK from steps backward. Therefore, it is more likely that there will be negotiations concerning these issues but the way which will be chosen is not clear. However, there can be identified three main possible ways after the Brexit that depend on the withdrawal agreement under Art. 50 of the Treaty on the European Union (hereinafter – TEU), which are³³:

- 1) Accession to the European Economic Area (hereinafter - EEA).
- 2) Bilateral free trade agreements, such as Switzerland example that shows that it has signed more than 100 sector-based agreements with the EU.
- 3) New specific solution.

In the first case, joining the EEA that was established in 1994 could be a solution in order to retain the application of the EU legal rules. However, other features of the EEA agreement are worth to be analysed. As parties of this agreement are the EU and other non-EU countries such as Norway, Liechtenstein and Iceland, the EEA agreement is used as a guarantee of the four fundamental freedoms (freedom of movement of goods, services, persons and capital) for these countries. Such a fate for the UK is, nevertheless, rather unlikely to be the same not only because of the freedom of movement of persons that was one of the most important arguments underlying the necessity of the Brexit. The other interesting aspect that as a party of the EEA the EU regulations and directives in the field of business and finance would be applied in the UK without being able for the UK to negotiate them.

In the second case, such an example as bilateral agreements with Switzerland could be deemed to be very promising because of the possibilities to negotiate individual cases and to take the best solutions for both parties – the EU and the UK. However, this way is questionable in relation to the fact that the Council already has expressed the position to try to go beyond the complex system of signing bilateral agreements as this is not acceptable to the EU³⁴.

As the British Prime Minister Theresa May has expressed, that the aim is to find a solution that departs from models that already exist³⁵ and this is the third case. According to such a solution the freedom of movement of persons should be restricted while for the freedom of movement of goods and services should be found the best solution. This possibility could be justified as being easier to implement, however, leaders of remaining EU Member States stated that ‘Access to the single market requires acceptance of all four freedoms. There will be no single market ‘à la carte’³⁶.

Furthermore, it should be also evaluated that the separate EU countries can have less motivation to allow the UK to achieve better solutions in the event of leaving the EU. Firstly, with regard of the rationale to take over the role that was played by the UK in insolvency proceedings³⁷, secondly, considering the problems created by the UK such as insolvency tourism, COMI migration, exploitation of the freedom of

³³ See more M. Lehmann, D. Zetsche, ‘Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK’ [2016] 27 EBLR 999.

³⁴ B. Hess, M. Requejo-Isidro, ‘Brexit – Immediate Consequences on the London Judicial Market’ [2016], article available at: <<http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/>>

³⁵ ‘PM and Slovakian Prime Minister Fico statements in Bratislava: 28 July 2016’, [2016] Speeches, source available at: <<https://www.gov.uk/government/speeches/pm-and-slovakian-prime-minister-fico-statements-in-bratislava-28-july-2016>>

³⁶ D. Tusk, ‘Remarks by President Donald Tusk after the informal meeting of 27 EU heads of state or government’ [2016] Statements and Remarks 396/16, source available at: <<http://www.consilium.europa.eu/en/press/press-releases/2016/06/29-tusk-remarks-informal-meeting-27/>>.

³⁷ B. Hess, M. Requejo-Isidro, ‘Brexit – Immediate Consequences on the London Judicial Market’ [2016], article available at: <<http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/>>. Germany in competition with UK being not very attractive now sees more possibilities to become the country attracting business not only to be established there but also not to escape for seeking better insolvency regulation (M. Weller, C. Thomale, N. Benz, ‘Englische Gesellschaften und Unternehmensinsolvenzen in der Post-Brexit-EU’, [2016] 69 NJW 33, 2382).

establishment³⁸. As it was mentioned above, the UK has fallen into disrepute with the name of “insolvency brothel”, as a result of the almost unlimited COMI migration to the UK in order to be liquidated, restructured or rescued in an easier way as well as the facilitated conditions for debtors. Moreover, the easier establishment of companies under the UK law by letting to avoid stricter requirements as for example the fulfilment of gender diversity in company organs, wider managers’ and shareholders’ liability in case of insolvency, in case of Germany, led to almost 9000 British ‘Limiteds’ to be registered in the UK but having their factual administrative seats in Germany³⁹.

However, an "exit from brexit" must remain the primary political goal in order to preserve the progress made by the EU and to achieve further European integration objectives – in the interests of the democracies and citizens of Europe⁴⁰. Moreover, it is argued that the Brexit can become a new lease of life in matters that for a long time have been forgotten⁴¹. This position is clearly justified and despite that there are some ‘hot spots’, it should be taken into account that there is undeniable importance to find a solution to protect more vulnerable groups in insolvency proceedings such as creditors, employees, other stakeholders and to maintain the certain level of cooperation in the modern insolvency law.

Conclusions

Although, besides the EIR and the Brussels I Regulation, there are some other existing and valid legal acts for the UK that regulate the recognition of judgments as well as other aspects of international insolvency proceedings. The most significant is the UNCITRAL Model Law, however, this and also other relevant acts, which can be applied as a result of the Brexit, are either fragmented and causing the difference in application scope or are negligible as being adopted by the few EU Member States. Therefore, it can be concluded that in the event when no agreements or arrangements are achieved in the negotiations on the UK exit from the EU, that not only the UK but also the EU or each EU Member State will have to make separate decisions to regulate international elements of insolvency proceedings falling within the UK jurisdiction or *vice versa*.

The Brexit situation has brought a lot of uncertainty in relation to the possible regulation of international insolvency law, which can still remain, notwithstanding the results achieved by the negotiations between the EU and the UK. As the best choice for such legal regulation can be treated the UNCITRAL Model Law and bilateral agreements between the UK and the EU stipulating particular legal questions. Although, technically such a decision for the UK to join the EU regulations on insolvency law is still possible, however, as these legal instruments are considered to be the part of the full package of all four EU freedoms including the freedom of movement of persons that would be against the main Brexit idea, therefore it is likely impossible.

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³⁸ P. Mankowski, ‘The European World of Insolvency Tourism: Renewed, But Still Brave?’ [2017] 64 NILR 1, p. 108.

³⁹ U. Kornblum, J. Schmidt, ‘Was würde ein Brexit für die "deutsche Limited" bedeuten?’, [2016], article available at: <<http://www.zeit.de/news/2016-07/04/unternehmen-was-wuerde-ein-brexit-fuer-die-deutsche-limited-bedeuten-04115613>>.

⁴⁰ B. Hess, ‘Back to the past: BREXIT und das europäische international Privat- und Verfahrensrecht’ [2016], article available at: <https://www.mpg.de/10815136/brexit-eu>.

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IMPLICATIONS OF BREXIT FOR CERTAIN ASPECTS OF EU PRIVATE INTERNATIONAL LAW

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Abstract

For a long time, private international law was a branch of domestic law. As a result, rules concerning court jurisdiction, applicable law and recognition and enforcement of foreign judgments varied among states. During the last decades, the EU legislator has significantly changed the landscape of private international law in Europe. Now a large part of private international law has lost its national character, becoming part and parcel of EU law.

The objective of the paper is to analyse the implications of Brexit for the legal framework in the area of private international law. While the United Kingdom is currently bound by a number of EU private international instruments, the scope of the paper is limited to three instruments: the Brussels *Ibis* Regulation, the Rome I Regulation and the Rome II Regulation. The first two of these instruments have replaced prior conventions. For this reason, the author discusses three questions: negative effects that may follow once these instruments will cease to apply in the United Kingdom, the possibility of revival of the former regimes of conventions and conclusion of a separate agreement between the EU and the UK on matters of private international law.

The author comes to the conclusion that the said EU private international law instruments cannot be fully replaced even by identical domestic legislation. At the same time, it is uncertain whether the former treaty regimes may be revived as it was strongly related with membership in the European Community and later in the EU. At the end of the day, the optimal solution is to have a separate agreement between the EU and the United Kingdom establishing common private international law rules for the fields under investigation.

Keywords: EU private international law, Brexit, conflict of laws, Brussels *Ibis*, Rome I, Rome II.

Introduction

2016 may be described as the year of the great divide. The United Kingdom (hereinafter: UK), having joined the European Community in 1973, is on its way to leave the European Union (hereinafter: EU²). The end of this marriage of convenience due to “emotional incompatibility” is producing different legal challenges.

The impact of Brexit on areas related to judicial cooperation in civil matters is among those challenges that remain obscure to a broader audience. Judicial cooperation in civil matters is a broad notion and covers all measures that the EU may adopt under Article 81 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). It includes issues traditionally associated with private international law - allocation of jurisdiction, determination of the applicable law and recognition and enforcement of foreign judgments. According to the House of Lords report, EU private international law instruments, due to their technical nature, “received little public attention during the referendum campaign or subsequently.”³ This is not entirely justified as some of the consequences may be important even for the public at large.

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² Hereinafter, the EU also refers to the European Community.

³ House of Lords: European Union Committee, ‘17th Report of Session 2016–17: Brexit: justice for families, individuals and businesses?’, 8. Available at: <https://www.publications.parliament.uk/pa/ld201617/ldselect/lducom/134/134.pdf>. The Report speaks of few particular private international law instruments, but it can be extended to all of them.

The UK has a privileged status with respect to judicial cooperation in civil matters. Pursuant to Articles 1, 3 and 4 of the Protocol No 21 to the TFEU, the UK is not bound by instruments adopted under Article 81 TFEU, unless it expresses its wish to take part in their application. Using its privileged status, the UK has cherry-picked instruments of judicial cooperation and is not bound by all instruments adopted in the context of judicial cooperation in civil matters. Nonetheless, the list of instruments binding upon the UK is rather long⁴. Still, taking into account the limited space of this paper, we will discuss the effects of Brexit on three private international law instruments: 1. The Brussels Ibis Regulation⁵. 2. The Rome I Regulation⁶ and 3. The Rome II Regulation^{7,8}. These instruments are of the greatest interest for academics and practitioners, dealing with general civil and commercial law.

The article consists of four sections. Section 1 provides a general overview of the said three regulations and their history. Section 2 describes the negative effects that may arise if the UK converts EU private international law into domestic legislation, while Section 3 discusses whether the negative effects of Brexit could be mitigated via a revival of the Brussels Convention⁹ and the Rome Convention¹⁰. Section 4 briefly touches upon the possibility for the EU and the UK to conclude a separate agreement dealing with private international law.

1. Short History of EU Private International Law

Traditionally, private international law was a branch of domestic law. Each state on its own determined jurisdiction of its courts and the applicable law and decided which judgments were to be recognized and enforced on its territory. However, private international law deals intrinsically with a cross-border element and its unilateral regulation was never entirely adequate. The EU has actively worked on elevation of private international law above its modest domestic origins toward a supranational regime.

Prior to the entry into force of the Amsterdam Treaty, the EU did not have any explicit competence for enactment of legislation dealing exclusively with private international law matters. However, this did not mean that there was no integration of private international law in Europe. Article 220 of the Treaty of Rome stated that: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." While Member States never concluded a convention simplifying reciprocal recognition and enforcement of arbitration awards,¹¹ such a convention was concluded concerning judgments.

⁴ To mention just few: Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7. Council 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 [2003] OJ L 338.

⁵ European Parliament and Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351.

⁶ European Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.

⁷ European Parliament and Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.

⁸ Hereafter, the term "EU private international law" is used to describe these three instruments.

⁹ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299.

¹⁰ Convention on the Law Applicable to Contractual Obligations (Rome) [1980] OJ L 266.

¹¹ B. von Hoffmann, 'The Europeanization of Private International Law', in B. von Hoffmann (ed.), *European Private International Law* (Nijmegen: Ars Aequi Libri, 1998) 13, 28.

In 1973, the Brussels Convention, negotiated with the framework of Article 220, entered into force.¹² This instrument applied to civil and commercial matters and provided two main groups of rules: jurisdictional rules and rules on recognition and enforcement of judgments. After the entry into force of the Amsterdam Treaty, the EU obtained competence to adopt private international law instruments.¹³ In 2001, using this recently obtained competence, the EU “converted” the Brussels Convention into the Brussels I Regulation.¹⁴ In 2012, the Regulation was amended and following these amendments goes under the name of the Brussels *Ibis* Regulation.

While unification of procedural rules of private international laws started early, unification of conflict of laws rules came rather late. The Treaty of Rome did not provide any specific negotiation framework for the unification of conflict of laws rules. However, in 1980 the Rome Convention was opened for signature and it entered into force in 1991.¹⁵ The Rome Convention did not refer to Article 220¹⁶ and, formally, was not based on any European Community instrument.¹⁷ Nevertheless, the preamble to the Rome Convention referred to “unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments” as an inspiration for further unification of conflict of laws. The Rome Convention contained a rather extensive set of unified conflict of laws rules for contractual obligations. After the entry into force of the Amsterdam Treaty, the EU replaced the Rome Convention by the Rome I Regulation, dealing with the same subject-matter, being based on similar principles and sharing a similar structure.

While unification of conflict of laws rules for contractual obligations was achieved through an international convention, unification of conflict of laws for non-contractual obligations was less successful. Initially, the authors of the Rome Convention wanted to unify conflict of laws rules for both contractual and non-contractual obligations. However, this idea was soon abandoned.¹⁸ Conflict of laws rules for non-contractual obligations neither made it into the Rome Convention, nor were they unified via a separate convention, until after the entry into force of the Amsterdam Treaty when the EU itself was endowed with competence to unify conflict of laws. The EU was able to adopt such an instrument that is currently known as the Rome II Regulation. The Rome II Regulation determines the law applicable to torts, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. Together with the Rome I Regulation it creates an almost comprehensive set of conflict of laws rules for obligations.

Once the Brexit process will be over and unless the EU and the UK agree on any specific terms in respect of the Brussels *Ibis*, Rome I and Rome II Regulations, these instruments will cease to apply in the UK. This poses the following questions. Firstly, what will be the consequences and can these instruments be effectively substituted by similar domestic law provisions? Secondly, could the Brussels *Ibis* Regulation and the Rome I Regulation be substituted in the UK by their predecessors: the Brussels Convention and the

¹² U. Magnus, ‘Introduction’, in U. Magnus, P. Mankowski (eds.), ‘European Commentaries on Private International Law: Brussels I Regulation’ (Berlin: Walter de Gruyter, 2011) 4, 14.

¹³ K. Boele - Woelki, R. H. van Ooik, ‘The Communitarization of Private International Law’ [2002] 4 Yearbook of Private International Law 1, 11 *et seq.*

¹⁴ A. Briggs, ‘Private International Law in English Courts’ (Oxford: Oxford University Press, 2014) 174.

¹⁵ Th. M. De Boer, ‘The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation’ [2009] 56 Netherlands International Law Review 295, 307.

¹⁶ A. Weber, ‘Die Vergemeinschaftung des internationalen Privatrechts’ (Berlin: Tenea, 2004) 7.

¹⁷ M. Wilderspin, ‘New Possibilities for Cooperation with the European Union - The Transfer of Competence for Judicial Cooperation from Member States to Community Institutions: The Foundations and the Implementation of the Transfer of Competence in the Area of Judicial Cooperation in Civil Matters to the Community Institutions’ [2002] 21 The Journal of Law and Commerce 181, 183.

¹⁸ G. van Calster, ‘European Private International Law’ (Oxford: Hart Publishing, 2013) 151. C. M. V. Clarkson, J. Hill, ‘The Conflict of Laws’ (Oxford: Oxford University Press, 2006) 172.

Rome Convention? Thirdly, could the EU and UK conclude a separate agreement on matters of private international law?

2. Domestication of EU Private International Law and Its Consequences

2.1. Conflict of Laws Rules

What happens when the UK will no longer be bound by the three instruments discussed above? According to the UK government, following Brexit, the existing legal framework will be preserved for the time being, by converting it into domestic legislation.¹⁹ However, even if the UK tries to domesticate EU private international law, domestication will bring with it a number of negative effects.²⁰ We will discuss just a few of them, starting by considering conflict of laws rules and afterwards looking at procedural rules.

In principle, conflict of laws rules do not require reciprocity.²¹ In other words, effective application of conflict of laws rules by a national court does not require any cooperation with foreign courts. For EU Member States this means that not much will change, because most of the provisions in the Rome I and Rome II Regulations equally apply to any legal relation involving a cross-border element, irrespective of whether it has connections with Member States or third states.

The fact that EU conflict of laws rules are not based upon the idea of reciprocity also means that the UK may try to copy the existing EU conflict of laws rules into its domestic legislation. However, it is important to take into account that the main objective of the Rome I and Rome II Regulations is to create uniform conflict of laws rules.²² unilateral measures cannot achieve this. Even if the UK takes into account the judgments of the Court of Justice of the European Union (hereinafter: CJEU) rendered prior to Brexit, once Brexit is executed, the UK will stop being bound by CJEU judgments. As a result, increasing discrepancy between conflict of laws rules will be inevitable.

For private persons, this means that the foreseeability of conflict of laws rules will diminish. Currently the place of litigation has very limited influence on conflict of laws in Member States applying the Rome I and Rome II Regulations. In the future, private persons will not be able to rely on uniform conflict of laws rules, but will have to consult UK domestic conflict of laws rules when planning their cross-border transactions. Likewise, often in cross-border disputes, practitioners consulting their clients must assess, at least *prima facie*, what could be the most obvious benefits and risks of starting litigation in one or another jurisdiction. With the Rome I and Rome II Regulations, a local counsel is able to determine with a high degree of certainty what law applied irrespective of the forum. Hence, the playing field is more transparent. This will change. Uncertainty will be magnified by the fact that EU rules on allocation of jurisdiction will also cease to apply in the UK, meaning that counsel will not be able to foresee with certainty whether UK courts will have jurisdiction, without consulting its domestic law.

¹⁹ R. Hoyle, L. Bastin, 'Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law', 6-7. Available at: <https://101r4q2bpyqyt92eg41tusmi-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Brexit-Conflicts-Sub-Group-International-Law-Aspects.pdf>.

²⁰ In order to domesticate the Rome I and Rome II Regulations, the UK does not need to introduce new domestic legislation. In fact, the UK has already transposed the Rome I and the Rome II Regulations into the domestic legal order through domestic legislative acts. Hence, leaving domestic legislation in place, after the Brexit process comes to an end, would preserve the existing conflict of laws rules. See, The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, SL 2008/2986. The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009, SL 2009/3064. See also, M. Harding, 'Conflict of Laws' (Oxon: Routledge, 2014) 151 and 177.

²¹ Cf., A. Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' [2016] 12 Journal of Private International Law 195, 203.

²² See, Recital 6 of the Rome I Regulation and Recital 6 of the Rome II Regulation.

Another problem is the fragmentation of rights and obligations. A uniform system of conflict of laws rules means that the validity and effects of a contract are assessed identically in every Member State, because the same law is applied. Likewise, all Member States' courts apply the same law to a tort. This means that the uniformity of conflict of laws rules mitigates the influence of jurisdictional rules on substantive resolution of disputes. Assessment of rights and obligations is independent from jurisdictional rules. Fragmentation of conflict of laws rules will mean that a contract that would have been valid before the EU Member States' courts may be found to be invalid before the UK courts or a tort that would have spawned liability in the EU may be found non-existent by the UK courts and *vice versa*.

Finally, EU conflict of laws instruments, besides their general objective to attain uniformity, promote multiple specific substantive policies. Let us give two examples. Article 6(1) of the Rome I Regulation, subject to certain additional requirements, applies the law of the consumer's habitual residence to consumer contracts, while Article 6(2) allows choice of law agreements in consumer contracts. However "[s]uch a choice may not, [...] have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of [Article 6(1)]."²³ Application of Article 6(1) means that consumers may easily foresee the applicable law and, usually, they are most familiar with this law. Pursuant to Article 6(2) the professional party is not able to lower the level of protection provided by the law of habitual residence of the consumer, by pressuring the consumer, as a weaker party, into a choice of law agreement.

Article 7 of the Rome II Regulation offers the victim of environmental damage a choice between the law of the state where the damage occurred and where the tort was committed. The rule discriminates in favour of the person sustaining damage, giving him/her a right to choose the most favourable law.²⁴ At the same time, it neutralizes opportunistic behaviour of persons trying to benefit from disparities of liability standards in different substantive laws and prevents dangerous regulatory competition among Member States. If the place of tort was to determine the applicable law, potential tortfeasors would be encouraged to "set up factories in low protection states and could indeed encourage legislators in turn to lower standards in order to attract firms [...]"²⁵ If the place where the damage occurred was to determine the applicable law, factories would have been set up "in a higher protection countr[ies] if natural conditions, such as down winds or rivers flowing across state boundaries, meant that the effects of the pollution were in fact felt elsewhere."²⁶ Article 7 prevents both forms of opportunistic behaviour. After Brexit it will be in the hands of the UK to determine whether these and other policies protected by EU conflict of laws rules will merit any further protection.²⁷ In the worst case scenario, it may turn out that they will be abandoned, leaving British society worse off.

Overall, domestication of EU conflict of laws rules in the UK is not impossible. However, in the long run, domesticated conflict of laws rules will diverge from their EU counterparts, lacking the unifying role of the CJEU. This will lead to the weakening of legal certainty and a possible fragmentation of rights and obligations. Similarly, further changes of conflict of laws rules in the UK may lead to the abandonment of specific substantive policies promoted by EU conflict of laws rules.

2.2. Jurisdictional Rules

²³ Article 6(2) of the Rome I Regulation.

²⁴ Recital 25 of the Rome II Regulation.

²⁵ H. Muir Watt, 'European Integration, Legal Diversity and the Conflict of Laws' [2004-2005] 9 *Edinburg Law Review* 6, 18.

²⁶ *Ibid.*

²⁷ This is a hypothetical assumption dependent on many variables. Firstly, to what degree current conflict of laws rules will be genuinely preserved after the Brexit process and for how long. Secondly, UK may adopt formally different conflict of laws rules, preserving similar policies as the same objective may be achieved (possibly with different efficiency) by different means. The most important consideration is whether the UK will consider substantive policies of EU conflict of laws rules to be worth protecting.

EU jurisdictional rules are more dependent upon reciprocity than conflict of laws rules. Notably, certain jurisdictional rules grant exclusive jurisdiction to a court in order to ensure, *inter alia*, the protection of public interests. This protection cannot be ensured if other states do not respect these rules.

Let us consider a few examples of such rules. One important example is embodied in Article 24(1) of the Brussels *Ibis* Regulation. According to this provision, in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction.²⁸ This rule is said to protect the public policy of the Member State where the immovable property is located.²⁹ Another important example are jurisdictional agreements designating UK courts. The UK is one of the principal “exporters” of its legal system, benefiting from jurisdictional agreements. The Brussels *Ibis* Regulation provides that a Member State court designated in a jurisdictional agreement has exclusive jurisdiction.³⁰ A jurisdictional agreement is a fully recognized mechanism of transferring jurisdiction to a Member State court that otherwise lacks it.

Currently, the UK courts have exclusive jurisdiction in proceedings which have rights *in rem* in immovable property or tenancies of immovable property located in the UK as their object or when a jurisdictional agreement designates a court in the UK. Courts in other Member States must respect their jurisdiction and decline jurisdiction in favor of UK courts. However, there is no rule stating that Member States must respect jurisdiction of third state courts when the immovable property is located therein or a third state court is designated in a jurisdictional agreement.³¹ If read literally, the Regulation even prohibits respecting jurisdiction of third states, because no Member State court may deny jurisdiction, granted by the Regulation in favour of a third state court, lacking an express rule to the contrary.³² A domestic jurisdictional rule of a third state cannot impose respect for jurisdiction of its courts upon Member States.

The situation will be somewhat different, if proceedings in such cases will be first commenced in the UK. The Brussels *Ibis* Regulation supplements jurisdictional rules with an indispensable rule of *lis pendens*. According to this rule, “where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.”³³ The court second seized must decline jurisdiction, if “the jurisdiction of the court first seized is established [...]”³⁴ The *lis pendens* rule prevents positive jurisdictional conflicts where a number of courts simultaneously find themselves competent and may possibly render incompatible judgments.³⁵ However, this mandatory rule applies only among Member States’ courts, meaning that after Brexit the jurisdiction of the UK courts will not be protected by this rule and positive jurisdictional conflicts are to be expected with both the UK and EU Member States’ courts claiming to have jurisdiction.

²⁸ For an exception from this rule, see the second paragraph of Article 24(1) of the Brussels *Ibis* Regulation.

²⁹ P. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1979] OJ C 59/1, 35.

³⁰ See, Article 25 of the Brussels *Ibis* Regulation.

³¹ In respect of jurisdictional agreements, it is necessary to note that currently the EU is a party to Hague Convention on Choice of Courts Agreements. If after Brexit, the UK will become an independent contracting state to that convention then mutual enforcement of exclusive jurisdictional agreements between the UK and EU Member States will be preserved. Hence, risks related to non-enforcement of jurisdictional agreements may turn out to be a more theoretical than practical. The same is not true for matters falling within the scope of Article 24 of the Brussels *Ibis* Regulation, which currently protects exclusive jurisdiction of Member State courts.

³² See, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, C-281/02 [2005] ECR I-01383.

³³ See, Article 29(1) of the Brussels *Ibis* Regulation.

³⁴ See, Article 29(3) of the Brussels *Ibis* Regulation.

³⁵ A. Briggs, ‘Private International Law in English Courts’ (Oxford: Oxford University Press, 2014) 301-302.

Nevertheless, the Brussels *Ibis* Regulation has also a specific *lis pendens* rule for third states. Pursuant to Article 33(1) of the Brussels *Ibis* Regulation, in such a case, a Member State court has a right (though not an obligation) to stay proceedings. However, this right exists only if a long list of requirements is satisfied: 1. An action before a Member State court and that of the third state have the same cause of action and same parties. 2. Jurisdiction of a Member State court is based on Articles 4, 7, 8 or 9. 3. It is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State. 4. The Member State court is satisfied that a stay is necessary for the proper administration of justice.

The main characteristic of this provision is that it leaves the door open for the application of domestic law. Since the Brussels *Ibis* Regulation does not impose an obligation upon Member States to recognize and enforce judgments rendered by third state courts, Article 33(1) functions under condition that domestic law imposes an obligation on a particular Member State to recognize and enforce a judgment rendered by a court of a particular third state. Let us apply these rules to the situation of a jurisdictional agreement designating a UK court. If one of the parties manages to commence proceedings before a UK court, then the other party will be able to commence later proceedings before a Member State court, if the latter has jurisdiction under the Brussels *Ibis* Regulation, provided that the judgment rendered by the UK court will not be recognizable and enforceable in the given Member State. However, even if the judgment is to be recognizable and enforceable, the Member State court may refuse to stay the proceedings, based on considerations of the proper administration of justice. Moreover, pursuant to the text of Article 33, even if the court finds that the stay of proceedings is necessary for the proper administration of justice, it remains in the court's discretion and not an obligation.

This complicated set of cumulative requirements for the application of the *lis pendens* rule vis-à-vis a third state shows that this is a non-predictable tool. It does not impose a true obligation on Member States courts to avoid parallel litigation. In fact, it contains an express reference to the domestic law of the respective Member States. Member States that pursuant to their domestic law would not recognize and enforce judgments from the UK, would not be obliged to avoid parallel proceedings. And even in cases where such an obligation would exist, avoidance of parallel litigation would remain a discretionary matter for Member States. Therefore, Brexit will inevitably revive the risk of parallel litigation and domestication of EU jurisdictional rules in the UK will not be a viable tool to eliminate this problem.

Moreover, just like conflict of laws rules, jurisdictional rules are often aimed at protecting certain substantive policies, e.g. the protection of weaker parties. For example, subject to certain requirements, Article 18 of the Brussels *Ibis* Regulation ensures that a consumer is able to sue his/her counterparty in his/her own domicile or that of the counterparty. This is an important exception from the general rule of Article 4(1), providing that the domicile of the defendant determines the forum. Such a method of protection can be ensured unilaterally. However, it is in the hands of the UK legislator to choose whether these weaker parties currently protected by the Brussels *Ibis* Regulation will enjoy this protection in the future before the UK courts.

For private persons, domestication of jurisdictional rules in the UK means that the risk of parallel litigation and uncertainty will rise. Parallel litigation also involves additional expenses for the parties and often results in incompatible judgments. Planning of international transactions will become more cumbersome as parties will have to consult domestic law of the UK in addition to the Brussels *Ibis* Regulation, in order to determine the competent court or courts. At the same time, protection of individual rights that are currently protected by jurisdictional rules of the Brussels *Ibis* Regulation may suffer if the UK legislator decides that their protection is not worth it. For the UK, it will be more difficult to ensure protection of its public interests that are now protected by EU jurisdictional rules.

2.3. Recognition and Enforcement of Judgments

Currently, the Brussels *Ibis* Regulation creates an efficient regime for recognition and enforcement of judgments rendered by a Member State court in other Member States. Once the Brexit process is over, judgments rendered by UK courts will not be covered by the provisions of the Regulation on recognition and enforcement of judgments rendered by Member State courts. Such judgments will be able to fall only within the scope of Article 33(3) and Article 45(1)(d).

Article 33(3) states that the court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State. This provision does not impose any self-standing obligation upon the Member States, as such a judgment is binding upon the Member States only if another legal instrument makes it recognizable and enforceable in the given state.

According to Article 45(1)(d), recognition of a judgment rendered by a Member State court in another Member State may be refused, provided that there is an earlier judgment involving the same cause of action and between the same parties rendered in a third state. Once again, the refusal is possible only if the earlier judgment fulfils the conditions necessary for its recognition in the respective Member State. Hence, the Brussels *Ibis* Regulation does not impose an obligation to recognize and enforce a judgment rendered in a third state, but provides for certain consequences, if a judgment is recognizable in a Member State.

The UK legislator may adopt legislation imposing an obligation on its courts to recognize and enforce judgments rendered in EU Member States. However, it cannot impose such rules on other Member States. Hence, it will depend on every Member State to decide whether judgments rendered in the UK are to be recognized and enforced and under which conditions.

The practical effects of this development are easy to see. Currently, a judgment rendered in the UK has “liquidity” in other Member States and *vice versa*. Rights determined by a judgment are valid in all other Member States and a judgment creditor knows this by simply looking at the text of the Brussels *Ibis* Regulation. After Brexit, liquidity of UK judgments in the EU will not be self-evident, but will depend on 27 domestic legislations. Similarly, liquidity of judgments from EU Member States in the UK will depend upon domestic legislation. This will lead, at the very least, to a significant loss of legal certainty. At worst, it may mean that rights obtained in one state will not be recognized and enforced in other states, leading to parallel litigation. As a result, litigation will cost more, take more time and, in principle, will make planning of cross-border transactions more complicated.

3. Is Revival of the Former Treaty Regimes a Viable Option?

While domestication of EU private international law will probably leave everybody worse off, there is another option - revival of the Brussels Convention³⁶ and the Rome Convention. The option is better than domestication, but it has its own flaws, *inter alia*, that the revival seems unlikely.

Before we try to outline the possible scenario of revival of the treaty regimes, we have to specify that such an option does not exist for the Rome II Regulation. As it was said before, there was no prior international convention among EU Member States unifying conflict of laws rules for non-contractual obligations and for that reason, once the Brexit process comes to its end, conflict of laws rules for non-

³⁶ There is another convention - the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339). The convention is concluded between the EU and Members of the European Free Trade Association and contains rules very similar to those in the Brussels Convention and later regulations replacing it. We will not discuss here whether this Convention could apply between the UK and EU. However, arguments against that are similar to those expressed in respect of the Brussels Convention, namely, the Convention was intended to apply between EU and states participating at the European Free Trade Association. the UK will not participate in either. For an in-depth discussion, see, in general, A. Dickinson, ‘Back to the future: the UK’s EU exit and the conflict of laws’ [2016] 12 Journal of Private International Law 195.

contractual obligations in the UK will be determined by domestic legislation. Member States' courts will continue to apply the Rome II Regulation just as before even to cases related to the UK, since the Rome II Regulation has a universal territorial scope.

The situation is more complicated in respect of the two other instruments. Let us first take a look at the Brussels *Ibis* Regulation. Article 68(1) provides that “[t]his Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.” Pursuant to this provision, the Brussels Convention remains in force in respect of overseas territories of the Member States, but it is superseded in other territories by the Regulation. It means that while the Brussels *Ibis* Regulation “supersedes and replaces the Brussels Convention as between Member States [...] [it] neither repeals the Brussels Convention, nor forces the Member States to denounce it.”³⁷ In other words, while the Regulation has priority over the Convention (except in some overseas territories), the latter most likely has remained in force.³⁸

However even if the Brussels Convention is not terminated by the subsequent legislation, it is doubtful that it may be applied in a state outside the EU. The Brussels Convention was adopted pursuant to Article 220 of the Treaty of Rome. Hence, it was perceived as an instrument concluded by Member States of the European Community and was never joined by a non-Member State. In the Schlosser report it was stated that “[t]he Working Party was unanimous that any territory which becomes independent of the mother country thereby ceases to be a member of the European Community and, consequently, can no longer be a party to the 1968 Convention.”³⁹ It follows from this statement that *a fortiori* a state cannot be a party to the Brussels Convention anymore, once it leaves the EU.

If we agree with the approach that the UK's accession to the Brussels Convention was conditioned upon its membership of the European Community (and later its EU membership), we must conclude that Brexit automatically means an implicit exit from the Brussels Convention.⁴⁰ This is not the only interpretation possible,⁴¹ but it casts serious doubts over revival of the Brussels Convention.

Even if the Brussels Convention, like the phoenix, were to be reborn, we would be worse off than with the Brussels *Ibis* Regulation. Member States that joined the EU in 2004 and thereafter are not parties to the Convention.⁴² For these Member States there would still be no international instrument, ensuring mutual recognition and enforcement of judgments with the UK. Moreover, the Brussels Convention has a number of important weaknesses. Let us mention just one example. Currently, the Brussels *Ibis* Regulation provides an important exemption from the *lis pendens* rule. Pursuant to Article 31(2), “[...] where a court of a Member State on which an agreement [...] confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it

³⁷ P. Mankowski, ‘Article 68’, in U. Magnus, P. Mankowski (eds.), ‘European Commentaries on Private International Law: Brussels I Regulation’ (Berlin: Walter de Gruyter, 2011) 850, 850.

³⁸ A. Dickinson, ‘Back to the future: the UK's EU exit and the conflict of laws’ [2016] 12 Journal of Private International Law 195, 204.

³⁹ P. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, 1978 [1979] C 59/71, 143.

⁴⁰ Cf., R. Hoyle, L. Bastin, ‘Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law’, 15. Available at: <https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Brexit-Conflicts-Sub-Group-International-Law-Aspects.pdf>.

⁴¹ Another approach is to perceive the Brussels Convention as an independent convention binding all its contracting states irrespective of their relations with the EU.

⁴² R. Hoyle, L. Bastin, ‘Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law’, 8. Available at: <https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Brexit-Conflicts-Sub-Group-International-Law-Aspects.pdf>.

has no jurisdiction under the agreement.” This exemption favours jurisdictional agreements, allowing the court designated in the agreement to be first to determine its own competence. The Brussels Convention did not contain such a rule, meaning that a claim brought before a court not designated in a jurisdictional agreement had the priority to determine its own competence, while the designated court had to stay the proceedings until the first-seized court reached the decision. This is just one example showing that a revival of the Brussels Convention is better than nothing, but is still not optimal.

Similarly to the Brussels Convention, the Rome Convention unified the conflict of laws rules for contractual obligations prior to the entry into force of the Rome I Regulation. Currently, Article 24(1) of the Rome I Regulation holds: “[t]his Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.” Just as in respect of the Brussels Convention, there is no definitive answer whether the Convention is terminated, although it is possible to argue that partial “replacement” of the Rome Convention does not imply its termination.

At the same time, participation in the Rome Convention was strongly related to the EU membership. Although it was not adopted pursuant to any specific EU “negotiation framework”, only Member States have been parties to the Rome Convention. Moreover, its preamble refers to the parties to “the Treaty establishing the European Economic Community” and regards the Convention as a complementary instrument to the unification of the jurisdictional rules and the rules on recognition and enforcement of judgments. In other words, the authors of the Rome Convention perceived this document as being intrinsically related to the EU. Hence, we can once again pose the question whether the participation in the Rome Convention is not conditioned upon EU membership.

Moreover, even if the Rome Convention revives, it would supply less developed conflict of laws rules in comparison to the Rome I Regulation. To take a simple example. Article 4(1) of the Rome I Regulation provides a number of clear-cut conflict of laws rules for typical contracts. Instead of these strict rules, Article 4 of the Rome Convention used the most closely connected country as a central connecting factor for contracts, supplemented by a set of presumptions. Before the entry into force of the Rome I Regulation, it was far from self-evident when these presumptions were to be applied and when they could be set aside. This created uncertainty about the conflict of laws rules. At the same time, it is unclear whether the UK would be bound by preliminary rulings of the CJEU on the Rome Convention rendered after the split. If this is not the case, then the UK and the EU will inevitably drift away in the practices of application of the Rome Convention and its main objective of uniformity of conflict of laws⁴³ will be lost.

Altogether, currently there is no clear answer as to whether the Brussels Convention and the Rome Convention could be revived. On the one hand, there is a place for an argument that they are not terminated and could revive in case the respective regulations cease to apply. On the other hand, they were adopted only by Member States and it may be argued that their application is conditioned upon the membership of the EU.

4. A Separate Agreement between the EU and the UK

Neither domestication of private international law, nor revival of the Brussels Convention and the Rome Convention are optimal options for preservation of the current private international law regime. The best option seems to be the conclusion of a separate agreement between the EU and the UK, preserving the current regime of private international law or at least maintaining it as much as possible. Such an agreement seems particularly necessary to compensate the absence of the Brussels *Ibis* Regulation as this instrument

⁴³ See, Preamble of the Rome Convention.

is based on reciprocity and its absence will negatively affect recognition and enforcement of judgments rendered in the UK and *vice versa*.

Currently, it is too hypothetical to discuss this option in detail as it is not even known whether the EU and the UK are considering this option. Possibly this option will come to the table during the Brexit negotiations. Nevertheless, it is necessary to note that the conclusion of this agreement is much easier said than done. In particular, because without the unifying role of the CJEU, it will be difficult to achieve a uniform uniformity. Even if such a separate agreement was to reproduce *verbatim* the current EU private international law, divergence among national courts applying it would be difficult to avoid. Hence, in order for a separate agreement to ensure uniformity of private international law in relations between the EU and the UK, the CJEU must be granted the competence to interpret that instrument. Unfortunately, it is rather doubtful that the UK will be willing to subject itself to the competence of the CJEU.

Conclusions

For the general public, the effects of Brexit on EU private international law both within the UK and in the EU Member States may seem to be of secondary importance. In reality, these effects are noteworthy. Non-existence of an efficient, common regime for the recognition and enforcement of judgments will drag judicial cooperation back to a long forgotten past, where judgments in civil and commercial cases were either not recognized and enforced abroad or their recognition and enforcement was complicated and varied among jurisdictions. In addition, the non-existence of unified jurisdictional rules may lead to positive jurisdictional conflicts, parallel litigation and incompatible judgments. The relevance of the latter two problems will depend on whether judgments rendered within the EU or the UK will be mutually recognized and enforced. If this is not the case, then parallel litigation and the risk of incompatible judgments will occasionally be inevitable.

In respect of conflict of laws, the risks are smaller. The UK could domesticate EU conflict of laws. However, taken out of their original legal framework and escaping interpretation of the CJEU, these rules will soon start to diverge from those applied in the EU. For private persons this would mean greater uncertainty in respect of the applicable law and a more complex planning of cross-border transactions and litigation. Moreover, current EU conflict of laws rules are often protecting certain substantive policies, in particular, rights of weaker parties. In the long run, it is not clear whether these policies will be preserved by the UK legislator. At the same time, this will not affect application of EU conflict of laws rules by Member States' courts.

There is also an ongoing debate about the revival of the Brussels Convention and the Rome Convention. While not impossible, such a result seems unwarranted, since both instruments are strongly related to the EU membership. Moreover, the Brussels Convention is not binding upon all Member States, hence its revival cannot truly replace the current regime.

All the previous considerations show that every attempt to preserve the current framework of private international law in relations with the UK could hardly succeed. Irrespective of whether EU private international law is domesticated or the former treaty regimes are revived, we will be in a worse state of affairs than we are now when the Brussels Ibis, Rome I and Rome II Regulations are fully operating in the UK. Hence, there is only one optimal solution – to negotiate a special agreement between the EU and the UK on private international law. Unfortunately, it is not clear whether this option will be viable in practice.

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AUTONOMOUS WEAPONS SYSTEMS IN INTERNATIONAL HUMANITARIAN LAW

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Abstract

Autonomous weapon system is defined as a weapon system capable of independently selecting and engaging targets without human intervention. Nowadays, the development of technology has reached the point where the use of such systems, *inter alia* in modern conflicts, is unavoidable. It allows to reduce casualties as well as costs of produce on the owner's side. However, some legal aspects arise while deploying such systems in armed conflict.

Autonomy for selecting and attacking targets in autonomous system is limited by the specific parameters. However, its predictability may be lost while being deployed in complex tasks or in more dynamic environment. The first question arises, whether rules of proportionality and distinction functioning under international humanitarian law can be fully applied in the context of autonomous weapon system.

Secondly, introduction of such a system in modern conflicts may lead to an accountability gap in case of violations of international humanitarian law, as the limits of human control over a system could make it difficult to find individuals responsible for international crimes. Owing to the fact that such a weapon can select targets independently, it may be impossible to prove the subjective element of a crime, within which the knowledge or intent of an individual is required.

Furthermore, the use of fully autonomous weapons system shall be considered in the area of State responsibility. Articles on Responsibility of States for Internationally Wrongful Acts provide the responsibility of States also for violations of international humanitarian law committed by their armed forces. This, however, is only the case, when an act is attributable to forces being under State control.

The aim of this paper is to analyse legal aspects of using fully autonomous weapon systems, their advantages and disadvantages, as well as find an answer to the question: whether autonomous weapons should be banned or regulated by international law.

Keywords: autonomous weapons systems, principle of distinction, principle of proportionality, international responsibility

Introduction

In general, autonomous weapon system can be defined as a weapon system capable of independently selecting and engaging targets without human intervention. Its deployment in the battlefield possesses a wide range of advantages. Firstly, their computing capabilities prevail over other systems in terms of strength, speed and precision. This enables autonomous weapons to adapt and learn in a variety of complex scenarios, in which other weapons face horrendous difficulties. Autonomous weapons also lack human emotions (ie. fury or fear), which in case of human beings may lead to unreasonable, even illegal behaviour. Deployment of fully autonomous weapons in a battlefield will result in lower personnel costs, contrary to the semi-autonomous weapons (i.e. drones), where the operator, analyst, technician have to be involved, since autonomous weapons work on their own. Secondly, since autonomous weapons work independently, they avoid cyber-attacks as a result of cut communication-link between a weapon and an operator. They also

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possess the ability to stay on assignment for longer period and perform tasks that human beings would prefer to avoid. Last, but not least, the application of autonomous weapons systems allow to reduce human casualties and mental health illnesses of militants related to war experience.

However, deployment of autonomous weapons in armed conflicts brings a lot of doubts and objections. Human rights and humanitarian organisations are deeply concerned about the legality of their presence in the battlefield. States and armed forces, on the other hand, consider autonomy as a real chance to reduce casualties coming from armed conflicts. This article relates to the question, whether and who should be held responsible for possible malfunctions of such weapons.

1. Definitions of autonomous weapons systems

One can find various definitions of fully autonomous weapons system. United States Department of Defence in Directive Number 3000.09 on Autonomy in Weapon Systems of November 21, 2012², defines it as 'a weapon system that, once activated, can select and engage targets without further intervention by human operator'. This definition is significant insofar as United States become one of the most probable inventors of fully autonomous weapons and are the first State that has undertaken an act regarding such weapons.

Human Rights Watch, on the other side, refers to the distinction based on the range of human control and divides autonomous weapons into three categories: 'in-the-loop', 'on-the-loop' and 'out-of-the-loop' weapons. Two of them can be considered as fully autonomous, it is: out-of-the-loop and weapons that are technically on-the-loop, in fact being out-of-the-loop, because human supervision is so limited³. The abovementioned distinction is based on a role that human beings play in the process of acquiring and attacking a target. To actively engage a target, in-the-loop weapon requires human input after activation⁴. It is remotely controlled and is not able to make a decision without human command. On-the loop system can engage a target independently, but under a human supervision. Once activated, it can engage target that has been previously selected by a human operator, who sets limits on weapon's decision. And finally, out-of-the-loop weapon acts without human intervention at all⁵.

During the Convention on Certain Conventional Weapons Meeting of Experts on Lethal Autonomous Weapons Systems, taking place in Geneva from 11th to 16th of April 2016, the International Committee of the Red Cross has defined autonomous weapons system as 'any weapon system with autonomy in its critical functions, which can select (i.e. search for or detect, identify, track, select) and attack (i.e. use force against, neutralize, damage or destroy) targets without human intervention'⁶. This is probably the broadest definition available in the context of autonomous weapons systems, since it encompasses some of the already existing weapon systems⁷. The International Committee of the Red Cross believes that thanks to that, it allows weapons technology to consider what is legally and ethically acceptable in the area of weapons deployment in armed conflicts.

² Department of Defense of the United States Directive 3000.09, 21 November 2012, available at: <http://www.dtic.mil/whs/directives> (April 4th, 2017).

³ Human Rights Watch, Review of the 2012 US Policy on Autonomy in Weapons Systems, 15 April 2013, https://www.hrw.org/news/2013/04/15/review-2012-us-policy-autonomy-weapons-systems#_ftn2 (April 5th, 2017).

⁴ As Predators or Reaper drones used in Pakistan and Afghanistan.

⁵ C. A. Hauptman, 'Autonomous Weapons and the Law of Armed Conflict' [2013], 218 Military Law Review 170, page 1.

⁶ International Committee of the Red Cross, 'Views of the International Committee of the Red Cross on autonomous weapon system', April 11th, 2016, Convention on Certain Conventional Weapons Meeting of Experts on Lethal Autonomous Weapons Systems, 11-16 April 2016, Geneva, page 1.

⁷ Such as: anti-material defensive weapons (missile and rocket defence weapons and vehicle 'active protection' weapons), offensive weapon systems (loitering munitions, encapsulated torpedo weapons). see: International Committee of the Red Cross, 'Views of the International Committee of the Red Cross...', page 2.

At last, one should notice the distinction between autonomous and automated weapons systems. The latter ones, already commonly used in military forces, have certain automated features, possess an autopilot function and simply react to preset triggers⁸. Landmines and trip-wire sentry guns can be given as an example⁹. Fully autonomous weapons, on the contrary, require no human input, since they can engage target without human direction or oversight.

2. Relevant principles of international humanitarian law in the context of autonomous weapons systems

Human rights and humanitarian organisations undermine the autonomous weapons' ability to comply with fundamental principles of international humanitarian law. The main objections arise from principles of humanity, distinction and proportionality which are considered as norms of a customary nature binding in all types of armed conflicts. It is Common art. 3 to the I-IV Geneva Conventions of 12 August 1949¹⁰ that obliges to treat humanely persons taking no active part in the hostilities. Also art. 27 of the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949¹¹ obliges State Parties to respect persons protected under international humanitarian law in all circumstances as well as to treat them humanely and protect against all acts of violence or threats. In the context of autonomous weapons it can be impossible to fulfil the abovementioned obligations.

2.1. Autonomous weapons and the principle of distinction

Before the employment of new weapons, means or methods of warfare, one shall determine whether it is prohibited by international law. This obligation comes from art. 36 of the Additional Protocol I to the 1949 Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Additional Protocol I)¹². One of the fundamental and customary principles of international humanitarian law, applying in the context of art. 36 of the Additional Protocol I, requires to distinguish between combatants and non-combatants while engaging a military target¹³. Employment of weapons that are inherently indiscriminate amounts to a war crime under Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court¹⁴. This includes firing a weapon blindly or at random, in conditions that hinder visibility or near civilians with an imprecise device¹⁵.

⁸ R. Crotoof, 'War Torts: Accountability for Autonomous Weapons' [2016], 164 *University of Pennsylvania Law Review* 1347, page 2.

⁹ J. Lewis, 'The Case for Regulating Fully Autonomous Weapons' [2015], 124 *Yale Law Journal* 1309, page 1.

¹⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 *United Nations Treaty Series*. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 *United Nations Treaty Series* 85. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 *United Nations Treaty Series* 135. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 *United Nations Treaty Series* 287.

¹¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 *United Nations Treaty Series* 287.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8th June 1977, 1125 *United Nations Treaty Series* 3.

¹³ J.M. Henckaerts, L. Doswald-Beck, 'Customary International Humanitarian Law, (Cambridge 2005), Volume I: Rules: Rule 1. see: International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, I.C.J. Reports 1996, para. 78.

¹⁴ Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9.

¹⁵ C. A. Hauptman, page 5.

UN General Assembly in its Resolution 2444 (XXIII) of 19 December 1968 on Respect for human rights in armed conflicts stipulates that 'distinction must be made at all times between persons taking part in hostilities and members of the civilian population to the effect that the latter be spared as much as possible'¹⁶. Civilians remain under the protection of this principle as long as they do not take direct part in hostilities, which means acting intended to cause actual harm to enemy personnel and armament¹⁷. This rule finds also its confirmation in art. 48 of the Protocol Additional I and art. 13(2) of the Protocol Additional II to the 1949 Geneva Conventions of 1977 and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (Protocol Additional II)¹⁸.

According to art. 43(2) of the Protocol Additional I, combatants are defined as members of the armed forces of a part to the conflict, other than medical personnel and chaplains, who have the right to participate directly in hostilities. In case of doubt, art. 50(1) of the Protocol Additional I requires treating such persons as a civilians until their status is determined. Nevertheless, nowadays it becomes difficult to distinguish between civilians and combatants, since there rarely is a front line and military operations very often take place near or among civilian population. It is also difficult to determine whether or not a person is a civilian protected under international humanitarian law, since they play a double role – once being a civilian and then taking direct part in hostilities¹⁹.

Abovementioned difficulties are strengthen in the context of autonomous weapons, because it is doubtful whether they would be capable to comply with the principle of distinction²⁰. Their ability to engage a military target would certainly work in a simple environment. However, their precision may be lost while performing more complex tasks with circumstances that military commander or programmer could not previously predict. It may result in mistakes that humans would probably not make, since they possess an ability to adapt and behave depending on changing circumstances. Humans would not probably kill a child who brings a toy gun, which is not so obvious in the case of autonomous weapons. Breaches of the principle of distinction appear in case of firing a weapon blindly, at random, with limited visibility or near civilians with an imprecise devise²¹. Firing a weapon with limited visibility or with an imprecise devise seems being the most pertinent when it comes to autonomous weapons, since it applies to their technical capabilities, and therefore, may undermine their legal use in armed conflict. Furthermore, autonomous weapons' lack of empathy would make them unable to act with regard for human lives²². This is not the only discrepancy regarding such weapons.

¹⁶ UN General Assembly, Resolution 2444 (XXIII) on Respect for human rights in armed conflicts, UNTS A/RES/2444, 19 December 1968.

¹⁷ J.M. Henckaerts, L. Doswald-Beck, Rule 6.

¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 United Nations Treaty Series 609.

¹⁹ D. Fleck, 'The Handbook of International Humanitarian Law' (Oxford 2013), page 255.

²⁰ See, for example: Campaign to stop Killer Robots, available at: <http://www.stopkillerrobots.org/> (6 April 2017). see also: Human Rights Watch and International Human Rights Clinic, 'Killer Robots and the Concept of Meaningful Human Control. Memorandum to Convention on Conventional Weapons Delegates' [2016], Geneva. International Committee of the Red Cross, 'Views of the International Committee...

²¹ C. A. Hauptman, page 3.

²² J. L. Rogers, 'Legal Judgment Day for the Rise of the Machines: a National Approach to Regulating Fully Autonomous Weapons [2014], 56 Arizona Law Review 1257, page 3.

2.2 Autonomous weapons and the principle of proportionality

Another core principle of international humanitarian law relevant in the context of autonomous weapons is proportionality. It underlines that the right of the parties to an armed conflict to choose means and methods of warfare is not unlimited. Its origins come from Martens Clause included in the Preamble to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907 which states that 'populations and belligerents remain under the protection of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience'²³. It is particularly prohibited to employ means or methods which are intended to cause superfluous injury or unnecessary suffering, as it is stated in: art. 23 of the Hague Regulations Respecting the Laws and Customs of War on Land of 18 October 1907, art. 35 (2) of the Protocol Additional I, as well as in the Preamble to the Convention on Certain Conventional Weapons of 10 April 1981²⁴. In its judgment on *Kupreskic and others* case of 14 January 2000 International Criminal Tribunal for the former Yugoslavia has considered proportionality as a part of customary law, applying both in international and non-international armed conflicts²⁵.

The principle requires to balance between military necessity and humanity while engaging a target. According to art. 51(5)(b) and art. 57(2)(a)(iii) of the Protocol Additional I the military operation must be undertaken only in so far as military necessity requires it and the damage caused by the operation be proportionate to the military advantage anticipated²⁶. Any collateral damage that results from a military operation cannot be excessive in relation to the military, both tactical and strategic, advantage expected²⁷. To make the subject more objective, States' military manuals provide their soldiers with Rules of Engagement. Furthermore, international law regulates conditions that need to be taken into consideration in the context of collateral damage while engaging a target. Among them one shall pay attention to civilians inside the target, civilians possibly within weapons range, as well as possible effects of a weapons malfunction. As every programmable device, autonomous weapons are vulnerable to malfunctions or errors resulting from their software coding. There is a real threat that in such a case autonomous weapons would engage and attack targets without any limitations, thus, causing a superfluous injury or broadening the amount of collateral damage.

3. Discrepancies in accountability for malfunctions of autonomous weapons

3.1. Individual accountability

The practical problem with the autonomous weapons' ability to operate without human oversight is the accountability for their malfunctions or errors, when they do damage that could not have been predicted. While less autonomous weapons systems require a human pilot to decide on or oversight the actions undertaken by a device, the accountability problem does not arise. It can be a pilot or a programmer who is

²³ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Hague, 18 October 1907, 187 CTS 227.

²⁴ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed or Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, 1342 UNTS 137.

²⁵ International Criminal Tribunal for former Yugoslavia, Prosecutor v. Kupreskic and others, IT-95-16-T (14 January 2000), para. 524.

²⁶ D. Fleck, page 122.

²⁷ Ibidem.

held responsible for crimes committed by such a weapon²⁸. Fully autonomous weapons, on the contrary, after activation are not piloted or supervised by anyone, and the question is, whether and who should be held responsible for crimes committed by a weapon.

While analysing military responsibility, the first individual that comes into account is a commanding-officer, who authorises the use of such a weapon. The superior's responsibility flows from giving the unlawful order or neglecting to take the necessary measures to prevent from committing or punishing a crime (failure to prevent or failure to punish)²⁹. According to art. 87 (1) of the API, a commanding officers are obliged to prevent breaches of international humanitarian law committed by the forces under their command, as well as to ensure that members of these forces are aware of their obligations under international humanitarian law. Commanders can be held responsible for violations of international humanitarian law committed by their troops whom they fail to control, as well as by their subordinates which they permit or acquiesce in³⁰.

There are, however, several requirements that need to be fulfilled while imposing commander's responsibility. Firstly, commander is not charged with crimes committed by his subordinates *per se*, but with his failure to carry out a proper control over them. Secondly, for their breaches of duty, commanders are usually held responsible within national structures through disciplinary action. To held commander responsible, it is also necessary to establish that a crime that have been committed, was one in which the commander acquiesced³¹. Assuming that it is possible to identify the commander's necessary and reasonable measures in carrying out a proper control over his subordinates, the subjective element of a crime needs to be proved. Criminal or disciplinary responsibility depends on the fact that a commander was aware, or under the circumstances, should have been aware, that the subordinate was committing or was going to commit such a violation³². One shall notice that all weapon systems pose some degree of risk and autonomous weapons systems would not be an exception. A commander, therefore, would be aware of the probable risks resulting from deployment of autonomous weapons. Commander's responsibility would not provide any difficulties while he is aware of the fact that deployment of a weapon actually creates a risk of a crime, for example by knowing that a malfunction disables a weapon to distinguish between civilians and combatants³³. The problem is with responsibility of a commander who is not able to predict a particular malfunction or error, because he is not aware of the particular risks coming from a software or a construction of such a weapon. When a malfunction or error appears right after weapons activation, it may turn out to be impossible for a commander to get back the control over the weapon, which would result in the lack of intentional behaviour.

Another potential individual liable for a damage caused by the autonomous weapon would be the manufacturer. Taking into account that such weapons are produced by a corporate manufacturer, it would be impossible to prove the negligence of a particular individual responsible for weapon's malfunction or error (manufacturer, designer, programmer). Producers are also rarely held responsible for design effects, especially when they notify the possible malfunctions or errors in the deployment of a weapon to the military purchasers³⁴. Furthermore, the accountability would require a victim to initiate a court case against manufacturer and to prove the negligence in the process of weapons' production. Victims would be forced to

²⁸ D. N. Hammond, 'Autonomous Weapons and the Problem of State Accountability' [2015], 15 Chicago Journal of International Law 652, page 5.

²⁹ G. D. Solis, 'The Law of Armed Conflict' (Cambridge 2010), page 381. see also: J.M. Beard, 'Autonomous Weapons and Human Responsibilities' [2013-2014], 45 Georgetown Journal of International Law 61, page 655.

³⁰ G. D. Solis, page 393.

³¹ J.M. Beard, pages 656-657.

³² D. Fleck, page 669.

³³ Supra note 24 - D. N. Hammond.

³⁴ J.M. Beard, page 647.

pursue appropriate lawsuits in a foreign court against a producer, which might turn to be difficult when one realizes the extraordinary nature of a situation in which such a weapon is deployed³⁵.

3.2. State's accountability

Difficulties related to individual responsibility for AWS malfunctions or errors result in the necessity to consider other possible ways of international accountability, shifted from individuals to State's responsibility. In the beginning, one shall consider the International Military Tribunal at Nuremberg's judgment of 1 October 1946, in which the Tribunal ascertained: 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'³⁶. However, with autonomous weapons it would be unavoidable that violations of international humanitarian law may be committed by abstract entities, without any wilful act of a human being³⁷.

State responsibility is based on internationally wrongful acts, which are defined under art. 2 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts. They are understood as acts or omissions that are attributable to the State under international law and constitute a breach of an international obligation of the State³⁸. Violations of international humanitarian law are included into the list of internationally wrongful acts, therefore, State responsibility for AWS acts may become more effective than individual one. As the International Court of Justice in the United States Diplomatic and Consular Staff in *United States Diplomatic and Consular Staff in Tehran* Judgment of 24 May 1980 stated, it must be considered whether such acts are compatible or incompatible with State's obligations 'under treaties in force or under any other rules of international law that may be applicable'³⁹.

The State's liability is divided into two categories: strict and negligence liability. Strict liability is based on mere injury caused by State's behaviour. Negligence liability, on the other hand, refers to failure in exercising reasonable care to prevent injury⁴⁰. With autonomous weapons violations of international humanitarian law it would be difficult to prove negligence liability, since it requires the lack of efficient measures in preventing a violation. The only reasonable possibility would be a risk responsibility of a State, similar to space liability grounded on the principle of an absolute liability for damages caused by space object on the surface of the earth or to aircraft flight, as established in art. II of the Convention on International Liability for Damage Caused by Space Objects of 29 November 1971⁴¹.

The main problem arising from State's liability is the implementation aspect. In theory there are two commonly met forms in which States could be held responsible for autonomous weapons violations. Responsibility before the International Court of Justice is the first that comes into account. As it was stated in *the Mavrommatis Palestine Concessions* case before the Permanent Court of International Justice, a victim State can seek redress on behalf of its citizens⁴². Unfortunately, there is a sharp limitation on the International

³⁵ *Idem*, page 649.

³⁶ International Military Tribunal, *The Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg*, judgment, 1 October 1946, 41 *American Journal of International Law* 186-218 [1946], page 223.

³⁷ R. Crootof, page 1385.

³⁸ UN General Assembly, *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

³⁹ International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, judgment, 24 May 1980, *International Court of Justice Reports* 1980, para. 56.

⁴⁰ R. Crootof, page 1394.

⁴¹ *Convention on International Liability for Damage Caused by Space Objects*, 29 November 1971, 961 *United Nations Treaty Series* 187.

⁴² Permanent Court of International Justice, *The Mavrommatis Palestine Concessions*, judgment, 30 August 1924, *Publications of the Permanent Court of International Justice, Collection of Judgments (1924), Series A – No 2*, page 12: 'It is an

Court of Justice's jurisdiction connected to the acceptance factor. Under the Statute of the International Court of Justice, the case before the Court can be carried out on the ground of: special agreement, *forum prorogatum* acceptance, jurisdictional clause or unilateral declaration accepting the jurisdiction of the Court⁴³. Each of them is, nevertheless, based on the acceptance requirement and therefore, ICJ's jurisdiction is limited. Furthermore, beside the Security Council competence under art. 94 of the UN Charter, the Court lacks an enforcement mechanisms to give effect to its judgments.

The second possible way of holding a State responsible for autonomous weapons violations is a lawsuit before domestic courts. However, State immunity becomes an actual bar from judicial proceedings, since according to art. 5 of the Convention on Jurisdictional Immunities of States and Their Property, 'a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention'⁴⁴. Although, the aforementioned Convention has not yet entered into force, the principle is considered as a norm of a customary nature⁴⁵. This would result in impossibility of suing a State by a victim of the weapons' violation.

Conclusions

Technology should be used in armed conflicts and autonomous weapons systems are among the greatest ones. They are faster, longer range and endurance, greater persistent and precise. They lead to reducing military casualties and injuries coming from war experience, allowing to remove humans from the battlefield. Nonetheless, their deployment in armed conflicts rise objections that cannot be simply omitted. The main consideration deals with core principles of international humanitarian law, it is: distinction and proportionality. Furthermore, accountability for autonomous weapons violations is blurred by their unpredictable malfunctions and errors. Individual responsibility seem impossible to be carried out because of the subjective element. State accountability, on the other hand, faces practical problems connected with ICJ's non-compulsory jurisdiction and State immunities before domestic courts. There is also a danger of hacking and reprogramming such weapons in order to purportedly violate international humanitarian law.

Banning autonomous weapons would be counter-productive, since benefits coming from their deployment in armed conflicts are of a great range. It is necessary to specify red lines in the use of autonomous weapons, precisising how and when it is legal and acceptable to use them. One shall notice, therefore, that not every autonomous weapon present unacceptable risk of civilian casualties and their absolute removal from battlefield would not solve the problem of collateral damage.

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⁴³ Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, Treaty Series 993 (1945).

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TERRORISM AND THE PROTECTION OF CULTURAL HERITAGE

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Abstract

One of the greatest risks that our world is now facing is the prevailing issue of terrorism which rose in the last decades. We are thus nowadays convinced that even cultural heritage as such can represent a target. The attacks on cultural goods in the Middle-East, widely conveyed by news and reports coming from Syria and Iraq, are undeniably raising awareness on the international stage and the danger that terrorism holds, even in a cultural perspective, does not go unnoticed. The intentional destruction of the cultural heritage of mankind as a whole is and should be considered as an international crime, and accordingly punished.

This presentation will focus on the current international rules and their adaptation to the issue of terrorism in this context. It will aim at answering the question of whether or not it is possible to find a solution to effectively protect cultural goods by following acts such as the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* along with its protocols. The brief review of these international regulations will then be enriched by a presentation of relevant soft-law acts adopted by the UNESCO and the UN, and international judiciary concerning what is referred to as “cultural terrorism”.

Keywords: cultural heritage, terrorism, humanitarian law

Introduction

It can be said that the destruction of cultural heritage and art's pillage is an institution as old as the term of “war”². The influences of mechanic and physic factors during armed operations result really often of losses or damages in the historic goods.³ Nevertheless current events show us that these objects could be a target themselves. Modern conflicts, especially the problem of terrorism, oblige the international community to revise international humanitarian law. In fact, from the conflict in Afghanistan and the destruction of Buddha's statues in Bamiyan to the present day, many resolutions have been adopted by the UN⁴ concerning the problem of intentional destruction of heritage and pillage of antiquities. Nowadays, thanks to the activity of the media, international organizations and NGOs⁵, the international society witnesses and is made aware of a gradual cleansing of cultural goods by the so-called Islamic State. Nevertheless, a new kind of destruction

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² G. Leszczyński, *Ochrona dóbr kultury w razie szczególnych zagrożeń*, [in:] K. Sałaciński (red.), *Bezpieczeństwo dóbr kultury. Nowe idee i technologie*, Warsaw 2001, s. 43.

³ See more in K. Sałaciński, *Ochrona dóbr kultury w prawie międzynarodowym i polskim – doświadczenia z realizacji zadań w ramach misji wojskowych*, [in:] J. Nowakowska-Małusecka (red.), *Międzynarodowe prawo humanitarne, Antecedencje i wyzwania współczesności*, *International Humanitarian Law Antecedences and Challenges of The Present Time*, wyd. Branta, Bydgoszcz-Katowice 2010.

⁴ For example the resolution of Security Council 1267 (1999), 1373 (2001), 1483 (2003), 1546 (2004), 2056 (2012), 2071 (2012), 2085 (2012), 2100 (2013), 2139 (2014), 2170 (2014), 2195 (2014), 2199 (2015), 2249 (2015), 2253 (2015) and 2322 (2016).

⁵ In here the inestimable role is held of course by UNESCO and it's Director-General Irina Bokova who announce the cultural vandalism in Syria and Iraq, nonetheless by other organizations and NGO's such as International Committee of Red Cross, International Council of Monuments and Sites and International Council of Museums.

of cultural heritage, which became a direct victim of terrorist attacks, should indeed provoke a reaction on the international level.

1. Protection of cultural heritage – seeking for the solution

For the international regulations concerning the protection of cultural heritage in time of armed conflict we had to wait until the end of 19th century and in fact the very first act was barely the *IV Hague Convention respecting the Laws and Customs of War on Land* and especially its article 27.⁶ In this article the contracting powers pledged that they would take all the necessary steps to spare the buildings dedicated to religion, art and science, “provided they are not used for the military purposes”. The same content can be found in article 5 of the *IX convention concerning Bombardment by Naval Forces in Time of War*.⁷ Despite the fact that these conventions relate to the protection of cultural heritage to a limited extent, they were the very first international regulation to be adopted by numerous “civilized” countries.

After the adoption of The Hague conventions, the defence of cultural goods remained scarce when it came to regulations. This new agreement, which tackled this part of humanitarian law, took place in 1954. World War II showed the international society all the gaps of binding rules and put the international law to the test. Along with human losses, the damage on cultural goods as a result of many bombardments, arsons and of a policy of requisition of cultural property is innumerable. After this experience, the community of the newly created United Nations Educational, Scientific and Cultural Organization, in 1945, put the emphasis on the necessity of working on a new convention for the protection of cultural heritage during armed conflicts. In 1954, during the last day of the international conference in The Hague, the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* was adopted.⁸ It is worth mentioning that this regulation not only sustains the “time of armed conflict” but also several rules that are binding even in time of peace, as it can be seen in the preamble where the leading parties consider that the effectiveness of the preservation of cultural property depends on the national and international measures undertaken in time of peace. This obligation is implemented among others by the reports that should be sent every four years to the Director-General of UNESCO, detailing the actions that were taken by the contracting parties. The great value of this convention is undeniable, but history reveals its shortcomings. The events at the turn of the 20th century, especially the conflict in former Yugoslavia, clearly showed that it is not adapted to modern forms of armed conflicts where the dispute between two sovereign states is replaced by non-international or asymmetric forms.⁹

During the centenary celebration of The Hague conventions on the 26th of March 1999, the *Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*¹⁰ was adopted. Article 22 of the Protocol introduces a definition of conflicts with no international character and enacts the application of the conventions to these conflicts. Be that as it may, this Protocol does not apply to “internal disturbances and tensions”.

⁶ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁷ Convention (IX) concerning Bombardment by Naval Forces in Time of War. The Hague, 18 October 1907.

⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, 14 May 1954.

⁹ See more in the analysis of realisation of the convention prepared by Patric Boylan, P. J. Boylan, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954), UNESCO 1993, Doc. CLT-93/WS/12.

¹⁰ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999.

What is interesting and innovative is a broad regulation concerning the criminalization of certain activities. Chapter 4 introduces a specific regulation concerning criminal responsibility and jurisdiction. Contrarily to the scarce and vague regulation of the Convention's article 28 about sanctions, it provides the criminalization of certain activities such as "serious violation" defined in article 15. In the regulation of *The Hague Convention* there was no obligation for States Parties to conduct an investigation and to sentence those responsible, but only to undertake "all necessary measures" to find them.¹¹ According to this Protocol two main groups of violations can be distinguished, the first of which contains three violations include a universal jurisdiction and obligatory competence. The States are then forced to seek the culprit and to proceed to an extradition ("*aut dedere aut iudicare*"). It is of major importance, since under the *Second Protocol* the States are obliged to extradition not exclusively when the violation was committed on their territory or by their citizen. This obligation is also binding when the violation took place on another territory by a foreign citizen but when the responsible is found on the territory of the State-Party. In the second group, the violations constitute war crimes. They allow a State-Party to judge the author of a violation committed on its territory or by its citizen elsewhere. For other cases we have to deal with facultative competence.¹²

The broad regulation concerning individual responsibility does not exclude the responsibility of the State, which is defined in a general way in article 38 of the Protocol. Moreover, the *Second Protocol of The Hague Convention* of 1954, in the event of a serious violation of its regulation, establishes an institution of "international cooperation" (article 31). In accordance to this article, "(...) the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations." In this sense the Parties could notify the Security Council about conflicts that threaten the international security and peace and demand an intervention.¹³

2. The international reaction against "cultural terrorism"

The very first resolution of the Security Council related to cultural heritage was the resolution number 1267 (1999)¹⁴ concerning internal tensions and the increasing number of terrorist attacks in Afghanistan. In the beginning of this resolution, the Security Council reaffirms "its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan, and its respect for Afghanistan's cultural and historical heritage." However the reaction of the UN regarding the destruction of cultural goods was moderate. In resolution 1483¹⁵, adopted four years later, the Security Council admitted the necessity to protect the archaeological, historical, religious and cultural heritage of Iraq, which could be ensured by safeguarding these sites and places of cult. It could be observed that the protection of cultural heritage started to take an important measure in the struggle against terrorism.

Significant change came about the barbarian activity of the Islamic State of Iraq and the Levant (ISIL) on the territory of Syria and Iraq. At first, the vandalism committed by this terrorist organization was limited to religious places foreign to Sunni, especially Shia's mosques or temples. For example, Al-Qubba

¹¹ V. Mainetti, De nouvelles perspectives pour la protection des biens culturels en cas de conflit armé : l'entrée en vigueur du Deuxième Protocole relatif à la Convention de La Haye de 1954, RICR Juin, n. 854, vol. 86, 2004 s. 359.

¹² Idem p. 361.

¹³ A. Caligiuri, La destruction du patrimoine culturel en situation de conflit armé à caractère non-international : les limites du régime de protection face aux acteurs non-étatiques, Paix et Sécurité Européenne et Internationale, n. 2.

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¹⁴ Security Council, Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 October 1999, S/RES/1267 (1999) 15 October 1999.

¹⁵ Security Council, Resolution 1483 (2003) Adopted by the Security Council at its 4761st meeting, on 22 May 2003, S/RES/1483 (2003, 22 May 2003).

Husseiniya, Jawad Husseiniya or the temple Saab bin Aqeel Husseiniya in Iraq's Tal Afar were destroyed.¹⁶ These acts were a result of a social destabilization of Iraq divided between Sunni and Shia. After the conquest of Mosul, which became from that day the centre of ISIL, the "caliphate declaration" establishing a policy of cultural and religious uniformity was proclaimed.¹⁷

The territories of Syria and Iraq present a great deal of archaeological sites, along with the remains of great ancient empires, many of which are registered on the *UNESCO's World Heritage Site's* list. This region, according to some, could be described as the "cradle of civilization".¹⁸ The International society was shocked after the information of the devastation of the National Museum in Mosul or the pillage of an archaeological site in Hatra. After the capture of Palmyra, the public opinion held its breath. The lack of information about the site and rumours that the city whose multiculturalism contradicted the extremists' ideology of uniformity would be destroyed were paralyzing. In July, the statue of the Al-lāt lion was demolished. At the same time, the public executions of Syrian's soldiers by underage boys in the ruins of the ancient amphitheatre took place.¹⁹ Furthermore, in October 2015, the dreadful news reached the international society that the famous director of the archaeological site of Palmyra for more than 50 years, Khaled al-Asaad, had been beastly murdered and that his body was hung on one of the columns of the ancient city.²⁰ On the 23th of August 2015 the Baalshamin temple was blown up, right after the Syrian Observatory of Human Rights informed that the temple of Bel, the biggest symbol of Palmyra was destructed as well.²¹ One month later, Aljazeera announced the same fate for the great Arch of Triumph.²²

The demolition and pillage of the National Museum in Mosul and the destruction of Palmyra met with instantaneous reaction from the international society. Irina Bokova, the Director-General of UNESCO, after the vandalism in Mosul, emphasized the lack of efficiency in the protection of cultural goods and the shortcomings of the execution of international regulations. She appealed as well to the Secretary-General of the United Nations, urging the Security Council to gather and confer about the protection of Iraq cultural heritage. As she mentioned: "this attack is far more than a cultural tragedy – this is also a security issue as it fuels sectarianism, violent extremism and conflict in Iraq."²³

When it comes to UNESCO itself, the 196th Executive Board adopted a decision entitled "*Culture in conflict areas: a humanitarian concern and a safety issue. UNESCO's role and responsibilities*"²⁴ This decision reaffirms the significant role of UNESCO in the protection of tangible and intangible cultural heritage. Besides, the Director-General of UNESCO has the obligation of initiating cooperation between the States

¹⁶ Y. Hafiz, ISIS destroys Shiite Mosques And Shrines In Iraq, Dangerously Fracturing Country (PHOTOS), Huffington Post, 7th July 2014.

¹⁷ Al Jazeera and agencies, Sunni rebels declare new 'Islamic caliphate', 30 June 2014. <http://www.aljazeera.com/news/middleeast/2014/06/isil-declares-new-islamic-caliphate-201462917326669749.html> (access: 07.04.2017).

¹⁸ "Nettoyage culture": le patrimoine mondial dans le viseur de Daech, Sputnik France News, 29th March 2016, <https://fr.sputniknews.com/international/201603291023780361-palmyre-daech-destruction-vestiges-syrie/>.

¹⁹ Agence France - Presse in Damascus, Isis 'blow up temple dating back to 17AD' in Palmyra, The Guardian, 24th October 2015, <http://www.theguardian.com/world/2015/aug/23/isis-blows-up-temple-dating-back-to-17ad-in-unesco-listed-syrian-city>.

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²² ISIL blows up Arch of Triumph in Syria's Palmyra, Middle East, Aljazeera, 5th October 2015, <http://www.aljazeera.com/news/2015/10/isil-blows-arch-triumph-syria-palmyra-151005033238445.html>.

²³ Director-General requests UN Security Council meeting on destruction of heritage in Mosul, UNESCO, 24th July 2015, <https://en.unesco.org/news/unesco-director-general-expresses-outrage-following-terrorist-attacks-against-mosul-museum>.

²⁴ Executive Board, Culture in conflict areas: a humanitarian concern and a safety issue. UNESCO's role and responsibilities, Hundred and ninety-sixth session, Paris, 24 March 2015, 196 EX/29.

and the other UN organizations and institutions in order to create “protected cultural zones” which should be established “around heritage sites of recognized and shared cultural significance”. From this moment, the Director-Generals role is to be an intermediary between all international organisms with the UN at the spearhead to ensure the control of illegal trade of antiquities and to protect the cultural diversity on the zones of conflict. What is interesting is that the Executive Board calls for a collective elaboration of a new strategy with the United Nations for enhancing the power of UNESCO in the domain of preservation of cultural heritage in danger. As it can be noticed, this decision is the very first act that is considering the protection of cultural heritage as part of a humanitarian necessity and the issue of international security and peace.

What is worth noticing is that, simultaneously to UNESCO’s work, “cultural terrorism” met a reaction in the UN itself and, more accurately, with the Security Council. Never before was the question of cultural rights and the prevention of cultural goods perceived as an issue of international security. As such, it establishes a turn in the protection of cultural heritage. The Security Council came to a resolution, resolution 2199 (2015)²⁵, blocking the financing and establishing the prevention of the trade of the antiquities that can be a source of terrorist activity. Moreover, the Security Council forces the States to resituate to the government of Syria and Iraq all the objects that are illicitly detected on their territory. Despite the fact that resolution 2199 (2015) constitutes a huge step forward in this domain, it only marginally treats cultural heritage.

The historic moment ensued when on the 24th of March 2017 the United Nations’ Security Council unanimously adopted resolution 2347 (2017)²⁶ condemning the unlawful destruction and pillaging of cultural heritage. The Security Council reaffirmed that cultural terrorism should be perceived both as a danger for the international peace and security and that it “can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States.” Besides, in virtue of this resolution the fact that an attack against cultural goods such as archaeological sites, religious places and monuments, constitutes a war crime is affirmed and as such is liable to penalty. Interestingly enough, Irina Bokova, the Director-General of UNESCO, was present during the meeting and stated that “The deliberate destruction of heritage [...] has become a tactic of war to tear societies over the long term, in a strategy of cultural cleansing” and that is why it should be perceived as a security imperative.²⁷ Moreover, in the resolution, the Security Council underlines that UN peacekeepers operate according to the appropriate guidelines and on the request of the Council can also encompass the safeguarding of cultural heritage against its destruction or pillage.

When it comes to international jurisprudence, the protection of cultural heritage was not a subject of legal proceeding. The destruction of cultural goods and religious places was rather present in the evidential proceedings for other war crimes.²⁸

Contrarily to current jurisprudence, The Hague Convention of 1954 has been the basis of the recent case *The Prosecutor v. Ahmad Al Faqi Al Mahdi* before the International Criminal Court (ICC)²⁹ which responded to the non-international conflict in Mali. For the very first time, the usually overlooked letters of the Convention have been put into execution and became the only basis of the proceeding. Ahmad Al Faqi Al Mahdi was accused of the destruction of the mausoleum dating back to the 14th century in Timbuktu and

²⁵ Security Council, Resolution 2199 (2015), Adopted by the Security Council at its 7379th meeting, on 12 February 2015, S/RES/2199 (2015).

²⁶ Security Council, Resolution 2347 (2017), Adopted by the Security Council at its 7907th meeting, on 24 March 2017, S/RES/2347 (2017).

²⁷ Building peace requires culture, education – message of historic UN Security Council resolution, UN News Centre, 24 March 2017, <http://www.un.org/apps/news/story.asp?NewsID=56428#.WOjzNVWLTce>.

²⁸ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radislav Krstic*, case IT-98-33-T, [2001] where the destruction of mosques was perceived as a proof of the genocide.

²⁹ Trial Chamber VIII of the International Criminal Court (ICC), *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15 [2016].

registered on the World Heritage list. He also directed the attacks on ten historic buildings in the capital of Mali.³⁰ These places were devastated by extremists who used hammers and chisels with great cruelty during the occupation of the city. On the 27th of September 2016, the judgment of the Court was delivered. Al Faqi Al Mahdi was unanimously found guilty of a war crime as a co-perpetrator of the directing of the attacks against religious places and historic buildings in Timbuktu in 2012, and punished to nine years of imprisonment. While determining the nine-year sentence the Court took into consideration the fact that those places were not only places of cult but that they also brought symbolic value and emotional attachment for the local community. Despite the controversy around this proceedings (firstly because of the fact that it is the first trial concerning the bloody conflict in Mali, and secondly because it is based exclusively on the destruction of cultural heritage³¹), its importance is inestimable. We can observe the execution of The Hague Convention and its Protocol as well as the rise of the importance of the International Criminal Court, the judiciary of which is broadened to the protection of cultural heritage during non-international conflict.

Conclusions

Information about the destruction of cultural heritage that reached the international society from every part of the world led to a greater awareness of the danger of terrorism in the cultural field. Current terrorism is more than the “silent war” it used to be defined as. Targeting cultural goods affects not only a distinguished group but the whole international community as the successor of the heritage of our civilization. The analysis of current regulations clearly shows that a revision is necessary. International conflicts are replaced by non-international and asymmetric conflicts and thus by terrorism. The protection of cultural heritage against terrorism constitutes one of the greatest challenges of international law nowadays. We can observe that the recent events in the Middle-East and the intentional destruction of cultural heritage by extremists became a driver for the international cooperation. Recently adopted, the UN’s Security Council’s resolution 2347 (2017) is raising the importance of preservation of cultural sites during tensions and its impact to the international security and peace. The greatest criticism of the Hague Convention of 1954 was due to its inefficiency and impracticability. The conflict in Afghanistan, Syria and Iraq where the historic and religious places were the direct victims revealed its shortcomings. The judgment of International Criminal Court in the case *The Prosecutor v. Ahmad Al Faqi Al Mahdi concerning the cultural vandalism in Mali* led to a turn in the notion of responsibility of the vandalism against cultural heritage. Thanks to the sentence of the ICC, it can be admitted without any doubt that conventional regulations are binding rules. The reinforcement of current regulations against the people responsible for iconoclasm and intentional destruction of cultural goods, taking into account the potential growth of the issue on a worldwide scale, is more than necessary.

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HEALTH DATA, BIG DATA AND INNOVATIONS. WHERE'S THE LAW? EU APPROACH

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Abstract

The progress of biomedical and technological innovations is strongly driven by the possibility to use personal health data. Billions of records are being generated in health care or for the purposes of health care. In the light of freedoms and advantages of free movement within the EU, it is obvious that conservative and closed health care system is not sufficient anymore. It is essential to acknowledge the fact that free movement and cross-border health services refer to free flow of data related to EU citizens and residents. Since the entry into force of the Treaty on the Functioning of the EU² (TFEU), the EU Charter of Fundamental Rights³ has become legally binding, and Article 8 of the Charter guaranteeing the fundamental right to the protection of personal data is now enshrined in Article 16(1) TFEU. It was a significant shift in the perception of an individual in the context of enormous amounts of personal health data being collected within the EU. Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁴ is the general EU law on the protection of personal data sets the rights of data subjects and establishes criteria for the legitimacy of processing personal data, including "personal data on health". Though the value of the objectives and principles of Directive 95/46/EC are not to be questioned, it is obvious that it has failed to prevent fragmentation in the implementation of data protection across the EU, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons. The ultimate level of protection of the rights and freedoms of natural persons, with regard to the processing of personal data is enshrined in the 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/EC⁵ (hereinafter referred to as General Data Protection Regulation - GDPR) shall apply from the 25th of May, 2018.

According to the European Court of Justice, the notion of "data concerning health" must be given a wide interpretation, so as to include information concerning all aspects, both physical and mental, of an individual's health. Respecting this concept, there still are some major issues which must be discussed when disposing health data as extremely sensitive data, which are collected and exchanged through ICT tools.

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² Consolidated version of the Treaty on the functioning of the European Union. Internet access: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

³ Charter of Fundamental Rights of the European Union. Internet access: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

⁴ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Internet access: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>.

⁵ 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. Internet access: <http://eur-lex.europa.eu/eli/reg/2016/679/oj>

The paper deals with major issues: risks, opportunities and potential threats, which appear while disposing health data as a co-creator of technological innovations.

Keywords: health data processing, big data, sensitive data, biotechnological innovations, electronic medical record

Introduction

The idea of patients' rights across the European Union emerged very early in the aftermath of the first rulings of the European Court of Justice on the free provision of health services⁶ as well as fostering better health outcomes, safety and quality of care⁷. In March 2011, after a political debate spanning more than ten years, Directive 2011/24/EU on the application of patients' rights in cross-border health care was adopted⁸. The aim of the aforementioned Directive is to facilitate access to safe and high-quality cross-border health care within the European Union, in accordance with the principles of free movement, based on the will to gather and disseminate best practices in various fields of excellence, building a direct pathway for health innovations but at the same time - respecting the responsibilities of the Member States in organizing access to health care for their citizens. On the other hand, personal health data is indispensable agent for building innovations in healthcare and therefore, free movement of data may bring actual cross-border benefits are revealed only by disclosing the data at specific level and for specific purposes. And still, EU Member States and the developers of healthcare industry across the EU and beyond have been frustrated by the increasing lack of harmonization at the legal basis on personal data protection across the EU Member States, despite data flowing increasingly without boundaries. There was a growing desire to get the GDPR agreed quickly, even if that meant that some of the detail is left for later. The EU institutions have certainly stepped up to the plate. Adoption of the GDPR marks a milestone in data protection laws in the EU. It seems promising as there is seen much less ambiguity in the legal background of personal health data protection and the provisions should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data. The other sections of this paper deal with the most important aspects of health data and big data with a regard to personal data processing and other details, which cannot be left for unsolved. Paper analyses the EU recent legislation and reveals the insights of the authors on health data protection – J. Manyika, B. J. Evans, W. Sauter, S. Fredman and other modern lawyers engaged with data protection in healthcare.

1. Personal health data as a public value

GDPR defines 'personal data' as any information relating to an identified or identifiable natural person ('data subject'). an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. As regard to its scope of application, the definition is more explicit and exhaustive than the one which was provided by Directive 95/46/EC. What is even more important from the perspective of health innovation industry – new definitions constituting the essence of natural person are

⁶ Judgment of the Court of Justice, C-120/95 *Nicolas Decker v Caisse de Maladie des Employés Privés*, 28 April 1998. Internet access: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-120/95>.

⁷ Judgment of the Court of Justice, C -158/96 *Raymond Kohll v Union des Caisses de Maladie*, 28 April 1998. Internet access: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=158/96&td=ALL>.

⁸ Directive on patients rights Directive 2011/24/EU on the application of patients' rights in cross-border healthcare. Internet access: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0045:0065:EN:PDF>.

introduced: '*genetic data*' (personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question), '*biometric data*' (personal data resulting from specific technical processing relating to the physical, physiological or behavioral characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data) and '*data concerning health*' (personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status). Biometric data and genetic data may be retrieved through provision of sophisticated health care services and often become a part of health data sets. These sets of health data form massive big data and therefore the processing of data becomes even more complicated.

GDPR prohibits the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation unless certain conditions are fulfilled. Among the detailed list of exclusions, one is worth further discussion, as it is not bound by data subject's will, participation and explicit informed consent: sensitive data processing is allowed when it is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy.

In this sense, data concerning health is considered public assets and is above the interest of data subject. On the other hand, some authors argue that existing regulatory provisions allowing nonconsensual access to data fail to incorporate any "public use" requirement to ensure that unconsented uses of data are justified by a publicly beneficial purpose⁹. It might appear that persons whose health data are used in, for instance, research of medicinal products or medical devices, have no assurance that the use will serve any socially beneficial purpose at all. Going deeper into the concept of 'public interest', we can see no definition of it, suggested by the new EU legislation¹⁰. Some authors, like Sandra Fredman, provide definitions describing it as the welfare of the public as compared to the welfare of a private individual or company¹¹. Others, like Wolf Sauter¹², Ioanna Tourkochoriti¹³ relate public interest with certain degree of will coming from both society and government, arguing that all of society has a stake in this interest and the government recognizes the promotion of and protection of the general public. It means that it is left open for Member states to decide whether some interference to the privacy of sensitive may be justified on the grounds of public interest. It is no wonder, that the essence of public interest may be interpreted in many different ways and the risk of improper use of sensitive data. The GDPR, which is believed to be the milestone of

⁹ B. J. Evans, Much Ado About Data Ownership (June 4, 2011). Harvard Journal of Law and Technology, Vol. 25, Fall 2011.

¹⁰ Currently applicable Directive 95/46/EC defines that Member States are allowed to derogate further from the prohibition of processing sensitive categories of data, for reasons of substantial public interest in areas such as public health and social security (Article 8(4) of the Directive). Any such measure must be proportionate, i.e. there must not be other less infringing measures available.

¹¹ S. Fredman, Human Rights Transformed: Positive Duties and Positive Rights. Oxford Legal Studies Research Paper No. 38/2006. Public Law, pp. 498-520, 2006.

¹² W. Sauter, The Impact of EU Competition Law on National Healthcare Systems, 2012. TILEC Discussion Paper No. 2012-032. Tilburg Law School Research Paper No. 12/2012.

¹³ I. Tourkochoriti, The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection Against Surveillance (April 20, 2015). University of Pennsylvania Journal of International Law, Vol. 36, p. 459-524, 2015.

harmonization in EU law, beating the walls between access to innovations and access to data, empowers Member States to maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health. It means that the GDPR refrains from sharp regulation of such data with the regard to the principle of subsidiarity. One of possible reasons why EU law leaves extra tools for the Member states is that biotechnologies, the omics, the applications of ICT tools in electronic medical record data retrieving and analysis have gone that far, that law has a challenge to foresee and regulate legal relations of the future at the same time granting the validity and sustainability of social order. On the other hand, unjustified restrictions on the free movement of data are likely to constrain the development of the EU data economy. These restrictions relate to requirements imposed by public authorities on the location of data for storage or processing purposes. The issue of free movement of data concerns all types of data: enterprises and actors in the data economy deal with industrial and machine-generated data whether personal or not, as well as data created due to human action. The amounts of health-related data are becoming so robust, that there is a great chance of losing control of the data and breach the terms and conditions of lawful data processing. "Big data" is one of the challenges which was opted out in the GDPR.

2. Health evolves to "Big data"

For many years, the term "Big data" used to be a computing term since it was first called so in 2000¹⁴. „Big data“ cannot be precisely quantified by for instance of being larger than a certain number of terabytes. It refers to datasets whose size is beyond the ability of typical database software tools to capture, store, manage, and analyze. Data storage and analytics technologies are getting more sophisticated and advanced over time, the size of datasets that qualify as big data will also increase. Big data can create significant value for the world economy, enhancing the productivity and competitiveness of companies and the public sector and creating substantial economic surplus for consumers. For instance. J. Manyika estimated that if US health care could use big data creatively and effectively to drive efficiency and quality, the potential value from data in the sector could be hundreds of billions of dollars in value every year, two-thirds of which would be in the form of reducing national health care expenditures by about 8 percent¹⁵. While some authors provide clear evidence that big data in healthcare creates new value pathways for right living, right care, right provider, right innovations and right value for money¹⁶, others argue that big data is good for medical science, but potentially risky for the patient¹⁷. By amassing and analyzing massive quantities of digital information from multiple sources, including an emerging class of wearable devices and smartphone apps, medical professionals will be well equipped to solve major health problems and warn people of emerging threats like pandemics, viruses.

And still it remains unclear whether standard data protection rules and research regulations which bind data processors by certain requirements for privacy, informed consent and autonomy are applicable for "big data" regulation. It is important to emphasize that legal background of the EU data protection legislation does not see "big data" as a phenomenon worth separate legal provisions. The general rule might be as follows: the fundamental right to personal data protection applies to big data where it is personal: data processing has to comply with all applicable data protection rules. EU law acknowledges that privacy concerns are legitimate concerns but they should not be used by public authorities as a reason to restrict the free flow of data in an unjustified way. GDPR provides a single set of rules with a high level of protection of personal data

¹⁴ M. Dewatripont, L.P. Hansen and S.Turnovsky (Eds.),'Big Data' Dynamic Factor Models for Macroeconomic Measurement and Forecasting" *Advances in Economics and Econometrics*, Eighth World Congress of the Econometric Society.Cambridge: Cambridge University Press, 2000, 115-122.

¹⁵ J. Manyika et al, *Dealing with data*, Science, 2011.

¹⁶ P. Groves et al, *The big data revolution in healthcare*, McKinsey, 2013.

¹⁷ *Supra* note 15.

for the entire EU. Therefore, common legislation should fill the gap until the specific provisions on “big data” are laid down if the former term ever acquires its legal shape.

3. Patient empowerment meets the “Big data”

EU framework on data protection puts a high emphasis on the interest of the data subject. From the perspective of healthcare, we should refer to empowered patient, who is inspired to control how his or her personal data are collected, processed and stored. Electronic medical record is put under extremely precise audit trail to make sure that no one has a chance to access the data illegally. Moreover, the patient has a right to question the aims and purposes of his health data deployment, verify the basis of his diagnosis, demand alternative interpretation of his laboratory test results and etc. On the other hand, the right of empowerment is not a great virtue itself, unless its implementation is complied with full legitimacy. What is referred to as full legitimacy? Basically, it is considered as lawfulness by enhancement of being authorized or in accordance with law, which means the alignment of entire legal system. It is not about a natural person being empowered and properly involved – it is about role of the State and the means, which must be implied in order to facilitate changes in the perception of patient-doctor-researcher-industry interaction. And in most cases, this interaction is based on full awareness of all stakeholders, mutual trust and benefits. This is where the informed consent plays its important role.

According to EU legislation, processing of sensitive health data requires explicit consent unless they are used for the sake of public interest. What is more, consent must be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data. When the processing has multiple purposes, consent should be given for all of them. In healthcare, it is often not possible to fully identify the purpose of personal data processing when the data is being prepared for a secondary use for scientific research. Therefore, data subjects should be allowed to give their consent to certain areas of scientific research in line with recognized ethical standards for scientific research.

Public interest calls for more efficient and effective healthcare by opening the door to addressing clinical issues before they become serious problems. Predictive medicine, which is one of the facilitators in healthcare innovations, is based on various types of linked data- some of them do not require consent, some of them – do and the others in some urgent cases become so important that may be processed unconsented. What happens when the flow of information is so immense and coming from various sources – electronic health systems, wearables, specific healthcare sites and even social media and networks? And at this point - people seem indifferent to “Big Data” collection. They share personal information on web platforms, knowing full well that it is collected by websites. We can even compare personal health data to new currency—collecting mountains of information about personal habits, physical activity, health states, medicines under consumption when people use the services of certain enterprises which own commercialized databases.

It appears that each patient, having a clear concern of his data privacy is also a user of many smart devices, smart materials and web based solutions which are collecting and storing his personal data without any additional privacy concerns. In some way, patients are transferring their personal data and receiving something valuable for themselves in return: personalized training advice, balanced diet, treatment, advice on possible diagnosis and etc.

Empowered patients are not only ones whose consent is rightly obtained, but the ones who know how to use the information which is generated by their body and mind.

Therefore, the EU law on cross-border healthcare services and personal data should ensure the best outcomes for the citizens corresponding the realities on how innovations change our life.

Conclusions

It is obvious that Europe is calling for a total shift in national Health care systems, whereas all personal health data subjects and users should fall under clear legal regulation and GDPR offers clear provisions on how data should be collected, stored and processed. The massive sets of information, being retrieved from electronic medical records, wearables, smartphones and specialized websites. All together they make “big data” - the new currency of modern relationship.

“Big data” is left somewhere in between the legal lines of EU legal framework and that may have two adverse effects: either possible breaches in personal data privacy either overregulating the free flow of data with a negative impact on the environment of innovations.

GDPR should come back to the question of “big data” and revise the conditions of personal health data processing, the conditions of consented and unconsented disposal in a reasonable manner.

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15. Judgment of the Court of Justice, C-120/95 Nicolas Decker v Caisse de Maladie des Employés Privés, 28 April 1998. Internet access: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-120/95>

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THE FUTURE OF EUROPEAN UNION EMISSIONS TRADING SCHEME

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Abstract

The article aims to analyse the future of the European Union Emissions Trading System, by outlining the legal background upon which it was formed, its developments and changes required for its successful functioning in the future. Article relies on legal and economic analysis as well as market data.

Keywords: EU ETS, European Union Emissions Trading Scheme, emissions, carbon market.

Introduction

The radical development in international climate change awareness at the end of the 1980s could be attributed to many discoveries², however one major international agreement takes the spotlight – United Nations Framework Convention on Climate change (hereinafter referred to as the Convention)³ which entered into force on 21 March, 1994. As of today, all members of the United Nations have ratified it (so called Parties to the Convention) plus four non-Member States. The ultimate objective of the Convention is “to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”⁴. In general, the development of international climate change policy and regulation could be described as a negotiations phase, all up to 2005, when a Kyoto Protocol to the United Nations Framework Convention on Climate Change has entered into force. Article 8 of the Convention established a secretariat, which is responsible for organising the sessions of the Conference of the Parties (hereinafter referred to as the COP), as well as preparing reports and presenting them to the COP.

Under the Convention, Parties to the Convention are divided into two groups – Annex I countries and Annex 2 countries. Annex I countries under Article 4, paragraph 2 of the Convention are listed as developed or industrialised countries, which should take the lead by developing national policies which would contribute to limiting greenhouse gases to 1990 levels⁵. These Annex I parties are allowed to implement such policies and measures jointly or individually, and may assist other Parties to the Convention. Some countries that are listed in Annex I are listed in Annex II as well, therefore it could be said that those Annex II countries are required to provide supplementary efforts in comparison to Annex I countries. Such efforts include providing new and additional financial resources, including transfer and financing of new technology, to cover developing country Parties compliance costs⁶. The logic behind this reasoning was that developed countries have more resources to achieve the results drawn up by the Convention and thus shall assist developing countries in their effort through economic resources, technology and know-how. However the prevailing issue at the time of discussions in the Convention was - who should act first, which later led to the 1st Decision

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² BODANSKY, D. The history of the Global climate change regime: <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/admininst/shared/doc-professors/luterbacher%20chapter%202%20102.pdf>.

³ United Nations framework Convention on climate change, 1992.

⁴ Ibid. 3, Article 2.

⁵ Ibid. Article 4.2., point b.

⁶ Ibid. Article 4.3.

adopted by the 1st COP - COP 1, which in turn established the Berlin mandate⁷. In short, Berlin mandate set out the process of further negotiations for the period beyond 2000, under which Annex I Parties should be bound by set quantified limitations and reduction objectives within specified time frames, without introducing new commitments to non-Annex I, developing countries⁸.

In 1997, at the 3rd COP at Kyoto, Japan, Kyoto Protocol to the Convention was adopted. Kyoto Protocol set out binding allowed national quantified emissions targets for Annex I Parties⁹, with a goal of reducing an overall emission of greenhouse gases by at least 5 per cent below 1990 levels in the first commitment period (2008 to 2012)¹⁰. The allowed emissions are divided into “assigned amount units”. Kyoto Protocol introduced several novelties such as: i) limitation or reduction of greenhouse gases from aviation and maritime bunker fuels not controlled by Montreal Protocol¹¹. ii) concept of greenhouse gas removals by sinks associated with land-use change and forestry activities¹². iii) introduction of new greenhouse gases¹³. iv) “joint implementation” mechanism, which allows Annex I Party to earn emission reduction units from emission reduction and/or removal project in another Annex I Party, which could be counted towards meeting its target¹⁴. v) clean development mechanism, under which Annex I Parties can implement project activities resulting in certified emissions reductions in non-Annex I Parties, thus contributing to compliance to their quantified emission limitation and reduction requirements¹⁵. and finally vi) emissions trading, under which Annex I Parties may participate in emissions trading thus fulfilling their targets set out by Kyoto Protocol¹⁶. This article will focus on the later¹⁷.

Essentially Kyoto Protocol created a new commodity – carbon. Even though the Kyoto Protocol and the Convention covers other greenhouse gases and families of gases besides carbon dioxide¹⁸, carbon dioxide being the principal greenhouse gas, all emissions trading is simply referred to as trading of carbon. It is further supported by the fact that under Kyoto Protocol, all greenhouse gas units are measured per one tonne of carbon dioxide. As mentioned, Kyoto Protocol allowed EU to reach designated emission targets jointly, under burden sharing scheme, where each EU member state, in the first Kyoto Protocol commitment (hereinafter – Kyoto commitment) period, had to reach its individual goals¹⁹. While Kyoto Protocol established carbon trading only between Parties to the protocol (Member States), European Union Emission Trading Scheme (hereinafter referred to as – the EU ETS) allows greenhouse gas trading between any natural or legal persons within the EU. Besides other measures, such as promotion of energy efficiency, renewable

⁷ DELBEKE, J and others, *EU Energy law, Volume IV, EU Environmental law, The EU Greenhouse gas emissions trading scheme*, Leuven: Clayes & Casteels, p. 17.

⁸ United Nations Framework convention on climate change, Conference of the parties, First session, 1995 June 6, p. 4.

⁹ 1997 Kyoto Protocol to the UN Framework Convention on Climate Change, 11 December 1997, Annex B.

¹⁰ Article 3, Annex B.

¹¹ Ibid. Article 2.2.

¹² Ibid. Article 3.3.

¹³ Ibid. Articles 2, 3.8. Exceptions provided to Austria, Croatia, France, Italy, Slovakia.

¹⁴ Ibid. Article 6.

¹⁵ Ibid. Article 12.

¹⁶ Ibid. Article 17.

¹⁷ Ibid. Article 3.13. It should be noted that Kyoto Protocol allowed Annex I Parties, who are undergoing the process of transition to a market economy to use historical base year or period other than 1990. For example Articles 3.5, 3.6 exceptions for Bulgaria – 1988, Hungary – average of 1985-7, Slovenia – 1986, Poland –1988, Romania – 1989. It allowed Parties to transfer greenhouse gas emissions to subsequent commitment period, which surpassed the required reduction numbers. As to EU countries, Kyoto Protocol allowed EU member states to fulfil their commitments of greenhouse gas emissions reduction jointly, by setting out EU member states individual commitments in a separate agreement.

¹⁸ Ibid. Annex A. These include Methane, Nitrous oxide, Hydrofluorocarbons, Perfluorocarbons, Sulphur hexafluoride.

¹⁹ Kyoto Protocol legally came into force by Council Decision of 25 April 2002 No. 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder.

energy, biofuels and others, EU ETS continues to serve as a flagship solution aimed at reducing EU greenhouse gas emissions for EU as a whole. It should be noted that emission trading schemes are favourite policy tools for reduction of greenhouse gases. It guarantees an environmental objective, whereas taxation simply establishes a price. Moreover, the most cost effective options are developed first, thus giving flexibility to business. Secondly, emission trading schemes open a possibility to scale up set goals by linking the scheme with other countries, thus reducing international competitive distortions. Finally, it allows price discovery through market forces. But first things first.

1. EU ETS first steps

Principal document establishing EU ETS was Directive 2003/87/EC²⁰ (hereinafter – the Directive). Directive “establishes a scheme for greenhouse gas emission allowance trading within the Community <...> in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner”²¹. Scope of the Directive is twofold: 1) EU ETS applies to the same greenhouse gases as in Kyoto Protocol²², although the Convention prescribes a more general definition, meaning that more “gaseous constituents” might be added in the future. 2) Annex I of the Directive lists all activities covered by the Directive. Although Directive allows for the exception to installations used for research, development and testing of new products. EU ETS Directive applies to several different types of installations, such as energy, production and processing of ferrous metals, mineral industry and other industrial plants. As of energy activities, it includes all combustion (including all combustion processes) installations with a rated thermal input exceeding 20 MW²³.

Article 4 of the Directive establishes the key principle, echoed in the Kyoto Protocol. That is that each EU member state shall ensure that all installations while performing the respective activities subject to Annex I, hold a permit, issued by a competent authority. This means that EU ETS is based on direct emissions, whereas other existing emission trading systems at the time Directive came into force (such as United Kingdom) were based on indirect reporting²⁴. EU ETS allows an operator (legal or natural person who controls the installation) to receive greenhouse gas emissions permits covering one or more installations on the same site, provided that operator controls both the site and the installations²⁵.

Before the start of first and second EU ETS phases, EU Member States had to submit national allocation plans, upon which a total amount of allocated allowances for each EU member state was established²⁶. These plans contributed to EU ETS system in following aspects: firstly, combined individual EU Member States national allocation plans established the overall EU ETS cap. secondly, it helped to set and further enhance the rules for the allocation of allowances to individual installations. Directive describes an allowance as a right to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of the Directive and shall be transferable in accordance with the provisions of the Directive²⁷. Allowance allows the operator to emit a corresponding amount of greenhouse gases. Due to the mutual recognition of allowances in the EU internal market, EU

²⁰ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (Text with EEA relevance) OJ L 275, 25.10.2003, p. 32–46.

²¹ Ibid. 20, Article 1.

²² Ibid. Annex II.

²³ Ibid. Annex I.

²⁴ Ibid. 7, p. 73.

²⁵ Ibid. 20, Article 6.

²⁶ Ibid. 20, Article 9.

²⁷ Ibid. 20, Article 3, paragraph a.

ETS allows both primary and secondary markets to coexist. Under the Directive, EU Member States used to decide upon the exact number of allowances to be allocated each year in a respective EU ETS phase²⁸. Therefore, after the allocation of allowances, the EU ETS market functions within these limits, by transferring, surrendering and cancelling issued allowances.

Key rules regarding the trade of the allowances are laid down in Articles 12 and 13 of the Directive. Any legal or natural person within the EU can participate in the EU ETS directly, or indirectly (through brokers or other third parties). Directive has essentially left it to the market to decide the rules and come up with tools to trading. As experience has shown, this approach has paved the ground for market liquidity and efficiency in achieving climate action goals. By the principle of mutual recognition, all EU Member States are required to recognise the allowance issued by other EU member state's competent authority. By 30 April each year, all operators within the EU are required to surrender a number of allowances, from all the installations it operates, equal to the total amount of emissions emitted during the preceding calendar year. Issued EU ETS allowances are valid for the corresponding period (phase) they are issued. If, by any chance, allowances that are no longer valid and have not been surrendered and cancelled, the competent authority will cancel them²⁹.

Finally, the key aspect of the Directive, differentiating it between other EU climate policies is its enforcement measures. Any operator, who does not surrender sufficient amount of allowances to cover emissions during the preceding year, is held liable for the payment of an excess emissions penalty³⁰. Excess penalty was initially set to 100 EUR for each tonne of carbon dioxide equivalent emitted and not surrendered for that particular installation. More importantly, payment of the fine did not release the operator from the obligation to surrender the required amount of allowances³¹. This was an important step forward, since for the EU ETS penalty system to work, penalty had to be high enough to incentivise operators to acquire allowances. On another hand, the non-release of obligation to acquire allowances ensures that EU ETS and Kyoto Protocol (and all other superseding protocols in line with the Convention) goals are upheld. According to some authors, this approach of high penalties was taken over from United States sulphur trading scheme, which had an excellent compliance record³².

During the first EU ETS phase (years 2005 – 2007) almost all allowances were given for free.

2. EU ETS Phases 1, 2 and 3

EU ETS is divided out of 4 periods, commonly referred to as "Phases". At the time of writing this Article EU ETS is at its 3rd Phase (years 2013 – 2020).

Phase 1 (years 2005 – 2007) of the EU ETS was set three years before the first commitment period of the Kyoto Protocol. This phase could be described as a learning period since it was aimed at establishing the effective infrastructure, market and preparing for the first Kyoto commitment period by issuing the right amount of allowances. These goals were reflected in the provisions of the Directive, whereas penalty for non-compliance was lowered to 40 EUR per tonne³³ and absolute majority of allowances were given free of charge. Moreover, during this first phase, EU Member States had no binding targets to meet. It is safe to say that Phase 1 had succeeded in establishing primary and secondary markets for carbon trading in the EU as well as national and EU infrastructure required for monitoring, reporting and verification of emissions data. However, since there was no reliable emissions data at the time, total emissions cap, calculated by pooling

²⁸ Ibid. 20., Article 11.

²⁹ Ibid. 20., Article 13, paragraph 3.

³⁰ Ibid. 20, Article 16, paragraph 3.

³¹ Ibid..

³² Ibid. 7, p. 93.

³³ Ibid. 20, Article 16, paragraph 4.

all EU Member States national allocation plans, was set too high, resulting in price of allowances falling to zero euros at the end of Phase 1.

Phase 2 (years 2008 – 2012) of EU ETS was in line with the first commitment period of the Kyoto Protocol, where EU Member States had concrete emissions reduction targets to meet³⁴. Each EU member state was set specific national cap of greenhouse gas emissions expressed in tonnes of CO₂ equivalent for 2008-2012 period. It should be noted that under the first Kyoto commitment period EU has set itself an ambitious goal of reducing total EU emissions by 8 per cent below 1990 levels, reduction three per cent higher than initially required under Kyoto Protocol³⁵. Due to the lessons learned during Phase 1, EU ETS Phase 2 had seen a few significant changes. Firstly, the total EU cap was lowered to roughly 6.5 per cent. Free allocation of allowances was lowered to 90 per cent, and some EU Member States held auctions³⁶ a trend that is prevailing in current EU ETS revision negotiations. Under the Directive, for the EU ETS Phase 2, the applicable penalty for non-compliance went back to 100 EUR per tonne³⁷. Moreover, Phase 2 has introduced several novelties by linking the Kyoto Joint implementation and Clean development mechanisms. A single EU registry and an online database tool were introduced in 2009, covering all national implementation measures, recording accounts, transfer and surrender of allowances³⁸.

Phase 3 (years 2013 – 2020) is the currently ongoing EU ETS phase. It has seen some major improvements over the preceding ones. Firstly, a single EU wide cap was established by removing the previously existed national allocation plans. This meant that EU Commission is in charge of setting a total EU wide cap of allowances, whereas total EU cap used to be set by merging national allocation plans. As of beginning of Phase 3, a fixed EU wide cap was set together with a yearly linear reduction of 1,74 per cent³⁹. Article 10 of the amended Directive lays down the following composition of the auctioned allowances: i) 88 per cent of auctioned allowances to be distributed amongst EU Member States on the basis of the their shares of previously verified emissions. ii) 10 per cent of the auctioned allowances to be distributed amongst the economically weakest EU Member States to invest in new technologies, reduce greenhouse gas emissions, develop renewable energy capacities. iii) 2 per cent of the remaining allowances to be given to nine EU Member States⁴⁰ which by 2005 had reduced their emissions by at least 20 per cent below their emissions the base year applicable to them under Kyoto Protocol.

Secondly, auctioning of allowances became the default method of allocating allowances within the EU ETS⁴¹. As of today, there are two EU ETS auctioning platforms in place: i) European Energy Exchange, which acts as an auctioning platform on behalf of 25 EU Member States plus Norway, Iceland, Liechtenstein as

³⁴ Commission Decision of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC (notified under document number C(2006) 6468) (2006/944/EC) OJ L 327M , 5.12.2008, p. 796–800 (MT).

³⁵ Ibid. 9, Article 3, paragraph 1.

³⁶ Auctions by the transitional common auction platform, July 2016, European Commission report.

³⁷ Ibid. 20, Article 16, paragraph 3.

³⁸ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (Text with EEA relevance) OJ L 140, 5.6.2009, p. 63–87, Article 21.

³⁹ 2010/634/EU: Commission Decision of 22 October 2010 adjusting the Union-wide quantity of allowances to be issued under the Union Scheme for 2013 and repealing Decision 2010/384/EU (notified under document C(2010) 7180) OJ L 279, 23.10.2010, p. 34–35. Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (Text with EEA relevance) OJ L 140, 5.6.2009, p. 63–87, Article 9.

⁴⁰ Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia.

⁴¹ Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (Text with EEA relevance). Ibid 38, Article 10, paragraph 1.

well as Germany's and Poland's national (appointed) platform (Poland is pending the appointment of its own auctioning platform). and ii) Intercontinental Exchange Futures Europe, auctioning on behalf (appointed) of the United Kingdom government. Only Poland (pending confirmation), United Kingdom and Germany have opted for the appointment of their own auctioning platform. It should be noted that transition to auctioning has taken place progressively, varying between different sectors. Whereas almost all allowances in power generation are issued through auctioning, majority of allowances acquired by other sectors, such as airlines, still depend on free allocation. However, allowances to aviation sector will not be discussed in this Article.

3. Achieving Kyoto targets

EU and its Member States have met all their commitments and are fully compliant under the Kyoto Protocol's first commitment period (2008 – 2012). According to data, EU has achieved an overall cut of 11.7% domestically, without counting the additional reductions coming from carbon sinks and international credits⁴², this is more than two times more the required 5 per cent reduction under the Kyoto Protocol.

On 8 December, 2012 in Doha, Qatar, at the eight session of the COP, Parties to the Protocol adopted an amendment to the Kyoto Protocol. The key amendments to the Kyoto Protocol were⁴³: i) new binding emission commitments for second Kyoto commitment period (years 2013-2020) to the Parties to the Kyoto Protocol. ii) revised list of greenhouse gases⁴⁴. iii) aim to reduce the overall emissions of greenhouse gases by 18 per cent below 1990 levels during second commitment period.

As of second Kyoto commitment period, which corresponds to 3rd EU ETS Phase, EU has agreed to meet a 20 per cent reduction target compared to 1990 levels. According to the latest data, EU is on track to overachieve second Kyoto commitment period greenhouse gas emissions targets⁴⁵.

On 12 December, 2015 at COP 21 in Paris Parties have agreed on Paris Agreement, successor to Kyoto Protocol. The Agreement will come into force as of year 2020. The Agreement aims to hold the increase in global average temperature below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels⁴⁶. Finally, review of nationally determined contributions, climate finance together with transparency and reporting mechanisms were introduced.

4. Issues and structural reform

In its current stage, EU ETS faces several issues, related to carbon price. As it was submitted earlier, the carbon price at the end of the EU ETS Phase 1 has dropped to zero. During the currently ongoing Phase 3 the carbon price is roughly 5 EUR⁴⁷, however predictions do not show a significant price increase in near

⁴² Report From The Commission to The European Parliament and the Council, *Progress Towards Achieving The Kyoto And Eu 2020 Objectives*, Brussels, 9.10.2013 COM(2013) 698 final.

⁴³ Doha amendment to the Kyoto Protocol, Articles 1, 2.

⁴⁴ Ibid., added Nitrogen trifluoride, Article 1, paragraph b.

⁴⁵ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Implementing the Paris Agreement - Progress of the EU towards the at least -40% target (required under Article 21 of Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC) COM/2016/0707 final.

⁴⁶ Conference of the Parties, Paris, 12 December 2015, adoption of the Paris Agreement, Annex Paris Agreement, Article 2, paragraph 1.

⁴⁷ *EU Market: EUAs fall below €5 after late sell-off, still notches 4.3% weekly gain*, Carbon pulse [online] <https://carbon-pulse.com/32960/>.

future (Phase 3)⁴⁸. Low carbon price has a twofold negative impact: firstly, it hinders carbon market liquidity, and secondly, it negatively affects ambitious climate action goals set forward by EU 2030 framework for climate and energy policies⁴⁹. Therefore, the future of EU ETS carbon pricing and issues affecting it may be structured as follows: i) issue of overlapping policies. ii) oversupply of allowances. iii) technological innovation.

Responding to the issues above, back in 2015 EU has introduced two measures: 1) Back-loading of auctions in EU ETS Phase 3 and 2) Market stability reserve. Back-loading solution was introduced in order to balance supply and demand in the short term. The auction volumes were reduced starting from year 2014 to 2016 and shall continue onwards to year 2020⁵⁰. Another tool, Market stability reserve was introduced as a long-term solution to address the issue of surplus of allowances and to improve EU ETS resilience to major financial and/or other shocks by adjusting the amount of allowances to be auctioned⁵¹. This reserve will start operating from 1 January, 2019 and 900 million allowances deducted from auction volumes during years 2014-2016 will be placed in the reserve⁵². Moreover, each year 12 per cent of the total number of allowances in circulation will be deducted from the volume of allowances to be auctioned by EU Member States. Accordingly, allowances could be placed or released from the reserve depending on total number of allowances in circulation⁵³.

According to data, EU ETS allowances demand is shrinking faster than supply, however this demand drop is not a result of EU ETS allowances price incentive, but an economic recession and in some cases might even be viewed as a side effect of other EU climate policy measures. It should be noted that if demand for allowances should keep decreasing faster than supply over a long period, market will be structurally oversupplied. According to some analytics, Market stability reserve itself is not capable of resolving the issue of oversupply. It is due to the fact that Market stability reserve effects only the amount of accumulated oversupplied allowances. Even by doubling the Market stability reserve withdrawal rate will have no significant effect on overall 2020 – 2030 supply and demand balance.

Moreover, demand side of EU ETS allowances will be negatively impacted by new Energy efficiency Directive, which should decrease the overall emissions and energy consumption, resulting in higher oversupply of EU ETS allowances⁵⁴. According to analytics, EU Member States national coal phase-outs⁵⁵, Renewable energy initiatives and targets, Energy efficiency initiatives will eventually overlap resulting in fall of EU ETS demand and liquidity as well as EU ETS not fulfilling its ultimate climate policy goals. Finally, other factors such as Paris agreement, Market stability reserve as well as recently published Commission legislative package “Clean energy for all Europeans” shall be taken into account.

Some critics address the fact that electricity decarbonisation is driven not by the EU ETS but rather decreasing demand and a decommissioning of fossil fuel capacities due to continued downwards pressure

⁴⁸ *Analysts trim EU carbon price forecasts as supply swells*, Reuters. [online] <http://www.reuters.com/article/us-eu-carbon-idUSKBN14T190>.

⁴⁹ GREEN PAPER A 2030 framework for climate and energy policies COM/2013/0169 final.

⁵⁰ Commission Regulation (EU) No 176/2014 of 25 February 2014 amending Regulation (EU) No 1031/2010 in particular to determine the volumes of greenhouse gas emission allowances to be auctioned in 2013-20 Text with EEA relevance OJ L 56, 26.2.2014, p. 11–13.

⁵¹ Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (Text with EEA relevance) OJ L 264, 9.10.2015, p. 1–5.

⁵² *Ibid.* 50, Articles 1, 2.

⁵³ *Ibid.* 50, Article 1, paragraph 8.

⁵⁴ ARES, E., DELEBARRE, J. *The carbon price floor* House of Commons library, Briefing paper number CBP05927, 23 November 2016.

⁵⁵ HOWARD, R. *Next steps for the carbon price floor*, Policy exchange, November 2016.

on electricity wholesale price. While all new EU capacities are from renewables and constantly growing, tax and policy costs have increased.

Other EU Member States such as UK and France introduced national measures aimed at raising carbon prices in respective markets. United Kingdom on 1 April, 2013 has introduced carbon price floor⁵⁶. Carbon price in UK consists of two components paid by energy generators in two different ways: i) EU ETS allowances price, purchased through auctions or secondary carbon markets. ii) Carbon support price, which is paid on top of EU ETS allowance price to the carbon floor price target. Charges are applied through Climate change levy measured in sterling pounds for each kilowatt-hour and applied to fuels used for electricity generation. Carbon support price rates of Climate change levies are paid by owners of electricity generating station. UK plans to phase out unabated coal (that has no carbon capture and storage) by 2025⁵⁷. France has proposed similar measures to be adopted on EU level, however these proposals were not favoured by the other EU Member States, since it was held that true economic cost of abating greenhouse gas emissions is best determined through market principles. Eventually EU has chosen to implement other alternatives – back loading and Market stability reserve.

Taking all into account, on 15 July, 2015 EU Commission has addressed these issues by introducing an initiative to reform the EU ETS. On 15 February, 2017 European Parliament voted for the amendment to the EU Commission proposal. The key ambition - linear reduction of emission allowances was kept at 2.2 per cent per year starting in 2021. However, a new review clause has been inserted under which EU commission shall keep linear reduction factor under review and to put proposal to the European Parliament and the Council. Market stability reserve surplus was raised from 12 to 24 per cent for four years starting in 2019. Secondly, EU Parliament wished for indirect cost compensation fund to be established, a form of subsidy to certain sectors to cover costs incurred for greenhouse gas emissions costs. Thirdly, a just transition fund is established in order to support training and employment initiatives in highly carbon dependant sectors. Moreover, European Parliament has further addressed the issue of carbon leakage, by focusing on free allocation of allowances to certain sectors. Another important step forward is the simplification of administrative burden of the EU ETS to the small and ultra-small emitters, by establishing a simplified compliance procedure. Finally Innovation and Modernisation funds were confirmed. Core idea of the Innovation fund is to back new technologies aimed at reducing EU greenhouse gas footprint. Major input made by European Parliament was establishing that at least half the Innovation Fund will come from the share of allowances auction. the fund will be supported by 150 million unallocated allowances from the start and up to 75 per cent of the cost of projects will be supported. Modernisation fund is another important tool, aimed at facilitating investments in modernising the power sector and wider energy systems and boosting energy efficiency in 10 lower-income EU Member States⁵⁸.

Most importantly, EU Parliament has proposed that EU Commission, during its annual review of the functioning of the EU ETS, should consider the impact of overlapping EU policies and if necessary make a proposal to the European Parliament and the Council. Moreover, every 2 years, Member States may surrender a number of allowances to the Market stability reserve equal to the number of allowances connected to electricity capacity that has come offline in that period⁵⁹.

⁵⁶ Schedule 6 to Finance Act 2000 (as amended). The Climate Change Levy (General) Regulations 2001 (SI 2001/838) as amended by the Climate Change Levy (General) (Amendment) Regulations 2013 (SI 2013/713).

⁵⁷ Coal generation in Great Britain, the pathway to a low-carbon future: consultation document, November 2016, [online] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577080/With_SIG_Unabated_coal_closure_consultation_FINAL_v6.1_.pdf.

⁵⁸ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments COM/2015/0337 final - 2015/0148 (COD).

⁵⁹ Ibid..

5. EU ETS and Brexit

Following the United Kingdom's notification to the EU Council on the start of the withdrawal process from the EU⁶⁰, a question of United Kingdom's future relation with EU ETS came into question. One of the key aspects to comprehend is the fact that UK was one of the key EU Member States which designed and reformed the EU ETS. Moreover, it played a decisive role in Convention and Paris Agreement negotiations as well as in bilateral agreements on climate change with other countries. On the other hand, EU ETS ensures cost efficiency in UK emissions cuts, and provides benefits associated with a large scheme such as avoiding cross border distortions. However there is high uncertainty regarding UK's future in EU ETS system. The priority of both EU and UK should be to ensure as much continuity and stability as possible in order for UK EU ETS participants to prepare for any future arrangements. There are three possible scenarios resulting from the so-called "Brexit": i) UK remains a full participant of EU ETS. ii) UK establishes its own emission trading system with the rules being either aligned with EU ETS or differing. iii) there is no UK emission trading scheme at all. Best-case scenario would be to keep UK as a part of EU ETS either through direct involvement or through linkage agreement⁶¹. Since membership of EU is not a required pre requisite to participate in EU ETS scheme following Paris Agreement, there is an added value of participating in EU ETS and expansion of global emissions trading.

Conclusions

There is an ongoing debate on how EU ETS should be shaped to be future proof and whether additional instruments should be used to shape EU ETS allowances price. However, these proposals overlook two key aspects. Firstly, the track record has shown that EU Member States were in compliance with greenhouse gas reduction goals set by EU ETS Phase 1 and Phase 2. Over the time both primary and secondary EU ETS markets have evolved and are fully functional today, offering instruments for EU ETS allowances price risk management. Secondly, other EU initiatives and policies, such as promotion of renewables, energy efficiency, "Clean energy for all Europeans" legislative package and even national coal phase-outs, are not intra compatible and all suffer from over competition. Although currently ongoing revision of EU ETS is promising, together with ambitious yearly linear reduction factor of 2.2 per cent and Market stability reserve, the price casts for future remain dim, as prices are expected to stay low. Even if some ideas as establishing modernisation and innovation funds might work to some extent, they will not be a game changer for EU ETS. Finally, UK's withdrawal from the EU raises the question of its position in future international climate treaties and remaining in EU ETS, although highly beneficial, remains uncertain.

⁶⁰ *Statement by the European Council (Art. 50) on the UK notification*, statements and remarks 159/17, 29 March, 2017.

⁶¹ *Ibid.* 58, Article 25.

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NON-REFOULEMENT IN LIGHT OF SHIFTING RESPONSIBILITY ON REFUGEES

Natallia Karkanitsa¹

Abstract

This article addresses mainly the importance of burden-sharing and the principle of international cooperation considering the current mass migration. The article provides several examples of the states trying to negotiate a burden of the refugee protection by outsourcing their responsibility. This paper is concerned with the reluctance of states to apply solidarity and share the burden of refugee protection as well as duly respect the principle of non-refoulement, disregarding their conventional obligations or requirements of a customary nature. The paper concludes by recommending that the international community could make a commitment to share the responsibility for refugees in the upcoming Global Compact on Refugees as well as to build on the benefits the migrants bring to the hosting communities. At the European level a common refugee status granted by the European Protection Agency could help to harmonize the state practices and safeguard the principle of non-refoulement. All issues raised in the paper are interlinked and lead to recognition of the lack of solidarity between the states in providing the refugee protection what is evidenced by an emerging opinion of a possibility to seek a compensation from the countries of origin for causing mass migration.

Keywords: refugee, responsibility sharing, principle of international cooperation, non-refoulement.

Introduction

Non-refoulement is a core principle of international refugee law and is enshrined both in the 1951 Convention relating to the Status of Refugees and in the customary law. In accordance with Article 33 of the 1951 Convention 'no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The principle of non-refoulement is also protected in EU law by the Treaty on the Functioning of the European Union and the EU Charter of Fundamental Rights, Article 19 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

Protection against return to a country where a person could face persecution, death penalty, torture or other inhuman or degrading treatment or punishment is the most essential component of the refugee status in the EU. The recent EU-Turkey deal as well as some other examples to negotiate a burden of refugee protection make the issue of non-refoulement even more relevant. Assessment of the human rights implications for this type of agreements is very timely. While a scheme of providing money in exchange for accepting returns is becoming more and more popular among the states aiming to keep asylum-seekers far from their borders, another problem is the indirect violation of the non-refoulement and measures to protect refugees from the chain returns.

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Both the EU-Turkey Agreement and the Dublin system represent European attempts to share the burden of refugee protection. At the same time, the enhanced responsibilities of the EU border states and inconsistency of the national approaches to the refugee status in the EU demonstrate the lack of solidarity and the need to find new solutions in accordance with the principle of international cooperation.

New York Declaration adopted in 2016 by the UN Member States acknowledged ‘the burdens that large movements of refugees place on national resources, especially in the case of developing countries’. To address the needs of refugees and of the hosting countries, the States committed to a more equitable sharing of the burden and responsibility for receiving and supporting the refugees.

The EU states have a chance to reinforce refugee protection by improving the Common European Asylum System and introducing more safeguards to avoid even indirect violations of the principle of non-refoulement. Another opportunity for the UN States is the Global Compact on Refugees to be adopted in 2018 which could become a new framework for a more effective and fair burden-sharing in spirit of the international solidarity.

1. Responsibility sharing and the principle of solidarity

There are no doubts that international forced migration can not be managed unilaterally, what explains the fundamental role of effective responsibility-sharing and implementation of the principle of international cooperation and solidarity. Unfortunately, the current global response to the refugee crisis demonstrates a certain lack of commitment from the sovereign countries to share the burden of refugee protection.

Importance of the burden-sharing was already stressed in the Preamble to the 1951 Convention relating to the Status of Refugees (the Refugee Convention) ‘the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation’².

The international community returned to the issue of asylum after 20 years from the Universal Declaration on Human Rights where the right of everyone ‘to seek and to enjoy in other countries asylum from persecution’ was enshrined³. The Universal Declaration on Human Rights contains no reference to the right to be granted asylum – a compromise between the territorial sovereignty and individual entitlement to asylum. The UN Declaration on Territorial Asylum 1967 proclaimed the principle of international solidarity in Article 2: ‘Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State’⁴.

Guy S. Goodwin-Gill notes that principles adopted unanimously in 1967 are still very much a part of the legal framework today, but with some significant refinements due to the practice of States and international organizations⁵.

The current situation of the international forced migration is unprecedented and UNHCR reports that wars and persecution have driven more people from their homes than at any time since UNHCR records began. The UNHCR’s annual Global Trends Report 2014 was named ‘World at War’ and said that the number of people forcibly displaced at the end of 2014 had risen to 59.5 million compared to 37.5 million a decade ago⁶.

² Convention relating to the Status of Refugees, Geneva, 28 July 1951. United Nations, Treaty Series, vol. 189, p. 137

³ Universal Declaration on Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

⁴ Declaration on Territorial Asylum, New York, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967)

⁵ Guy S. Goodwin-Gill, ‘Declaration on Territorial Asylum. Introductory note’, <http://legal.un.org/avl/ha/dta/dta.html>

⁶ UNHCR, ‘Global Trends 2014’, <http://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html>

The lack of international burden-sharing or solidarity becomes evident from the statistics that almost nine out of every 10 refugees are in the regions and countries considered economically less developed. The majority of those who have fled their home countries are hosted by: Kenya, Jordan, Ethiopia, Iran, Lebanon, Pakistan, and Turkey – collectively providing protection to more than half the world's refugee population. Worldwide, Turkey was the biggest host country, with 2.5 million refugees. With nearly one refugee for every five citizens, Lebanon hosted more refugees compared to its population than any other country⁷.

Back in 1998 UNHCR classified the impact of the refugee burden borne by the developing countries:

- economic impact.
- environmental impact.
- social and political impact.
- impact on national, regional and international peace and security⁸.

Despite the fact that most of the impact mentioned above has a negative character, we often underestimate the benefits the refugee population could bring to the host communities if the integration measures are managed effectively. The Sustainable Development Goals and the 2030 Agenda adopted by the UN Member States not only recognize the positive contribution made by migrants for inclusive growth but also provide an entry point for strengthening development support⁹.

On September 19, 2016, the UN General Assembly unanimously adopted the New York Declaration for Refugees and Migrants, a landmark political declaration directed at improving the way in which the international community responds to large movements of forced migrants and protracted refugee situations in the host communities.

Particularly important in the Declaration is the commitment to 'a more equitable sharing of the burden and responsibility'. As part of the Declaration, States agreed on a comprehensive refugee response framework for addressing large-scale refugee movements and protracted refugee situations and decided to adopt a Global Compact on Refugees in 2018¹⁰.

Although the primary responsibility for protecting refugees under the international law lies with the hosting states, it is time to acknowledge that the global system of burden-sharing and international solidarity is broken. Global Compact on Refugees provides an opportunity for the international community to agree on 'how' to share the responsibility for refugees and 'how' to apply the principle of international cooperation. The recent political trends in many countries fuelled by negative attitude towards migrants also demonstrate importance of measures aimed at unleashing potential of migrants to help them contribute to the development of the hosting countries.

⁷ Bloomberg, 'Blame the Rich World for the Global Refugee Crisis', <https://www.bloomberg.com/news/articles/2015-06-22/blame-the-rich-world-for-the-global-refugee-crisis>

⁸ UNHCR, 'Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees', 7 September 1998, A/AC.96/904', <http://www.refworld.org/docid/4a54bc2f0.html>

⁹ UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development', 21 October 2015, A/RES/70/1, <https://sustainabledevelopment.un.org/post2015/transformingourworld>

¹⁰ UN General Assembly, 'New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly', 3 October 2016, A/RES/71/1, <http://www.refworld.org/docid/57ceb74a4.html>

2. EU practice of sharing protection responsibilities

Many states have increasingly relied on a range of policies in an attempt to minimize their own obligations of protection, including the principle of non-refoulement, towards refugees. The European Union has more frequently exercised the policy of keeping the migrants off the shores and preventing their access to asylum in Europe in light of the ongoing rise in the number of forced migrants.

M. Foster identifies a 'protection elsewhere' as a situation in which a state or agency acts on the basis that the protection needs of a refugee should be considered or addressed somewhere other than in the territory of the state where the refugee has sought, or intends to seek protection¹¹. It is important to assess the human rights implications of the states who shift a burden for accepting refugees or outsource protection responsibilities.

M. Foster defines three methods by which protection elsewhere policies are implemented:

1. A formal multilateral assignment scheme such as the Dublin Regulation.
2. Formal bilateral assignment scheme like the EU-Turkey Agreement.
3. Unilateral transfer schemes effected in Australian law, which excludes from protection a person 'who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently, any country apart from Australia'.

We will assess the multilateral and bilateral schemes applied by the EU in accordance with the written agreements of the EU with the relevant states.

Asylum seekers in the EU can be moved from the country where they lodged an application for asylum to another EU country in accordance with criteria of the Dublin regulation¹². Dublin Regulation is a part of the Common European Asylum System premised on the harmonised standards of protection and outcomes of asylum procedures. However, the common protection space has never been realised and continues to be weakened by diverse practices of the EU states. The different rates of the asylum recognitions result in what is called an 'asylum lottery' and asylum shopping when asylum seekers try to choose a country of asylum with higher chances of obtaining international protection¹³.

The Dublin system is based on assumption that all EU countries could be considered 'safe third countries' so that the transfers in the EU do not violate the non-refoulement principle. At the same time, the Dublin system itself is not a fair burden-sharing mechanism and it has many times demonstrated its shortcomings, including the facts of prohibited transfers to Greece because of the overloaded border states or to Hungary due to the unilateral restrictive measures, like mandatory detention or excessive use of violence, imposed by the state on all asylum seekers what does not correspond to the EU and international standards of protection¹⁴.

In this regard, the transfers conducted in framework of the Dublin system could violate the non-refoulement principle if the EU state does not treat refugees in accordance with the EU human rights standards and there is a risk of 'chain refoulement'. The 'chain' or indirect refoulement occurs when one country transfers the asylum seeker on to another country, which in turn returns them to the place of

¹¹ M. Foster, 'Responsibility sharing or shifting? "Safe" third countries and international law'. *Refuge*. 25

¹² Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) No 604/2013 of the European Parliament and of the Council of 26 June 2013, OJ L. 180/31-180/59

¹³ European Commission, 'Reforming the Common European Asylum System and developing safe and legal pathways to Europe', https://ec.europa.eu/home-affairs/what-is-new/news/news/2016/20160406_2_en

¹⁴ UNHCR, 'UNHCR urges suspension of transfers of asylum-seekers to Hungary under Dublin', <http://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html>

persecution or other danger¹⁵. Unfortunately, the suggested reforms of the Common European Asylum System do not really fix the Dublin system but propose before assessment of the application to verify if asylum seekers could find protection outside the EU¹⁶. These reforms if adopted have no safeguard against the chain refoulement and the EU might be responsible for this violation under the international law.

Another bilateral scheme or outsourcing the protection responsibilities – EU-Turkey Agreement was strongly criticized from its conclusion and has not reduced the mass migration as a result of the first year of its application. Even if the EU Commission praised the lower number of refugees arriving to Greece and people dying on the way to Europe, this approach ignores unfairness of the EU-Turkey deal to the international protection regime.

The EU Turkey Statement of 18 March 2016 provides that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU. The EU-Turkey deal legally presents Turkey as a 'safe third country' what is criticized because of poor conditions of treatment faced by asylum seekers, high risk of chain refoulement to Syria and availability of the refugee status in accordance with the 1951 Convention only to the refugees from Europe¹⁷.

The previous concerns about the Agreement are also proved by the fact that only 750 asylum seekers have been sent back from Greece to Turkey, because Greek courts consider Turkey to be an unsafe country for Syrian refugees, despite all pressure from the European Commission¹⁸.

M. Foster draws a conclusion that safe third country schemes undermine refugee protection and countries should dedicate their efforts to fashioning solutions to the refugee crisis by developing internal policies based on human rights and needs of refugees¹⁹. Although we tend to agree more with Guy S Goodwin-Gill who does not exclude further engagement of the EU with outside states but suggests expanding it to not only the EU's interest, but to wider international dimensions, including management of migration, enhancement of the infrastructural capacity to accommodate, assist and protect forced migrants. At the European level, Guy S Goodwin-Gill suggests establishing a European refugee status granted by the European Protection Agency and based on the international obligations of the Member States as well as provisions of the EU law. The possible delegated competence of the EU to provide protection and grant a refugee status is explained by the fact that the EU can sign treaties and all Members of the EU are already bound by the Refugee Convention, therefore have the same legal understanding of the refugee status, so the EU in theory could replace states in exercising refugee protection²⁰.

In terms of the principle of non-refoulement, the European refugee status granted by the European Protection Agency might play an important role in harmonizing the States' practices and holding the EU accountable for any violations of non-refoulement. The rights of refugees would be better protected if the refugee status would be granted at the EU level as this would help to avoid differences in the national procedures, which sometimes depend on anti-migration policies or lack of capacities to ensure the due process. Absence of the 'asylum lottery' should result in less asylum shopping and more fair burden-sharing of the refugee protection in the EU.

¹⁵ Moira Sy, 'UNHCR and Preventing Indirect Refoulement in Europe', *Int J Refugee Law* (2015) 27 (3): 457-480

¹⁶ Open Society Foundations, 'Understanding Migration and Asylum in the European Union', <https://www.opensocietyfoundations.org/explainers/understanding-migration-and-asylum-european-union>

¹⁷ Parliamentary Assembly, 'PACE raises human rights questions over EU-Turkey migrant deal', <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6132&lang=2&cat=8>

¹⁸ PRO ASYL, 'PRO ASYL Appeals Committee on Lesbos stops deportations to Turkey', <https://www.proasyl.de/en/pressrelease/appeals-committee-on-lesbos-stops-deportations-to-turkey/>

¹⁹ M. Foster, 'Responsibility sharing or shifting? "Safe" third countries and international law'. *Refugee*. 25

²⁰ Guy S Goodwin-Gill, 'Legal and practical issues raised by the movement of people across the Mediterranean', *Destination: Europe*, *FMR* 51, January 2016, 82-84

3. Compensation for accepting and hosting the refugees

While the international community is struggling to set up a fair burden-sharing regime, some of the hosting countries might think of seeking compensation for accepting refugees from the neighbouring states. This practice is unprecedented and hopefully will not be supported, although we would like to see if there are any grounds in the international law to seek redress for causing mass forced migration.

Adopted by the International Law Association in 1992, The Cairo Declaration of Principles of International Law on Compensation to Refugees, which aims at reflecting customary international law, declares in Principle 4 that 'a state is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated by international law to compensate an alien'. Principle 1 of the Cairo Declaration provides that 'responsibility for caring for the world's refugees rests ultimately upon the countries that directly or indirectly force their own citizens to flee and/or remain abroad as refugees. The discharge of such responsibility by countries of asylum, international organizations (e.g., UNHCR, UNRWA, IOM) and donors (both governmental and non-governmental), pending the return of refugees, their settlement in place, or their resettlement in third countries, shall not relieve the countries of origin of their basic responsibility, including that of paying adequate compensation to refugees'²¹.

The Permanent Court of International Justice suggested two standards for the compensation of damage in 1929, case of Chorzow Factory, depending on the legality of state's acts. It was indicated that reparation must 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed'²². This high standard is not a fair one if applied to the states of origin in case of mass migration and especially when the long time has passed and the values changed.

The principle that refugees are entitled to compensation for their lost property was already applied after the Second World War and in some other cases, like Iraq's occupation of Kuwait. The United Nations Compensation Commission, established by the Security Council in 1991 to deal with claims against Iraq had a mandate to hear claims for compensation for any direct loss or damage, including environmental damage and the depletion of natural resources, or other injury to states and individuals²³. This commission did not receive individual petitions, but the claims collected and submitted by the governments, and allocated available funds to each government expected to distribute these amounts to their nationals²⁴.

The liability through compensation is possible under the international law in case if the state of origin committed a wrongful act causing the mass migration and damage to the hosting state. At the same time the negative effect of such liability could be seen in future possible restrictions on the freedom of movement imposed by the states of origin, although the right to leave any country, including its own is enshrined in the Universal Declaration on Human Rights. Moreover, states might face difficulties in calculating the actual costs spent by the states for receiving migrants as well as the amount of benefits that the migrants bring to the host communities, what should be deducted from the amount of compensation.

Conclusions

Establishment of the fair burden-sharing scheme based on the principles of solidarity and international cooperation is vital for sustainability of the refugee protection mechanism.

²¹ Luke T. Lee, 'The Cairo Declaration of Principles of International Law on Compensation to Refugees', 87 Am. J.

²² Case concerning the Factory at Chorzów (Germany v. Poland), (1928) P.C.I.J., Ser. A, No. 17

²³ S.C. Res. 687, U.N. Doc. S/RES/687 (3 Apr. 1991). S.C. Res. 692, U.N. Doc. S/RES/692 (20 May 1991)

²⁴ Eyal Benvenisti, 'Compensation as Part of a Comprehensive Solution to the Palestinian Refugee Problem', Workshop on the Issue of Compensation for Palestinian Refugees, <http://prn.mcgill.ca/research/papers/benvenisti.htm>

The New York Declaration represents a milestone for the global refugee regime and underlines the centrality of international cooperation to the refugee protection. Moreover the New York Declaration and the upcoming Global Compact on Refugees demonstrate a commitment to share responsibilities in a more equitable way. However, the real value of the Global Compact will be in the readiness of Member States and other relevant stakeholders to take an action and transform its provisions into reality, including an effective legally binding refugee response framework and a programme of action.

In terms of the principle of non-refoulement, wide application of the safe third country schemes by the EU and differences in the national asylum procedures have caused asylum shopping and indirect violations of the non-refoulement, like chain returns by the countries previously assessed as safe third countries. Practical solidarity and responsibility-sharing based on respect for human rights and international law is needed for a sustainable system of the refugee protection. A common European refugee status granted by the European Protection Agency and based on the international obligations of the EU Member States could be one of the solutions for the improvement of the refugee protection.

A compensation from states of origin might seem as one of the ways to alleviate the burden faced by the states hosting refugees. At the same time this compensation might be unfair as states of origin are not always responsible for the mass migration, although are less developed and will be asked to pay to the wealthier hosting states what is based on the current statistics of the distribution of refugees.

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COMMERCIAL DATA PROTECTION FOR AN INFORMATION TECHNOLOGY BASED BUSINESS AFFORDED BY PROHIBITION OF UNFAIR COMPETITION

Vaidas Kontrimas¹

Abstract

Data is at the core of today's digital businesses and it is even used as a competitive tool. Digital business, to a large measure, relies on screen scraping techniques which enable them to use others' data or databases. For these purposes, they employ automated software that collects publicly available online data from others' websites or databases. This data is then passed off as their own.

This paper will explore what legal protection is available against the use of publicly accessible screen scraped commercial data within the instruments of intellectual property rights: protection of copyright and databases, *sui generis* rights. Subsequently, this paper will deal with the practicalities of prohibition of unfair competition in order to provide legal protection against the use of screen scraped publicly available online commercial data.

Keywords: unfair competition, screen scraping, data, protection.

Introduction

Against the background of the fast paced development of information technology, companies increasingly focus on moving their business into cyberspace or even starting a digital based business. Data is at the core of today's digital businesses and it is even used as a competitive tool.

Regrettably, it must be said that a digital business, to a large measure, relies on screen scraping techniques which enable them to use others' data or databases. For these purposes, they employ automated software that collects publicly available online data from others' websites or databases. This data is then passed off as their own. Nowadays, for these very reasons, the aspect of protection of commercial data assumes a particular importance.

Unlike personal data protection, efficient and proportionate legal protection of commercial data represents tough challenges for legal systems. This is further confirmed by discussions on the legal protection of publicly accessible commercial data in cyberspace, that have been taking place over the past few years, both at EU institutional level and at the level of jurisprudence.

This paper will explore what legal protection is available against the use of publicly accessible screen scraped commercial data within the instruments of intellectual property rights: protection of copyright and databases, *sui generis* rights. Subsequently, this paper will deal with the practicalities of prohibition of unfair competition in order to provide legal protection against the use of screen scraped publicly available online commercial data.

1. Publicly available online commercial data

Before analyzing legal protection of commercial data, it shall be clarified and defined what data shall be considered as publicly available online commercial data. Contrary to the regulation of personal data, the

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legislation in force does not provide a definition of publicly available commercial data. Therefore, almost any type of information published by entities online may be considered publicly available commercial data. However, for reasons of clarity, it is possible to distinguish the following information attributes that describe publicly available commercial data.

First of all, the information shall have commercial nature. This means that the information is related to commercial activities of a certain entity, i.e. the entity is using said information in its commercial activities. This may include information about the goods or services that the entity provides, the price and features thereof, and etc.

However, it shall be noted that the direct relation between information and the goods or services that the entity provides is not required. Information will be considered as having commercial nature, provided that the entity uses said information in its commercial activities, even if it is not directly related to the commercial activities of the entity and the income thereof. A good example is the information about the weather conditions in certain area or consumer reviews about cafeterias, hotels and etc. collected by the entity. The entity generates income from advertisement on a website or in mobile application but at the same time, the entity is able to pursue commercial activities only because it has collected (accumulated) information about the weather, customer reviews and the entity is sharing the above data online. Only because of the above mentioned information, the website belonging to the entity generates visitors' traffic, or the mobile application has users. Precisely through this aspect, commercial nature of the information that is not directly related to commercial activities of the entity and the income thereof is revealed.

Secondly, information shall be publicly accessible online, meaning that the entity shall publish online the information it has acquired (accumulated). Information will be considered publicly accessible online in cases where the information may be accessed without any obstacles or restrictions, as well in cases where the access to the information is granted to the persons registered and connected to particular system (platform). It is important that the information is granted to an undefined circle of subjects who have registered to a particular system or platform. Otherwise, when the access to the information has strictly defined circle of subjects (for instance, 15 people), it is doubtful whether such information may be considered publicly accessible.

In conclusion, publicly available commercial data (hereinafter referred to as – the Commercial data) shall be considered as all publicly available information published online, which is directly related to the commercial activities of certain entity or is extremely important to the business activities of the entity and performance thereof.

2. Legal protection granted using the instruments of intellectual property rights

Information is protected using the institutes of intellectual property protection. However, it is unclear, whether such protection is relevant, and to what extent, in respect to Commercial data.

First of all, the information having commercial (industrial) value can be protected as commercial (trade) secret, provided that the information meets the criteria indicated in the Art. 1.116(1) of the Civil Code of the Republic of Lithuania² and developed in the practice of the Supreme Court of Lithuania³: (i) the information is secret, it is not disclosed publicly. (ii) the information has commercial value (creates commercial value for

² Civil code of the Republic of Lithuania (Valstybės žinios 2000, Nr. 74-2262).

³ Decision of the Supreme court of Lithuania, Case No. 3K-3-676/2013 [2013]. Decision of the Supreme court of Lithuania, Case No. 3K-3-447/2014 [2014]. Decision of the Supreme court of Lithuania, Case No. 3K-3-524/2014 [2014]. Decision of the Supreme court of Lithuania, Case No. 3K-3-421-695/2015 [2015]. Decision of the Supreme court of Lithuania, Case No. 3K-7-6-706/2016 [2016].

the entity against other participants of the market). (iii) the owner of the information protects the secrecy of the information.

As previously mentioned, the Commercial data has the attribute of publicity – the data is made available publicly online. This means that the Commercial data does not meet the two criteria specific to the commercial (trade) secrets: (i) the information is not secret, it has been disclosed publicly. (ii) the owner of the information did not protect the secrecy of the information. Thus, in the present case, the Commercial data cannot be protected as a commercial (trade) secret.

Following the Art. 4(1) of the Law on Copyright and Related Rights of the Republic of Lithuania⁴ (hereinafter referred to as – LCRR), the object of copyright protection is considered as original literary, scientific and artistic works which are expressed in any objective form as a result of creative activities. Criteria for the object of copyright (the work) are provided in the above article of LCRR.

In the case where Commercial data corresponds to the above mentioned criteria for the object of copyright (the work), such data will be protected by copyright. For instance, if entity publishes photographs, clip art or literary works on a website, such information corresponds to the criteria applied for the object of copyright, while unauthorized use of such information can be defended by applying the protection granted to copyright. However, it shall be noted, that in such case, only the author (natural person) has the possibility to defend the copyright. The entity which has published such data online, could defend the rights only if the author has transferred to the entity the economic rights to the work or works⁵. For instance, if the work has been created by the employee while performing his job duties or functions, the economic rights to the work will be passed to the employer for a certain period of time (Art. 9(2) of LCRR).

According to the Art. 4(3)(2) of LCRR, collections of works, data sets or databases, which due to selection or arrangement of their content are the result of intellectual creation, are also regarded as the objects of copyright. It shall be noted, that such data sets or databases can be comprised of copyright protected works as well as of data or information which is not protected by copyright. In this case, the protection is not granted to the content itself, while it is granted to the collection (set).

As in the previous case, the rights can only be defended by the person who has compiled the collection of works, data sets, or databases (natural person). While the entity publishing a certain collection or database, could defend the rights only in case where the person who had compiled the collection or database, has transferred economic rights to the entity.

Therefore, taken into account the above, the Commercial data published by entity online can be protected by copyright, if the data falls into the definition of the objects of copyright, provided in the Art. 4(1) of LCRR. For this reason, authors of the works, compilers of collections or databases, or entities which have acquired economic rights to any work, collection or database, may defend their rights from the use of Commercial data by screen scraping techniques on the basis copyright and protection thereof.

Another instrument of intellectual property protection, related to protection of information, is the protection of the rights of database makers (*sui generis* rights). It is indicated in the Art. 61(1) of LCRR, that the maker of database who can prove that by selecting, compiling, verifying, and submitting the content of the database he has made substantial qualitative and (or) quantitative (intellectual, financial, organizational) investments, has the right to prohibit the following acts (i) permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form. (ii) any form of making available to the public of all or a substantial part of the contents of a database by the distribution of copies, by renting them, by transmitting all or a substantial part of the contents of a database via computer networks (the Internet) or any other mode of transmission.

⁴ Law on Copyright and Related Rights of the Republic of Lithuania (Valstybės žinios 1999, Nr. 50-1598).

⁵ V. Mizaras, 'Civil remedies for infringement of copyright' (Vilnius: Justitia 2003) 49-50.

From the above mentioned provision of LCRR, it is obvious that the rights of the maker of database (*sui generis* rights) and their protection occur when the maker of the database has made substantial investments in order to compile the database⁶. Having evaluated the above, the object of the protection of database maker rights (*sui generis* rights), shall be considered as the result of investment, made to create a database⁷.

In order for the rights of database makers (*sui generis* rights) to take effect, the following conditions shall be met: (i) the elements comprising the database are selected and arranged according to certain system or criteria. (ii) substantial investments (intellectual, financial, organizational) shall be made in order to create a database, for which the database has gained independent economic value⁸.

Consequently, if the Commercial data published by the entity online, collectively meet the above mentioned criteria, the entity will gain the rights of the maker of database (*sui generis* rights) on the basis of which, the entity may defend itself from the use of Commercial data by screen scraping techniques. However, as indicated in the Art. 61(1) of LCRR, such line of defense is only possible, if all of the Commercial data comprising a database or a substantial part thereof is screen scraped.

3. The problem of the scope of legal protection, granted by the instruments of intellectual property rights

Although legal protection may be granted to Commercial data by instruments of intellectual property rights, the scope of such protection is significantly limited. As indicated above, in order for Commercial data to gain the protection applied to copyright, collection or database, or granted to the maker of database (*sui generis* rights), the Commercial data or collection, or presentation thereof, shall meet very strictly defined criteria. In addition, in certain cases, even if the criteria are met, the protection itself is very limited (for instance, the maker of database may defend the rights only when all Commercial data or a substantial part thereof is used by another entity⁹).

Admittedly, Commercial data often will not meet the above discussed criteria to be granted protection of intellectual property objects. For example, in case where Commercial data is information related to the goods or services of the entity (price, characteristics of goods or services, etc.) such information shall not be regarded as the work (object of intellectual property). Presentation of such information will not be regarded as database in the context of *sui generis* rights. Commercial data regarding meteorological conditions or customers reviews about cafeterias will not be regarded as the work as well.

Therefore, the instruments of intellectual property protection grant a limited protection to the Commercial data published by the entity online, because often the Commercial data may not meet the conditions and requirements for copyright or the rights of makers of database (*sui generis* rights).

In the case *Ryanair Ltd v. PR Aviation BV*¹⁰ the Court of Justice of the European Union has recognized that in certain cases Commercial data is not granted copyright protection or protection of the maker of database (*sui generis* rights). Accordingly, by applying these institutes of intellectual property rights protection from the use of Commercial data by screen scraping techniques in such cases will not be possible.

However, the Court of Justice of the European Union has also indicated that in this particular case Commercial data protection can be achieved on the basis of the national law, and that the holder of such

⁶ G. Surblytė, 'Data as a digital resource' [2016] Max Planck Institute for Innovation & Competition Research Paper No. 16-12, 20.

⁷ V. Mizaras, 'Copyright law (II volume)' (Vilnius: Justitia 2009) 139-140.

⁸ V. Mizaras, 'Copyright law (II volume)' (Vilnius: Justitia 2009) 140-141.

⁹ Law on Copyright and Related Rights of the Republic of Lithuania (Valstybės žinios 1999, Nr. 50-1598) Art. 61 (1).

¹⁰ *Ryanair Ltd v PR Aviation BV*, Case C-30/14 [2015] ECLI:EU:C:2015:10.

data may determine contractual restrictions on third parties, without prejudice to the applicable national law¹¹. This means, that in cases when protection of copyright or maker of database (*sui generis* rights) cannot be achieved, other possibilities of protection of Commercial data shall be sought. Similar opinion is expressed in the legal doctrine¹².

4. Protection granted by prohibition of unfair competition

One of the alternatives for protection from use of Commercial data by screen scraping techniques (excluding contractual restrictions) may be prohibition to conduct actions of unfair competition and the protection granted by such prohibition.

Protection against unfair competition is ensured both on the international and on national level. The provisions related to prohibition of unfair competition on the international level are provided in the Art. 10^{bis} of the Paris Convention for the Protection of Industrial Property¹³, adopted in 1883, as well as the Model provisions on protection against unfair competition¹⁴ developed and published by the World Intellectual Property Organization in 1996.

Prohibition of unfair competition is also included in the Art. 15(1) of the Law on Competition of the Republic of Lithuania¹⁵ (hereinafter referred to as - the Law on Competition) where 7 groups of prohibited actions are listed out. The use of Commercial data by screen scraping techniques does not enter into any of the 7 groups of actions prohibited by the Art. 15(1) of the Law on Competition. However, it shall be underlined, that according to the practice of the Supreme Court of Lithuania, the actions listed out in the Law on Competition shall be considered as a sample list of activities which is not finite, therefore other actions, not included in above article, but causing or which may cause unfair competition, may be considered as prohibited¹⁶.

In the Art. 15(1) of the Law on Competition, a general notion is provided that the subjects are prohibited from the actions which contradict honest business practice and good customs, when such actions may hinder the possibilities of the other entity to compete. Given the general definition of unfair competition, protection will be granted to Commercial data by prohibition of unfair competition and on the basis of such protection, the entity will be able to defend itself from the use of Commercial data by screen scraping method, provided that the following conditions are be met.

First of all, following the practice of the Supreme Court of Lithuania, in order to recognize that the actions of the defendant are the actions of unfair competition, the fact that the entities are competitors shall be established¹⁷. This means that the entity which is the lawful holder of the Commercial data (initial publisher of the data online) and the entity which uses screen scraped Commercial data, are competitors. This requirement will be met to perfection, if the above mentioned entities are direct competitors which pursue the same activities. For instance, both entities operate a website and (or) a mobile application, where the information about computer evaluations and test results is published.

¹¹ *Ryanair Ltd v PR Aviation BV*, Case C-30/14 [2015] ECLI:EU:C:2015:10. G. Surblytė, 'Data as a digital resource' [2016] Max Planck Institute for Innovation & Competition Research Paper No. 16-12, 20-21.

¹² M. Husovec, 'The end of (meta) search engines in Europe?' [2014] Max Planck Institute for Innovation & Competition Research Paper No. 14-15, 4.

¹³ Paris Convention for the Protection of Industrial Property (Valstybės žinios, 1996, No. 75-1796).

¹⁴ World Intellectual Property Organization, 'Model provisions on protection against unfair competition' (Publication of the World Intellectual Property Organization, 1996, No. 832).

¹⁵ Law on Competition of the Republic of Lithuania (Valstybės žinios, 1999, No. 30-856).

¹⁶ Decision of the Supreme court of Lithuania, Case No. 3K-3-223/2005 [2005]. Decision of the Supreme court of Lithuania, Case No. 3K-3-475/2008 [2008]. Decision of the Supreme court of Lithuania, Case No. 3K-3-366/2011 [2011].

¹⁷ Decision of the Supreme court of Lithuania, Case No. 3K-3-475/2008 [2008].

However, digital business is developing rapidly and it is focused on changes and innovation. In addition, the digital business is often not linked to a specific territory, or with customers or users within the specific territory. Because of peculiarities of digital business, the prohibition of unfair competition may exist in cases when the entities are indirect competitors which pursue activities in similar or closely connected fields. For example, the owner of the Commercial data organizes events and publishes information on a website about the future events as well as sells tickets to the events. Meanwhile, another entity runs a website where it provides ideas of the activities to be done in free time (to generate these ideas screen scraped information about the events from the first website is being used). Another example could be when Commercial data holder owns a website where real estate sales and rental properties are advertised. Meanwhile, another entity controls a website where real estate search is performed and the results of real estate advertisements from the first website are presented by using screen scraping techniques.

Secondly, the use of Commercial data while applying the method of screen scraping could be considered as contrary to fair business practice and good customs when such use of Commercial data may harm another entity's abilities to compete. In this context, two aspects are important: (i) what kind of information comprises Commercial data of another entity. (ii) the context in which this data is used and what negative consequences may be caused by the use of Commercial data.

The Supreme Court of Lithuania has explained that not every act of unfair competition at the same time means infringement of competitor's copyright or other intellectual property rights, because protection against unfair competition shall be regarded as an independent institute¹⁸. Therefore, the prohibition of unfair competition may protect both the information which falls under the scope of copyright and the information which does not fall under the scope of copyright.

The prohibition of unfair competition does not identify what types of information are protected. However, this prohibition cannot be construed as an absolute prohibition providing protection for virtually the entire information contained online. Absolute prohibiting the use of Commercial data would artificially cause stagnation in information technology and, consequently, the progress of digital business would be prevented as well. This is true especially in view of the consistent tendency to share the information in cyberspace. It is therefore essential to define and assess, what information could be protected by prohibition of unfair competition.

Commercial data are not required to be unique in order to gain protection, since otherwise, prohibition of unfair competition would be practically inapplicable. However, the content of Commercial data may lead to limited protection. If the information used in commercial practice of an entity is comprised of the facts already existing in reality or the facts foreseeable in the future, such information may not be protected by prohibition of unfair competition. In such cases unrestricted dissemination of information is required by the public interest. For instance, information about train and bus schedules, information about the dates of court hearings and etc. With certain exceptions, the news in the areas of politics, economics and other areas may be assigned the status of such information. The society is concerned that such information will be made publicly available and sharing or use of such information will not be limited. The public interest in this case shall be given priority, resulting in criticism and questioning of the usefulness of protection by prohibition of unfair competition in this context.

Nevertheless, certain cases shall be excluded, where the information is related to the facts, but the collection such information is a separate, complex process, which requires investment. A good example is the information about the weather conditions in particular location or country. If the entity, in order to be able to collect this type of information, has invested in necessary meteorological equipment, processes of information processing and presentation in real time, it shall be considered that the ownership of such information is very important for the entity. Meanwhile, if such information collected by the entity is allowed

¹⁸ Decision of the Supreme court of Lithuania, Case No. 3K-3-475/2008 [2008].

to be used by other entities in their commercial activities, such entities will obtain an unjustified competitive advantage compared to the entity which has collected the information (the entities would not require investment in physical information collection tools and equipment). Given the investment of the entity for information collection, it would be objectively and logically unjustifiable to allow the competitors of the entity to use freely the information gathered by the entity, even when the information is comprised of the facts existing in reality or in the foreseeable future. Therefore, in this case, due to the investment of the entity as well as significant effort to collect the information, the protection by prohibition of unfair competition may be applicable to the information comprised of facts.

It shall be noted, that the information shall be collected and published by the lawful holder of Commercial data, even though the information may not belong to the holder of Commercial data, i.e. the creators of the information may be third parties or even an undisclosed circle of persons. For example, customer reviews about cafeterias, other catering establishments or accommodation facilities may fall under the above category. In such case, the entity does not create the information. the entity collects the information and makes it available for the users of its website or mobile application. In this case, the information shall be protected because the owner of the information has generated and implemented the idea to collect the information on specific issues which is useful to the society. Meanwhile, direct or indirect competitors of the entity have not carried out such work, which will result in prohibition to the other entities to use the information which has not been created by the first entity but it was collected by it. The principle that the information which was not created by the entity, may be granted protection by prohibition of unfair competition, is established in the international practice¹⁹ and expressed in the legal doctrine²⁰.

Lastly, Commercial data shall have significant value to the entity and its commercial activities. Commercial data shall be considered valuable by the entity and for pursuit of its activities, meaning that with the help of Commercial data, the entity may pursue its commercial activities. For example, has the entity not collected information – customer reviews about catering establishments or accommodation facilities – the website or mobile application controlled by the entity would not function (would not generate traffic of visitors and users).

Regarding the second aspect, it is important not only to establish what kind of information comprises Commercial data, but also the manner in which Commercial data is used and what negative consequences may arise from the use of Commercial data. On one hand, the prohibition of unfair competition by its very nature is related to the economic and commercial activities. Therefore, this prohibition may be applied only when Commercial data collected by screen scraping techniques will be used for commercial activities of another entity (i.e. commercial purposes). Commercial purposes in this case shall be understood in a broad sense, having considered the fact that digital business usually generates income from advertizing and other types of services but not directly from dissemination of information.

On the other hand, the lawful holder of Commercial data shall suffer negative consequences because the data belonging to it is used by another entity. Such negative consequences by their nature should be related to competitive capabilities of the entity while using Commercial data. Given the specifics of the digital business, reduced traffic of the users of website or mobile application may be considered as negative consequences, because the users can find Commercial data not only on the website of the lawful data holder but also on the website or mobile application of another entity which is using screen scraped Commercial data. Often, such reduction of traffic may directly or indirectly lead to a decline in income from advertising or other services related to the website or mobile application belonging to the lawful holder of Commercial data.

¹⁹ <http://www.hlmediacomms.com/2016/06/30/hantao-v-baidu-scraping-third-party-information-as-unfair-competition/>.

²⁰ M. Husovec, 'The end of (meta) search engines in Europe?' [2014] Max Planck Institute for Innovation & Competition Research Paper No. 14-15, 20.

However, the decline in income shall not be considered a compulsory criterion in terms of prohibition of unfair competition and protection granted to the Commercial data.

Conclusions

Commercial data may be protected by the instruments of intellectual property rights from the use of Commercial data by screen scraping techniques. However, this protection is limited. Often, Commercial data may not meet the conditions and requirements for objects of copyright or the rights of makers of database (*sui generis* rights). In addition, there is a possibility that in cases where Commercial data meet the requirements for objects of copyright or the rights of makers of database (*sui generis* rights), the protection itself will be very limited.

Protection from the use of Commercial data by screen scraping techniques may be granted to the Commercial data and ensured by prohibition of unfair competition. In order for the protection to be granted, the legitimate holder of Commercial data and the entity which is using Commercial data of the first entity (the holder) by applying screen scraping techniques shall be competitors.

Protection by prohibition of unfair competition cannot be granted to any type of Commercial data. The Commercial data which is granted the protection, shall meet the following requirements: (i) the data does not have to be unique, however, generally, such data cannot be information about the facts existing in reality or in the foreseeable future, when unrestricted dissemination of such facts is required by the public interest. (ii) the information does not have to be created by the legitimate holder of the Commercial data. Creators of the information may be third parties or an undisclosed circle of persons, however the holder of the Commercial data should have collected and published the data. (iii) Commercial data shall have substantial value to the entity and its commercial activities.

Prohibition of unfair competition may be applied only when screen scraped Commercial data is used by another entity in its commercial activities (commercial activities shall be understood in a broad sense) and when such use of Commercial data will cause negative consequences to the legitimate holder (publisher) of the Commercial data.

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BREXIT = THE BEGINNING FOR BRITISH PEOPLE AND THE END FOR POLISH ENTREPRENEURS? THE EFFECTS OF BREXIT ON ECONOMIC AND LAW POSITIONS OF POLISH ENTREPRENEURS

Justyna Kopałka – Siwińska

Abstract

It is obvious that Brexit is one of the most important occurrence in history of modern Europe. It has undoubtedly extraordinary influence on British people and their position among other nationalities but it must be underlined that a long period of uncertainty is something that not only British people will have to face. It is crucial to mention that Polish people run over 40.000 businesses in UK, left alone those whose partners are in UK and according to this Poland is at the forefront of nations which conduct an economic activity in UK. That is why Polish people are affected by the Brexit in similar or even the same way as British. According to the fact that Brexit is a process, at this stage it is hard to presume what specific effects it will cause on Polish entrepreneurs. Nevertheless Polish lawyers, economists and entrepreneurs themselves loudly speak and point many examples of possible consequences. On the question of what will be the results of Brexit especially for the Polish economy, representatives of the companies correspond to: changing the EU budget and the reduction of EU subsidies for Polish, reduction in exports to the UK, higher cost of servicing Polish debt, decrease the competitiveness of Polish products, further marginalization of the Polish Union structures. But aforementioned problems are just the tip of the iceberg. It cannot be omitted that one of the problematic areas will be litigation between Polish and British entrepreneurs considering binding contracts. The next problem will be an intellectual property. It should be underlined that the exit of the UK from the EU will have a future impact on intellectual property rights, and in particular those which are based on EU regulations, primarily EU trademarks and registered Community designs. Moreover in the long term some significant consequences for the protection of personal data should be expected. However, Polish entrepreneurs also recognize the positives of the Brexit, such as the fact that the economy will get a new strong impetus to the development, increase the availability of workers in Poland in connection with the homecoming of part of the emigrants from the UK, the possibility of a stronger emphasize Polish presence in the EU. Notwithstanding among many doubts one thing is certain - Brexit will neither be an easy process, nor short-term for British as well as for the Polish people and will require consideration of many complicated legal issues and for sure will entail many risks. The question is for whom more?

Keywords: situation of Polish entrepreneurs after Brexit, effect of Brexit in Poland

Introduction

It is obvious that Brexit is one of the most important occurrence in history of modern Europe. It has undoubtedly extraordinary influence on British people and their position among other nationalities but it must be underlined that a long period of uncertainty is something that not only British people will have to face. It is crucial to mention that Polish people run over 40.000 businesses in UK, left alone those whose partners are in UK and according to this Poland is at the forefront of nations which conduct an economic activity in UK. That is why Polish people are affected by the Brexit in similar or even the same way as British. According to the fact that Brexit is a process, at this stage it is hard to presume what specific effects it will cause on Polish entrepreneurs. Nevertheless Polish lawyers, economists and entrepreneurs themselves

loudly speak and point many examples of possible consequences. On the question of what will be the results of Brexit especially for the Polish economy, representatives of the companies correspond to: changing the EU budget and the reduction of EU subsidies for Polish, reduction in exports to the UK, higher cost of servicing Polish debt, decrease the competitiveness of Polish products, further marginalization of the Polish Union structures. But aforementioned problems are just the tip of the iceberg. It cannot be omitted that one of the problematic areas will be litigation between Polish and British entrepreneurs considering binding contracts. The next problem will be an intellectual property. It should be underlined that the exit of the UK from the EU will have a future impact on intellectual property rights, and in particular those which are based on EU regulations, primarily EU trademarks and registered Community designs. Moreover in the long term some significant consequences for the protection of personal data should be expected. However, Polish entrepreneurs also recognize the positives of the Brexit, such as the fact that the economy will get a new strong impetus to the development, increase the availability of workers in Poland in connection with the homecoming of part of the emigrants from the UK, the possibility of a stronger emphasize Polish presence in the EU. Notwithstanding among many doubts one thing is certain - Brexit will neither be an easy process, nor short-term for British as well as for the Polish people and will require consideration of many complicated legal issues and for sure will entail many risks. The question is for whom more?

This article tries to present short description of some legal and economic consequences of the Brexit of Polish entrepreneurs considering contracts, financial services, employee affairs and pension system.

1. The letter from London

On Wednesday 29th March 2017 in a letter to the President of the European Council, Donald Tusk, Prime Minister of United Kingdom Teresa May presented her government's plan to leave the UK from the European Union. The letter announcing the intention to leave the European Union was signed by May on Tuesday afternoon and transported by Eurostar to Brussels by one of the Foreign Ministry officials who served it to the British ambassador to the EU institutions, Tim Barrow. Barrow handed over a letter to the President of the European Council, Donald Tusk, on Wednesday, thus launching a two-year period of negotiations on Brexit. The UK's exit from the EU should end within two years of launching the procedure described in Article 50 of the Treaty of Lisbon, that is until 29 March 2019. Extension of talks for the next two years would be possible only with the unanimous agreement of all Member States. May has confirmed that the UK government will not seek membership in the EU common market and is aware that it will "lose its impact on European economic rules" but, she emphasized, is counting on parallel negotiations on exit conditions and future FTAs. The head of the London government stressed that "the decision to leave the EU was not a rejection of the values we share as Europeans or the attempt to harm the EU." "The referendum was a voice for recovering, in our understanding, the right to self-determination," she wrote. May also stressed that he wanted "the EU to succeed and prosper". "We are out of the EU but not in Europe, we want to remain a faithful partner and ally to our friends on the continent," she added. May also added that her country "is counting on agreeing a deep and special partnership" on economic cooperation and security policy on Brexit. At the same time, she noted that the government hoped for parallel talks on an agreement on exit conditions and a future new free trade agreement between Great Britain and the European Union. In a letter to the Mayor of the European Council, May called for talks to be "constructive and respectful, in a spirit of sincere cooperation." The government in London is aware that "Britain will suffer the consequences of its exit from the EU," she added. "We know we will lose influence on the rules of the European economy, and we also know that UK companies will have to adapt to the EU's trade with the rules set by the institutions we no longer belong to, as in other foreign markets," she said. The head of government repeated that "Britain will not apply for membership in the common market." "We understand and respect your position that the four freedoms of the single market are indivisible," she emphasized. During a previous speech in the House of Commons, the

Prime Minister stressed that accepting the four freedoms of the EU single market - the flow of goods, services, capital and people would be "incompatible with the democratic will of the British". "We want to continue contributing to Europe's resilience, prosperity, and being able to lead the world by influencing its values to the rest of the world and defending itself against threats," stressed the head of the British government. The head of government wrote that if the agreement could not be reached, "according to the default scenario" trade between the UK and the EU will be based on World Trade Organization (WTO) rules. At the same time, she warned that failure to agree on this matter would harm the safety of both parties. "On the issue of security, the lack of agreement would mean weakening our cooperation in the fight against crime and terrorism, and in this scenario both the United Kingdom and the European Union will have to deal with it, but it is not the outcome of the talks desired by either party. "We have to work hard to avoid it", added the Prime Minister. Ipso facto, for the first time, the British government has directly linked the issue of future trade regulation between the United Kingdom and the EU with future cooperation in security and the fight against terrorism¹.

In other words 29th May 2017 has started an official process of leaving UK from EU and Brexit became a fact.

2. Legal and economic consequences of Brexit

According to Art. 50 of the EU Treaty, the State which has decided to speak, announces its intention to the European Council and commences the negotiation of the terms of reference. This agreement is crucial for defining its future relations with the Union. It can be assumed that apart from institutional issues and financial settlements, the agreement with Great Britain would also regulate (at least in part) the rights of EU entrepreneurs, including Polish ones, in the United Kingdom and the laws of the UK and foreign companies operating in the Union.

Despite the fact that the Brexit will have a huge impact on English as well as Polish people, according to research conducted by the Kronenberg Foundation 62% of Polish entrepreneurs doing business abroad are not afraid of Brexit². Polish companies are primarily concerned that Brexit will limit flow of goods and services (12% of respondents), and will cause adverse exchange rate differences (11% of respondents) and tariff increases (9%). And all these factors can have a significant impact on the costs of our business. Among obstacles to conducting business abroad, Polish entrepreneurs most frequently cited strong competition (25% of respondents) and bureaucracy (17% of respondents). Less often Polish companies pointed to differences in exchange rates or cultural barriers. "Here respectively 10% and 9% respondents answered so", said the expert of the City Handlowy Bank.

The research shows that the higher profitability abroad is primarily seen by manufacturing companies (73%) and commercial (72%), which is less often the case for service companies. The reason for higher profitability are primarily higher margins (48% said so) and higher demand (46% of respondents) on the goods and services offered. The latter factor is more often emphasized by those who generate more than 50% abroad business turnover in more countries³.

On the other hand, according to research conducted by the Finances Cotrolling Magazine⁴, respondents' answers (considering the consequences of the Brexit) clearly show the attitude of entrepreneurs to the changes that Poland is facing in relation to the recent provisions of the British. These forecasts are not

¹ <http://www.tvn24.pl/wiadomosci-ze-swiata,2/brexit-co-w-liscie-do-tuska-napisala-theresa-may,727744.html>.

² <http://businessinsider.com.pl/finanse/firmy/brexit-i-polskie-firmy-jak-brexit-odbije-sie-na-firmach/hbgbmrp>.

³ It must be underlined that the Kronenberg Foundation's Citi Handlowy research, Millward Brown, was launched in August this year on a sample of 300 entrepreneurs, both private and public, active in overseas sales. The main objective of the study was to diagnose how Polish companies manage foreign markets.

⁴ <http://www.finansecontrolling.pl/analizy/brexit-i-co-dalej-czy-polscy-przedsiębiorcy-boja-sie-wyjscia-wielkiej-brytanii-z-unii>.

optimistic. As it turns out, more than half of respondents (60%) stated that this decision will be stamped on Polish companies, although this is a very long-time perspective. Another 20% of respondents indicate that the effects will be felt in the short term. Only 20% of respondents reassure that Brexit effects will be more noticeable in the UK than in Poland. Aforementioned magazine asked also about the effects of the last provisions most likely to be of concern to the trader. As many as two thirds of respondents are afraid of rising trade costs with the United Kingdom and the turmoil of the British pound and other currencies. The new situation also raises concerns about the free movement of goods and services and labor. The necessity of signing new economic contracts is frowned upon by more than half of respondents (54%), while 43% of respondents expect the closure of the labor market. What else do entrepreneurs worry about? Opinions are divided and votes like never, aligned. Their focus, however, is primarily on Poland's higher financial liabilities to the European Union (54%), changes in immigration policy (46%) and increased political risk (45%). The European integration seems to be of interest - although 49% predict its braking, some of the respondents in open answers point to the opposite effect of Brexit. Which of the scenarios is more likely, given that Brexit is not the only headache of a united Europe? That is an open question.

a) contracts

Polish commercial companies as well as entrepreneurs conducting an economic activity in Poland benefit from the freedom to provide services, capital movements and start-ups in each of the European Union (EU) and European Economic Area (EEA) countries. The decision taken by the British to withdraw from the EU (and, consequently, from the EEA), would result in a profound change in the legal relationship between Polish entrepreneurs and their British counterparts after the expiry of the two-year "extinction" period. The status of Polish entrepreneurs in the UK and British in Poland and in other EU countries would also change.⁵

According to Mr. Paweł Zboina and Mr. Paweł Romowicz⁶, the result of voting should not be regarded as an event giving the possibility of terminating a trade agreement. Even when the contract itself allows it to be terminated when its execution becomes more difficult, Brexit should in principle not mean that it is impossible to deliver the goods or services and therefore is unlikely to consider that fact as a reason for automatic resolution. It is not certain whether the same application applies to contracts subject to laws other than English.

Looking further on, the reference to force majeure clauses in contracts governed by English law in Polish judgment will also be unfounded. The decision to leave the Union should not be included in the definition of "force majeure", even if the event is outside the control of the parties. Definitely more uncertainties about the consequences may result in clauses regarding the choice of law, but no change will occur automatically or immediately.

Should the United Kingdom leave the single market, it is necessary to prepare for the return of certain trade barriers (either through customs tariffs, restoring customs controls or applying trade support rules to third countries). At this time, however, all common market rules will continue to apply. Concrete agreements affecting trade can be concluded within two years of negotiating the exits from the Union, so entrepreneurs should analyze everything in advance and adapt to the new situation as soon as possible. If Brexit will cause significant changes in prices on the financial markets, traders should reconsider the margins and collateral established in their business.

b) financial services

⁵ <http://www.rp.pl/Opinie/306239976-Brexit-Przewidywane-konsekwencje-prawne.html#ap-1>.

⁶ <http://www.gospodarkamorska.pl/Administracja,Prawo/brexit-konsekwencje-prawne-i-gospodarcze-wystapienia-wielkiej-brytanii-z-unii-europejskiej.html>.

One of the benefits of EU membership is the right of "passport" of individual rights between EU countries, and it gives the right to the eligible entities in the Member State concerned to provide services in another Member State. Many financial institutions and fund managers are based in the United Kingdom and operate in other countries. Brexit means that these entities will no longer be able to provide services in other Member States on the basis of this principle. Perhaps, in the course of further negotiations, this right will be maintained at the moment, it is unclear how complicated and long-term negotiations and many financial institutions may be able to secure their presence in the EU Member States⁷.

As Mr. Zboina and Mr. Romowicz⁸ indicate, Brexit may also create differences and inconsistencies between financial regulations in force in the United Kingdom and EU Member States, which could theoretically lead to increased costs and regulatory obligations for financial service providers wishing to operate both in the UK and in the Member States.

Parties of contracts that include references to EU directives on regulatory affairs (eg to a "credit institution") as a condition, statement or requirement will have to analyze whether the cessation of such regulation to the United Kingdom will constitute a breach of contract giving the right to its immediate solution. As a consequence of such an analysis, the parties may be forced to change their contracts in order to avoid financial consequences.

Should Brexit cause significant price fluctuations in the financial markets, traders as in the case of trade agreements should seriously analyze the margins and collateral established in their business. Investors may have to take appropriate measures to ensure the effective exercise of their rights.

c) employee affairs

According to experts, leaving the Union as such does not automatically change the English labor law either at present or at the time of actual departure of the UK from the Union, even if the law expressly relies on EU directives or other acts of Community law. The above means that there will be no immediate changes in English law as regards the transfer of workers together with the workplace, the legislation on employee councils, rules on information and consultation of employees,

Employees from EEA (European Economic Area) Member States will certainly not have to leave the UK by law or stop working in the UK, but they may choose to do so. If they leave the UK, whether they go abroad for business or holiday, they will be able to return to the UK.

Citizens of the EEA member states (including Poles, of course) will still be able to be recruited without having to obtain a visa at this time, however, if the UK entrepreneur bases its business on the use of relatively low-skilled labor from EEA member states, the trader will probably be He wondered if he could recruit workers from the British labor market. Moreover, the United Kingdom may not feel obliged to implement new provisions of Community law in its legal order. UK workers working in Europe will not, of course, have to immediately return to the country. In the longer term (at least two years) their position will depend on the European Union's position on future emigration policy. Voting results will likely mean a reduction in protection related to, for example, claims for holiday leave and other solutions based on Community law that have not yet been introduced into UK national law. It is unclear whether the UK government will feel obliged to implement such a solution before formal exit from the EU - many believe it is unlikely.

What is also significant in the long run, after the possible formal departure of the United Kingdom from the EU, the London government may move towards greater protection for British workers and, for example,

⁷ <http://www.rp.pl/Firma/308199990-Brexit-Konsekwencje-prawne-i-handlowe-dla-przedsiębiorców.html#ap-2>.

⁸ <http://www.gospodarkamorska.pl/Administracja,Prawo/brexit-konsekwencje-prawne-i-gospodarcze-wystapienia-wielkiej-brytanii-z-unii-europejskiej.html>.

the suspension of all benefits for non-British nationals because the UK has a unique system Social benefits that act as an additional factor that attracts people from other states to the UK and allows them to work for a minimum wage.

d) pension system

British pension funds will suffer the effects of Brexit very quickly, mainly in terms of investing rather than legal issues. Before the vote, the optimists noticed shocks in the market for the pound and stock prices, but suggested that if UK treasury yields rise as a result of the Bank of England intervention, it will reduce payouts. If this scenario is fulfilled, it would be a boon for UK companies that have difficulty financing the deficit, but the reality is likely to be more complex, and the decline in asset value will undermine bond yields. In the long run, the results of the vote will force institutional investors to reconsider their investment strategies. British businessmen, who are largely dependent on Union income, will have to check whether they meet the financial conditions set by the pension fund managers.

Provisions stemming from Community law on equality in pensions will remain in force, as there are labor law provisions. This does not exclude consideration for the equalization of minimum benefits. In the longer term, reflections on the details of the draft IORP II directive, which is currently being finalized by the Dutch Presidency, may be, strictly speaking, theoretical considerations from the British perspective but still very important for the other EU Member States.

Conclusion

According to the fact that the process of Brexit is going to last for at least two years, currently it is difficult to foresee what will be the real consequences of the Brexit in nearest future. That is because of the fact that we are at the beginning of a long road and we cannot be certain if the Great Britain itself know what to do next. Nevertheless, both Polish entrepreneurs and employees should be aware of the effects of Brexit and consequently gradually prepare for it.

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MAPPING ELECTORAL FRAUD: IS THERE A ROLE FOR INTERNATIONAL COURTS?

Dmitry Kurnosov¹

Abstract

Mathematical and geographic tools become increasingly popular in detecting electoral fraud. They help find suspicious pattern in conduct of elections and vote tabulation even when interested parties lack resources. Thus such tools can empower democracy activists against the entrenched regimes, perpetrating electoral fraud. One of the examples of the power of fraud detection are the protests, which engulfed Russia in the wake of the disputed 2011 legislative election. International courts could serve as natural partners of democracy activists. Democratic rights are enshrined in the majority of regional and global human rights instruments. On the face of it, nothing should prevent democratic activists from achieving standing in electoral disputes. However, the involvement of international courts in the issues of political power is inherently fraught with a danger of backlash.

Keywords: Elections, fraud, forensics, courts

Introduction

Electoral democracy is becoming deeply entrenched in the international legal order [Davis Roberts, Carroll 2010] as both the only acceptable collective identity of a sovereign. At the same time, various international human rights instruments assert an individual right to participate (either as a voter or as a candidate) in a free and fair vote². In the legal order of the European Convention of Human Rights these developments manifested themselves in the proliferation of soft law, which however had direct political impact due to the political criteria set for the aspiring EU member states. In other jurisdictions electoral rights were codified in 'hard' international legal instruments, such as the CIS Convention on the Standards of Democratic Elections, Electoral Rights and Liberties. Further institutionalization of electoral rights came as a result of the several judgments of the European Court of Human Rights, most notably *Hirst v. United Kingdom (No.2)*, which asserted the individual character of the right to vote, *Sejdic and Finci v. Bosnia and Hercegovina* and *Paksas v. Lithuania*, which affirmed similar outcomes, regarding candidates in an election. In other judgments, the Court actively defended democracy-related rights by assessing the adverse effect of particular legislation on political actors (see e.g. *Republican Party of Russia v. Russia* or *Stankov and United Macedonian Organization Ilinden v. Bulgaria*).

International recognition of the right to a free and fair vote also manifests itself in the practice of the states and other actors in international relations. Some international organizations implicitly or explicitly state that democracy is the only system compatible with their human rights regime. (see e.g. the ECtHR Judgment in *United Communist Party v. Turkey*) Others, such as the African Union, Organization of American States and the Economic Community of West African States employ 'anti-coup' policies by refusing to recognize

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² see e.g. A.Davis-Roberts, D.Carroll. "Using international law to assess elections" [2010] 17 Democratization 3

Y.Dawood, Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review [2012], 62 University of Toronto Law Journal 4.

R.L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v Carr to Bush v Gore*. (New York: New York University Press, 2003).

undemocratic transfer of power. Against this background, international monitoring of domestic elections has become a widespread practice³. Electoral monitors have developed a framework of requirements against which the conduct of elections can be assessed in procedural terms. Such a framework is largely standardized, allowing for unbiased evaluation, which can be relevant, both in developed and developing democracies⁴. Electoral monitoring allows international organizations and individual states to back up their own political judgment on the outcome of a particular foreign election.

The above-stated developments seem to allow a larger role for international courts in judging electoral procedures and outcomes. Being removed from domestic political pressures, they may be in a better position to independently resolve such disputes.

1. Electoral Forensics as a tool of unmasking and mapping electoral fraud

Modern technology allows for faster dissemination of data, regarding electoral process. An official electoral count would often be held in real time with detailed precinct data. This serves the goal of highlighting the transparency and integrity of electoral process. At the same time, political actors can hold their own alternative parallel counts as a means of putting pressure on authorities and detecting electoral fraud. Those developments allow for large swaths of electoral data to be analyzed. Electoral forensics⁵ uses this data to notice suspicious patterns and to put them into a wider perspective of a particular election.

The most basic technique would involve looking into the numbers, announced by the electoral authority, and checking whether they simply add up. In cases of most blatant electoral fraud, the percentage for a particular party or candidate would be decided beforehand. The votes would then be reversed-engineered to reflect this prior arrangement. This type of electoral fraud is often easy to detect at micro-level as the results would uniformly follow the same pattern⁶. Another popular technique of electoral fraud is 'ballot-stuffing'. In this case, the result of a poll will be swayed either through the actual stuffing of a ballot box, altering of election returns or through coordinated busing of bribed voters. In this case one has to look for a visibly increased turnout and vote percentage for a particular party or candidate. However, if taken outside of the context, the search for such type of fraud may yield false positives⁷. If voters are genuinely mobilized by certain social or political reasons, it could yield a similar pattern. Thus, instead of electoral fraud the anomaly would result from strategical voter behaviour. Finally, the more sophisticated techniques of electoral fraud would aim to distort the main parameters as little as possible, while swaying results in a particular direction. It would involve 'poaching' of votes from one party to another. Thus, the distribution of votes would be affected, while the turnout remains the same.

More thorough electoral forensics techniques would look into raw data from electoral returns and search for broader patterns of fraud. Three main approaches can be distinguished. The first one, multimodal frauds simulation model⁸, looks into the relationship between turnout and number of votes received by the winner. The model allows to pinpoint anomalies, either in form of 'extreme fraud' (largely consistent with pre-set percentages model of fraud) or 'incremental fraud' (largely consistent with the 'ballot-stuffing' technique) Usually that would result in a combination of extremely high turnout with extremely high percentage of votes for a particular party or candidate. The model would allow to distinguish between the normal and anomalous

³ M.Boda, "Judging elections by public international law: a tentative framework" [2005], 41 Representation 3.

⁴ Ibid.

⁵ W.Mebane "A Guide to Election Forensics." [2015] Working paper for IIE/USAID subaward #DFG-10-APS-UM.

⁶ A.Kireev "Podborka gorodov i rajonov s narisovannymi rezul'tatami vyborov", [2016] URL: <http://kireev.livejournal.com/1308365.html> (Accessed: 6 April 2017).

⁷ Mebane 2015.

⁸ P.Klimek, Y.Yegorov, R.Hanel, S.Thurner "Statistical Detection of Systematic Election Irregularities" [2012] Proceedings of the National Academy of Sciences 109:16469-16473.

patterns of electoral returns. However, for it to have practical impact, the scope of electoral irregularities has to be limited. If the whole electoral procedure is systematically tainted, it would be impossible to distinguish between regular and irregular conduct. On the other hand, some cases of extremely high turnout and extremely high percentage of the vote for a particular candidate may be caused by actual political cleavages, resulting in voter polarization.

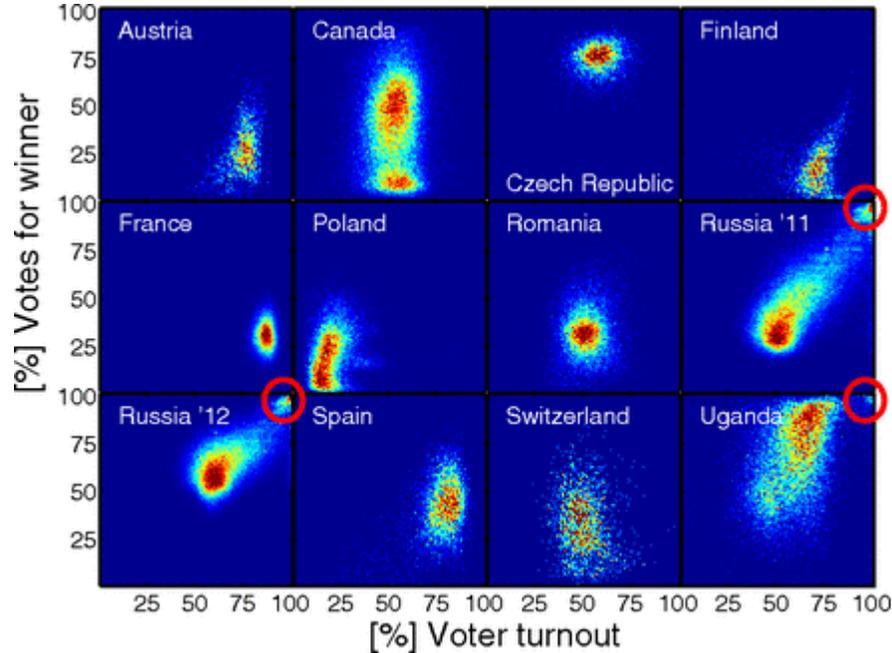
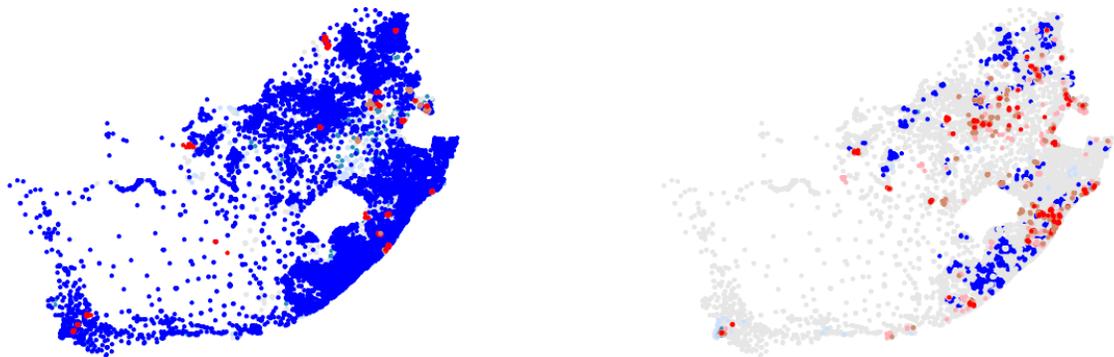


Image 1. Multimodal frauds simulation model (as a heat map). Source: Klimek 2012

Another method is geographic clustering tests⁹, which allow for mapping of voting patterns. By comparing electoral data from different locations with mean parameters, it allows to show geographical variations. In some cases it may mean fraudulent conduct, in others political polarization, embedded in the regional context.



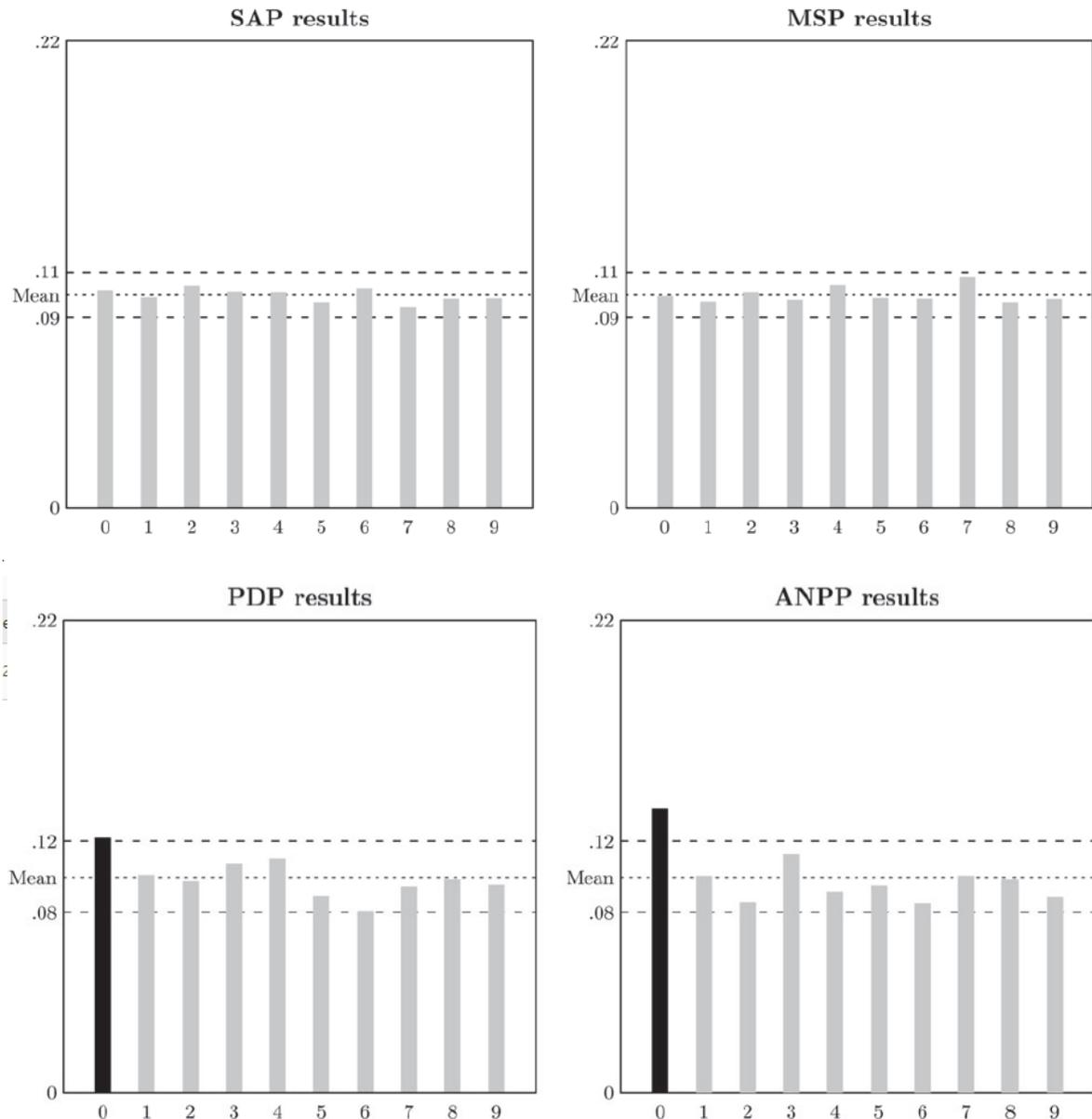
(a) national votes extreme fraud

(b) national votes incremental fraud

Image 2. Geographic clustering test. Source: Mebane 2015

⁹ See Mebane 2015.

Finally, another method is multimodal frauds likelihood model¹⁰. Here, the analysts look into actual numbers on their own. The underlying assumption is that an honest conduct of elections would produce results, which are random after the first digit. However, fraudulent administrators would often favor particular numbers, resulting in their overrepresentation. 'Usual suspects' are often '0' and '5'¹¹. If they consistently pop up in electoral results (for example, the candidates would mostly gain 35.0, 40.5 percentage points). This technique is particularly effective for detecting 'extreme fraud' (that is, 'pre-set percentages'). However, as noted previously, this kind of fraud would often be facially obvious. What is particular value then is the ability to evaluate the extent of fraud within a given electoral administration.



¹⁰ see W.Mebane, R.Walter Can Votes Counts' Digits and Benford's Law Diagnose Elections? In *The Theory and Applications of Benford's Law*, ed. Steven J. Miller. (Princeton: Princeton University Press, 2014) pp. 206-216.

¹¹ see e.g. A.Myatlev *A chisla v protokolah UIK risuyut kak i v 2011, lish' nemnogo rezhe* (2017), URL:<http://corbulon.livejournal.com/323792.html> (Accessed: 6 April 2017).

Image 3. Multimodal frauds likelihood models. Source: Beber, Scacco 2012

Precisely this task is crucial for the role of courts in judging the fairness of a particular electoral outcome. The key distinction is whether the fraud was so prevalent that it does not allow establishing the outcome of an election (see e.g. the judgment of the Ukrainian Supreme Court regarding the 2004 contested result of a presidential election). In this regard, electoral forensics along with supporting statements of witnesses (such as electoral monitors) could produce a robust conclusion of inability to establish an electoral outcome.

However, the use of electoral forensics is ultimately premised on state's commitment to transparent electoral process and/or its inability to prevent electoral monitoring. An unintended consequence of employing electoral forensics may be that states stop being transparent and increase pressure on external and independent election monitor. It is hardly a coincidence that certain recent politically charged events of electoral nature provided little in the way of transparency. In case of the 2014 Crimean referendum precinct-by-precinct data was never published. In case of the subsequent votes in the separatist-controlled parts of the Eastern Ukraine only the final tally was provided. Electoral monitoring in both cases was limited to pro-Russian actors. Such behavior is also typical for Belarus, which provides little in the way of detailed electoral data.

2. Limitations of the role of international courts in establishing electoral outcomes

The extent to which the judiciary may get involved in electoral matters depends both on general institutional environment and individual decision making of a particular court.

Institutionally, electoral disputes are sometimes placed wholly outside of the purview of the judiciary. Many parliamentary systems place the responsibility for judging the validity of the elections and qualifications of elected person with the parliament itself. Such examples would include, among others, Denmark, Germany¹², The Netherlands and the United States¹³. In cases when the electoral dispute would concern the presidency, a special body may be set up. An example of such a construction is the Electoral Commission, set up by Congress in 1876 to determine the outcome of the disputed presidential election. The rationale for entrusting political bodies with such kinds of decisions is one of respect for the autonomy of political process.

Similar approaches illuminated the judicial approaches to some controversial electoral practices. Prominent among them are malapportionment¹⁴ and gerrymandering¹⁵. In both instances, the American judiciary had to grapple with the issue of whether such a practice was a political question. The dissenters in *Baker v. Carr*, which dealt with malapportionment underscored "the futility of judicial intervention in the essentially political conflict"¹⁶. In a similar vein, the majority in *Vieth v. Jubilier* treated partisan gerrymandering as "a lawful and common practice"¹⁷, which is impossible for the judiciary to counteract¹⁸. The logic of judicial modesty in both cases is not to endorse controversial practices, but rather to respect the autonomy of political process and its own institutional limitations.

¹² Basic Law of the Federal Republic of Germany, Article 41, Part 1, available at URL: <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

¹³ See e.g. Tibbetts, Donn. *The Closest U.S. Senate Race in History, Durkin v. Wyman*. [Manchester ?, N.H.]: J.W. Cummings Enterprises, 1976.

House votes for Republican Tullos, unseats Eaton, Clarion Ledger, 21.01.2016 URL: <http://www.clarionledger.com/story/news/2016/01/20/rep-bo-eaton-says-he-lose-seat/79055200/>.

¹⁴ Establishing electoral units without regard for current population numbers.

¹⁵ Drawing the borders of electoral units to reflect partisan loyalties above everything else.

¹⁶ *Baker v. Carr* (1962), 369 U. S. 267.

¹⁷ *Vieth v. Jubilier* (2004), 541 U.S. 267.

¹⁸ *Ibid.*

The European Court of Human Rights uses a similar rationale to limit its involvement in electoral matters. Unlike other issues (even those intertwined with the democracy and political rights), here the notion of 'European consensus'¹⁹ does not apply and the 'margin of appreciation' would be extremely wide, allowing for almost unlimited state discretion in establishing the rules of political game. The emblematic case in this regard would be *Mathieu-Mohin and Clerfayt v. Belgium* from 1987, which essentially distinguished electoral procedures as a zero-sum game in which there are always clear winners and losers²⁰. A similar rationale would underpin the judgment in *Yumak and Sadak v. Turkey* twenty years later. Finally, in *Communist Party of Russia and Others v. Russia*, the Strasbourg Court explicitly stated that it views the right to a free and fair election mostly through the prism of procedure, rather than state conduct²¹.

The inclusion of electoral rights in the European Convention on Human Rights was a controversial issue from the very outset. While new democracies were interested in having an institutional 'insurance' against possible resurgence of authoritarianism²², established ones were clearly concerned of the ability of human rights institutions to undercut domestic political process. In those cases, where the ECtHR did uphold electoral rights, it faced powerful political backlash. What is striking is that the extent of the backlash would often have no direct connection with the practical consequences of a particular judicial decision on a political system in question. A case in point would be the issue of prisoner vote. The rationale for non-implementation of Strasbourg judgments revolved not around the practical impact, but on the threat to the autonomy of the political system (in case of the United Kingdom) or constitutional sovereignty (in case of Russia). Subsequent efforts of the Strasbourg Court to limit the impact by allowing states to choose which prisoner categories would vote were not sufficient to ensure compliance with the new principle. A possible explanation could be the divergence of value, attached to the right to vote in different jurisdictions²³. This could signal the larger concern about any possible incursion of international judiciary into the domain of elections. The right to determine the workings of your electoral system may be one of the pillars of sovereignty. In a further complication compared to 1950s, the balance of interests seems to have fundamentally shifted. If back then new democracies were interested in robust protections for electoral rights, today they would often act in bad faith. For them, sovereignty means not only determining how the electoral system functions, but also how it would malfunction, when it suits those in power. Political backlash follows external allegations of electoral fraud even if they are aired by actors with serious institutional clout (such as foreign states and international organizations).

The constraints for judicial role in electoral matters come not from the concerns over fairness, but rather from the idea of autonomy of the political process. Judiciary could see itself as incompetent or incapable²⁴ to resolve certain issues in the political domain. Those issues, the argument goes, can either be resolved through self-corrective capacities of the political process or do not need resolution at all as they in fact enhance the capabilities of a particular political system. The latter argument does not seem to apply in cases of electoral fraud. (although many politicians seem to be convinced, they probably won't state it openly)

¹⁹ Here the Strasbourg court would take a quantitative approach in measuring the attitudes of individual states towards a particular issue at hand. Some similarities can be found e.g. with how the US Supreme Court places the criminal policies of individual states in the national context to determine what constitutes a 'cruel and unusual punishment'.

²⁰ Here one can find similarities with the Baker dissenters contending that there is 'no constitutional right to proportional representation'.

²¹ *Communist Party of Russia and Others v. Russia* (2012), No. 29400/05, Paragraph 111.

²² A.Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" [2000], 54 *International Organization* 2.

²³ S.Dothan, "Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement" [2016] Forthcoming in *Comparative International Law* (Anthea Roberts et al. eds., Forthcoming Oxford University Press). iCourts Working Paper Series, No. 64. Available at SSRN: <https://ssrn.com/abstract=2778062>.

²⁴ Such incapacity could stem from, inter alia, the countermajoritarian nature of the judiciary which would directly conflict with the majoritarian essence of electoral politics.

The former, however, would feature very heavily. Electoral fraud, above all, involves the breakdown of trust between political actors. That trust can't be restored by judicial fiat alone. On the other hand, it can be argued that electoral fraud destroys the very essence of a right to free and *fair* election. Electoral forensics increase the potential capacity of the judiciary to make actual decision according to this rationale. However, to realize this potential, the courts have to make a difficult political call, no less momentous than the one in *Baker v. Carr* (which, after all, literally drove people mad²⁵)

Conclusion

International human rights instruments put international courts in a position to decide on democracy-related issues. The case for their involvement is further strengthened by state conduct, which allow for external monitoring of elections and the development of significant body of 'soft law' in this sphere. Electoral forensics is a set of tools, which look into numerical and (or) geographical patterns in election results. It allows pinpointing electoral irregularities, especially if additional context-based evidence is presented to filter out false positives. As such, it could help inform judicial deliberation on whether the scale of electoral violations allow for precise determination of electoral winner. However, the very involvement of international courts in the issue of electoral fraud is limited by virtue of limited mandate and a strong possibility of a political backlash. Domestic courts, on the other hand, may not be sufficiently politically insulated to make such determinations.

List of acronyms

CIS – Commonwealth of Independent States

EU – European Union

ECTHR – European Court of Human Rights

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²⁵ Lawrence S. Wrightsman, *The Psychology of the Supreme Court* (2006), p.180.

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BREXIT EFFECT ON UK PUBLIC PROCUREMENT LAW: STRAIGHT WAY BACK TO THE PROCUREMENT MIDDLE AGES OR THE OPPORTUNITY TO IMPOSE A BETTER REGULATION VIA REDISCOVERING UK COURTS DEVELOPED SOLUTIONS?

Vilius Kuzminskas¹

Abstract

Brexit outcomes for free movement of goods, services and works are still unclear, but that is not a reason to underestimate dramatic possible outcomes for public procurement law changes in United Kingdom (hereinafter – UK). Nowadays UK law system was deeply impacted by European Union (hereinafter – EU) public procurement law. It could be noted, that UK public procurement law has always been at the highest integration level with EU procurement law, to compare with other branches of EU law. One of the purposes of this deep public procurement law integration was intend to open up UK markets to tenderers from other EU member states, acknowledging, at the same time, that there is obvious lack of better local regulation. Of course, there are some options for possible future of UK public procurement law – starting with “business as usual” with agreement similar to other European Economic Agreement states and finishing with no agreement at all with EU on public procurement (because of EU refuse to sign such type of agreement or because of UK sole choice to move forward with different rules of public procurement). This option leads UK to situation, that major changes in procurement law system are inevitable. But what are these other options that are left for UK? There are two major procedures of EU public procurement – verification of supplier’s qualification and contract award procedure. both are strictly regulated in current EU public procurement law. This paper will examine main problems in current EU public procurement regulations to provide a possible guidance for public procurement rules review to support better value for money attitude, looking for solutions in UK courts cases. Are there any UK’s judicial tools, introduced in UK courts decisions before EU public procurement regime monopolized public procurement law area in UK? Is this the time and opportunity to move forward to better regulation and empower the judicial tools, which have taken a back seat because UK courts generally declined to apply them to situations governed by the procurement legislation of EU?

Keywords: Lithuanian public procurement law, EU public procurement, qualification and contract award procedures, principles of public procurement, contracting authorities, tenders, participation in public procurement, procurement transparency, public procurement impact on tenders offered prices.

Introduction

It is obvious, that a good procurement is essential to ensuring good public services, from buying goods and services that work as they are supposed to, to achieving savings that can be ploughed back into front-line services². Starting with the obvious statement that currently UK public procurement law is deeply integrated with EU procurement law, it is worth to mention the fact, that this is about to change due to Brexit. It is worth to mention, that during the last decades of XX century, the UK procurement law was mostly based on the administrative rules, imposed by dedicated governmental institutions. Of course, at the time of such regulation the main aim of procurement law at the time was to achieve two main goals – to promote value for

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² Transforming government procurement, HM Treasury, 2007.

money and prevent corruption. Taking a short sideway to UK procurement law early stages of evolution, it is worth to mention, that the procurement used to be traditionally carried out on a decentralized basis, by individual government departments and agencies and by individual local authorities. Arrowsmith states, that such bodies have both enjoyed a broad freedom to make their own purchases to meet their requirements, and a wide discretion in establishing their own procurement policies when doing so. Later some areas of procurement started to centralize and in 1980 individual government departments were in fact quite often obliged to use the services of central purchasing bodies for some acquisitions³. It is noted, that in this article UK public procurement regulation is treated as a single system, even though there some differences in public procurement regulations in Scotland, Wales, England and Northern Ireland public procurement regulations. In the end of the first decade of XXI century situation started to change and main procurement aim – to achieve value for money – was in pursuit by seeking to accumulate government collecting buying power. Note fully, collecting government buying power exploited not only internally, but also internationally, through buying hi-tech goods together with other states. As the UK was and currently is the part of EU, public procurement law of EU procurement directives was incorporated in UK public procurement law. The implementation of EU procurement directives in UK public procurement law change the center of procurement law gravity from pursuing “value for the money and prevent corruption approach” closer to the main aim of EU procurement directives “to avoid discrimination of foreign suppliers”. Worth to mention, that a first point is that while the aim of EU procurement law is to open up markets, this EU law and the implementing UK regulations de facto also provide a system of transparent procurement procedures of the kind that countries often put in place to support value for money and anti-corruption objectives in procurement.⁴ Even though the EU procurement regulation is very complex and sophisticated, currently it provides one of the bests combinations of value for money and corruption prevention.

1. Brexit: UK public procurement law possible scenarios

The UK procurement legislation arises in the majority from EU procurement directives, which have been implemented into UK law through UK Regulations. Due to Brexit, it is expected, that in short term perspective no immediate impact on the legislative position in the UK will change and all the same provisions continue to apply, including the EU Treaty principles of equal treatment, non-discrimination, transparency, mutual recognition and proportionality, because they are enshrined expressly in the UK legislation.⁵

Generally, after Brexit UK public procurement law regulation might develop in several directions – to continue to engage with the existing world trade system through the World Trade Organization, or bilateral trade agreements, or some other closer engagement with the EU such as the European Economic Area. It could be noted, Arrowsmith⁶ states, that in case of European Economic Area agreement UK will leave the EU but still be a party to the EEA agreement. The EEA effectively applies the same rules on public procurement as the EU does. Thus under this scenario it would be pretty much business as usual for public procurement. One thing that would change, however, is that the UK would have no vote, and thus a significantly reduced voice, on any future changes to the EU rules. A second option for UK is to negotiate another type of trade arrangement with the EU. A third possibility is that the UK will not conclude any specific trade agreement with the EU, but that UK trade – including with the EU – will be based simply on commitments under the World Trade Organization agreements, such as the General Agreement on Tariffs and Trade

³ ARROSMITH, S. Law of public and utilities procurement: regulation in the EU and UK. 3rd Edition, Volume 1, Sweet & Maxwell, 2014, p. 12.

⁴ ARROSMITH, S. The implications of Brexit for the law on public and utilities procurement, 2016.

⁵ MOORCROFT, V. Brexit: the end of public procurement rules or business as usual?, 2017.

⁶ ARROSMITH, S. The implications of Brexit for the law on public and utilities procurement, 2016.

(GATT). To sum up, it should be noted, that all noted possibilities of further UK's public procurement law changes seems possible at the moment, but whether these changes lead to better or more flexible regulations is still unclear. Current EU procurement law regulation is proven to be a good compromise between transparency, effectiveness and rationality. It is possible to make a better public procurement regulation putting priorities to more flexible procedures, but the option if the UK can develop that one is open to debate.

2. Blackpool case: limits of implied contract in public procurement

Taking first step towards UK public procurement case law, a *Blackpool* case must be mentioned. In this case⁷ action the plaintiffs Blackpool and Fylde Aero Club limited sued the defendants Blackpool Borough Council for damages for breach of contract and common law negligence. It was an issue between the parties whether there was any contract between them and whether the Council owed the Club any duty of care in tort. The Council own and manage Blackpool Airport. For purposes of raising revenue the Council has made it a practice to grant a concession to an air operator to operate pleasure flights from the airport, no doubt largely for the entertainment of holiday-makers. This case was significant in segregating procurement and contract law, by concluding, that an invitation to tender in this form was well established to was no more than a proclamation of willingness to receive offers, the statement that late tenders would not be considered did not mean that timely tenders would, and, most importantly, there is a vital distinction between expectations, however reasonable, and contractual obligations. The court stated, that the Club here expected it's tender to be considered, the Council fully intended that it should be. It was in both parties' interests that the Club's tender should be considered. Court agreed, that all the circumstances of this case there was an intention to create binding legal obligations if and when a tender was submitted in accordance with the terms of the invitation to tender, and that a binding contractual obligation arose that the plaintiffs' tender would be before the officer or committee by whom the decision was to be taken for consideration before a decision was made or any tender accepted. To compare with EU procurement regulations, it is worth to mention, that implied contract currently does not arise in public procurements covered by EU public procurement regulation, but limited adaptation of this doctrine could increase overall protection of suppliers. Still, due to specific implied contract doctrine, the further evolution of this doctrine is imaginable only in states of common law. To sum up, implied contract doctrine, taking into consideration all important circumstances, together with increased discretion degree of procurement organizations, could be interesting instrument to ensure more transparent and effective public funds spending.

3. Value for money approach versus economic efficiency evaluation

Value for money approach and duty to exercise it is deeply integrated in UK procurement law and the responsibility to pursue this aim is enforced in every procurement organization in UK. Even though this approach is declared and established in UK procurement regulations and confirmed, mostly only in limited scale, in UK court decisions, further evolution of this instrument is limited due to possible conflict with EU procurement regulation. The root of this approach seeks last decades of XX century and the philosophy of best value for money consists of 3 main pillars: economy, efficiency and effectiveness. Within Northern Ireland the public procurement policy concept of "best value for money" is defined as "the optimum combination of whole life cost and quality to meet the customer's requirements⁸. It should be noted, that this

⁷ Blackpool & Fylde Aero Club v Blackpool Borough Council [1990] EWCA Civ 13.

⁸ ERRIDGE, A. et al. Devolution in the UK and Public Procurement: what difference has it made? 2007.

assumption includes social, economic and environmental aims. UK revised Best Value Statutory Guidance⁹ impose a general Duty of Best Value to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness. Arrowsmith states¹⁰, that economy is defined with reference to the cost of inputs (employees' salaries, level of rents for Office or operational accommodation, the price paid for supplies, works and services, etc.), efficiency is defined as the relationship between inputs and outputs (productivity – how many cases a member of staff handles, how many patients are treated with a particular radiotherapy and etc.), effectiveness relates to the achievements of the organization's objectives as expressed in targeted service outputs, and outcomes for the community which it serves (the impact of service provision). As it is stated, under the duty of best value, public procurement authorities should consider overall value, including economic, environmental and social value, when reviewing service provision. Authorities also have a statutory duty to consider social value for services above specified procurement thresholds at the pre-procurement stage. Returning back to economy, efficiency and effectiveness measuring, it should be noted, that to evaluate economy and efficiency is slightly easier than to evaluate effectiveness, because evaluation of effectiveness is closely related to subjective evaluation, which is indistinguishable from discretion of evaluator. More detailed views about this chapter and other issues, especially concerning effectiveness and efficiency, could be found in Gershon¹¹ report or HM Treasury guidance¹². EU procurement directives conception of the most economically advantageous tender is comparable to best value for money approach, but the main difference between them are the degree of discretion, which is slightly diminished in EU procurement regime and this might be one of the main reasons of EU regime inefficiency.

4. Judicial review: last frontier of remedies

It is obvious, that in public procurement process a procurement power is subject to the general administrative law rule, that power must be exercised only to the extent given by legislation. In addition to this, UK courts have developed a body of principles to control exercise of administrative powers – the principles of judicial review, which are implied as a general rule to govern the exercise of administrative powers. Judicial review mainly consist of 3 separate principles, that are the requirement that persons affected by administrative decisions should generally be given a hearing before a decision is made, requirement not to act arbitrarily and the principle of legitimate expectations. The first pioneer in successful apply of judicial review in public procurement was case of *Hibbit*¹³ where the applicant disputed Lord Chancellor's Department public procurement procedure and argued that Department acted contrary to applicant's legitimate expectations by negotiating with other bidders after receipt of tenders and contrary to statements in the tender documents. Department allowed some bidders, but not the applicant, to submit bids to altered specifications. The court took a view that, whilst the applicant's expectations were not met, there was no element of public law to render the decision to judicial review. Even though essence of "public law" clause was fixed in this case, it should be noticed, that some of later decisions withdrawn from necessity of "public law" clause. As Arrowsmith states, element of public law may exist when there is a "statutory underpinning" to the decision,

⁹ Revised Best Value Statutory Guidance, Department for Communities and Local Government, 2015 <<https://www.gov.uk/government/publications/revised-best-value-statutory-guidance>>.

¹⁰ ARROWSMITH, S. Law of public and utilities procurement: regulation in the EU and UK. 3rd Edition, Volume 1, Sweet & Maxwell, 2014, p. 18-19.

¹¹ Sir GERSHON, P. Releasing resources to the front line: independent Review of Public Sector Efficiency, 2004.

¹² Transforming government procurement, HM Treasury, 2007.

¹³ R v Lord Chancellor ex parte Hibbit & Saunders [1993] COD 326.

but only mere existence of statutory obligations regulating the process is not sufficient.¹⁴ It should be mentioned, that “public law” element is the most contradictory part of judicial review because currently UK courts have not developed any clear criteria’s to define “public law” clause. As states Maurici¹⁵ while ordinarily the test to apply at the permission stage is arguability, the court has discretion to apply a different and higher test. The higher test can be applied by any court considering whether to grant permission to apply for judicial review. To sum up, judicial review is created to ensure that bodies exercising public law functions act lawfully and fairly and do not abuse their powers and that kind of tool of last resort is useful remedy in situations that arise in area where is no clearly line if the tender should be done. Of course, judicial review has its own limits and it is quite clearly stated in the case law. For example in *cookcon* case, court stated, that as permission for judicial review will usually only be granted where no alternative remedy is available, it will not always be given in a procurement context especially if applicant’s case does not raise public law issues.¹⁶ Judicial review, if properly developed, might be quite good tool to improve public spending effectiveness, especially in area of contracts between procuring authorities and their controlled entities.

Conclusions

Final Brexit impact to UK’s public procurement law is still an object for debates and possible outcomes varies from significant alteration to insignificant changes. It should be noted, that current EU procurement law regulations is proven to be a good compromise between transparency, effectiveness and rationality and it is still unclear if UK is able to design a better regulation. Still, application of quite widely in UK’s case contract law used doctrine of implied contract in procurement law is unpredictable, but this is mostly because the EU procurement regime stopped evolution of this instrument. Judicial review should be considered as good option for last resort remedies, especially in utilities sector procurement. Lastly, but most importantly, value for money approach may lead strait to better overall quality of intended-to-procure goods, services and works. Generally, the concept of value for money approach together with wider discretion of procurement authorities could meet the public’s demands for increasingly high quality public services at good value for money and in a sustainable way. Government public interest to pursuit of value for money for the taxpayer should be uncompromising and value for money approach may lead to more sustainable procurement than current EU regime offers, so pursuing 3E – economy, efficiency, and effectiveness might be an answer and way to move forward.

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¹⁴ ARROSMITH, S. Law of public and utilities procurement: regulation in the EU and UK. 3rd Edition, Volume 1, Sweet & Maxwell, 2014, p. 120.

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LAW AND POLITICS AT THE INTERNATIONAL CRIMINAL COURT – THE ROME STATUTE SYSTEM IN THE AFTERMATH OF AFRICA’S WITHDRAWALS

Tomasz Lachowski¹

Abstract

The International Criminal Court (ICC), the first, permanent international criminal body established in order to pursue international (criminal) justice, has recently fallen in a trap. The notified withdrawals of three African State Parties to the Rome Statute (Burundi, Gambia and South Africa) in Autumn of 2016, might undermine the fragile system of the Hague Court. Even though, at the end of the day, Gambia and South Africa will most probably not leave the ICC, this unprecedented situation may lead to the next withdrawals, especially having in mind an approach demonstrated by the African Union (AU) to foster the collective withdrawals from the Rome System, in the first months of 2017. At the same time, the ICC has advanced its proceedings with reference to the situation in Georgia, as well as in Ukraine, concerning the alleged crimes committed during the armed conflict in Donbas. As a result of the ICC Prosecutor report of November 2016, claiming that the situation in the Ukrainian eastern provinces and Crimea may amount to the international armed conflict, President Vladimir Putin decided to withdraw the Russian signature to the Rome treaty (Kremlin has never ratified the Statute).

This paper is devoted to understanding the ICC role as a mechanism to fight against impunity of the perpetrators of most heinous crimes, alongside the analyses of its role in the contemporary international politics. The latest example of Ukraine clearly shows that the ICC intervention is expected in order to achieve a deterrence effect and contribute to the post-violence efforts in Ukraine, not losing sight of Kyiv being perceived by Kremlin as a natural sphere of the Russian Federation political interest. The forthcoming months will definitely craft the Hague Court’s strategy to function in a world between the paradigm of fighting against impunity and delivering criminal justice and the realism of international politics.

Keywords: International Criminal Court, Africa, Georgia, Ukraine, law and politics.

Introduction

In the last period of 2016, the International Criminal Court (ICC), based in the Hague, was confronted with three notifications of the African State Parties to the Rome Statute: Burundi, Gambia and South Africa, informing on their willingness to withdraw from the ICC system. All of them claimed the neo-colonial character of the Hague Court, what is more, the South African took the decision after being condemned by international community (consisting of states and non-governmental organizations) of not arresting the Sudanese President, Omar al-Bashir, while he was attending the African Union (AU) summit in Johannesburg, in June 2015. As a result, the AU backed the collective disengaging with the Rome system by issuing its resolution on the ‘ICC withdrawal strategy’ in January 2017.

Undoubtedly, before 2016 the ICC has never moved even from the preliminary stage of proceedings in the so-called *situations* of non-African states (which has slightly changed bearing in mind opening investigations with reference to Georgia, in early 2016) and never opted for issuing the arrest warrant for

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non-African individual. As it seems, the African leaders try to make political use of the current situation and simply escape the international criminal justice system. Undeniably, it may sound hypocritical, since the majority of cases before the ICC are based on the primary self-referrals by the African states.

This paper is to shed more light on the Rome Statute regulations and its practical application, claiming that the legal document has strong political implications. What is more, the ICC cannot be treated solely as a court of law, aimed at fighting against impunity of the most responsible perpetrators of the international core crimes. In addition to its primary function, the Court plays a role of peace-making (in a case of ongoing conflicts), peace-building (in post-conflict scenarios) and transitional justice instrument for post-violence societies. In spite of the African context, the purpose of the paper is to highlight the possible 'pivot' of the ICC, of being labeled 'a Court for weak (African) countries',² and strengthening its global position by tackling the situations of Georgia and Ukraine, two states being in the sphere of the geopolitical interest of the Russian Federation. Kremlin was evidently disappointed by the conclusion of the ICC Prosecutor report of November 2016 ('the situation in Donbas and Crimea may amount to the international armed conflict', which is constantly denied by Moscow) what resulted in Vladimir Putin's decision to withdraw the Russian signature from the Rome Statute (Russia has never ratified this document). The forthcoming months may craft the ICC future and its international character, serving as a legal instrument of delivering criminal justice in a world of politics.

1. The ICC Rome Statute - the legal document with political implications

The International Criminal Court (ICC), established in Rome in 1998, functioning since 1 July 2002 (the initial date of its temporal jurisdiction), was created in order to prosecute the cases of genocide, crimes against humanity, war crimes and a crime of aggression (starting from 2017, at the earliest). Up to date, 124 states have ratified the Statute and are fully obliged to comply with its regulations. Although, among State Parties there is no representative of the biggest players of world politics (and, by so, actors involved in committing international crimes), mainly USA, the Russian Federation, China, India or Israel, what clearly undermines the goal of pursuing international criminal justice.

Undoubtedly, the final version of the Rome Statute was a result of tough negotiations eventually limiting powers and competences of the ICC, what is more, leaving enough place for uncertainty and its broad interpretation. One of the examples of world consensus towards a shape of the legal basis of the first international permanent body was the principle of complementarity (Article 17), balancing between the jurisdiction of the ICC and domestic ones, moreover, defining the Hague Court as 'a court of last resort' (unlike, for example, the two *ad hoc* tribunals, for the former Yugoslavia (ICTY) and Rwanda (ICTR) that have been granted 'primacy' over national jurisdictions, on a basis of the UN Security Council (UNSC) resolutions). In practice, the ICC operates mostly within the paradigm of the so-called 'negative complementarity', examining whether a state is unwilling or unable to proceed the domestic prosecutions, which may trigger the Court's interference. It is highly visible in the cases of post-election violence in Kenya, what in fact brought again on the table the argumentation of the 'neo-colonial false justice' streaming from the Hague, raised by two accused, Uhuru Kenyatta and William Ruto ("an adversarial zero-sum game" between the Hague and Kenyan authorities, which resulted in a total rejection of Kenya's argumentation and challenge for admissibility).³ Instead of this unnecessary competition between international and domestic jurisdictions, the ICC should push for the 'positive complementarity', in which the Prosecutor in the Hague is cooperating with national officials, as well as civil society organizations and victims' groups in order to enhance the capacity

² P. Baofu, 'The Future of Post-Human Law. A Preface to a New Theory of Necessity, Contingency and Justice' (Cambridge Scholars Publishing 2010) 151.

³ G. Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya' [2017] 11 International Journal of Transitional Justice 9-29.

of a given state to adjudicate the most heinous crimes, and by so, strengthening a combination of international and domestic tool-kit of global justice.⁴

The ICC may commence its proceedings on a ground of State Party self-referral, the UNSC resolution (examples of Sudan and Libya) or the Prosecutor acting on *proprio motu* basis – like in the Kenyan example (additionally the Court may exercise its jurisdiction under Article 12 (3), when a non-State Party issues an *ad hoc* resolution approving the interference of the ICC, just like in cases of Ivory Coast, Palestine and, recently, Ukraine). At first glance, a case of self-referral (Uganda, Democratic Republic of Kongo (DRC), Central African Republic and Mali) demonstrates a pure commitment of a given state to the ICC. What is more, in fact the Court achieved its biggest successes based on this triggering mechanism (just to mention all convictions: Thomas Lubanga, Germain Katanga or Jean-Pierre Bemba from DRC and Ahmad al-Faqi al-Mahdi from Mali, the latest rooted in a plea deal). Nonetheless, even in such framework, a strict cooperation between the Hague and national jurisdictions shall be promoted, especially that many African governments are heading just to ‘unilateral justice’ touching there political opponents, but not themselves.⁵ It is clear that the Court having no police or army forces has to rely upon the willingness of members of the Rome system to abide by their regulations under the Statute – a non-compliance with arrest warrants (like in a case of the Sudanese President, Omar al-Bashir, charged by the ICC with several counts of war crimes, crimes against humanity and genocide committed in Darfur) manifested by some State Parties (South Africa, for instance) undermines the value of putting impunity to an end. Although, as it seems, cooperation should also include the introduction of international criminal law provisions into domestic regulations – up to date just 14 out of 34 African State Parties implemented the definitions of crimes under the Rome Statute into their criminal codes.⁶

Both Prosecutors of the Hague Court – a charismatic Argentinian lawyer, Luis Moreno-Ocampo, and Gambian Fatou Bensouda – insisted on understanding their work as purely impartial and not subjected to any political considerations.⁷ Nevertheless, indisputably, the ICC Prosecutor simply cannot avoid taking into account the political consequences of its decisions, especially concerning the selectivity of cases. Needless to say, with the exception of Georgia, all 23 cases being examined by the Court come from 9 African states – that is why, naturally in such circumstances all three convictions issued by the ICC in its 15 years of adjudicating refer to African perpetrators. A given label of the anti-African, neo-colonial court targeting just African states appears as one of the most difficult challenges for the ICC, existing practically since the day of its first decisions issued on whom to prosecute.

Last but not least, the ICC is perceived, by some countries, as a transitional justice tool, firstly by exercising its primary function and prosecuting international crimes (criminal accountability as a clear boundary between the ‘past’ and ‘present’), secondly, by using its statutory regulations enabling the

⁴ B.S. Brown, ‘The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit’ [2017] 31 Temple International & Comparative Law Journal No. 1 forthcoming issue.

⁵ Some experts express their concerns on a real motives of state parties self-referring cases to the ICC, bearing in mind the first ever self-referral issued by the Ugandan government (a clear willingness to bring to justice just the members of Joseph Kony’s Lord’s Resistance Army (LRA), leaving the government forces outside the scope of the Court’s proceedings). Does it mean that a state is automatically ‘unable’ to prosecute the wrongdoers on their own (the challenge of complementarity and admissibility)? This statement needs a further deep research. See L.M. Keller, ‘The Practice of the International Criminal Court: Comments on the Complementarity Conundrum’ [2010] 8 Santa Clara Journal of International Law Issue 1 220.

⁶ O. Bekou, ‘Realizing the Potential of the International Criminal Court’s Complementarity Jurisdiction: The African Experiment’, a lecture delivered during the seminar: “Africa’s Recent Efforts to Enforce the Complementarity Regime Along the Consensus of Kampala”, Salzburg, 7 August 2013.

⁷ Compare L. Moreno-Ocampo, ‘The International Criminal Court: Seeking Global Justice’ [2008] 40 Case Western Reserve Journal of International Law Issue 1 224.

participation of victims (Article 68) and, limited, reparations (Article 75).⁸ Transitional justice approach may foster the positive complementarity and shape the relationship between the Hague Court and domestic prosecutorial offices,⁹ as well as potentially other post-conflict bodies - the agreement with Ugandan authorities to prosecute only, eventually, five leaders of the Lord's Resistance Army (LRA) by the ICC, leaving place for other judicial and non-judicial mechanisms for Uganda may serve as an example.¹⁰ Similarly, the declaration issued by the Verkhovna Rada (the Ukrainian Parliament) on 25 February 2014, just three days after the rapid fall of President Viktor Yanukovych and his escape to Russia (in the aftermath of the Revolution of Dignity), seeking the ICC assistance in prosecuting Yanukovych and his 'old guard', appears as a clear sign of marking the strict line between the *ancien régime* structures and new post-revolutionary authorities, what definitely falls within the ambit of transitional justice main goals.

It is argued that within the Rome Statute there is enough place for applying the criminal law and being able to exist in a world of politics. The ICC deterrence effect may be achieved by its decisive interference into situations of ongoing conflicts, when the presence of the Hague Court shall extend the range of instruments of de-escalating atrocities and bringing to justice those most responsible. Even if the ICC lost some ground in the African continent in the last few months, its parallel functioning in the post-Soviet space (Georgia and Ukraine), just 'in front of' the Russian Federation, may significantly contribute to the international position of the first permanent criminal body, based in the Netherlands.

2. Is the ICC losing Africa? A question of the cooperation between the Hague Court and African State Parties in the aftermath of withdrawal notifications

The Rome Statute provides under Article 127 a possibility for any State Party to withdraw from the ICC system by written notice to be given to the UN Secretary-General, taking legal effect one year after receipt, unless a later date is specified in the notice. In the last months of 2016, three African State Parties to the Statute, namely Burundi, Gambia and South Africa, decided to leave the Hague Court, all claiming the biased character of functioning of the ICC towards the African countries. Ultimately, as it seems at the time of writing, Gambia and South Africa will remain as members of the Court, what may lead to the political isolation of a position taken by Burundi, as a result, weakening the African Union (AU) approach to back the massive withdrawals from the Rome treaty. It is necessary to highlight the main motives demonstrated initially by all three State Parties and the legal outcomes of withdrawing from the Rome Statute: firstly for the ICC itself, secondly for states willing to leave the Court.

In January 2017, the AU adopted the 'ICC Withdrawal Strategy', however on a basis of non-binding resolution (eight AU members made reservations to this document).¹¹ The AU opted for a new legal concept, unknown in international law, i.e. 'a collective withdrawal' of the African State Parties to the Court. Firstly, it has been argued that the UNSC ("biased") resolutions referring a situation to the ICC without the consent of a given state (especially of those that are not members of the Court, as Sudan) are unacceptable. What is more, the AU criticized prosecuting sitting Heads of States, like the Sudanese President Omar al-Bashir. Eventually, the resolution calls upon for the deep legal and administrative reform of the ICC (notably by

⁸ J. Lindenmann, 'Transitional Justice and the International Criminal Court: Some Reflections on the Role of the ICC in Conflict Transformation' [in:] M.G. Kohen (ed.) 'Promoting Justice, Human Rights and Conflict Resolution through International Law' (Leiden: Liber Amicorum Lucius Caffisch 2007) 330.

⁹ W.W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' [2008] 49 Harvard International Law Journal No. 1 53-108.

¹⁰ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/ Movement, 27 June 2007, Juba, Sudan.

¹¹ Available at: https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf [last accessed: 15 April 2017].

limiting powers of the UNSC given by the Rome Statute), promotion of the national and regional means of pursuing criminal justice and preservation of the sovereignty and integrity of the AU members. As it was stated by the drafters of the AU resolution, the protection of abovementioned values was manifested by three African countries in late 2016.

Unquestionably, the South African decision drew the biggest attention of mass media around the globe, consistently apprehending this country as one of the most Western-oriented African representatives, thus fully approving the existence of the ICC. It directly relates to the Omar al-Bashir's visit to South Africa, during the UA summit held in June 2015, and a choice of the authorities of a hosting state not to arrest the Sudanese President. In spite of the Rome Statute provisions waving any kind of immunities shielding the possible perpetrators from being brought to justice, South African government claimed that al-Bashir possessed an immunity of the Head of State.¹² In March 2016, the Supreme Court of Appeal found the South African authorities' conduct as unlawful, breaching the obligations rooted in the Rome treaty, as well as being against the domestic legislation.¹³ As a result, South Africa notified its withdrawal from the ICC – this particular decision was questioned by the High Court in Pretoria, ruling it unconstitutional. Albeit the voices raised by civil society organizations underlining the victory of human rights and rule of law, it has to be noted that neither President Jacob Zuma, nor the ruling African National Congress (ANC) government have change their position towards the Hague Court.¹⁴ On 7 April 2017, the ICC found South Africa accountable for violating the Rome Statute by failing to arrest Omar al-Bashir.¹⁵

While it is still not certain, whether South Africa will eventually leave or stay among the Court's member states (although the government in Pretoria announced that they will no longer pursue the ICC withdrawal), as it seems, another African country, Gambia, previously notifying its withdrawal, will ultimately remain in the ICC. The new Gambian President, Adama Barrow, reversed the ICC withdrawal decision made by his predecessor, Yahya Jammeh (claiming the Court's reluctance towards 'the Western crimes', such as, for instance, British, allegedly committed during the intervention in Iraq).¹⁶ That is why, at present, the only State Party moving to quit the Hague is Burundi – a response to the Fatou Bensouda's decision to start preliminary examination concerning acts of killing, imprisonment, torture, rape and other forms of sexual violence that have been allegedly committed since April 2015 in this African country.¹⁷

¹² It is a legacy of the International Military Tribunal (IMT) in Nuremberg that no one, including representatives of a state, cannot hide themselves before criminal justice for committing international crimes, such as genocide, war crimes or crimes against humanity. The Rome Statute regulates the Irrelevance of official capacity under Article 27.

¹³ Read more D. Akande, 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for All Heads of States?' (29 March 2016, EJIL: Talk!, available at: <https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/> [last accessed: 15 April 2017]).

¹⁴ M. Kersten, 'Re-Setting the Clock – South African Court Rules ICC Withdrawal Unconstitutional' (22 February 2017, Justice in Conflict, available at: <https://justiceinconflict.org/2017/02/22/re-setting-the-clock-south-african-court-rules-icc-withdrawal-unconstitutional/> [last accessed: 15 April 2017]).

¹⁵ 'ICC: South Africa violated rules by not arresting Sudan president' (7 April 2017, Jurist, available at: <http://www.jurist.org/paperchase/2017/04/icc-south-africa-violated-rules-by-not-arresting-sudan-president.php> [last accessed: 15 April 2017]).

¹⁶ In fact, under the Jammeh's rule, Gambia failed to cooperate with numerous regional judicial bodies, like ECOWAS Court of Justice or the African Commission on Human and Peoples' Rights, examining the human rights violations that occurred during and in the aftermath of the 2014 *coup d'état*. See more R. Colojoară, 'Does the International Criminal Court have a future or is it just an illusion?' [2016] 2 Journal Of Eastern European Criminal Law 54-70.

¹⁷ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016> [last accessed: 15 April 2017].

Nearly all arguments shown by those three State Parties, with just small exceptions,¹⁸ were mostly of political nature (like the ICC as ‘a neo-colonial manifestation of Western imperialism’). Numerous commentators point out that for African countries the regional loyalty is of much more significance than the obligation to cooperate with the Court, as it is stipulated by the Statute.¹⁹ Nonetheless, the ICC is still far from losing its African State Parties, the biggest bloc of member states. Even the AU resolution, in spite of its official title (‘ICC Withdrawal Strategy’) should be construed more as a postulate to reform the Court, instead of seeing it as a document annihilating the international criminal justice central body.²⁰ Moreover, the AU is not a member state to the ICC, thus the only possibility to leave the Court is the individual procedure of withdrawal.

To conclude this part of deliberations, it is necessary to underline that the Hague Court itself should be more open for a dialogue with its States Parties (‘a positive complementarity’) and promote the local or regional judicial responses to mass atrocities, what in fact stays in line with the analyzed AU resolution’s argumentations (Hissene Habré’s trial before the Extraordinary African Chambers in Senegal – since the temporal jurisdiction’s limitations being outside the scope of the ICC possible inquiry – is a positive signal of pursuing criminal justice at the regional level). Lastly, for African countries staying within the Rome system may simply appear as much more efficient – as member states they can check the admissibility of a case (a complementarity principle gives a discretion for a State Party on whether to prosecute or not), what is not able for non-State Parties (for instance, examined under the UNSC triggering mechanism), Having in mind that all crimes falling within the ambit of the ICC jurisdiction are of *ius cogens* character, furthermore, creating *erga omnes* obligations, more non-African states may try to exercise the universal jurisdiction to prosecute the African wrongdoers.

3. The ICC interference in the post-Soviet space – a test for the Court’s future

The formidable situation of the ICC regarding the African context may be overcome by its decisive interference into two states, coming from the former Soviet Union: Georgia and Ukraine. It is necessary to underline that in both cases a third state, i.e. the Russian Federation, was allegedly involved in committing international crimes, either by its direct involvement in the Russo-Georgian war in 2008, or by a combination of indirect and direct aggression in Ukraine with the use of pro-Russian separatists in Donbas, starting from 2014 (a conflict is still ongoing during the time of writing). The latest was a consequence of Kremlin’s disregard to the gains of the Revolution of Dignity and a desire shown by the Ukrainian nation on Maidan Nezalezhnosti in Kyiv during the Euromaidan protests in winter 2013/2014 (that resulted in ousting the former President, Viktor Yanukovich) to enter on a path of democratization and Europeanization of a country. Russia is not a State Party to the Rome Statute, being at the same time the permanent member of the UNSC and one of the biggest players on the international scene, though. With no doubts, tackling those two cases appear as a significant test for the Hague Court to fulfill its primary, as well as secondary functions, stipulated by the Statute.

With reference to the Georgian situation, the Russo-Georgian war of August 2008 was the first armed conflict outside Africa that attracted attention of the ICC Prosecutor, who, in the absence of a State Party self-referral (Georgia ratified the Statute in September 2003) or the UN Security Council resolution, acted on

¹⁸ South Africa argued that is not obliged to arrest anyone, even a person charged by the ICC, coming from a non-State Party to the Hague Court.

¹⁹ F. Boehme, ‘We Chose Africa’: South Africa and the Regional Politics of Cooperation with the International Criminal Court’ [2017] 11 International Journal of Transitional Justice 57.

²⁰ M. Kersten, ‘Not All it’s Cracked Up to Be – The African Union’s “ICC Withdrawal Strategy”’ (6 February 2017, Justice in Conflict, available at: <https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/> [last accessed: 15 April 2017]).

the basis of *proprio motu* power (on 14 August 2008, Luis Moreno-Ocampo decided to open a preliminary examination). The war placed mostly on the territory of South Ossetia²¹ was classified as an international armed conflict, thus the Court is looking at the possibility of war crimes and crimes against humanity committed *in and around* the territory of South Ossetia (legally speaking – a Georgian one) between 1 July and 10 October 2008 perpetrated by potentially three actors: the Russian, Georgian and South Ossetian troops. On 27 January 2016 the Pre-Trial Chamber authorized the Prosecutor to open investigation into the matter that altered the ICC interference in Georgia from a *preliminary examination* to a *situation under investigation*.²²

From the very beginning both parties to the conflict declared cooperation with the Hague, which might have appeared as surprising especially concerning the Moscow positive initial attitude into probing the possible crimes of the 2008 war. Nonetheless, neither Kremlin's, nor Tbilisi's commitment was assessed by the ICC from Prosecutor as sufficient. The Russian prosecutorial offices examined 575 incidents of possible engagement of soldiers of the Russian Federation in perpetrating war crimes or crimes against humanity, however did not find any evidence of abuse of power by the army commanders. Georgia suspended its domestic prosecution in 2015 due to the security reasons.²³ These circumstances, evaluated together with 6335 applications lodged in the Hague by victims of the Russo-Georgian conflict, forced Fatou Bensouda to ask for the authorization of the Pre-Trial Chamber, granted eventually in early 2016 (fully in conformity with Article 17 of the Statute), although with the exception concerning the attack on the Russian Federation's Peacekeeping Battalion, because the Hague Court did not find the Russian authorities neither unwillingness nor inability to adjudicate those cases.²⁴

Regarding the ICC involvement in Ukraine, the situation is much more problematic, not only taking into consideration its political dimension, but also bearing in mind the purely legal context. It is necessary to underline that Ukraine is still not a party to the Rome Statute. Nevertheless, one of the first reactions of the new post-Maidan authorities was the submission of a resolution issued by the Verkhovna Rada on 25 February 2014 to the ICC on the basis of Article 12 (3) of the Statute, asking the Court to assist Ukraine in prosecuting people possibly responsible for crimes committed during the protests in Kyiv. This resolution lodged on 17 April was related to crimes against humanity, allegedly committed during the period from 21 November 2013 to 22 February 2014. Then, on 8 September 2015 the second *ad hoc* declaration was registered in the Hague on the grounds of Article 12 (3) – in February 2015 the Verkhovna Rada passed a resolution covering the possibility of war crimes and crimes against humanity that occurred since February 2014 on the whole territory of Ukraine (onwards). As it seems, a more than one-year gap between the first days of fighting and lodging the second declaration of the Parliament might be rooted in a fear of the Ukrainian leaders of prosecuting in the Hague not only pro-Russian separatists, but also their own forces, like, for instance, the conduct of the voluntary "Battalion Aidar" that may constitute war crimes in the light of the Rome Statute.²⁵

²¹ An integral part of Georgia, although politically and military backed by Kremlin, one of the examples of *de facto* regimes within the post-Soviet area (among Abkhazia, Transnistria, Nagorno-Karabakh and, since 2014, Donetsk and Luhansk People's Republics).

²² The International Criminal Court the Pre-Trial Chamber I, 'Decision on the Prosecutor's request for authorization of an investigation' (27 January 2016, available at: https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF [last accessed: 15 April 2017]).

²³ S. Maupas, 'Georgia Becomes First ICC Case Out of Africa' (17 February 2016, JusticeInfo, available at: <http://www.justiceinfo.net/en/component/k2/26068-georgia-becomes-first-icc-case-out-of-africa.html> [last accessed: 15 April 2017]).

²⁴ *Ibid.*

²⁵ T. Lachowski, 'International Criminal Court —the Central Figure of Transitional Justice? Tailoring Post-violence Strategies, with Special Reference to Ukraine' [2015] 24 The Polish Quarterly of International Affairs No.3 53.

The ICC interferes only if crimes meet the requirements of its jurisdiction, gravity and interest of justice (Article 53 (1) of the Statute). The initial probe into the 'Maidan situation' presented by Fatou Bensouda shows that most probably crimes committed during protests in Kyiv do not constitute crimes against humanity. In the eyes of the Prosecutor, although acts of violence in Maidan Nezalezhnosti were directed against the 'civilian population', which falls within the ambit of a definition of crimes against humanity, stipulated by Article 7 of the Rome Statute, they lack a prerequisite of 'widespread' or 'systematic' attack, thus shall be dropped by the ICC in its proceedings.²⁶ It has to be mentioned that this statement is questioned by some of the Ukrainian scholars, referring to similar cases (like the post-election violence in Ivory Coast), when the Pre-Trial Chamber confirmed the widespread and systematic character of attacks.²⁷ Additionally, on the basis of the second *ad hoc* declaration of the Ukrainian Parliament, the ICC Prosecutor decided to extend the temporal scope of the existing preliminary examination, covering possible crimes committed - mostly - during the conflict in Donbas, starting from 20 February 2014, as a date indicated by the Verkhovna Rada.

As it was stated before, the effectiveness of the prosecutions of international crimes depends heavily on a direct cooperation between the ICC Prosecutor and national authorities of an interested state. As it seems, the level of assistance provided by Kyiv for the ICC, as well as its own efforts in the area of criminal proceedings, are still insufficient. The domestic Criminal Code of Procedure invokes that the Prosecutor General's Office (PGO), the Ministry of the Interior (Mol) and the Security Service are in charge of conducting inquiries into international crimes committed on the territory of Ukraine. As a result of post-Maidan reforms, the PGO changed its structure, authorized the Special Investigations Division to prosecute crimes that occurred during the protests in Kyiv (in December 2014) and established two new bodies – (I) 'military Prosecutor's office of Anti-Terrorist Operation (ATO)', investigating crimes committed by the Ukrainian forces during the conflict in eastern provinces, and (II) a 'department on investigating crimes against peace, security of the humankind and international legal order', inquiring on the crimes of pro-Russian separatists and a direct outcome of the Russian aggression in Ukraine. Nevertheless, as many commentators state, all these mechanisms are rather 'inadequate' – partially, since the PGO did not alter its staff after the Revolution of Dignity and, subsequently, having in mind the lack of cooperation between the PGO and Mol. Moreover, the Ukrainian state does not possess enough institutional capacity and experience in prosecuting international crimes by domestic means.²⁸ With reference to 'Maidan prosecutions', some experts indicate that recent developments show rather the obstruction presented by the General Prosecutor towards its own Special Investigation Division what clearly affects the whole proceedings (for instance some of the ex-Berkut²⁹ officers were released from custody and were able to flee to Russia). Moreover, the biggest case for Ukrainian authorities, i.e. the prosecution of Viktor Yanukovych, is changing in the eyes of various researchers from delivering justice to just revenge and retaliation (by using the *in absentia* procedure), what may constitute a violation of the European Convention on Human Rights (ECHR), notably the right to fair trial of the accused.³⁰

This statement is confirmed by the International Advisory Panel (IAP), constituted by the Secretary General of the Council of Europe, in order to control whether domestic prosecutions meet all requirements

²⁶ The International Criminal Court, 'Report on Preliminary Examination Activities' (12 November 2015, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [last accessed: 15 April 2017]) para. 95.

²⁷ I. Marchuk, 'Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond' [2016] 49 *The Vanderbilt Journal of Transnational Law* 352.

²⁸ V. Polunina, 'Between Interests and Values Ukraine's Contingent Acceptance of International Criminal Justice' [2016] *International Nuremberg Principles Academy*, available at: <http://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Ukraine.pdf> [last accessed: 15 April 2017] 6.

²⁹ The system of special police within the Ministry of Internal Affairs, existing in Ukraine in the period of 1992-2014. Abolished in the aftermath of the Revolution of Dignity.

³⁰ H. Coynash, 'New Laws in Ukraine Obstruct Prosecution for Crimes against Maidan Activists' (21 February 2017, Human Rights in Ukraine, available at: <http://khp.org/en/index.php?id=1487620600> [last accessed: 15 April 2017]).

of the ECHR. In its report of March 2015, the IAP concluded that investigations undertaken by Kyiv generally fail to comply with ECHR standards under Article 2 (right to life) and Article 3 (prohibition of torture) of the Convention. The IAP stated that ‘the lack of genuine effort’ to conduct investigations presented by the pre-Maidan authorities during protests in Kyiv affected the subsequent inquiries provided by the new Ukrainian officials – in spite of the difficult (geo)political situation of Ukraine, a state is still responsible for the observance of rights guaranteed by the ECHR.³¹

As a result, although the ICC staff organized few meetings with their Ukrainian colleagues, the Prosecutor may rely mostly on information gathered by the civil society organizations (i.e. Ukrainian EuroMaidan SOS and the Centre for Civil Liberties) – in fact no UN- or OSCE-backed fact-finding mission was established in Ukraine. Up to date one of the most significant pieces of evidence on war crimes that occurred in Donbas was gathered by a Member of Parliament of Poland, Małgorzata Gosiewska, and a group of her volunteers. Gosiewska’s report, entitled ‘Russian War Crimes in Eastern Ukraine in 2014’, was handed over to the ICC Prosecutor on 22 April 2016. This very detailed document, prepared on the basis of field research and interviewing victims and witnesses of crimes, among submissions by a coalition of human rights NGOs to the ICC, is one of the most crucial and reliable sources for the Hague to accelerate its proceedings, at present.³²

Despite the pressure put on Ukrainian authorities by civil society, Kyiv is still reluctant to eventually ratify the Rome Statute – some experts underline that a possible ratification is dependent on the simultaneous adoption of the Statute by Russia.³³ That is why, bearing in mind the low effectiveness of domestic probes into international crimes that occurred during an armed conflict in eastern Ukraine (and Crimea), like in the Georgian example, if the Prosecutor asks the ICC to open investigations in the matter, it can be presumed that Pre-Trial Chamber would approve this request. As it seems, it may relate also to the ‘Maidan crimes’, even though, at present, they are outside of the scope of the Prosecutor inquiry.

Both abovementioned cases may serve as a new opening for the Hague Court. Unlike examples of Afghanistan and Iraq, when the question of the possible criminal responsibility of American and British soldiers were pending, the ICC Prosecutor decided to open investigation in Georgia and named the ongoing war in Ukraine as possible international armed conflict (additionally, a permanent state of occupation of Crimea), involving the Russian army,³⁴ which may lead to further prosecutions (the question whether the Russian authorities possess ‘overall control’ or ‘effective control’ over South Ossetians or pro-Russian separatists in Donbas still has to be determined). Vladimir Putin’s decision to withdraw the Russian signature from the Rome Statute in November 2016, even though just symbolically, shows the Kremlin’s strong dissatisfaction with ICC recent findings, underlining a potential significant role played by the Hague in cases of ongoing wars and post-conflicts environments.

³¹ G. Nuridzhanian, ‘A new model for transitional justice process in democracies facing challenge’ (29 May 2015, International Law Observer, available at: <http://www.internationallawobserver.eu/2015/05/29/guest-post-a-new-model-for-transitional-justice-process-in-democracies-facing-challenge/> [last accessed: 15 April 2017]).

³² B. Marcinkowski, ‘Nobody wanted to listen to the victims. Interview with Małgorzata Gosiewska’ (27 January 2016, New Eastern Europe, available at: <http://www.neweasterneurope.eu/interviews/1873-nobody-wanted-to-listen-to-the-victims> [last accessed: 15 April 2017]).

³³ V. Polunina, *Ibid.* 9.

³⁴ The International Criminal Court Prosecutor, ‘Report on Preliminary Examination Activities 2016’, available at: https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf [last accessed: 15 April 2017] 33-42.

Conclusions

The International Criminal Court, practically since its establishment, was criticized by numerous states (and experts), expecting from the Hague Court to become the institution crafted for their own interests. The most influential countries around the globe, leaders of the international politics, such as the United States, the Russian Federation or China, were reluctant towards the ratification of the Rome Statute, even though, both, Bill Clinton and Vladimir Putin originally signed the treaty in 2000. Thus, throughout the first fifteen years of its functioning, the ICC became an international instrument of pursuing criminal justice solely for the African states. Initially, the acceptance towards the Hague Court expressed among the African continent was relatively high, notably recalling booming enthusiasm of those countries (like Uganda) that decided to use a self-referral mechanism and ask for the ICC assistance (although, the African governments perceive justice rather as just 'an unilateral mean' tackling solely their opponents).

Therefore, rightly or wrongly, the Court was named as 'a court for weak, African states', a toothless tiger unable of inquiring the possibility of international crimes committed directly or indirectly by Americans, Brits or Russians, for instance. The African approach, especially after charging sitting the Heads of States, the Sudanese Omar al-Bashir (under the UNSC resolution) or Uhuru Kenyatta from Kenya, rapidly altered, underlining the neo-colonial character of the Western-oriented Court and a need of a regional loyalty prevailing over the legal obligations of the State Parties to the Rome Statute. The recent proposal of the African Union leaders and the creation of the 'ICC Withdrawal Strategy' (even though the document is not binding and shall be interpreted as a postulate of reforming the Court) was preceded by notifications of three African ICC member states (Burundi, Gambia and South Africa) willing to leave the Rome system. In spite of the fact that at the end of the day most probably only Burundi will pursue its withdrawal from the Court, this situation shall lead to the redefinition of the ICC interference in Africa. Much too often, like in the Kenyan case, the ICC Prosecutor was operating under the paradigm of the so-called 'negative complementarity' instead of seeking the common ground for a cooperation with national jurisdiction in prosecuting international crimes.

A problem of proper cooperation is also witnessed by the ICC Prosecutor with regard to two countries coming from the post-Soviet area, Georgia and Ukraine, being under the Court examination. In spite of their primary openness to cooperate fully with the Hague, neither Tbilisi's, nor Kyiv's inquiries do not meet requirements of sufficient domestic prosecution. That is why, considering the Georgian situation, Fatou Bensouda decided to ask to open investigations in Georgia, which was granted by the Pre-Trial Chamber in January 2016. Undoubtedly, both cases, involving the possible crimes committed by the representatives of the Russian Federation (directly or indirectly, with the use of pro-Russian separatists in Donbas), may serve as a new opening for the Hague Court, exercising its main function (adjudicating international core crimes), as well as the secondary ones, peace-making or peace-building and transitional justice tool-kit for war-torn societies. To conclude, it can be argued that all notified withdrawals (including the Putin's move to eliminate the Russian signature from the Rome treaty), what may sound as paradox, indicate the potential huge role of the ICC for conflict and post-conflict environments. The future of the Court strongly depends on its own capability of redefining the ICC's role of functioning between the paradigm of fighting against impunity of the most responsible wrongdoers and in a world of politics – therefore, those prophesizing the rapid end of the Hague Court seem to be detached from reality.

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BREXIT AND THE INSTITUTE OF ADMINISTRATIVE SANCTIONS¹

Milda Markevičiūtė²

Abstract

Brexit as one of the milestones of the modern EU history, not only did launch the detachment of the UK from the EU, but also created an uncertainty regarding the future of the EU in general. It also provided a crossroad for further paths of integration the EU and member states might take. First, considering the raise of the nationalistic tendencies in some of the major players of the EU, the EU might provide the member states with more autonomy. Second, further developing integration even in spheres that EU previously did not create harmonised regulation might strengthen the cracking EU. The same choices also stand before the institute of administrative sanctions as one of the spheres EU previously did not create unified regulation. The institute of administrative sanctions is considered to be an important tool, commonly used in order to protect EU financial interests, therefore its further development can strongly influence tendencies in the EU and its members. In the context of the EU, institute of administrative sanctions is only in initial stages of its developments while in the Lithuanian context the similar institute, though not new, is complex and overburdened. Therefore, in this article the two institutes of administrative sanctions, Lithuanian and European, are discussed and analysed as well as possibilities available of their development and risks of the EU institute of administrative sanctions that might influence institute of administrative sanctions in the member states, including Lithuania.

Keywords: Administrative sanctions, Brexit, harmonisation, integration.

Introduction

After the UK referendum regarding exiting the EU and the initiation of Brexit, a lot of discussion regarding the future of the EU in general was raised, especially in the light of nationalistic tendencies and upcoming elections in some of the major EU countries (e.g. the Netherlands, France, Germany). It was discussed whether Brexit will trigger further cracks in the EU and launch more member states to initiate detachment from the EU. The two further lines of further development of the EU in general were suggested: the first – providing more independence and autonomy to the member states in order to satisfy the raising nationalistic tendencies hoping it would keep the rest of the member states from detaching the EU. The second – further developing integration even in spheres where EU previously did not create harmonised regulation hoping that it might unite and strengthen the EU.

The same possibilities can also be applied to the rules enabling the EU to sanction natural persons and companies of the member states directly. The powers of the EU to define and/or impose sanctions shall be explained starting with the criminal justice area in the EU. Historically, criminal justice system was first introduced with the Maastricht Treaty in the area of so-called „third pillar“, however, European Commission defines it as building „the European criminal justice area with one hand tied behind its back.“³ The main reasons for such conclusion are provided the unanimity rule, the lack of enforcement powers of Commission

¹ This article was completed and submitted on the 9th of August, 2017.

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³ European Commission, 'Justice. Criminal Justice', http://ec.europa.eu/justice/criminal/index_en.htm.

and the lack of decision making powers of the parliaments and the courts.⁴ Historically, the member states tended not to agree to handle the competence of criminal justice to the EU fearing it might affect their autonomy in one of the crucial spheres of a country due to significant differences in social, economic and justice policies.⁵ This situation was considered to be a flaw due to lack of tools enabling the EU to protect its financial interests and ensure compliance.⁶ Providing competence for the EU to sanction residents of the EU (natural persons and companies of the member states) directly or legislating regarding it is expected to enhance mutual trust between the member states, prevent from and punish for committing grave offences of the EU regulation and also ensure consistent legislation between the member states and eliminate the possibility for the offenders to avoid prosecution for the offences committed.

Criminal justice system is also important in the context of administrative sanctions due to the case law of the European Court of Human Rights, providing that the convention does not prohibit for the states to classify the offences to criminal and not. however, it does not mean that such distinction is decisive for the purposes of the convention. Thus, it was established that if the offence can be regarded as at least as serious as criminal offence judging by its nature and possible sanction, the accused shall have at least the same guarantees as he would have while being sanctioned pursuant to the criminal system.⁷ Therefore, administrative sanctioning pursuant to EU rules can also be qualified as criminal, thus the tendencies the EU has towards criminal justice system may also be applied to the system of administrative sanctions. The case law of the European Court of Human Rights is considered to have significantly influenced the institute of the administrative sanctions of the EU.⁸

In the light of the Brexit the question is whether the EU will adopt rules continuing unifying the EU institute of administrative sanctions or will the EU suspend further integration of the member states in this context and ensure them more sovereignty. This question is further analysed in this article in order to evaluate the possibilities of further development of the institute of administrative sanctions of the EU, possible risks, flaws and advantages. Due to the fact that the institute of administrative sanctions was also influenced by the experience and regulation of the national systems of the member states, the institute of administrative sanctions of Lithuania is also presented in order to evaluate possible outcomes of the options discussed.

For the purposes of this article, the term Brexit is understood not as a decision of a single member state to leave the EU, but as a wide-angle process which might trigger similar decisions of the other member states. It also shall be noted that in this article the term administrative sanctions refers to empowerment to sanction residents of EU (natural persons and companies) only and does not extend to sanctioning member states or other states as an issue of foreign policy.

It shall be noted that there are only a few scholar analyses of the institute of administrative sanctions of the EU, for example Administrative sanctions in the European Union by Oswald Jansen, Administrative Sanctions in EU Law by Adrienne de Moor-van Vugt. Since Brexit as an action of the member state detaching from the EU is still new and the first such example in the history of the EU, currently there are no detailed analysis of the influence of the Brexit on the development of the institute of the EU. Therefore, it is hoped that this article might contribute to starting a discussion on the future of the administrative sanctions of the EU in the context of the Brexit.

⁴ European Commission, 'Justice. Criminal Justice', http://ec.europa.eu/justice/criminal/index_en.htm.

⁵ Jansen, Oswald, 'Administrative sanctions in the European Union' (Cambridge-Antwerp-Portland: Intersentia 2013) 608-610. De Moor-van Vugt, Adrienne, Administrative Sanctions in EU Law' [2012] 2-3 <https://ssrn.com/abstract=1992922>.

⁶ Jansen, Oswald, 'Administrative sanctions in the European Union' (Cambridge-Antwerp-Portland: Intersentia 2013). De Moor-van Vugt, Adrienne, Administrative Sanctions in EU Law' [2012] 2-3 <https://ssrn.com/abstract=1992922>.

⁷ Öztürk v. Germany, Case application No 8544/79 [1984] <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57553&filename=001-57553.pdf>.

⁸ Jansen, Oswald, 'Administrative sanctions in the European Union' (Cambridge-Antwerp-Portland: Intersentia 2013) 607-608.

1. The institute of administrative sanctions of the EU

The institute of administrative sanctions in the EU legal system as an instrument was developed out of need to ensure appropriate member states' reaction towards private parties' infringements of the EU law.⁹ Before the introduction of this institute, the European Commission did not have any powers to ensure that both member states and private parties perform its obligation towards the EU.¹⁰ One of the reasons of the lack of empowerment towards the EU and its institution is considered to be the historic division of the competence between the member states and the EU: the powers to impose criminal liability was attributed to an exclusive competence of the member states due to social, economic and cultural differences of the member states as well as an issue of political sovereignty while the Commission was empowered only with limited sanctioning powers, for example in the sphere of competition law, also the sphere of the production of steel and coal.¹¹ However, at that time the Community did not have powers to act in the sphere in which the competence was delegated to the member states, though, as it was mentioned, this regulation was not responding to the needs of the EU after the common market was created, over the years this rule was overturned, stating that the member state could not legislate regarding administrative sanctions if the EU has already been legislation in the certain sphere and cannot define administrative sanctions if the EU has already did it in the regulations of the EU.¹² Thus, the institute of administrative sanctions was considered to be new in the EU system as previously the EU was considered not to have instruments of enforcing the compliance with the EU law in other spheres.¹³ The functions of the institute of administrative sanctions are usually considered to be common and individual prevention, restauration and retribution.¹⁴

Although the regulation of administrative sanctions was at first scattered and more of an exception than a general rule, it was unified into one regulation in 1995, adopting the Council Regulation No 2988/95 of 1995-12-18 on the protection of the European Communities financial interests¹⁵ (hereinafter – **Regulation No 2988/95**).¹⁶ The Regulation No 2988/95 defined administrative sanctions (usually referred as measures or penalties instead of sanctions) if the legal acts governing EU structural funds were infringed.¹⁷ The Regulation No 2988/95 defined measures as, for example, withdrawal of the wrongly obtained advantage, and penalties, such as payment of an administrative fine, removal of an advantage granted by the EU rules, temporary withdrawal of an approval or recognition necessary for participation in a EU aid scheme, the loss of security or deposit, etc.¹⁸

Another regulation, empowering the European Commission to impose sanctions, is Council Regulation No 1/2003 of 2002-12-16 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter referred as **Regulation No 1/2003**). The latter regulation empowered the

⁹ Jansen, Oswald, 'Administrative sanctions in the European Union' (Cambridge-Antwerp-Portland: Intersentia 2013) 609.

¹⁰ Jansen, Oswald, 'Administrative sanctions in the European Union' (Cambridge-Antwerp-Portland: Intersentia 2013) 608.

¹¹ Jansen, Oswald, 'Administrative sanctions in the European Union' (Cambridge-Antwerp-Portland: Intersentia 2013) 608-611.

¹² De Moor-van Vugt, Adrienne, 'Administrative Sanctions in EU Law' [2012] 2-5 <https://ssrn.com/abstract=1992922>.

¹³ Jansen, p. 608-609.

¹⁴ Murawska (Nowakowska), Agnieszka Aleksandra 'Administrative anti-fraud measures within the European Union. Necessity and means' (Nomos, 2008) 83-89.

¹⁵ Council Regulation 2988/95 on the protection of the European Communities financial interests [1995] OJ L 312, 23.12.1995, 1-4.

¹⁶ Jansen, Oswald, 'Administrative sanctions in the European Union' (Cambridge-Antwerp-Portland: Intersentia 2013) 609-210.

¹⁷ *Ibid*, p. 610.

¹⁸ *Ibid*, p. 613-614.

Commission not only to analyse the possible infringement, requiring that an infringement be brought to an end, ordering interim measures, but also imposing fines, periodic penalty payments or other penalties.¹⁹

Due to these reasons, the EU administrative sanctions institute was developed not centralised, but rather in separate spheres, and does not create a homogenous sanctioning system but is combined from separate legal acts not creating a unified system. However, during years, the EU institute of administrative sanctions developed unique qualities, influenced by the administrative sanctions institute of the member states. The main criterion in order to define whether the measure imposed should be considered to be a sanction is whether administrative sanction would make a negative influence on the interests of the person being accused. The more restrictive is the sanction, the more guarantees shall be available to the person.²⁰

The institute of administrative sanctions is considered to be an important instrument of the EU law, influencing the sanctioning systems of the member states.²¹ The institute of administrative sanctions of the EU, though quite new, is an important tool in order to ensure the compliance with the EU law. However, it also shall be noted that the institute's development has been delayed by the issues regarding the EU competence and the close ties of the institute with the criminal liability. Thus, the institute might be further developed into integrating the EU member states into one harmonised sanctioning systems.

2. The institute of administrative sanctions of Lithuania

In order to evaluate EU institute of administrative sanctions and the future of its development, it can be beneficial to compare it with similar institute of Lithuania.

Lithuania can be called as having a unique system of administrative sanctions, although strange and chaotic, the system can be explained from the historic point of view. In 1989 Lithuania adopted a Code of Administrative Offences, regulating offences committed by natural persons. After Lithuania regained its independence, the Code of Administrative Offences was pronounced to be valid after imputing some *mutatis mutandis* changes.²² In 1994-1995 Lithuania started adopting separate laws, governing the certain sphere of activities involving imposing sanctions if violation of such law occurs. Such laws are called special laws in Lithuanian legal system. The special laws are applicable to both, natural persons and companies,²³ therefore, the rules regarding sanctioning especially considering issues concerning culpability significantly differ. This was one of the reason why suggestions to including violations set in the special laws into the new Code of Administrative Violations was dismissed, indicating that it would mean that the Code should be altered and be applicable to companies as well as natural persons while the code was not prepared to handle the liability of the companies in respect that pursuant to the special laws companies are to be sanctioned under the rules of strict liability.²⁴ In 1990s it was not considered to be a problem: at that time only a few of the special laws existed, e.g. Law on Alcohol Control, Law on Tobacco Control, Law on Competition etc., this type of sanctioning was considered to be new in Lithuanian system.²⁵

¹⁹ Council Regulation No 1/2003 of 2002-12-16 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1, 4.1.2003, 1–25.

²⁰ De Moor-van Vugt, Adrienne, 'Administrative Sanctions in EU Law' [2012] 15-22 <https://ssrn.com/abstract=1992922>.

²¹ De Moor-van Vugt, Adrienne, 'Administrative Sanctions in EU Law' [2012] 37-38 <https://ssrn.com/abstract=1992922>.

²² Valančius, Virgilijus, et al., 'Administraciniai teismai Lietuvoje. Nūdienos iššūkiai' (Vilnius: Lietuvos vyriausiasis administracinis teismas 2010) 346.

²³ Šedbaras, Stasys, 'Administracinė atsakomybė' (Vilnius: Justitia 2005) 105-106.

²⁴ The Parliament of the Republic of Lithuania explanatory note on the Draft Code of Administrative Violations [2014] http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=406528.

²⁵ For example, The Parliament of the Republic of Lithuania conclusions regarding the draft law on competition [1922] the archive of the Parliament f. No 2, ap. No 2, Case No 348 46.

Currently there are more than 20 special laws. however, the systems' complexity does not end here. After 2017-01-01 the new Code of Administrative Violations came into force. The explanatory note of this code provided that the idea to incorporate special laws into Code of Administrative Violations was dismissed due to the fact that that it would be too difficult due to the fact that pursuant to special laws companies are sanctioned under the rule of strict liability, while Code of Administrative Violations sanctions natural persons with necessity to identify the guilt of the accused.²⁶ It also shall be noted that a few of the special laws requires the circumstances regarding guilt to be identified while the case law on this issue is uneven. However, the newest case law regarding measures taken if the EU aid is misused forms a position that the identification of guilt is a must and the regulation providing otherwise is not compatible with the Constitution.²⁷

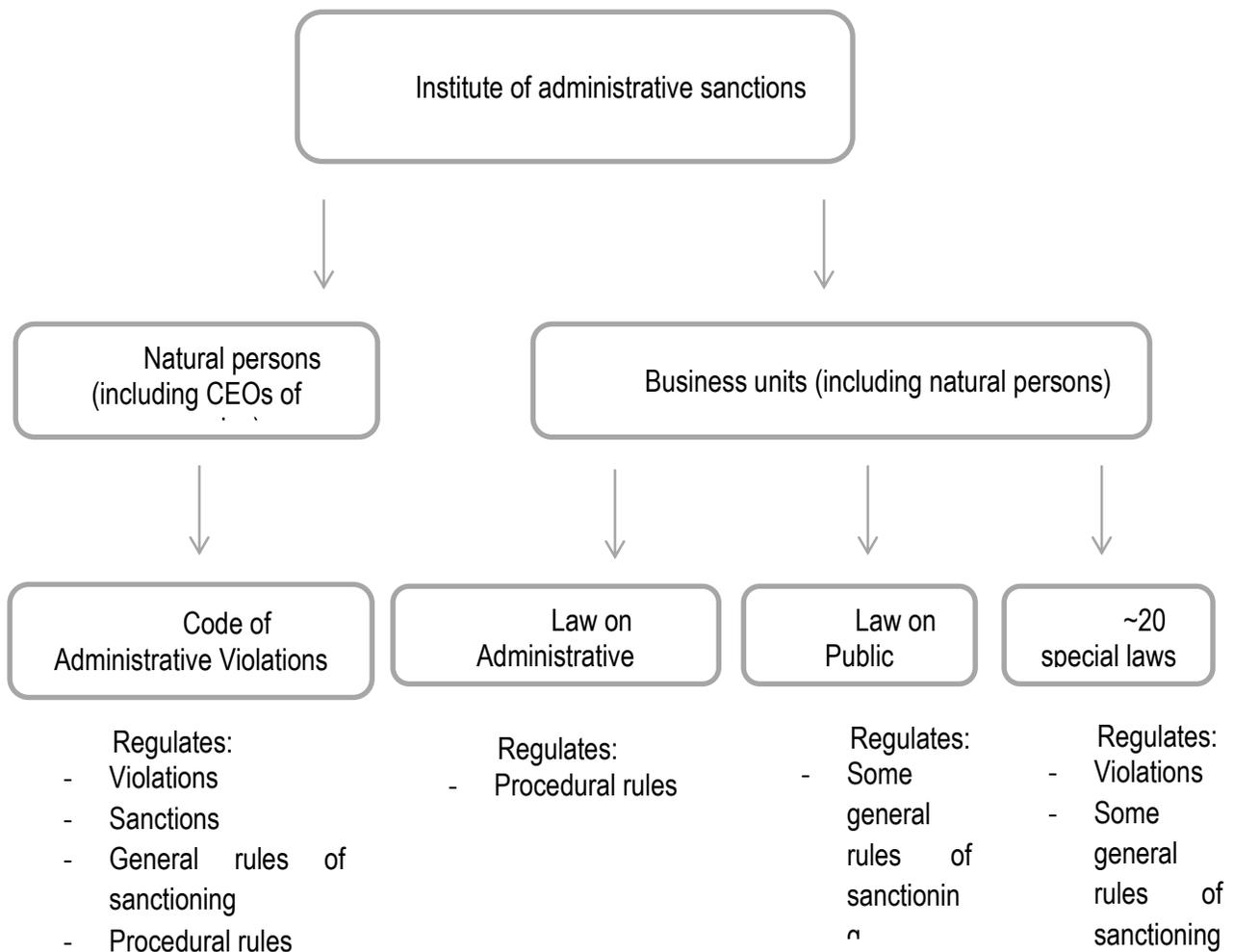
Special laws are considered to be brief and incomplete and usually cover only the violation itself and some rules regarding sanctioning. Due to vacuum of law some rules regarding administrative sanctioning were established in the law of Public Administration in 2014 (there are also doubt whether administrative sanctions fall into the sphere of public administration²⁸), but neither it, nor the special laws covered the procedure of disputing the imposed administrative sanctions and the amendments did not cover all necessary topics. The procedure of disputing the sanctions imposed pursuant to the special laws is set in the Law on Administrative Procedure, regulating disputes regarding public administration. Thus, currently the system of administrative sanctions in Lithuania is like this (see the scheme below):

- Code of Administrative Violations – regulates liability of natural persons as well as CEO's of companies (if a violation is committed by a company), defines violations, possible sanctions, general rules of sanctioning and procedural rules of disputing the sanction.
- Approximately 20 special laws – regulates liability of business units – companies or individuals, defines violation, possible sanctions, brief rules of sanctioning.
- Law on Public Administration – regulates some rules of sanctioning, applicable to sanctioning pursuant to special laws.
- Law on Administrative procedure – regulates procedural rules of disputing the sanction.

²⁶ The Parliament of the Republic of Lithuania explanatory note on the Draft Code of Administrative Violations [2014] http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=406528.

²⁷ For example, The Supreme Administrative court decision case No el-4-822/2017, http://www.lvat.lt/lt/normines-bylos/isnagrinetos-bylos_364/2017-metai_451.html.

²⁸ Supreme administrative court decision in case No eA-1736-552/2016 <http://infolex.lt/tp/1392366?nr=2>.



Variety of laws regulating relationships of the same nature would not be dangerous to the consistency of the legal system if these rules were harmonised. However, the system of administrative sanctioning in Lithuania is far from being harmonised or unified. For example, special laws and Code of Administrative Violations defines different circumstances mitigating or aggravating liability, different time limits to impose the sanction. Also, the Law on Administrative Procedure and the Code of Administrative Violations provide significantly different procedural rules, for example pursuant to the Law on Administrative Procedure the case is to be analysed by three-judge panel, while pursuant to the Code of Administrative Violations the case is to be analysed by one judge. Also, the Code of Administrative Violations does not provide the guarantee of reimbursing the litigation expenses while the Law on Administrative Procedure does as well as pursuant to the Criminal Code for that matter. Also, the graveness of sanctions varies significantly, for example failure to notify regarding concentration pursuant to the Code of Administrative Violations is punishable by a fine up to 50 000 euros, while pursuant to the Law on Competition can be punishable by a fine up to a 3 per cent of the annual turnover of the certain company. The graveness of the offences are also not harmonised with sanctions set in the Criminal code. ECHR provides case law that if administrative sanctions can be as severe

as criminal. the person should have the same guarantees and be subjected to the same rules as it would be available pursuant to the criminal system. Administrative liability can not only be as severe as criminal but also impose greater sanctions, e.g. Sanctioning on the ground of the Law on Competition, the Law on Energy etc., for example, Law on Competition sets a fine up to 10% of annual turnover, Law on Energy: a fine up to 1% of annual turnover, Law on VAT sets a fine up to 50% of unpaid VAT, Law on Alcohol Control and Law on Tobacco and Tobacco Products Control sets a suspension of licence, termination of licence. In comparison, Criminal Code sets a fine up to 57 000 EUR (natural person) or 1 900 000 EUR (company).

In 1999 the draft Code of Administrative Offences suggested incorporating sanctioning both, natural persons and companies. The issue was postponed by the Government until the relevant laws are amended. The issue was not reopened. In 2004 the draft Code of Administrative Offences suggested including sanctioning companies if the offences were committed negligently or intentionally. The issue was postponed by the Parliament until the possibility to include sanctioning pursuant to the special laws was analysed. The issue was not reopened. In 2009, it was proposed to integrate economic sanctions into the systems of criminal liability and administrative liability. The issue was not further developed. In 2010 legal scholars suggested integrating sanctioning natural persons and companies. The new Code of Administrative Offences (valid since 2017-01-01) regulates only natural persons and CEOs of companies. The explanatory note of the code provides that it would be too difficult to integrate all administrative sanctions into one law. As it was mentioned, in 2014 while preparing the new Code of Administrative Violations it was also decided that unifying the institute by codifying it was too difficult due to the rule of strict liability, applicable to companies while sanctioning pursuant to the special laws.

Therefore, the institute of administrative sanctions in Lithuania is chaotic and not consistent although there have been a number of initiatives to unify the institute even though there were options available, thus, further development of the institute unifying it would probably benefit the whole system.

3. Possible influence of Brexit on the EU legal system and the institute of administrative sanctions

As it was discussed, EU institute of administrative sanctions is only at its initial stages and was developed in order to mitigate the consequences that lack of the EU competence in sanctioning might create. Therefore, currently the institute of administrative sanctions of the EU is rather scattered and fragmented, thus in a need of further developed. However, in the light of the Brexit it is not clear which tendency the EU should adopt in developing the institute of administrative sanctions.

It is not disputable that a homogenous sanctioning system is clearer and easier applicable than a fragmented regulation. On the one hand, strengthening integration of the member states in the sphere of administrative sanctions might bring the member states closer and create stringer ties. It also might create a more uniform, homogenous and clearer legal system not only in the EU, but also in the member states which, judging by the example of Lithuania, might need further improvement. On the other hand, raising nationalistic moods in some of the member states and the example of Brexit may indicate that the member states seek more autonomy and thus might resent the idea of further integration especially in the sanctioning sphere. This point of view is also grounded by the fact that the EU has a hybrid competence legislating in the sphere of criminal justice and limited competence of enforcing its legislation (also called “criminalising without punishing”).²⁹ Thus, if the institute of administrative sanction was to be further integrated, it would require the

²⁹ Colson, Renaud, Field, Stewart ‘EU Criminal justice and the challenges of diversity’ (Cambridge: Cambridge university press 2016)
<https://books.google.lt/books?id=6cfxDAAAQBAJ&pg=PA34&lpg=PA34&dq=criminal+justice+competence+eu&source=bl&ots=rnhtRUO5Fi&sig=4cFuWI6xVDXgc->

expansion of the EU competence into criminal justice sphere in the light that administrative sanctions can be considered as criminal in respect of the European Convention of Human Rights. Therefore, further mandatory legislation in a sphere in which the EU competence is not entirely clear or even expanding competence into politically sensitive area might receive opposite result and only strengthen the discussions in other member states regarding initiating exiting the EU.

The other choice is to leave the institute of administrative sanctions of the EU as it is at least for some time. Although it would hinder the development of the administrative sanctions, it also might help prevent the member states from initiating exit of the EU and ensure stability in the EU.

Conclusions

In the light of what was discussed in this article, the following conclusions can be made. The institute of the administrative sanctions of the EU is an autonomous instrument influenced by the experience of the member states created as a tool in order to ensure compliance with EU law and protect financial interests of the EU. The institute was created out of need and is rather fragmented than consistent. Although creating a homogenous system might be beneficial for the legal system as it is shown with the example of Lithuanian institute of administrative offences, strengthening integration in politically sensitive sphere might also create further cracks as the Brexit has clearly shown. Therefore, evaluating nationalistic tendencies in Europe, it might be more beneficial to postpone further development of the institute of administrative sanctions in order to ensure the stability of the EU.

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LOST IN TRANSLATION – BEST INTEREST OF THE CHILD PRINCIPLE AND REFUGEE CHILDREN IN CRISIS

Karolina Mendecka¹

Abstract

Children suffer the most from the greatest emergency of our times – the refugee crisis. In addition to their vulnerable position, they encounter endless obstacles on their way to a dignified childhood and the enjoyment of basic human rights. In order to maximize their protection, the refugee law has to be considered through the international human rights standards. The 1951 Refugee Convention and the *non-refoulement* principle play an important, but limited role in children protection. Therefore, the aim of the article is to evaluate the complementary role of the Convention on the Rights of the Child, with particular reference to the best interest of the child principle, in deciding upon internationally displaced children's plight. The best interest of the child standard receives a worldwide acceptance as a rule of procedure. It can also serve as a substantive right, especially for unaccompanied children. The paper examines the indeterminacy of the best interest as an interpretative principle and explores the dangers stemming from cultural essentialism while considering what is best for asylum seeking and refugee children. Importantly, the arguments such as national security or public safety cannot serve as valid reasons to override the child's best interest, which is particularly important to note in the current climate of suspicion and prejudice towards refugees. In order to achieve the widest possible scope of protection for asylum seeking and refugee children, the best interest principle has to be taken together with principle of non-discrimination and the right of the child to be heard. Only open-minded and comprehensive approach can safeguard refugee children's rights.

Keywords: best interest of the child, children's rights, general principles, children's rights, refugee children

Introduction

There are currently around 21.3 million refugees around the world. Approximately, 53% of the refugee population come from just three countries: Somalia, Afghanistan and Syria. Over half of them are children under the age of 18², fleeing conflicts and persecutions. Children are exceptionally vulnerable to a wide array of human rights violations – from the moment they are displaced, through the process of asylum seeking and long after being granted or refused a refugee status. However, there are additional layers to the problem. Many children seeking protection under international law are unaccompanied, usually lost in the process, or sent by their concerned relatives in a genuine hope for a better life. Other times, the child may be found to have committed war crimes or crimes against humanity. The number of possible scenarios is unlimited, to which international human rights law, along with international refugee law, strive to provide answers.

The scope of protection that international law offers is reliant on the cooperation with sovereign states, which are increasingly protesting that the current international regime governing the refugee status places

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² <http://www.unhcr.org/figures-at-a-glance.html> [access date: 20.03.2017].

an excessive burden upon them³. Therefore, in recent years states have been subjecting asylum seekers to more rigorous evaluations, which in many instances leads to the *refoulement*. Additionally, due to numerous terrorist attacks and associating them with Islam, there is a soaring climate of suspicion towards refugees from non-Western countries.

The perspectives for a child asylum seeker or a refugee therefore seem not promising. However, there are several instruments, which address their complex situation. Firstly, the 1951 United Nations (*hereinafter* UN) Convention Relating to the Status of Refugee (*hereinafter* the 1951 Convention, the Refugee Convention, the RC)⁴ along with its Protocol from 1967⁵ plays an important, but limited role in children protection. Therefore, the UN Convention on the Right of the Child (*hereinafter* the CRC)⁶ serves as a supplementary instrument. Its almost universal ratification (notable absence of the USA⁷) along with its monitoring body (that 1951 Convention has not) – Committee on the Rights of the Child (*hereinafter* the Committee) arguably guarantees more scrutinized and wider scope of refugee children's rights protection. Especially relevant provision is the best interest of the child – the basic guiding principle in any child care and protection circumstances – articulated in art. 3(1) of the CRC.

This article aims to assess instruments available for children under international law, with a particular reference to the best interest principle. In Part 1 it will be evaluated how does international human rights law complement refugee law, in relation to children. Part 2 will cover the best interest of the child principle, how it is interpreted and its complementary role in determining the protection of asylum seeking and refugee children. Lastly, in Part 3 the issue of indeterminacy of the principle will be discussed, along with other obstacles, that are direct consequences of prejudice and bias, which those children encounter. Its goal is to provide an overview of the selected mechanisms already available, show the influence of the general principles on the plight of refugee children, and point to the range of problems, that may arise when determining what is indeed “best” for the refugee child.

1. International human rights law and refugee law

International law has to be read in a wide context – states are bound by various international obligations stemming from different treaties. They have to be perceived not as unrelated documents, but as an entity, in order to guarantee the maximum protection⁸. Therefore, international human rights law can and should fill gaps in refugee law, and provide necessary directions. Therefore, in the context of asylum claiming and refugee children, the 1951 Convention has to be viewed through the lens of the CRC. As G. Goodwin-Gill has pointed out “it may even, as with the Convention on the Rights of the Child, call for a total re-alignment of protection away from the formalities of 1951-style refugee status towards a complete welfare approach”⁹.

Despite the underlying normative assumption of the RC that refugees are adults¹⁰, the influence of the 1951 Convention is unprecedented. Above all, it contributed to the crystallization the prohibition of

³ M. Happold, ‘Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention’ [2003] 24 Immigration and Nationality Law Review 1132.

⁴ UN General Assembly, Convention Relating to the Status of Refugees [1951] United Nations, Treaty Series, vol. 189, 137.

⁵ UN General Assembly, Protocol Relating to the Status of Refugees [1967] United Nations, Treaty Series, vol. 606, 267.

⁶ UN General Assembly, Convention on the Rights of the Child [1989] United Nations, Treaty Series, vol. 1577, 3.

⁷ The USA had, however, signed the CRC, thus is obliged to refrain from acts that would undermine and defeat its objective, art. 18 of the United Nations, Vienna Convention on the Law of Treaties [1969] United Nations, Treaty Series, vol. 1155, 331.

⁸ See G. S. Goodwin-Gill, ‘Unaccompanied refugee minors’ [1995] 3 International Journal of Children’s Rights 406 .

⁹ G. S. Goodwin-Gil, ‘Who to Protect, How..., and the Future’ [1991] 1 International Journal of Refugee Law 6.

¹⁰ UN Refugee Convention explicitly addresses a refugee child only in the aspects relating to “family unity” – states should take the “necessary measures for the protection of the refugee’s family especially with a view to: (...) the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption”.

refoulement (art. 33) into a customary law. Moreover, it is also argued that it had created the “right to asylum”, which is however widely debated. Opponents point out that although art. 14 of the RC guarantees the right “to seek and enjoy in other countries asylum from persecution” there is no explicit mention of the right to asylum¹¹. However, this is contested as an out-dated view, as “the purpose of the Refugee Convention is precisely to provide international protection (or asylum) to persons defined as refugees in the form outlined in the Convention¹²”.

1.1. Asylum seeking and refugee children under the 1951 Convention

Children asylum applications are usually considered in conjunction with the claim of a parent or another family member, or through a group determination procedure¹³. Typically, the individual application is only considered when the child is unaccompanied (ca. 5% child refugee population)¹⁴. The UN High Commissioner for Refugees (HRC) emphasized that all children seeking asylum “are entitled to special care and protection¹⁵”, especially however when unaccompanied.

The criteria in 1951 Convention for obtaining a refugee status include, *inter alia*, having a “well-founded fear (emphasis added) of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (art. 1 RC). The HRC has rightfully pointed out that children can manifest their fear in different ways than adults¹⁶. Additionally, there are several children-specific violations that require individual assessment. For example, children can be threatened by gender roles imposed by religion and other harmful traditions, or denied education for reasons of race or nationality, being HIV positive etc. Therefore, the determination of a refugee status should be examined in-depth in order to correctly address their plight. Moreover the HRC Guidelines highlight that children refugee status application has to be given a priority, due to their vulnerability and special needs¹⁷. Additionally, children should be kept informed about all procedures that affect them, in a manner appropriate to their age.

Notwithstanding, “adopting a child-sensitive interpretation of the 1951 Convention does not mean that child asylum-seekers are automatically entitled to refugee status¹⁸”. Therefore, if a child (especially unaccompanied) does not qualify for a refugee status and is subjected to the *refoulement*, international children’s rights law may serve as an additional source of protection.

1.2. Convention on the Rights of the (Refugee) Child

International human rights law is perpetually used to fill in the gaps in the refugee protection system. For example, the Refugee Convention in art. 33(2) provides exceptions from the *non-refoulement* principle in cases, when there are reasonable grounds for regarding that particular person constitutes a danger to the country. Nonetheless, the Convention Against Torture in art. 3, prohibits the return of *all* individuals when

¹¹ See e.g. M. Happold, *supra* note 3.

¹² A. Edwards, ‘International Refugee Law’ in D. Moeckli, S. Shah, S. Sivakumaran (eds.) ‘International Human Rights Law’ (Oxford: Oxford University Press 2010) 515.

¹³ J. McAdam, ‘Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protections’ [2006] 14 International Journal of Children’s Rights 255.

¹⁴ <http://www.unhcr.org/statistics/unhcrstats/3c99ab4d4/unaccompanied-minors-europe-statistical-summary.html> [access date: 26.03.2017].

¹⁵ UN High Commissioner for Refugees (UNHCR), Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum [1997] 2.

¹⁶ *Ibid*, para 8.6.

¹⁷ *Ibid*, para 66.

¹⁸ Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 19c07 Protocol relating to the Status of Refugees [2009] HCR/GIP/09/08

there is a threat of torture, thus making the exceptions provided in art 33(2) of the 1951 Convention *largely irrelevant*¹⁹. Human rights bodies and courts have later reaffirmed the absolute prohibition of expulsion to torture, even in times of emergency (e.g. in *Saadi v Italy*²⁰ or in *Chahal v the United Kingdom*²¹). Naturally, it also applies to children who are suspected of war crimes and war crimes or crimes against humanity, if upon return he or she would be subjected to torture or human or degrading treatment²².

Therefore, there can be no doubt that, for the maximum protection, refugee children's rights have to be read in conjunction with human rights treaties. Especially crucial in the context of the refugee child is the CRC, which provides the widest framework of protection. The Conventions on the Rights of the Child is one of the most detailed and comprehensive human rights instrument²³. Its adequacy for the displaced children protection is confirmed in art. 22, which reads: "state parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said states are parties". Therefore, protection and assistance applies to both: asylum-seeking children and those children who are already considered a refugee²⁴. The Committee on the Rights of the Child has indicated that the protection and humanitarian assistance from the provision includes civil rights and freedoms, as well as economic, social and cultural rights²⁵. Some CRC provisions are, according to the Committee, especially relevant for refugee protection: art. 7 (health and health services), art. 20 (family reunification), art. 23 (disabled children), art. 30 (children belonging to a minority), art. 20 (children deprived of their family environment), art. 28 (education).

Art. 22 of the CRC is from one perspective a truly unique provision – there is no similar article in any of the major universal human rights instruments. On the other hand, it only endorses general entitlements of protection²⁶, and arguably does not provide satisfactory solution to the plight of refugee or asylum-seeking children.

1.3. Complementary protection under the CRC

Despite a certain degree of protection that is being provided in international law, seemingly both the CRC and the 1951 Convention fail to address the situation of child refugees in comprehensive and satisfactory manner. The Refugee Convention neglects children in whole, not recognizing their particularly vulnerable position. It might be due to the fact that it has been drafted almost 70 years ago, but has been supplemented by the HRC Guidelines and Recommendation relating to children. Nonetheless, it still does not adequately address the plight of asylum seeking and refugee children.

The CRC in art. 22 also does not explicitly provide sufficient solutions for displaced children²⁷. However, as pointed out by J. McAdam, the refugee definition may change or develop with time, thus a

¹⁹ A. Edwards, *supra* note 12, 522.

²⁰ *Saadi v Italy* [2008] ECHR, Application No. 37201/06.

²¹ *Chahal v the United Kingdom* [1996] ECHR Application No. 22414/93.

²² M. Happold, *supra* note 3, 1173.

²³ P. Alston, 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights' [1994] 8 *International Journal of Law & The Family* 1.

²⁴ S. Deterick, 'A Commentary on the United Nations Convention on the Rights of the Child, (The Hague/Boston/London: Martinus Nijhoff Publishers 1999), 88.

²⁵ UN Committee on the Rights of the Child (CRC), General comment No. 6 [2005] *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6.

²⁶ G. S. Goodwin-Gill, *supra* note 8, 407.

²⁷ *Ibid.*

person has to be considered a child first, before he or she is seen as a refugee – “it is therefore vital to view the rights of child asylum-seekers not only in the context of the Refugee Convention, but also in the specific framework of the Convention on the Rights of the Child, in attempt to fill the gaps and achieve the best possible combination of protection measures available under international law²⁸”. Arguably then, in order to achieve maximum protection for refugee and asylum seeking children, all decisions concerning them have to be perceived through the lens of general principles enshrined in the Convention, especially through the principle of the best interest of the child, to which we now turn.

2. The best interest principle

The best interest of the child is one of four general principles in the Convention on the Rights of the Child, along with non-discrimination (art. 2), right to life, survival and development (art. 6) and the right of the child to be heard in all decisions that affect him or her (art. 12). The best interest principle is considered to be an “umbrella” provision and it is also included in art. 9 (separation from parents), art. 18 (parental responsibilities), art. 20 (children deprived of their family environment), art. 21 (adoption), art. 37 (right not to be subjected to torture), art. 40 (juvenile justice).

The best interest principle has been present in the arena of international law since the 1959 Declaration of the Rights of the Child²⁹. From that moment, it has received universal acknowledgement, but its meaning has been widely discussed. As P. Alston has remarked “perhaps the strongest evidence of the extent to which the principle has gained general acceptance is the frequency with which it is used in legal analyses at the international level in general³⁰”. Indeed, the principle has gained worldwide recognition and has significantly developed in international human rights law, flourished in human rights courts jurisprudence and influenced domestic laws. It is not only an interpretative legal principle and a procedural rule, but also a substantive right that should shape all decisions and actions concerning children in order to effectively fulfil children’s rights and combat all issues that affect them³¹.

2.1. Art. 3 and the Convention on the Rights of the Child

The Convention on the Rights of the Child in art. 3 stipulates that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”. The phrasing of the article raised immediate concerns. Firstly, according to the literal interpretation, ‘a’ is weaker than ‘the’ and arguably ‘primary’ is not as strong as, for example, ‘paramount’³². It has to be noted that during the Convention’s drafting, the wording of the principle was not broadly discussed. Notwithstanding, the CRC’s art. 3 *travaux préparatoires* show that the adoption of words – “a primary consideration” instead of “the primary consideration”, was made due to arguments that in some situations, the interest of society or justice should prevail over the interest of the child³³. However, P. Alston suggests that the choice of the article ‘a’ instead

²⁸ J. McAdam, *supra* note 13, 269.

²⁹ UN General Assembly, Declaration of the Rights of the Child [1959] A/RES/1386(XIV).

³⁰ P. Alston, *supra* note 23, 4.

³¹ 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), CRC /C/GC/14, 8.

³² S. Parker, ‘The Best Interest of the Child – Principles and Problems’ [1994] 8 *International Journal of Law & The Family*

³³ UN Doc. E/CN.4/1989/48, para121, S. Deterick, *supra* note 24, 88.

of 'the' during the draft of the CRC was made only to provide flexibility only in some *extreme* cases (a childbirth etc.)³⁴.

Secondly, "in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies", indicates that the provision is directly relevant also to administrative decisions concerning child asylum seekers and refugees³⁵.

Lastly, the Committee on the Rights of the Child in the General Comment 14 evaluated that the best interest is not just primary, but a '*paramount*' consideration in all actions concerning children by all public bodies³⁶. This approach is also applied in the Inter-American Court of Human Rights (e.g. *Geleman v Uruguay*³⁷). The concept of the best interest principle as a paramount has been developed also in the European Court of Human Rights. In *Neulinger and Shuruk v Switzerland* the Court confirmed that there is "currently broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interest must be paramount"³⁸.

The Convention on the Rights of the Child does not explicitly indicate what kind of interests can override the best interest of the child. It is however suggested that only rights-based interests can trump that of the child. In General Comment 6 the Committee pointed out that "non-rights based arguments such as those relating to general migration control, cannot override best interest considerations"³⁹.

2.2. In the best interest of a (refugee) child

It has been noted by the Committee on the Rights of the Child in relation to asylum seeking and refugee children that "the purpose of determining the best interest of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the (...) Convention relating to the Status of Refugees⁴⁰". Therefore, it has confirmed that standards of international protection of displaced children should be considered in the light of the best interest principle. The Committee also highlighted that the principle is applicable throughout all the stages of displacement cycle⁴¹. Accordingly, the UN High Commissioner for Refugees noted "that the basic guiding principle in any child care and protection is the principle of 'the best interest of the child' ⁴²".

In a nutshell, the 1951 Convention along with 1967 Protocol should to be interpreted accordingly. First, it is stated that "every child who has a well-founded fear of being persecuted" for one of the reasons from art. 1(b) Refugee Convention is a refugee. As it was remarked above, the principle requires a careful examination of the "well-founded fear" from the child perspective and considering his or hers best interest. Secondly, a child who holds the refugee status cannot be forced to go back to the country of origin⁴³. The scope of *non-refoulement*, as it has been already indicated, has been broadened through international human rights instruments, especially through art. 3 of the CAT, which prohibits the return to a state where there are "substantial grounds for believing that he would be in danger of being subjected to torture". Therefore, the prohibition has to be applied with stricter scrutiny, with additional layer of the best interest of the child principle.

³⁴ P. Alston, *supra* note 23, 12.

³⁵ CRC/C/GC/14, *supra* note 32, para 29.

³⁶ *Ibid*, para 38.

³⁷ *Geleman v Uruguay* [2011] I-ACHR Series C No 221.

³⁸ *Neulinger v Shuruck v Switzerland* [2010] ECHR Application No. 41615/07.

³⁹ CRC/C/GC/2005/6, *supra* note 25, para 86.

⁴⁰ CRC/C/GC/14, *supra* note 32, para 75.

⁴¹ CRC/C/GC/2005/6, *supra* note 25, para 19.

⁴² UN High Commissioner for Refugees Guidelines, *supra* note 15, 1.

⁴³ UN High Commissioner for Refugees (UNHCR), *Refugee Children: Guidelines on Protection and Care* [1994] 18.

There are many children-specific grievances that have to be taken into consideration when considering the *refoulement*.

In circumstances when the child is found ineligible for asylum, the solution to his or her situation should also be made in the best interest “as soon as practicable”⁴⁴. If the child is unaccompanied, the principle requires that “the child not be returned unless, prior to the return, a suitable care-giver such as a parent, other relative, other adult care-taker, a government agency, a child-care agency in the country of origin has agreed, and is able to take responsibility for the child and provide him/her with appropriate protection and care”⁴⁵. It is then noted that usually reuniting with family will be in the child’s best interest. However, this has to be examined and “the best interest of the child should take precedence”⁴⁶ even in family reunification situations. The Committee on the Rights of the Child in General Comment 6 has addressed situations, in which the return to the family is not possible: “in the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin”⁴⁷. Additionally, when deciding upon a *refoulement*, the decision-maker is expected to provide a compelling and evidence-based justification for such determination, keeping in mind that the argument has to be right-based.

In the light of the above, J. M. Pobjoy argues that the best interest principle from art. 3 CRC serves as an independent source of protection under the international law: “protection may proscribe the removal of a child notwithstanding the fact that the child is not eligible for protection as a refugee or protection under the *non-refoulement* obligations in IHRL”⁴⁸. It is an example of using the best interest as a substantive right – “intrinsic obligation for States (...) directly applicable (self-executing)”, which “can be invoked before a court”⁴⁹.

J. McAdam juxtaposes this optimistic conclusion. She sceptically points out that “although this principle influences the procedures and treatment relating to child asylum-seekers, especially unaccompanied minors, consideration of the ‘best interest’ principle in the substantive determination of refugee status itself is widely overlooked”⁵⁰. Concurring with that statement, it has to be concluded that the independent source of international protection under the best interest principle is exclusively prescribed to unaccompanied children that do not qualify as refugees. If the child is accompanied with a parent, or another family member, the principle is no longer being invoked when asylum claim has been rejected.

2.3. (Un)Settled understanding of the best interest

To a degree, the scope of the best interest of the child has been established. It is generally accepted that the child’s best interest should be *paramount*, and only in exceptional situations other rights may prevail. International human rights institutions’ firm standpoint is that only outstanding right-based interest can override the child’s best interest, therefore *national security*, *public safety* cannot serve as grounds for decisions contrary to what is best for the child. This viewpoint influences the well-established international law that “a state has the right to control the entry of non-nationals into its territory”⁵¹. Not only refugee law

⁴⁴ UN High Commissioner for Refugees Guidelines, *supra* note 15, para 9.2.

⁴⁵ *Ibid*, para 9.4.

⁴⁶ *Ibid*, para 9.8.

⁴⁷ CRC/GC/2005/6, *supra* note 25, para 85.

⁴⁸ J. M. Pobjoy, ‘The best interest of the child principle as an independent source of international protection’ [2015], 64(2) *International Law Quarterly* 326.

⁴⁹ *Ibid*, 327.

⁵⁰ *Ibid*, 331.

⁵¹ Abdulaziz, Cabales and Balkandali v. the United Kingdom, [1985] ECHR Application Nos. 9214/80, 9473/81, 9474/81.

restrains state sovereignty in this regard, but also international human rights law through the Convention on the Rights on the Child put effective boundaries thorough the application of the best interest principle.

Undoubtedly, the principle has gained worldwide recognition and acceptance, and it is not being contested, especially as the rule of procedure and to a certain degree, as a substantive right. However, as the interpretative legal principle, the best interest principle remains ambiguous.

3. Obstacles to the best interest interpretation

The best interest of the child, as any other legal principle, is a dynamic concept and flexible in its nature. Nonetheless, it has been shaped by judicial interpretations, general comments, recommendations and guidelines. From one perspective, general principles are purposely vague in order to leave decision-making bodies some room for interpretation. On the other hand, the indeterminacy and open-endedness of the best interest principle raises concerns about its efficiency, also in matters concerning refugee children.

3.1. Indeterminacy of the principle

S. Parker distinguishes two theoretical schemes that display the allegation of indeterminacy of the best interest principle. First pathway, the so-called “indeterminacy and rational choice”, was proposed by J. Elster⁵². He expanded another best interest principle antagonist’s perspective. It was R. Moonkin who first acknowledged that the principle in fact is hazardous –“the phrase is so idealistic, virtuous and high sounding that it defies criticism and can delude us into believing that its application is achievement itself. Its mere utterance can trap us into the self-depiction that we are doing something effective and worthwhile. However, the flaw is that what is best for any child or even children in general is often indeterminate and speculative and requires a highly individualized choice between alternatives⁵³”. J. Elster, basing on that criticism, provided the following framework. In order to achieve a determinate answer all the options would have to be known, as well as all the possible outcomes, along with the probabilities of each possible outcome. Moreover, the value attached to each outcome would have to be known. If decision-makers have a different knowledge about any of the stages, the outcome would be different every time, which thus validates the indeterminacy allegation of the best interest of the child principle⁵⁴. He based his methodology on the example of a custody battle, where there are usually only two initial choices (the mother or the father). Whenever there are more possibilities to this scheme, it would complicate the process even more.

The second approach is the “rule scepticism”, stemming from the Critical Legal Studies. It is argued that the law itself is indeterminate, accordingly so is the principle. Notably, S. Kripke based his theory on mathematical examples, proving that rule following in determining the best interest is illusory⁵⁵.

S. Parker accurately concluded this dispute, by saying that the best interest principle is *neither wholly useful nor wholly useless*⁵⁶, which will be deliberated in the following paragraph.

3.2. Prejudice, bias and the best interest

⁵² J. Elester, ‘Solomonic Judgements: Against the Best Interest of the Child’ [1987] 54 The University of Chicago Law Review 1.

⁵³ R. Mnookin, E. Szwed, ‘The Best Interest Syndrome and the Allocation of Power in Child Care’ in H. Geach and E. Szwed (eds) ‘Providing Cibil Justice for Children’ (London: Edward Arnold 1983), 8.

⁵⁴ J. Elster, *supra* note 52, 12.

⁵⁵ S. Parker, *supra* note 33, 33.

⁵⁶ *Ibid*, 39.

The theoretical argument about indeterminacy of the best interest principle is challenged by the praxis. In fact, it has been contested that the principle is viewed from a prejudiced perspective. It has been pessimistically noted that the best interest principle “provides a convenient cloak for bias, paternalism and capricious decision-making. Even worse, the open-endedness of the standard can legitimate practices in some cultures, which are regarded in other cultures as harmful to children⁵⁷”. Arguably however, there is also an opposite danger of bigotry towards certain cultures, considered as “backward”, which reproduces essentialism. S. Parker concludes, “both cultural domination and cultural relativism should be avoided in any pure forms. It would be wrong to assume that a wholly Western interpretation of the best interest of the child is necessarily preferable. It would be wrong also to assume that there is no basis at all for preferring one interpretation to other⁵⁸”. This observation is especially relevant to refugee children, who, after all, primarily flee Syria, Afghanistan or Somalia and other non-Western countries.

Without any doubt international human rights law has been created from predominately Western perspective. Meanwhile, non-Western societies are based on different merits, where the family, tradition and obedience are of a great value. Even the definition of a ‘child’ or ‘childhood’ has evolved on the Western ground, whereas “there are bound to be significant differences between the perceptions of childhood and circumstances affecting behaviour regarding children in the South and North⁵⁹”. Therefore, asylum seeking and refugee children may encounter problems based on cultural essentialism, which is defining people from the ‘Third World’ or ‘Global South’ as “victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West⁶⁰”.

When a child bride crosses the border in a hope for refuge, she is usually separated from her husband, as the marriage is considered unlawful under national law. The European Court of Human Rights addressed this issue in *Z. H. and R.H. v Switzerland*⁶¹ confirming that states are under no obligation to recognize religious child marriage. In reality is however many underage wives arriving to Europe are pregnant, already have a child, and for them the ‘childhood’ is long gone. Separating the family or even the spouses may lead to further disasters, worsening their plight. In such cases, the best interest principle is used as a tool to diminish the right to a family life.

Labelling the present-day “child” bride as a victim through the use of the best interest principle standard, is not always adequate, nor necessary⁶², because “what may appeal to one school as torture, may be absolved or approved by another as culture⁶³”. Those arguments are also applicable to other non-Western practices that are seen as harmful. Therefore, arguably, the other CRC principles should serve as a complementary but inseparable tool in assessing delicate circumstances of the refugee child.

3.3. The principle from another angle

Similar conclusion is reflected in UN HCR Guidelines on Determining the Best Interest of the Child. It has been pointed out that the framework for the “best interest determination” should include “adequate child

⁵⁷ Ibid, 26.

⁵⁸ Ibid, 40.

⁵⁹ A. An-na'im, ‘Cultural Transformation and Normative Consensus on the Best Interest of the Child’, [1994] 8 International Journal of Law & The Family 62.

⁶⁰ R. Kapur, ‘The Tragedy of Victimization Rhetoric, Resurrecting the „Native” Subject in International/Post-Colonial Feminist Legal Politics’ [2002], 15 Harvard Human Rights Journal 1.

⁶¹ *Z.H. and R.H. v. Switzerland*, 2015] ECHR Application no. 60119/12.

⁶² D. Kennedy, ‘The international Human Rights Movement: Part of the Problem?’ [2001] 3 European Human Rights Law Review 245.

⁶³ L. Amede Obiora, ‘Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision’ [1997], 47 Case Western Reserve Law Review 277.

participation without discrimination”⁶⁴. Therefore, the HCR stresses the importance of other CRC principles: non-discrimination (art. 2) and the right to be heard (art. 12), which serve as supplementary factors in resolving what is best for the child⁶⁵.

This approach also stems from Vienna Declaration and Programme of Action: “in all actions concerning children, non-discrimination and the best interest of the child should be primary considerations and the views of the child given due weight”⁶⁶. It is called the “triangle of rights” in the HRC Refugee Children – Guidelines on Protection and Care⁶⁷. Thus, those three principles considered together provide the widest scope of protection for refugee children. Their vulnerable position makes them particularly prone to discrimination on the grounds of race, religion and gender. they can also suffer from intersectional discrimination and bias. Additionally, the opportunity to be heard in every proceeding that affect them, judicial or administrative, is essential to their best interest, as he or she is given a chance to address his or hers fears and concerns. It is particularly crucial in deciding upon the refugee status or the *refoulement*.

Arguably, in order to achieve the satisfactory results from the interpretation of the best interest, it has to be applied in conjunction with other general CRC principles. Such approach allows best for respecting the experiences, background and culture of refugee children through open-mindedness, non-discrimination and dialogue.

Conclusions

The aim of the article was to discuss the protection available for asylum seeking and refugee children. They are the ‘forgotten victims’ of one of the greatest humanitarian emergencies of our times – the refugee crisis. Children encounter countless obstacles on their way to the dignified childhood and enjoyment of basic human rights. Therefore, Part 1 identified the available mechanisms in refugee law and international human rights law. It was pointed out that although the 1951 Convention and the Convention on the Rights of the Child offer a degree of protection (refugee status and the principle of *non-refoulement*), they do not provide satisfactory solutions to the unique circumstances of refugee children. Therefore, in Part 2 the focus was switched to the framework of protection provided under international human rights law with particular reference to the child’s best interest standard stemming from the CRC. The influence of the best interest principle on the refugee law was examined. It was concluded that the principle receives a worldwide acceptance, especially as a rule of procedure. Moreover, it has been established that sometimes the best interest principle may serve as an independent source of protection. It was pointed out that the main controversy concerns the interpretation of this legal principle, which was discussed in Part 3. Many argue that the ‘best interest’ is indeterminate. Notwithstanding, it was observed that the best interest is constantly interpreted in a prejudiced and essentialist manner, which may have a direct, negative effect on refugee children, who come from non-Western cultures. Therefore, the main finding of this short study pointed out to the necessity of holistic approach when deciding upon a case concerning asylum seeking and refugee children. Firstly, it is necessary to consistently remind that under no circumstances non-rights based arguments about national security or public order can override the refugee child’s best interest. It is especially important in the light of present-day unwelcoming climate for refugees. Secondly, it has to be emphasized, that the best interest of the refugee child is inherently connected to other principles, especially to non-discrimination and the right to be heard. In order to maximize refugee children’s protection, a truly

⁶⁴ UN High Commissioner for Refugees (UNHCR), UNHCR Guidelines on Determining the Best Interests of the Child [2008].

⁶⁵ The fourth principle of the CRC, right to life, survival and development (art. 6) although crucial, for the purpose of this paper, will not be further discussed.

⁶⁶ UN General Assembly, Vienna Declaration and Programme of Action [1993] A/CONF.157/23, para21.

⁶⁷ UN High Commissioner for Refugees, *Refugee...*, supra note 44, 20.

comprehensive, open-minded and unbiased assessment has to be made to deliver the promise of *universal, interrelated, interdependent and indivisible* rights for all children.

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SMART REGULATION FOR LOW – CARBON FUTURE

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Abstract

The European Union (EU) is moving towards the creation of a competitive low carbon economy. The main ways for this transition are clean energy and reduction of greenhouse gas emissions. Nowadays the energy sector in Europe produces the biggest amount of greenhouse gas emission and because of this fact the decarbonisation of economy requires an increased share of clean renewable energy. For a long period of time renewable energy has been regarded as alternative to conventional energy, but in recent times its role has changed: from alternative to conventional energy to its dominant source. These changes in energy paradigm and sustainable development of renewable energy require new policy solutions and intelligent regulation. The EU is working on elaboration of relevant energy and climate policy and legal framework able to provide a favourable platform for development of eco-innovation in particular environmentally friendly renewable energy technologies. It is the energy and climate EU policy and legal framework that fall under the scope of investigation of the paper. In parallel, the EU is striving to make its policy more innovative and to create innovation mechanisms in regulation. The paper combines together the analysis of 2020 and 2030 forward – looking energy and climate framework of the EU with its incentives to adopt smart regulation providing certainty and predictability. The paper reveals the fragile points of the transition towards low carbon economy.

Keywords: low carbon economy, renewable energy, smart cities, smart regulation

Introduction

The global energy system is changing. The energy system *per se* is quite dynamic. The changes are occurring within the energy system itself (such as discovering potential of liquefied natural gas, increase share of renewable energy in total energy consumption, carbon capture and storage, energy storage, smart grids and meters) and outside of it but influencing its development (geopolitics, global economy, climate change, demographic situation, technology innovation).

It is axiomatic that energy, environment and climate change are interrelated. Energy sector is the source of at least two-thirds of greenhouse-gas emissions. Growth in energy-related CO₂ emissions stalled completely in 2015 mainly due to a 1.8% improvement in the energy intensity of the global economy, a trend bolstered by energy efficiency and the expanded use of cleaner energy sources worldwide². Combating climate change and its impacts and ensuring access to affordable, reliable, sustainable and modern energy for all are amid the aspirational and global goals of the 2030 United Nations (UN) Agenda for Sustainable Development³.

Energy access and fight against climate change have become a matter of global concern because these issues cannot be solved at the level of a single state.

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²International Energy Agency 'World Energy Outlook 2016. Executive summary' [2016] at <https://www.iea.org/publications/freepublications/publication/WorldEnergyOutlook2016ExecutiveSummaryEnglish.pdf>.

³UN, the General Assembly, Resolution on 25 September 2015 'Transforming our world: the 2030 Agenda for Sustainable Development' [2015] at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

Yet 17% of global population lack access to electricity and 38% lack clean cooking facilities⁴.

Uneven access to sustainable energy is not the only human factor influencing the global energy landscape. Another one is the impact of climate change on migration. The environmental degradation and, in particular, climate change became a driver of population displacement. In the mid-1990s up to 25 million people were forced from their homes by a range of serious environmental pressures⁵. After the Sustainable Development Goals of the 2030 UN Agenda for Sustainable Development that officially came into force on 1 January 2016, Paris Agreement on climate change entered into force on 4 November 2016 becoming a major step in combating climate change.

According to the International Energy Agency implementing current international pledges will slow down the rise in energy-related carbon emissions from an average of 650 million tonnes per year since 2000 to around 150 million tonnes per year in 2040. While this is a significant achievement it would only limit the rise in average global temperatures to 2.7°C by 2100. The path to 2°C would require that the global economy becomes carbon neutral by the end of the century⁶.

The UN Agenda for Sustainable Development and Paris Agreement gave a new impetus to global transition towards low carbon economy. The World Energy Council called the challenges required for the transition of global energy sector the Grand Transition.

The World Energy Council proposed the definition of energy sustainability based on three core dimensions: energy security, energy equity, and environmental sustainability, the so called “energy trilemma”. Environmental dimension is an integral part of energy sustainability also because energy is the second-largest consumer of freshwater after agriculture and due to population and energy demand growth the world will experience water stress early as 2020⁷.

The major actors to provide the Grand Transition are policy and law. Policy and law are pillars upon which society rest. “Laws should follow policy, and should be the instrument that promotes the realization of a particular policy. Law is a fundamental to the success or failure of any policy and may stimulate or impede growth in any area. Where there is a disconnection between policy and law, the law may inadvertently become an obstacle to the realization of a policy objective”⁸.

Further in the paper are investigating the issues of legal and policy energy and climate framework of the EU contributing to creation of low carbon future and an emphasis is made on renewable energy and smart cities as an example of innovation actors to fight against climate change.

1. “Law – carbon” future

The overarching EU target of transition towards low carbon resilient economy is compatible with the core energy objectives (sustainability, security of supply and competitiveness).

The EU being the largest energy importer in the World is encouraging clean energy progress moving away from the economy driven by fossil fuels, thus improving the situation with energy security.

In 22 Member States the total net import dependency decreased between 2005 and 2014. Such positive trends were supported by increased indigenous renewable energy production (in Austria, Estonia,

⁴International Energy Agency ‘About energy access’ at <https://www.iea.org/topics/energypoverty/>

⁵IOM, Migration Research Series ‘Migration and Climate Change’ No 31 [2008] at https://www.iisd.org/pdf/2008/migration_climate.pdf.

⁶International Energy Agency ‘World Energy Outlook 2016 sees broad transformations in the global energy landscape’ [2016] at <https://www.iea.org/newsroom/news/2016/november/world-energy-outlook-2016.html>.

⁷World Energy Council ‘World Energy Scenarios’ [2016] at https://www.accenture.com/t20161007T154938__w__/_us-en/_acnmedia/PDF-34/Accenture-World-Energy-Council-World-Energy-Scenarios-2016.pdf.

⁸Donald, N. Zillman, C. Redgwell, Yinke, O. Omorogbe, Lila. K. Barrera – Hernández, ‘Beyond the Carbon Economy. Energy Law in Transition’ (Oxford: Oxford University Press 2008) 45.

Ireland, Italy, Latvia, Portugal and Spain) and by decreasing the overall energy demand due to energy efficiency improvements⁹. In spite of this progress the energy import is expected to increase up to 57% by 2030 and 58% by 2050, despite increasing contributions from renewables (achievement of 20% target by 2020). Today import dependency is over 60% for gas and 80% for oil and it will increase to over 80% and 90% in 2030 and to over 90% (gas) and close to 100% (oil) in 2050 in the worst case if no action is taken¹⁰.

Therefore, the increase share of clean renewable energy contributes not only to decarbonization of economy but to energy security of the EU. The progress in clean energy transition is expected to be achieved due to the comprehensive approach to energy and climate policy and regulation elaborated by the EU and the breakthrough technologies of tomorrow. The climate and energy framework embraces 2020 targets for 20% reductions of greenhouse gas emissions, 20% share of renewable energy in total energy consumption and 20% improvements in energy efficiency.

Though the EU is making good progress towards meeting the 2020 targets it is time to develop a 2030 climate and energy framework the necessity in which is explained by the following reasons: long investment cycles (infrastructure funded in the near term will still be in place in 2030 and beyond and investors need certainty and reduction of regulatory risk). the objectives for 2030 will support progress towards a competitive economy and secure energy system by creating more demand for efficient and low carbon technologies and spurring research, development and innovation. The framework for 2030 reflects a number of important changes emerged since the time of adoption of original climate and energy framework in 2008 – 2009 such as the consequences of the on-going economic crisis. challenges in global energy markets, including in relation to renewable energy, unconventional gas and oil, and nuclear. concerns of households about the affordability of energy¹¹.

In 2015 was adopted a Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy¹². The goal of a resilient Energy Union with an ambitious climate policy at its core is to give European consumers secure, sustainable, competitive and affordable energy. Achieving this goal requires a fundamental transformation of energy system: transition from centralized supply – side approach that relies on old technologies and outdated business models towards low – carbon sustainable economy. The Energy Union empowers the consumers through providing them with information, choice and creating flexibility to manage demand and supply. In order to bring together energy security, sustainability and competitiveness the Energy Union strategy suggests five interconnected elements: energy security, solidarity and trust. a fully integrated European energy market. energy efficiency contributing to moderation of demand. decarbonization of the economy, research, innovation and competitiveness.

The EU has energy rules set at the European level, but in practice it has 28 national regulatory frameworks. The Energy Union represents an attempt to move away from a fragmented system characterized by uncoordinated national policies, market barriers and energy – isolated areas. Fully integrated energy

⁹European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Annex 2, 'Second Report on the State of the Energy Union' COM(2017) 53 final [2017] at http://eur-lex.europa.eu/resource.html?uri=cellar:16b10dae-e931-11e6-ad7c-01aa75ed71a1.0003.02/DOC_3&format=PDF.

¹⁰European Commission, Commission Staff Working Document Impact Assessment Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Roadmap for moving to a competitive low carbon economy in 2050' SEC (2011) 288 final [2011] at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0288:FIN:EN:PDF>.

¹¹European Commission, Green Paper 'A 2030 framework for climate and energy policies' COM(2013) 169 final [2013] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0169&qid=1490881946798&from=EN>.

¹²European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank 'Energy Union Package. A Framework Strategy for a Resilient Energy Union with a Forward – Looking Climate Change Policy' COM(2015) 80 final [2015] at http://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF.

market is necessary for increasing competitiveness, producing affordable prices for consumers, improving the usage of energy generation facilities. The current market design and national policies do not set the right incentives and provide insufficient predictability for investors.

Though the EU economy is currently the most carbon-efficient economy in the World, it is intended to keep leadership in the transition to a low-carbon economy after Paris. The EU generates more than half of its electricity without producing greenhouse gases. The EU is on track towards meeting its 2020 targets in greenhouse gas emissions. According to the latest projections submitted by the Member States emissions are expected to be 24% lower in 2020 than in 1990¹³.

The employment in green economy has risen to more than 4 million full-time equivalents. In 2017 the Commission plans to launch a campaign to encourage consumers to participate in and benefit from energy market developments. At the end of 2017 the Observatory of Energy Poverty starts operating. Its aim is to produce energy poverty statistics, to serve as a hub to disseminate good practices¹⁴.

The EU has all the potential to turn the climate change challenge into an opportunity. The low-carbon transition is expected to reduce occupations in traditional markets (related to fossil fuels, in particular carbon-intensive industries) while new jobs (related to renewable energy, energy efficiency and electrification of vehicle transport) will be created. To tackle skills challenges, the Commission is launching actions, which will make skills more visible and improve their recognition at local, national and EU levels, from schools and universities to the labour market¹⁵. Smart Regulation (“Better Regulation”) is at the core of the Energy Union. Smart regulation expands on the entire policy cycle from the drafting of a legal act to implementation, enforcement, assessment and revision. “Better Regulation” means design of EU policies and laws so that they achieve their objectives at minimum cost. Better Regulation is not about regulating or deregulating. It is a key to support growth and job creation – allowing the EU to ensure its competitiveness in the global economy - while maintaining social and environmental sustainability¹⁶.

2016 is a key year for implementation of the Energy Union: on 30 November 2016 the “Clean Energy for all Europeans” package was adopted. It is the largest in scope ever presented in energy field. The aim is to transform energy system of the Energy Union for 2030 and beyond towards a low carbon economy. The package pursues three main goals: putting energy efficiency, global leadership in renewable energy, and empowering consumers. The EU has set a binding target of reduction of greenhouse gas emissions of at least 40% by 2030 compared to 1990 levels and a binding EU level target of 30% for improving energy efficiency by 2030.

¹³European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank ‘State of the Energy Union 2015’ COM(2015) 572 final [2015] at http://eur-lex.europa.eu/resource.html?uri=cellar:ebdf266c-8eab-11e5-983e-01aa75ed71a1.0008.02/DOC_1&format=PDF.

¹⁴European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank ‘Second Report on the State of the Energy Union’ COM(2017) 53 final [2017] at http://eur-lex.europa.eu/resource.html?uri=cellar:16b10dae-e931-11e6-ad7c-01aa75ed71a1.0003.02/DOC_1&format=PDF.

¹⁵European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions ‘Accelerating Europe’s transition to a low-carbon economy. Communication accompanying measures under the Energy Union Framework Strategy: legislative proposal on binding annual greenhouse gas emissions reductions by Member States from 2021 to 2030, legislative proposal on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry into the 2030 climate and energy framework and communication on a European Strategy for low emission mobility’ COM(2016) 500 final [2016] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0500&qid=1490881946798&from=EN>.

¹⁶European Commission, Commission Staff Working Document ‘Better Regulation Guidelines’ SWD(2015) 111 final [2015] at http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf.

Fitness Checks are comprehensive policy evaluations covering more than one piece of legislation. They assess whether the regulatory framework is "fit for purpose" and if not, what should be changed¹⁷. The Commission established the "REFIT Platform" to bring together high level experts from all Member States, from the European Economic and Social Committee and the Committee of the Regions and from business, social partners, and civil society. A change in the culture of law-making at EU level can only happen if all the actors are involved into the agenda because paying into account opinions of those who have to apply the future rules is a powerful contribution to better regulation¹⁸.

By reviewing existing legislation the Energy Union contributes to Regulatory Fitness and Performance (REFIT) agenda. For example, 2016 REFIT evaluation of Renewable Energy Directive 2009/28/EC provides the evaluation of renewable energy targets for 2020 and 2030 and the stakeholders' conclusions concerning the character and the means to achieve the renewable energy targets¹⁹.

The concept of smart regulation that correlates with the Energy Union strategy creates the conceptual basis for in-depth look at the opportunities and challenges of transition towards low carbon future.

Factor shaping Grand Transition is its cost. In 2014 the Commission produced a first report on energy prices and costs that revealed the exposure of the EU economy to global energy price trends and that prices vary considerably across the EU and are significantly higher for Europe than for its international trading partners, particularly the United States²⁰. The costs of a low carbon transition do not differ substantially from the costs that will be incurred in any event because of rising fossil fuel prices and the need to renew an aging energy system²¹.

There is a political commitment of devoting at least 20% of the EU budget to climate action. Europe needs the right choices now as shifting to a low-carbon economy will be made harder because of the economic, social and environmental costs of having fragmented energy markets²².

¹⁷European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions 'Strengthening the foundations of Smart Regulation – improving evaluation' COM(2013) 686 final [2013] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0686&qid=1490881946798&from=EN>.

¹⁸European Commission, Communication from the Commission to the European Parliament and the Council 'Better Regulation: Delivering better results for a stronger Union' COM(2016) 615 final [2016] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0615&qid=1490881946798&from=EN>.

¹⁹European Commission, Commission Staff Working Document 'REFIT evaluation of the Directive 2009/28/EC of the European Parliament and of the Council Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast)' SWD(2016) 416 final [2016] at https://ec.europa.eu/energy/sites/ener/files/documents/2_en_autre_document_travail_service_part1_v2_416.pdf.

²⁰European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Energy prices and costs in Europe' COM(2016) 769 [2016] final at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0769&qid=1490881946798&from=EN>.

²¹European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions 'A policy framework for climate and energy in the period from 2020 to 2030' COM(2014) 15 final [2014] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0015&qid=1490881946798&from=EN>.

²²European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions 'Next steps for a sustainable European future European action for sustainability' COM(2016) 739 final [2016] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0739&qid=1490881946798&from=EN>.

2. Renewable energy is at the core of the Grand Transition

In 2011 was adopted a Roadmap for moving to a competitive low carbon economy in 2050 that underlined the central role of electricity in the low carbon economy²³. The European Union is committed to reducing greenhouse gas emissions to 80-95% below 1990 levels by 2050 in the context of necessary reductions by developed countries as a group.

In 2011 was adopted an Energy Roadmap 2050. All decarbonization scenarios show that in 2050 the biggest share of energy supply technologies are renewable energy technologies and the share of renewable energy increase substantially in all scenarios achieving at least 55% in gross final energy consumption in 2050²⁴. The renewable energy policy is driven by the need to address growing dependency on fossil fuel import and to decarbonize the energy sector.

If the European Union does not achieve success in increasing the share of renewable energy in its energy balance the progress towards the low – carbon economy and fulfillment of climate obligations will slow down. it will put in jeopardy the concept of energy independence and security.

The EU renewable energy policy is relatively young having started in the middle of 1990s when the first acts concerning renewable energy were adopted. In 1996 was adopted the Green Paper “Energy for the Future: Renewable Sources of Energy” and according to it renewable sources of energy contributed less than 6% to the Union’s overall gross inland energy consumption²⁵. The White Paper for a Community Strategy and Action Plan (1997) provides the strategic objective of promoting renewable energy sources as an integral part of energy policy and set the first indicative target of doubling the contribution of renewable energy sources to the European Union’s energy balance by 2010 (achieving a contribution by renewable energy to the gross inland energy consumption to 12%)²⁶.

Since that period the focus has moved from the promotion of renewable energy through indicative targets for the electricity and transport sectors to the definition of legally binding targets supported by a comprehensive legislative framework (20% by 2020) and 27% EU binding target by 2030. As stated, new energy package empowers the consumers. In order to encourage active participation of consumers in the energy market and to promote innovations among consumers the EU is enforcing the implementation of smart meters. The other side of the coin of the empowerment of consumers is a strong public perception of the risks of the construction of new power plants (large-scale renewable energy) and infrastructure needed to introduce large shares of renewables. "Not in my backyard" (NIMBY) reaction, where the European interest is not shared at the local level is an obstacle to development of energy infrastructure and network. One of the ways to lessen the social perception is placing cables underground but this leads to significant increase in cost²⁷.

²³European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions ‘A Roadmap for moving to a competitive low carbon economy in 2050’ COM(2011) 112 final [2011] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0112&rid=3488>.

²⁴European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions ‘Energy Roadmap 2050’ COM(2011) 885 final [2011] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0885&rid=3457>.

²⁵European Commission, Communication from the Commission ‘Energy for the Future: Renewable Sources of Energy. Green Paper for a Community Strategy’ COM(96) 576 final [1996] at http://aei.pitt.edu/1280/1/renewalbe_energy_gp_COM_96_576.pdf

²⁶European Commission, Communication from the Commission ‘Energy for the Future: Renewable Sources of Energy. White Paper for a Community Strategy and Action Plan’ COM(97)599 final [1997] at http://europa.eu/documents/comm/white_papers/pdf/com97_599_en.pdf.

²⁷European Commission, Commission of the European Communities ‘Green Paper: Towards a Secure, Sustainable and Competitive European Energy Network’ COM(2008) 782 final [2008] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0782&from=EN>.

The analysis conducted by the International Renewable Energy Agency in 2016 identified key social barriers to deployment of mini – grids as conflict with local authorities (local industry, communities, churches), resistance to cultural changes (loss of indigenous cultures), unwillingness to visit or work in the remote areas, insufficiently concentrated population, and opposition to local energy generation²⁸.

Around 70% of the EU population lives in urban agglomerations. According to worldwide estimations, about two thirds of final energy demand is linked to urban consumptions and up to 70% of CO₂ emissions are generated in cities²⁹. Cities are among the most dynamic actors in reduction of CO₂ emissions. Cities contribute both to problems and solutions.

“Smart Cities” are defined as an evolution of the present cities, where the increased inclusion of technology, in particular information and communication technologies, drives towards more sustainable growth and better quality of life of citizens. “Smart Cities” technology is a combination of multiple technologies as information and communication technologies, energy and transport. Estimations of the benefits achievable through the deployment of “Smart Cities” in the coming decade anticipate up to 50% reduction in energy consumption, 20% decrease in traffic and 80% improvement in water usage³⁰.

Conclusions

Global energy and climate challenges require global actions. Grand Transition to an inclusive green low carbon economy presumes holistic strategies integrating different and not only climate and energy policies.

The EU framework strategy for a resilient Energy Union with a forward-looking climate change policy has created a new momentum to bring the transition towards a low carbon and resilient economy and it is in line with the Paris Agreement and contributes to achieving the UN Sustainable Development Goals.

Creation of low carbon future is a sophisticated and scrutiny process and adoption of smart “green” legal regulation is not end itself. It is an integral part of collective efforts to deliver tangible benefits for European citizens and address the common challenges the EU is facing.

The proper functioning internal energy market that is necessary for realization of new energy package is not an end itself but is a key instrument for economic growth, jobs, secure coverage of consumers’ energy needs at affordable and competitive price, sustainable use of limited resources³¹.

The Energy Union’s aspirations are not only sustainable energy, “greening” the economy and combating climate change. The final destination is benefit of all consumers.

This is the paradox: though consumers are at the center of the low carbon society the human resistance to changes is very high especially when it comes to installation of eco – innovation technologies friendly to the environment.

²⁸IRENA ‘Innovation Outlook: renewable mini – grids’ [2016] at http://www.irena.org/DocumentDownloads/Publications/IRENA_Innovation_Outlook_Minigrids_2016.pdf

²⁹European Commission, report ‘Cities of Tomorrow: challenges, visions, ways forward’ [2011] at http://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/citiesoftomorrow/citiesoftomorrow_final.pdf

³⁰European Commission, Commission Staff Working Document ‘Technology Assessment. Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Energy Technologies and Innovation’ SWD(2013) 158 final [2013] at https://ec.europa.eu/energy/sites/ener/files/swf_2013_0158_en.pdf

³¹European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Making the internal energy market work’ COM(2012) 663 final [2012] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0663&from=EN>

Though many are aware of climate change and necessity to combat it this is not reflected in the citizens' behavior. It is difficult for citizens to relate personal consumption and behaviour to large-scale problems such as climate change, pollution, biodiversity loss and natural resource depletion³².

Encouraging green behavior should be an integral part of the "green" policy explaining the benefits of new clean energy technologies and means to diminish harm to the environment. This problem requires not only modern legislation and policy but development of energy culture. Human dimension should pervade transition to low carbon future.

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³²European Commission, Science for environment policy 'Future brief: green behavior' issue 4 [2012] at http://ec.europa.eu/environment/integration/research/newsalert/pdf/FB4_en.pdf

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DIESELGATE IN THE US AND IN THE EU. ONE SCANDAL, DOUBLE STANDARD IN CONSUMERS' TREATMENT

Hanna Misiak¹

Abstract

The Volkswagen emissions scandal started on 18th September 2015, when it was publicly announced that the software in some models of cars with Volkswagen diesel engine had been programmed to cheat testing of NOx emissions. The defeat device had been deployed in about eleven millions of cars around the world. The software installed in the cars is able to recognize whether the vehicle is put to an emission test and to decrease NOx emissions during the test. In day-to-day operation an invalid engine emits a quantity of NOx that exceeds the legal limits. Moreover, Volkswagen cars with defeat device had been called 'the green cars', won several awards for environmental friendliness and been a subject of tax breaks. The scandal concerns some models of Audi, Porsche, Skoda and Seat cars with Volkswagen engine as well. In November 2015 Volkswagen admitted that some irregularities concerning CO2 emission affected not only diesel but also petrol engines.

Soon after the scandal had erupted, Volkswagen decided on various ways of compensation to its US customers. According to the company statement, they were to receive vouchers and full compensation packages. The company was eager to resolve the problem as in just six weeks after the scandal eruption 230 class action lawsuits against Volkswagen had been filed. Eventually in June 2016 Volkswagen decided to settle public and private civil actions in the US. The US federal judge approved the settlement on 25th October 2016. According to the settlement Volkswagen will pay 15.3 billion dollars. Out of that sum the compensation of 10 billion dollars will be paid to the consumers - owners of the vehicles with defective device.

Initially, in December 2015, Volkswagen announced that customers outside US and Canada will also receive some compensation in the form of compensation package for reduction in residual values in the cars affected. However, a month later they had changed the approach, claiming that the situation of their customers in the EU is not comparable to the one in the US. Even after the settlement in the US, Volkswagen announced that the settlement should not be replicated in the EU as it would financially overwhelm the company.

Until the end of 2016 the national courts in the EU ruled in favor of Volkswagen customers in individual cases. The question is whether the EU citizens can obtain the same result as the customers in the US, preferably in class action.

Keywords: Volkswagen, Dieselgate, class action, United States, European Union

Introduction

On 18th September 2015 the US Environmental Protection Agency (EPA) issued a notice of violation, informing Volkswagen AG, Audi AG and Volkswagen Group of America of an ongoing investigation concerning compliance with the legal standards of vehicles' emissions. Its results showed that VW produced and installed in cars with 2.0 litre diesel engines defective devices that could either bypass, defeat or render inoperative elements of the emission control system mounted in the vehicles in order to comply with the Clear

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Air Act². The aim of that manipulation was obviously to bypass the emission limits of nitrogen oxides (NOx) in the US in order to have diesel vehicles certified and approved for the US market³. On 22nd September 2015 Volkswagen AG issued a press release stating that the discrepancies involve about eleven millions vehicles worldwide⁴. That was followed by the statement of 29th September in which Volkswagen AG announced a plan to correct the irregularities in vehicles with defective devices⁵.

Soon after the publication of EPA's notice of violation investigation started in a number of countries, i.e. Germany, France, Italy and Great Britain⁶.

On 2nd November 2015 EPA issued another notice of violation to Volkswagen Group companies, concerning another kind of emission-cheating software in vehicles with 3.0 litre diesel engine⁷. However, according to Audi AG spokesman Brad Stertz that kind of software was legal in Europe⁸. On 3rd November 2015 Volkswagen AG announced that the internal investigation revealed another kind of irregularities concerning false data on the emission of CO₂ in some vehicles with diesel and petrol engines⁹. Although those three issues concern different types of emission-cheating software, the problem in general is widely known as Volkswagen emissions scandal or Dieselgate.

The issue has been investigated in many countries from the point of view of criminal, administration, environmental, consumer and competition law, which led to impose a number of penalties, mostly fines.

Apart from public investigations led by relevant authorities in a number of countries, regarding emission-cheating as a cause of environmental pollution, a lot of private civil actions have been started by consumers who had bought vehicles with defective devices. Customers from United States will receive up to \$10 billion, according to the settlement of 28th June 2016, while European customers must rely on the promises of refitting defective vehicles. There arises the question of unequal treatment of customers from different countries. The article will cover the tradition and regulations concerning consumer protection as well as the real possibility of Volkswagen Group offering to European customers similar compensation as to its American customers.

1. Compensation for VW owners in the US

At the moment of the first EPA's notice of violation release there had been nearly 500.000 Volkswagen- and Audi-branded vehicles with defective device sold to the customers in the USA¹⁰. By 27th September 2015

² US Environmental Protection Agency, Notice of Violation of 18th September 2015, <https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-cao-09-18-15.pdf> (accessed March 22, 2017).

³ M. Frigessi di Rattalma, *Dieselgate. A Legal Perspective* (Springer, 2017), 43.

⁴ Volkswagen AG press release, https://www.volkswagen-media-services.com/en/detailpage/-/detail/Volkswagen-AG-has-issued-the-following-information/view/2715181/45d3a7a50202286bd358a98c25c96a2a?p_p_auth=VR7ORtWI (accessed March 23, 2017).

⁵ Volkswagen AG press release, https://www.volkswagen-media-services.com/en/detailpage/-/detail/Volkswagen-AG-announces-action-plan-to-update-diesel-vehicles-with-EA-189-EU5-engines/view/2741113/45d3a7a50202286bd358a98c25c96a2a?p_p_auth=VR7ORtWI (accessed March 23, 2017).

⁶ M. Frigessi di Rattalma, *Dieselgate. A Legal Perspective* (Springer, 2017), 43.

⁷ US Environmental Protection Agency, Notice of Violation of 2nd November 2015, <https://www.epa.gov/sites/production/files/2015-11/documents/vw-nov-2015-11-02.pdf> (access March 22, 2017).

⁸ D. Shephardson, *VW emissions issue extends to additional 75,000 vehicles* [2015], Reuters, <http://www.reuters.com/article/us-volkswagen-emissions-audi-idUSKCN0T92IG20151120> (accessed March 25, 2017).

⁹ Volkswagen AG press release, https://www.volkswagen-media-services.com/en/detailpage/-/detail/Statement-of-the-Supervisory-Board-on-irregularities-in-CO2-levels/view/2857016/18108d8d101b6284fe7b29bcf415eda5?p_p_auth=VR7ORtWI (accessed March 23, 2017).

¹⁰ *Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* (2017) WL 66281.

there had been already 34 class action lawsuits filed by the consumers¹¹. Volkswagen Group had been accused of fraud and breach of contract resulting in the diminished value of the vehicle as well as degraded horsepower and fuel efficiency in the case of fixing the defective device¹². By 7th October 2015 the number of lawsuits against the company had grown to over 230¹³. According to the Court of Appeals of Texas, the total number of consumer and environmental suits against Volkswagen was over 600.

On 8th December 2015 the Judicial Panel on Multidistrict Litigation transferred 56 related actions to the US District Court in California in order to start coordinated pretrial proceedings. Finally on 22nd February 2016 the Plaintiff's Steering Committee filed the Consolidated Consumer Class Action Complaint against 13 defendants, including Volkswagen Group companies and officers and managers of the group. The defendants had been accused of breach of contract, state fraud, unjust enrichment and breach of consumer protection laws of all fifty states of the US¹⁴.

Even before the consolidated complaint had been filed, in January 2016, the ruling court had appointed a Settlement Master who had to oversee the settlement negotiations between the parties. The satisfying agreement of the parties, concerning the main issue of the Dieselgate - problems with the vehicles with the diesel 2.0 litre engines - had been reached as soon as on 21st April 2016. On 26th June 2016 the Plaintiff's Steering Committee, the Federal Trade Commission and the Department of Justice together proposed a Class Action Settlement. On the same day the ruling court had granted the preliminary approval of settlement between the parties. The customers who had been included into the settlement class were either owners or lessees by 18th September 2015 r. or owners between that day and the end of the claims period, of a Volkswagen or Audi 2009-2015 model with 2.0 litre diesel engine sold in the US¹⁵.

Each class member could choose one out of two options:

- being paid an amount of cash as a restitution and getting the defective vehicle bought back by the company at the pre-defeat disclosure price,
- being paid an amount of cash as a restitution and getting the defective vehicle fixed by the company.

The restitution owed to each class member should not be less than \$5.100.

According to the settlement, the class members should be able to submit the claim by 1st September 2018. The claims program should consist of five steps:

- class members learn about their right to compensation via either dedicated website or telephone number,
- class members submit their claim via website, fax or mail,
- class member's claim is reviewed and verified. they get within 10 days the notice whether they are eligible claimants or not,
- the claimant confirms their selection of an offered remedy, accepts the offer and plans an appointment with the Volkswagen or Audi dealer,
- the claimant receives their remedy as chosen.

According to the settlement, Volkswagen Group had to create a fund of over \$10 billion to compensate class members. That amount of money assumes that all the class members decide to choose

¹¹ R. Martin, '34 And Maybe More: Class Action Lawsuits Pile Up Against VW' [2015], <http://www.npr.org/2015/09/27/443896365/34-and-maybe-more-class-action-lawsuits-pile-up-against-vw> (accessed March 27, 2017).

¹² B. Yerak, G. Karp, 'Volkswagen owners should be nervous about emissions scandal, experts say' [2015] <http://www.chicagotribune.com/business/ct-volkswagen-owners-0921-biz-20150921-story.html> (accessed March 26, 2017).

¹³ J. Puzanghera, 'Apologizing for emissions scandal, VW exec promises to 'make things right' [2015], <http://www.latimes.com/business/la-fi-volkswagen-emissions-hearing-20151007-story.html> (accessed March 27, 2017).

¹⁴ Re: *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* (2016) WL 4010049.

¹⁵ Re: *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* (2016) WL 4010049.

the buyback option.

As the class action in the US is based on the opt-out standard, in case a customer does not wish to be considered a class member nevertheless meeting all the conditions, they should send a written request of opting out. The court finally approved the settlement on 25th October 2016¹⁶. In December 2016 an agreement in principle was reached regarding 3.0 litre engine vehicles.

2. Situation of European VW customers

2.1. Reaction of EU authorities

Nevertheless some regulation on class action had been introduced to the EU legal framework by European Commission's recommendation of 11th June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, the proceedings concerning collective redress are a subject to national law. Therefore in the EU one consistent collective redress system does not exist. The customers can file class action lawsuits according to their country's legislation. The proceedings cannot be merged into one numerous European class action as it happened in the US.

EU authorities had not found any satisfying solution of Dieselgate problem. As the Member of European Parliament and of the committee investigating emissions from diesel engines Christine Revault D'Allonnes stated, 'Americans' strength is that they have rules and they enforce them'. According to the European Automobile Manufacturers' Association European customers have overlooked the scandal as the share of vehicles with diesel engines have diminished slightly from 51.6% of newly registered cars to 49.5% in 2016¹⁷.

The CEO of Volkswagen AG, Matthias Muller, responding to European industry commissioner Elżbieta Bieńkowska's demands of equal treatment of US and EU customers, stated that the situation in Europe is different than in the US. The limits of NOx emission are stricter in the US so it was more reasonable to offer a buyback to the customers in that country, meanwhile in Europe owners of defective vehicles will not be offered the same remedy¹⁸.

Under the pressure of European Commission Volkswagen AG published another press release, stating that not only do the questioned vehicles comply with European regulations but also nitrogen oxides are not harmful neither to human health nor to the environment¹⁹.

2.2. Individual cases

Nevertheless the opinion of the group, some consumers had already won an individual case or settled with Volkswagen Group companies or car dealers.

In March 2016 a German consumer sued his car dealer who had sold him a defective Volkswagen Tiguan. According to the judge it was not possible to rule against the defendant on the basis of the breach of a contract as the vehicle with defective device had been produced by Volkswagen AG and not by the car

¹⁶ Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation (2016) WL 6442227.

¹⁷ M. Laouchez, L. Charmichael, 'EU at pains to punish VW over 'dieselgate' scandal' [2017], <https://www.yahoo.com/news/eu-pains-punish-vw-over-dieselgate-scandal-154830353.html> (accessed March 27, 2017).

¹⁸ B. Vlastic, A. Kessle, "It took EPA pressure to get VW to admit fault" [2015], https://www.nytimes.com/2015/09/22/business/it-took-epa-pressure-to-get-vw-to-admit-fault.html?_r=0 (accessed April 9, 2017).

¹⁹A. Cremer 'VW says defeat device in conformity with European law' [2016] Reuters, <http://af.reuters.com/article/idAFL8N1D4A4U?pageNumber=1&virtualBrandChannel=0> (accessed April 9, 2017).

dealer²⁰. Both parties had eventually decided to settle the case. The conditions are not publicly known but as the plaintiff's lawyer states, the settlement was satisfactory for the consumer²¹.

In October 2016 a Spanish court for the first time ordered two of the Volkswagen Group companies to pay damages to the owner of defective Audi Q5 as well as to repair the car. The plaintiff sued for the entire value of the car which was initially 50.000 €. According to the judge, there had been no breach of contract as the owner of the car was able to drive freely all around Europe, notwithstanding the high level of NOx emission. Nevertheless the damages of 5.000 € (about 10% of car's price) had been granted on the basis of the principles of bona fide and contract integrity²².

2.3. Collective redress cases

The advantages of class action in cases concerning numerous groups of consumers against entrepreneurs are numerous.

The regular class member is not a plaintiff as in individual action. The duties of the plaintiff have to be fulfilled by a class representative who can be, depending on the legal system, one of the members, a consumer protection organization or some kind of authority. Therefore in legal systems with opt-in standard a prospective class member shall only join the class effectively and cover some costs according to the contract with plaintiff. In case of opt-out standard the duties of the class member are even less strict as all the prospective class members are automatically considered class members at the moment of certification of the action. The costs are relatively little, comparing to individual action. Information about class actions is often well known as mass-media spread it eagerly. The entrepreneur can act in a more consumer-oriented way while information about all their activity is published in the newspaper, on the TV and on the Internet.

As the history of class action in Europe is relatively short, in comparison to the US, European consumers might not notice all the beneficiary aspects of starting class action instead of an individual one. Dieselgate concerns citizens of every European country, in total millions of Volkswagen Group customers. As the type of the factual basis is common for class actions against Volkswagen Group companies while the legal framework concerning class action differ among the countries, the process and the results of actions in each country can be considered as a test of the efficiency of each country's regulation on class action.

In Belgium, Italy and Spain consumer protection organizations started class action on behalf of the consumers. The first class action in Europe regarding Dieselgate has started in Spain in March 2016. It has been initiated by OCU (Organization of Consumers and Users). The organization, acting on behalf of defective Volkswagen vehicles' owners, demand monetary damages from Volkswagen Audi Espana S.A. According to OCU the compensation for one class member could reach an amount of 1.000 €. OCU stated clearly that the legal action is the result of Volkswagen Group's refuse to offer any compensation and delays of the deadlines for affected vehicles' reparation²³.

Belgian owners of vehicles with defective device are represented by Test-Achats. According to the organization, the group shall consist of people who bought new or used cars with defective device after 1st September 2014, when the Belgian regulation on class action came into force. The organization claims full refunds without return of the vehicles on the basis of fraudulent practices²⁴.

An Italian consumer protection organization Altroconsumo sued Volkswagen AG and Volkswagen

²⁰ A. Cremer, 'German court rejects customer's bid to cancel VW purchase', Reuters [2016].

²¹ The plaintiff's lawyer statement, <http://www.rechtsanwalt-messler.de/> (accessed April 9, 2017).

²² *Paulino v Volkswagen Audi España S.A., Valladolid Wagen S.A.*, sentence no. 291/2016 [2016].

²³ OCU, 'OCU initiates a class action suit against Volkswagen due to the emissions scandal' [2016], <https://www.ocu.org/organizacion/prensa/press-releases/2016/vw-class-action> (accessed April 9, 2017).

²⁴ Test-Achats, 'Dieselgate: ensemble au tribunal contre le groupe VW!' [2017], <http://www.test-achats.be/autovelo/autos/dossier/dieselgate-faites-vous-partie-des-gens-trompes> (accessed April 8, 2017)

Group Italia s.p.a. on behalf of Italian consumers who purchased the vehicles with defective devices. In September 2014, one year before the scandal started, Altroconsumo had organized its own fuel efficiency tests of Volkswagen Golf 1.6 TDI as well as of Fiat Panda 1.2 models. As the tests results were alarming, the organization decided to look for owners of those models eager to start the class action against the two car producers²⁵. The Court of Appeal in Venice certificated class action concerning fuel efficiency of Volkswagen Golf in September 2016²⁶. The case is not to be confused with class action concerning NOx emission but nevertheless it helped Altroconsumo in contacting the Volkswagen defective vehicles' owners while planning the new class action. In October 2015 Altroconsumo had gathered already over 10.000 prospective class members²⁷ and started the class action on their behalf. There are also class actions brought in by other consumer protection organizations²⁸, but no class action had been yet concluded in a satisfactory way for the consumers.

Class actions against Volkswagen Group companies have been initiated also in other EU countries, i. e. France (on the basis of a new class action regulation - Loi Hamon) and Poland.

Group litigation regarding NOx emissions in Volkswagen vehicles in United Kingdom has been not initiated by any consumer protection organization as the proceeding is a group litigation rather than a typical class action. The group members have their own cause of of action raising common or related issues of fact or law. The claims are grouped together and managed by specific rules²⁹.

According to the information published by one of legal firms conducting the action³⁰, the action can be joined by owners of cars bought in England and Wales. The claimants allege that Volkswagen engaged in deceit by selling the defective vehicles. They seek monetary compensation for misleading (giving untrue information on compliance of cars with relevant regulations).

The UK group litigation costs are covered by third party litigation funder which is not the case in class actions in the countries above mentioned.

In January 2017 the High Court considered an application of the claimants for a Group Litigation Order³¹.

In Germany there is no regulation on class action in spite of EU regulations. For that reason the US law firm Hausfeld, which had participated in the US class action against Volkswagen Group, filed a suit for only one consumer who had bought a vehicle with defective device as a test case³². The proceedings are supported by a legal-tech website My-Right.de, which allows the German Volkswagen customers to sign up online. The litigation is funded by Burford Capital which lets the consumers avoid the risk of paying any legal fees. The German litigation case is even more significant as over 2.5 million vehicles with defective device

²⁵ G. Mahlich, 'Italian consumer group says to sue Fiat, VW over fuel economy figures' [2014], Reuters, <http://www.reuters.com/article/us-italy-autos-fuel-idUSKCN0H1BA20140923> (accessed April 9, 2017).

²⁶ E. Hardcastle, 'Italian appeals court accepts class action against VW - consumer group' [2016], Reuters, <http://uk.reuters.com/article/uk-volkswagen-fueldata-idUKKCN0Z31HZ> (accessed April 8, 2017).

²⁷ Altroconsumo, 'VW: "un errore il dieselgate". 10mila preaderenti alla class action' [2015], <https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2015/10mila-aderenti-alla-class-action-dieselgate-volkswagen> (accessed April 9, 2017).

²⁸ I.e. Codacons, Apdef.

²⁹ F. Murphy, O. Shah, R. Farningham, 'Class/collective actions in the UK (England and Wales): overview' [2017], [https://uk.practicallaw.thomsonreuters.com/6-618-0351?__lrTS=20170412190558906&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-618-0351?__lrTS=20170412190558906&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed April 10, 2017).

³⁰ Marcus Sinclair UK Ltd., 'VW Emissions Action' [2017], <http://www.vwemissionsaction.com/faqs-for-the-vw-emissions-action-legal-claim> (accessed April 10, 2017).

³¹ Emissions Lawyers, 'We succeed at first Volkswagen hearing!' [2017], <https://www.caremissionslawyers.co.uk/> (accessed April 10, 2017).

³² Hausfeld, 'Volkswagen "Clean" Diesel Litigation' [2016], <http://www.hausfeld.com/what-we-do/eu/case-studies/volkswagen-clean-diesel-litigation> (access April 10, 2017).

had been sold in German market, out of about 8 millions in whole Europe Union³³.

The purpose of initiating a test case is to resolve common or generic issues which are similar in other cases. The 93-page lawsuit states that the plaintiff seeks a buyback at the original price rather than pecuniary compensation for a diminished value of the vehicle. The ruling officially will not have any legal impact on the similar cases but the consumers believe the courts will honor the previous rulings and opinions of the courts³⁴.

It is not difficult to notice that European consumers, lawyers and courts are not as convinced of advantages of class action and similar proceedings as those from the US. The class action regulations vary from one country to another, which results in different approach to similar questions or problems. Moreover, in some countries consumers cannot benefit from class action, which leads them to look for another collective redress procedure (e.g. United Kingdom) or to find other solutions, like test cases (e.g. Germany).

Even though the consumers try to gather and initiate an action quickly, the proceedings seem to take a lot of time. Not only do the court seem inefficient but also the Volkswagen Group is not eager to settle with European consumers or find any way of meeting their needs.

Conclusions

As it has been underlined above, the treatment of European and American consumers by Volkswagen Group is extremely different. While in the US all the running collective actions have been merged into one class action and the conditions of settlement were ensured in a matter of months, similar proceedings in some European countries have been barely initiated.

Volkswagen Group does not want to notice any breach of European regulations on NOx emissions. While American customers had received pecuniary damages and possibility to fix the defective part, the European consumers have heard that the very same part is in full compatibility with EU emission regulations. Volkswagen Group has quite early agreed to change the defective devices, yet it still does not recognize that those devices have not complied with EU law from the beginning.

Another question is, whether Volkswagen Group can afford offering European customers a compensation similar to one proposed in the settlement with American customers. The payment of 10 billion dollars to the customers, along with fines, must have been a big problem even for a worldwide known group. As the quantity of vehicles with defective device in Europe is much higher (about 8 million versus less than 0,5 million in the US), the group could simply not be able to cover the costs of resolving the problem in the favor of the vehicles' owners and eventually go bankrupt.

It seems that fraudulent activity led by Volkswagen Group, concerning defective software in its vehicles, is a good basis for a civil action in the US but not necessarily in the EU. The very fact of being cheated by an entrepreneur may not stand for the prerequisite of having taken a loss. The basis of bona fide or contract integrity can be not enough in Europe to get a buyback or a compensation in amount of the price of the new car. European customers and consumer protection organizations have tried to prove that the cars with defective device had lost their market value or use more fuel after the fix but it has not been concerned as a basis for granting compensation for any European court.

It is too early to try to foresee what will the courts decide on the issue of Dieseldate. The interesting aspect of the scandal is that while Americans now buy less vehicles with diesel engines, Europeans do not change their habits or general opinions of Volkswagen quality. It seems also that the goodwill of Volkswagen Group is somehow more torn in the US, where it met all the demands of the customers, than in Europe,

³³ J. LeSage, 'German Lawsuit Hopes to Follow US Lead on VW Class-Action Settlements' [2017], <http://www.hybridcars.com/german-lawsuit-hopes-to-follow-us-lead-on-vw-class-action-settlements/> (accessed April 10, 2017).

³⁴ A. Hudson, 'VW faces first legal test case over emissions in Germany' [2017], <http://www.reuters.com/article/us-volkswagen-emissions-lawsuit-idUSKBN14N1FF> (accessed April 10, 2017).

where the customers are treated less favorable.

The Dieselgate scandal is a unique case which concerns consumers all around the world and can act as a test case for the efficiency of still new class action regulations in EU state members. The difficulties with receiving a compensation in Europe, compared with the different situation in the US, can make class action more recognizable among the regular citizens and maybe will result in more effective cooperation of the Member States in the area of regulation on class action. It would be beneficiary for the consumers in the case of any similar scandal concerning vehicles' emissions, which may arise in the nearest future.

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LEGAL REGULATION OF MULTIMODAL CARRIAGE OF GOODS IN LIGHT OF MODERN TECHNOLOGIES: TIME TO CHANGE

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Abstract

The establishment of a uniform international legal framework for multimodal carriage of goods has proven to be an almost unattainable objective. Despite the numerous past attempts to harmonize the legal field of multimodal transport, there still is no uniform international legal regime in force to govern at least the key aspects of such relations. Whether (and under what conditions) carriers should be allowed to enjoy the right of limited liability embedded in international conventions is one of the most intriguing as well as controversial parts of the legal regulation of (multimodal) carriage of goods. Such a regulation, dated back to the 18th century, first of all, was implemented as a necessity to ensure a stable growth of different transport sectors as the level of technologies back then was insufficient to allow carriers minimise the risk of cargo being damaged or lost to an acceptable level for the business to survive. However, in the days of smart containers, different types of autonomous vehicles and the possibility to create the process of automated door-to-door carriage without human intervention, more and more concerns of whether such a right of carriers to limit their liability still can be seen as well-grounded and relevant. The purpose of this paper is to analyse whether the new technology leads to the urge of withdrawal of the carrier's limited liability and if this can be seen as a tool to achieve harmonization in multimodal transport's case. While analysing the above mentioned, the author argues what the decreased level of risks, brought by the new technology, must lead to corresponding changes in legal regulation of international carriage of goods. Based on this, the paper concludes that there is a reason to believe that the implementation of new technology may help to solve the issue of lack of uniform international legal regime of multimodal carriages.

Keywords: Multimodal carriage of goods, Legal regulation, International private law, New Technology.

Introduction

In the Communication of the European Commission, dating back to 1990s, it was emphasized, that the transport sector had already proven it can not be left to self-regulation as from 1970 to 1997 European freight transport had increased by about 70 % while market share of road transport has increased from almost 50 % to 72 %². Ineffective usage of spare capacities in different transport modes makes socio-economic and environmental sustainability hardly achievable. Considering this, in year 2001 White book³ was released in which The European Commission explicitly embedded the aim to promote multimodal transport, especially, when cargo is being carried by road transport just short distances at the beginning and the end of a particular carriage. The opinion on multimodal transport was not been changed in White book of The European Commission, released in the year 2011, as the aim of development of all kind of transport modes with

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² Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the regions of The Commission of The European Communities, 'Intermodality and intermodal freight transport in the European Union' [1997] COM (97) 243.

³ White book of the Commission of The European Communities, 'European transport policy for 2010: time to decide' [2001] COM(2001) 370.

intention to create effective infrastructure of multimodal carriages was once again emphasized⁴. Moreover, the importance of multimodal carriages also was indicated by The European Parliament stating that the development of freight transport as a whole is largely dependent on effective use of the various modes of transport, and that the goal of European transport policy should therefore be efficient commonality⁵. Thus, it is obvious, that multimodal transport is one of the key measures in achieving one of the most overarching objective of the European Union transport policy – sustainable growth and development.

Unfortunately, in opposite to the goals set, in the year 2017, neither on the European Union level nor on international level there is any unified legal regulation in the field of international multimodal carriage while the need is obvious. For example, the survey⁶, carried by the United Nations Conference on Trade and Development (hereinafter – UNCTAD), showed, that 98 percent of all the respondents aired their support for the creation of a new international legal instrument, which would unify legal regulation in the field of international multimodal carriage, while 76 percent of all the respondents directly pointed out, that current muddle existing in the legal field of multimodal transport, causes higher friction costs⁷ and reduces the attractiveness of multimodal carriages.

As the last attempt to create such a regulation can be identified the signing of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea⁹ (hereinafter – the Rotterdam Rules). Despite the fact, that 109 stakeholders` answers were got in the survey, carried out during the preparation of the Rotterdam Rules, 121 countries and 54 governmental and non-governmental organizations participated in the preparation of the Rotterdam Rules¹⁰, there have been only 3 ratifications since the year 2008. This leads to the Rotterdam Rules still being not in force at the beginning of the year 2017 and many doubts are being raised whether we should continue to hope that the Rotterdam Rules would enter into force someday. One of the reasons for this, being raised by scholars¹¹, is the limited network liability system, adopted by the Rotterdam Rules. However, assessing the situation more deeply, it can be stated, that the reason for inability to adopt unified international legal regulation in the legal field of multimodal transport lies not in the (in)correct decision which liability system should be adopted as such, but more in the regulatory divergence of different transport modes as itself, particularly, diverse rules of limited carrier`s liability, embedded in every regulatory framework of separate transport modes¹².

⁴ White book of the Commission of The European Communities, 'Roadmap to a Single European Transport Area - Towards a competitive and resource efficient transport system' [2011] COM(2011) 144.

⁵ Resolution of the European Parliament on a sustainable future for transport [2010] 2009/2096(INI).

⁶ Report of United Nations Conference on Trade and Development, 'Multimodal transport: The feasibility of an international legal instrument' [2003] UNCTAD/SDTE/TLB/2003.

⁷ *Idem*, 11.

⁸ Similar results were got also in the survey, carried by the European Commission: https://ec.europa.eu/transport/sites/transport/files/themes/strategies/studies/doc/2009_05_19_multimodal_transport_report.pdf, last accessed April, 2nd, 2017.

⁹ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea [2008].

¹⁰ F. Berlingieri, 'The History of the Rotterdam Rules' in M. D. Güner-Özbek ed., 'The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' (Berlin: Springer 2011) 53-57.

¹¹ M. D. Güner-Özbek, 'Extended Scope of the Rotterdam Rules: Maritime Plus and Conflict of the Extension with the Extensions of Other Transport Law Conventions' in M. D. Güner-Özbek ed., 'The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' (Berlin: Springer 2011) 120-121.

¹² International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ('the Hague rules') and its Protocols ('the Hague-Visby Rules') [1924]. The United Nations Convention on the Carriage of Goods by Sea ('the Hamburg Rules') [1978]. Convention on the Contract for the International Carriage of Goods by Road ('the CMR Convention') [1956], Convention Concerning International Carriage by Rail ('the COTIF Convention, CIM rules') [1980]. Organization for Co-operation Between Railways Agreement on International Railway Freight Communications ('the SMGS Agreement') [1951]. Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways ('the CMNI Convention') [2000]. Convention for the Unification of Certain Rules for International Carriage by Air ('the Montreal Convention') [1999].

Whereas the inability to reach a widely acceptable consensus on the regulation of carrier's limited liability can be seen as the main obstacle to establishing a uniform international legal regulation of multimodal transport, the aim of this article is to evaluate the purpose of carrier's limited liability and assess whether such regulation, in the light of new technology, still can be considered as well-grounded.

1. Limited carrier's liability and its substantiation.

In general, several different transport modes can be singled out: cargo can be carried by road, rail, air, inland waterways and sea¹³. Furthermore, if the carriage of goods is carried by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country¹⁴, it will be considered as the multimodal one. As it was mentioned above, unfortunately, there is no uniform legal regulation of multimodal carriages. On the other hand, there is plenty of unimodal international transport conventions¹⁵. Almost all of them have a common feature, which can be described as the core of the legal regulation of carriages¹⁶, - set of rules establishing carrier's limited liability. Nevertheless, almost every regulation differs. Probably the best example of this is the limits of carrier's liability: the monetary cap limiting the liability of the road carrier for cargo is 8,33 SDR/kg¹⁷, of the air carrier – 19 SDR/kg¹⁸, of the sea or inland waterways carrier– 2 SDR/kg or 666,67 SDR/package^{19,20}, of the rail carrier²¹ - 17 SDR/kg.

Historically, at the beginning of the 19th century, carrier's liability was unlimited in general²². However, with the introduction of the risk sharing principle, as the level of technologies back then was insufficient to allow carriers to minimise the risk of cargo being damaged or lost to an acceptable level for the business to survive, carriers, in the middle of the 19th century, began to add more and more terms into contracts exempting themselves from civil liability²³. This went so far, that even clauses exempting carrier from civil liability in case of his own negligence were being incorporated into contracts and some courts, in respect of the freedom of contract principle, recognized such clauses valid²⁴. As in any way such a situation could be regarded as justified, lawmakers intervened. For example, in the year 1893, Harter Act was passed in the United States of America. The question of maritime carrier's right to limit their liability was so controversial, that, at the time of the reading of the Act, the discussion of the question whether the freedom of contract should be absolute or whether it can be restricted by special provisions of law lasted longer than the hearing of other provisions all together²⁵. At the end, the compromise was reached as the Act stated that carrier was liable for his own negligence but is not responsible in some particular cases, for example, when the damage

¹³ Pipeline transport can be seen as a separate transport mode as well. On the other hand, because of the specificity of this transport mode, it has not been studied in deep by scholars and this mode of transportation usually are being separated from the other modes when it is being dealt with legal relation of multimodal carriage.

¹⁴ The United Nations Convention on International Multimodal Transport of Goods [1980].

¹⁵ Ibid, note 12.

¹⁶ The only exception is the SMGS Agreement.

¹⁷ The CMR Convention, article 23.

¹⁸ The Montreal Convention, article 22.

¹⁹ The Hague-Visby rules, article 5.

²⁰ The CMNI Convention, article 20.

²¹ The COTIF Convention CIM rules, article 30.

²² M. F. Sturley, 'The legislative History of the Carriage of Goods by Sea Act and the Travaux préparatoires of the Hague Rules' (Littleton: Rothman 1990) 4-5.

²³ J. Ramberg, 'Freedom of contract in maritime law' [1993] Lloyd's maritime and commercial law quarterly 179.

²⁴ M. F. Sturley, 'Freedom of Contract and Carriage of Goods by Sea: A Retrospective on Shifting Attitudes from Hague to Rotterdam' in J. Schelin, 'Colloquium on Maritime Law': General trends in maritime and transport law 1929 - 2009' (Stockholm: Jure 2009) 213.

²⁵ Ibid, note 22.

has arisen because of navigation fault if a vessel had been seaworthy at the start of the voyage. It is noted, that later the legal regulation of the Harter Act largely was transferred to the 1924 Hague Rules, which established limited carrier's liability in international maritime haulage relations²⁶. Moreover, the international air haulage regulation, limiting carrier's liability, is based essentially on the same grounds. At the time Warsaw convention was introduced, the industry of aviation was in its infancy: technically undeveloped and financially weak²⁷. As air haulage was seen as very risky practise back then, it was commonly understood and justified to split the risks for both carriers and consignors. Differently, just one accident could have led to a bankruptcy of air carrier as generally all carriers could have been described as financially weak subjects. Therefore, aiming to protect the industry and set up a friendly environment for the industry to develop, keeping in mind, that consignor must have understood risks of air haulage, limited carrier's liability was established in the international legal air carriage regulation²⁸.

Thus, the limited carrier's liability establishment in legal carriage regulation, above all, was based on the low level of existing technology, insufficient to reduce the risk to an acceptable level, back then and the need to support the growth of haulage industry. Of course, objectively, it must be noticed, that the limitation of liability in the carriage on land had arisen due to various reasons mentioned above. For example, limitation of liability first appeared even earlier with the carriage by rail in the 18th century. A declaration of the value of the goods by shippers was mandatory due to the variety of goods carried. However, the increase in the amount of goods carried by rail resulted in the classification of goods, which subsequently resulted in shippers' declaring merely the type of the goods. This, however, caused lack of information on the value of goods, and therefore, carriers were not able to assess the risk they were taking. As a form of protection, they started to insert liability clauses into their general terms where they fixed the financial amount payable in case of damage or loss. Nevertheless, shippers had an option to declare the value of goods in which case the carrier would be held liable for the full amount. Limited liability turned to be the general practice, and the option of declaring the value of goods an exception. This system, afterwards, was adopted by international conventions on the carriage of goods²⁹. Again, even if it is not explicitly stated, it can be argued, that the introduction of limited liability in legal regulation of rail carriage was determined, firstly, because of insufficient level of technology back then to manage the risk.

Summarizing, it is worth to note, that the motives behind the limitation of liability, described above, are not exclusive ones as the legal doctrine also distinguishes others such as high value of cargo, insurance, freight rates, loss prevention, unification of law, litigation³⁰. Nevertheless, both the legal doctrine³¹ and historical perspective suggests, that limitation of carrier's liability, mainly, was introduced (and justified) as a way to protect the transport industry whereas the risk, largely determined by low level of technology, in principle could not have been held in up to an acceptable level for industry to survive by other means.

2. Is it time to change?

In the article, it has already been indicated several times that, unfortunately, there is no uniform legal regulation for international multimodal carriages of goods. Although, several different legal theories how such

²⁶ H. Jessen, M. J. Werner, A. Ntovas ed, 'EU maritime transport law' (Leuven : Claeys & Casteels Law Publishers 2016) 82.

²⁷ M. A. Clarke, 'Contracts of carriage by air' (London: LLP 2002) 24.

²⁸ G. Leloudas, 'Risk and liability in air law' (London: Informa 2009) 48-49. S. Hobe, 'Cologne Compendium on Air Law in Europe' (Köln: Heymann 2013) 968-969.

²⁹ D. Damar, 'Wilful Misconduct in International Transport Law' (Berlin: Springer 2011) 21.

³⁰ *Idem*, 15-23.

³¹ *Idem*, 12-14.

a situation should be solved can be found, one of the most influential is the “network system” theory that states that multimodal carriage contract should be seen as a mixed contract and every unimodal regulation of particular transport mode should be applicable to an analogical leg of a multimodal contract. In practice, this means high applicability of international unimodal transport conventions to multimodal contracts and, thereby, applicability of limited carrier’s liability to multimodal transport operator.

There are spectacularly diverse interests among the representatives of various transport industries (modes). As multimodal transport as itself is created as a compound of different transport modes, it seems, at the moment, almost impossible to find a way to satisfy at least most of the interests and create a regulation which would be voluntary acceptable for at least the majority of stakeholders. It is, as each of them wants to apply the regulation of particular transport mode (especially, the part which imposes rules of limited liability), he represents and which, in most cases, is already being applied to specific parts of a contract, to multimodal contracts as widely as possible. Therefore, the idea of limitation of carrier’s liability and from mode to mode varying rules of it can be identified as a possible cause of inability to adopt uniform international legal regulation of multimodal carriage. Naturally, this leads to questions whether the right of carriers to limit their liability still can be seen as well-grounded and relevant and, perhaps, the time has already come to withdraw it and thus facilitate the establishment of the legal regulation of multimodal carriages.

First of all, it is really questionable if the provisions, established in the international transport conventions, still can be seen as giving effect to its primary objective – to ensure the sincere balance between the interests of a carrier and a consignor. This can be based merely on the fact, that most of monetary limitations were introduced way back and have never been revised and adjusted to the inflation at least³². Of course, it can be argued, that all the conventions, except the CMR Convention, allow parties to agree on higher liability limits than it is stated in the regulation. However, in reality, it is recognized in legal doctrine, that legal regulation, which does not allow parties to soften the given regulation (in this case, to reduce the monetary limits), altogether stimulates the parties to keep the *status quo* and, neither rise the liability limits nor change the volume of obligation of a party³³. This leads to the situation when liability limits, *de facto*, constantly decrease while the value of cargo gradually rises³⁴. This leads to the conclusion that the sincere balance between the interests of the carrier and the consignor is not ensured any longer and such a situation is opposite to the aim of the institute of carrier’s limited liability.

Secondly, strict legal regulation on carrier’s liability³⁵, limiting the freedom of contract, nowadays, is doomed to be outdated and constantly fall behind the development of social relations and innovations. One illustration of this can be so called “parcel transportation”. In the proposal for a regulation of the European Parliament and of the Council on cross border parcel delivery services it is indicated that only 15 % of consumers bought online from other European Union countries³⁶. Despite such low percentage, in year 2011 (the rate of such consumers was even lower back then – about 10 %) the total value of this type of purchases was estimated between 181 and 453 millions per year³⁷. So, in practise there is plenty of parcel transportation. One of the features of parcel transportation is that very often the value of cargo is extremely high compared to the weight. If the transportation is being carried out by road, there is a high possibility that such carriage will fall under the scope of application of the CMR Convention and the regulation of the CMR

³² Only the Montreal Convention has a legal mechanism establishing how monetary limitation should be reviewed and changed, if needed, regularly.

³³ *Ibid*, note 23, 186.

³⁴ K. Lannan, 'Behind the Numbers: the limitation on carrier Liability in the Rotterdam Rules' [2009] 14 URL 910.

³⁵ Keeping in mind the complicated mechanism of revision of international transport conventions.

³⁶ Proposal of the European Commission for a regulation of the European Parliament and of the Council on cross border parcel delivery services [2016] COM(2016) 285.

³⁷ <http://ec.europa.eu/DocsRoom/documents/14205>, last accessed April, 2nd, 2017.

Convention will be directly applicable to such parties' relations³⁸. Belgian DPD case illustrates the problem very well. A Belgian jewellery company sold a pocket watch, worth 7000 Eur, to a citizen of Switzerland and entered into the contract of carriage, which did not specify which transportation mode should be used, with DPD. As the cargo was never delivered, the consignor sued DPD claiming damages, equal to the value of the watch. In its defence, DPD argued that the CMR Convention was applicable to the contract and, according to the liability limits, stated in the article 23 of the CMR Convention, DPD was responsible for only 1.79 Eur damage. Belgian Court of Appeal did not apply provisions of the CMR Convention, as the contract was qualified as an "integration agreement", and awarded the consignor damages of 7000 Eur. However, severe consequences was avoided just because of, ironically, differences in interpretation of the provisions of scope of application of the CMR Convention between courts. If the case had been brought in front of, for example, courts of Germany, the Netherlands or England, the consignor would have been awarded damages in the amount of only 1.79 Eur³⁹. This example shows very well how limited carrier's liability, limitation of freedom of contract and strict regulation can create undesirable obstacles for development of social relations as well as cause an absolutely opposite result to primary regulatory purposes.

Thirdly, as it was already pointed out, one of the main reasons of introduction of carrier's liability limitation was the fact that the level of technologies back then was insufficient to allow carriers minimise the risk of cargo being damaged or lost to an acceptable level for the business to survive. In recent years, a new industrial revolution has been going on and the transport industry is not an exception⁴⁰. Industrial automation, smart containers, autonomous vehicles, drones and other inventions are radically changing the carriage we used to know. Today, in the rise of new technology, even the possibility to create the process of automated door-to-door carriage without human intervention is being discussed. All of these technologies and autonomous processes dramatically reduce the risk of cargo being damaged or lost as a human error is being minimalised or even eliminated⁴¹. In light of decreasing of the risk, carriers, in opposite, have become large enterprises, capable of surviving some accidents when cargo is lost or damaged. What is more, given the fact that lower risk leads to lower insurance premiums, even small or medium size company can afford to insure their activities nowadays⁴². This leads to a situation when limited liability no longer can be justified. Even in the legal doctrine an opinion that an existing carrier's limited liability in the legal regulation is in no means related with the principle of fairness any longer, even if it was, originally, based on the idea of ensuring minimum protection for both carrier and consignor if damages occurred⁴³.

There is a saying "the limitation of liability is like "smoking" for the legislators, difficult to justify, but also difficult to quit"⁴⁴. But when limited carrier's liability is an obstacle to establish legal regulation of multimodal carriages as well as to develop modern social relations while new technologies have already eliminated reason why limited liability was introduced in first place at the same time, it is safe to say, that the time to withdraw carrier's limited liability has come. Also, since the regime of carrier's civil liability is one of the main obstacles to establish international multimodal legal regulation, it is reasonable to expect, that withdrawal of

³⁸ As it was already mentioned, the CMR Convention, in general, does not allow parties to change carrier's liability limits by their agreement. There is only a possibility to a sender to declare in the consignment fee for the agreed value of goods exceeding the limit specified in paragraph 3 Article 23 and in this case the amount declared replace the boundary. If there is no individual declaration of agreed value, the limit specified in paragraph 3 Article 23 will be applied.

³⁹ W. Verheyen, 'The DPD-case: a case for a parcel-specific liability regime?' [2013] 48 ETL 4.

⁴⁰ M. Faghfour, 'Multimodal transport' in D. J. Attard g. ed., 'Shipping law' (Oxford: Oxford University Press 2016).

⁴¹ F. Lorenzon, 'From sails to drones: time to reconsider a uniform liability regime for multimodal transport?' [2015] 21 IML 334.

⁴² *Idem*.

⁴³ *Ibid*, note 24, 223.

⁴⁴ E. Røsæg, 'Maritime Liabilities at the Crossroads' [2007] XXV *Annuaire de Droit Maritime et Océanique* 294.

carrier's limited liability in unimodal carriage legal regulations would allow to solve the issue of lack of uniform international legal regime of multimodal carriages.

Conclusions

The analyse of the institute of carrier's limited liability has shown, that such legal regulation, protecting the interests of carrier, mainly was introduced (and justified) as a way to protect the transport industry whereas the risk, largely determined by low level of technology, in principle could not have been held up to an acceptable level for the industry to survive otherwise. While almost every unimodal carriage international convention establishes different set of liability limitation rules and interests of stakeholders vary significantly from mode to mode, it seems that the limited carrier's liability is an insurmountable obstacle to establish uniform international legal regulation of multimodal carriages.

On the other hand, technology has changed greatly since the 18-19th centuries as well as social relations. Industrial automation, smart containers, autonomous vehicles, drones and other inventions, along with autonomous processes created, have dramatically reduced the risk of cargo being damaged. The privilege of carrier on limited liability can no longer be justified. On the contrary, outworn legal regulation is starting to cause the consequences opposite of what the limited liability was established for the first place.

Therefore, in light of new technology, it is believed the time to withdraw carrier's limited liability has come. Hereby, the biggest issue, interfering with adoption of the multimodal regulation, would be eliminated which, herewith, would create a greater opportunity to establish international legal regulation of multimodal carriages.

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DOES APPLICATION OF PHYSICIANS' LIABILITY ENSURE OR DETER THE USE OF INNOVATION?

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Abstract

Despite vast research on medical liability, very few studies have examined whether application of physicians' liability ensure or deter the use of innovation. This question has never been analysed in the Lithuanian context. Thus, the purpose of this paper is to analyse whether application of physicians' liability ensures or deters the usage of innovative medical procedures. In order to achieve this goal, firstly, general issues of application of liability to health care providers are examined. A special attention is given to the duty of care, the standard of care applicable to medical professionals and providers of health care services since the breach of this duty is a foundation for determining medical liability. The paper provides an analysis of the standard of care established in Lithuania and several other countries, and how it is interpreted by the courts. Secondly, the paper examines whether this application of liability and an interpretation of standard of care provided by courts ensure or deter the application of new innovative procedures. The paper suggests that physicians' liability concerns prevent from using innovative medical procedures, even whether it proposes benefits and clinical outcomes, whereas the innovative departure from the established practice can bring the greater risk of liability.

In the light of the experience of other countries and the opinions of legal scholars, the paper emphasizes the need to ensure the proper interpretation of the standard of care and concludes that the standard of care should be interpreted flexibly by courts in order to ensure the application of safe innovative procedures. The courts should assess whether the use of new medical procedure was reasonable in a particular situation, according to the findings of medical science, and not formally limit its analysis on legal lists of medical procedures applicable to certain diseases or acknowledgement of the used procedure worldwide. Also, the courts should not base their judgement for the use of such procedure on one physician's opinion. Such flexible interpretation of the standard of care would allow avoiding disincentives to use innovations.

Keywords: tort law, liability, standard of care, innovation.

Introduction

Innovation is a key determinant of well-being and economic growth². Innovations in health care sector have always led to medical progress. During the time, the healthcare industry has experienced a proliferation of innovations aimed at enhancing life expectancy, quality of life, diagnostic and treatment options, as well as the efficiency and cost effectiveness of the healthcare system. These include, but are not limited to, innovations in the process of care delivery, medications and surgical interventions. In the studies, the medications (e.g., angiotensin-converting enzyme inhibitors, statins, antidepressants), diagnostic modalities (e.g., magnetic resonance imaging, computerized tomography scanning, mammography) and procedures

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² R. E. Litan (ed.), 'Handbook in Law. Innovation and Growth' (Cheltenham, Northampton: Edward Elgar Publishing 2011) 151.

(e.g., balloon angioplasty, coronary artery bypass graft, cataract extraction) are mentioned in the list of top ten medical innovations³. Improved diagnostic techniques, including laboratory tests, invention of antiseptic and aseptic practice had effect to physicians and health care provision⁴. These facts demonstrate that the innovations lead to medical progress and contribute to the improvement of health care services.

It has to be admitted that academic discussions regarding innovation are typically confined to the issues of patent and trade secret law⁵. Moreover, many scholars have analysed different aspects of medical liability⁶. However, only few authors have analysed that remarkable connection between innovation and tort law⁷ and very few scholars have analysed this question in the context of the medical malpractice⁸. Richard N. Langlois, Deborah A. Savage correctly emphasise that medical practitioners remain important part in change into the modern era⁹. The initiative to apply and start using new innovative treatment procedures is essential for the medical progress. Thus, this article raises the question whether the application of civil liability to physicians ensures or deters the use of innovative procedures and suggests ways how to interpret the conditions of civil liability in order to make it more welcoming to innovation. This issue is the subject matter of this article.

Usually innovation is understood as the intentional introduction and application within a role, group, or organization, of ideas, processes, products or procedures, new to the relevant unit of adoption, designed to significantly benefit the individual, the group, or wider society¹⁰. Thus, the innovative procedures, for the purpose of this article, can be defined as the medical practices, modifying the current approaches to treat certain diseases: 1) legal newly developed treatments. 2) new legal methods not commonly used by a majority of physicians. These innovative procedures can contribute to the improvement of health or reduce the suffering due to illness¹¹. For the purpose of the article, innovative procedures do not include treatment provided during the clinical research¹².

The purpose of this paper is to address the basic question whether the application of civil liability to the physicians ensure or deter the use of innovative procedures. In order to achieve this goal, the general conditions of physicians' liability are analysed, special attention is given to the duty of care (the legal standard of care) – the core of medical liability – and its connection to the adoption of innovative procedures. In the second part – the issue whether the application of physicians' civil liability ensures or deters the use to innovative procedures is analysed. In the article, it is suggested that physicians' liability concerns can impede adoption of innovative procedures into practice, adversely affecting public health. The third part of article suggests how the standard of care should be interpreted by courts in order to ensure the application of safe

³ V. K. Omachonu, N. G. Einspruch, 'Innovation in Healthcare Delivery Systems: A Conceptual Framework' [2010] 15(1) *The Innovation Journal: The Public Sector Innovation Journal* 2-3.

⁴ R. N. Langlois, D. A. Savage, 'Standards, Modularity, and Innovation: the Case of Medical Practice' [1997] <https://pdfs.semanticscholar.org/c6f2/82e94230e93514ce2ff1653cd563a6dc63f2.pdf> 18 [last viewed 09-04-2017].

⁵ R. E. Litan (ed.), *op. cit.* 151.

⁶ E. P. Richards, T. R. McLean, 'Administrative Compensation for Medical Malpractice Injuries Reconciling the Brave New World of the Patient Safety and the Torts System' [2005] 49 *St. Louis University Law Journal*. D. M. Studdert, T. A. Brennan, 'No-fault Compensation for Medical Injuries' [2001] 286-2 *The Prospect for Error Prevention. Health Law and Ethics*. S. Taylor, 'Medical Accident Liability and Redress in English and French Law' (Cambridge: Cambridge University Press 2015). A. G. Williams, 'The Cure for what Ails: A Realistic Remedy for the Medical Malpractice' [2012] 23:2 *Stanford Law and Policy Review*

⁷ G. Parchomovsky, A. Stein, 'Torts and Innovation' [2008] 107:285 *Michigan Law Review* 308.

⁸ J. J. Arias, 'Becoming the Standard: How Innovative Procedures Benefitting Public Health are Incorporated into the Standard of Care' [2011] 39 *Journal of Law, Medicine & Ethics* 102-105.

⁹ R. N. Langlois, D. A. Savage, *op. cit.* 28.

¹⁰ V. K. Omachonu, N. G. Einspruch, *op. cit.* 3-4.

¹¹ J. J. Arias, *op. cit.* 102.

¹² There is a difference between treatment, however, new applied in best interest of the patient, and experimentation, which offers no direct benefit to the individual involved. In the experimental situation, the individual is not a patient, but a research subject. T. Christoffel, 'Health and the Law – A Primer for Health Professionals' (New York: Simon and Schuster 1985) 289.

innovative procedures.

When writing this paper, the main research methods were comparative, systematic and analytical.

1. Link between physicians' civil liability and innovation

Positive obligations under Article 2 (right to life) of the Convention for the Protection of Human Rights and Fundamental Freedoms require States to make regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives and to set up an effective independent judicial system so that the cause of patients' death in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable¹³. However, according to these clarifications, States' margins of appreciation, the establishment of legal regulation of the physicians' liability, regulation of the physicians' conduct is left to the members and states' practice reveal that this question is regulated in different ways.

It is important to state that the most national laws are silent whether and under what concrete conditions physicians can or must implement into the practice legal innovative medical procedure. For example, in Lithuania the patient has the right to receive information about the treatment methods, known to the health care provider and the physician, its risks, complications, prognosis and other circumstances¹⁴. Moreover, in Lithuania medical norms that are approved by Minister of Health Care provide the rights, obligations, competences and responsibilities of the health care specialists in different fields. Usually, these norms provide the obligation of physicians to apply only legal treatment methods, except the instances provided in the laws, and the right to implement into the practice in Lithuania new legal treatment methods¹⁵. However, the question is whether the physicians are willing to implement into practice such new treatment methods and the response to this question relates *inter alia* to the issues of physicians' civil liability¹⁶.

To begin with, it should be noted that the regulation of the healthcare quality has traditionally been a matter for the law of torts, specifically negligence¹⁷. Medical malpractice is a form of tort, or in other words, a civil claim in which an injured person requests damages from an alleged perpetrator, in compensation for a wrongful, harmful act. As with negligence based torts, more generally, a claim for medical malpractice generally requires that the plaintiff establishes four basic legal elements in order to obtain a recovery:

¹³ *Powell v United Kingdom*, application no. 45305/99 [2000] 30 EHRR CD 152. *Calvelli and Ciglio v Italy*, application no. 32967/96 [2002] ECHR 2002-I.

¹⁴ Part 3 of Article 5 of Law on the Rights of Patients and Compensation of the Damage to their Health of the Republic of Lithuania [2015] Teisės aktų registras no. 2015-20892.

¹⁵ Lithuanian Medical Standard MN 59:2016 Dermatovenereologists, Rights, Duties, Competence and Responsibility, Approved by Minister of Health of the Republic of Lithuania in 5 September 2016, order no. V-1067 [2016] Teisės aktų registras no. 2016-17365. Lithuanian Medical Standard MN 159:2016 Emergency Medicine Physician. The Rights, Duties, Competence and Responsibility, Approved by Minister of Health of the Republic of Lithuania in 26 August 2016, order no. V-1031 [2016] Teisės aktų registras no. 2016-23148. Lithuanian Medical Standard MN 125:2016 Occupational Therapist. The Rights, Duties, Competence and Responsibility, Approved by the Minister of Health of the Republic of Lithuania in 28 April 2016, order no. V-544 [2016] Teisės aktų registras no. 2016-11197, etc.

¹⁶ J. J. Arias, *op. cit.* 102-105.

¹⁷ E. Wicks, 'Human Rights and Healthcare' (Portland: Bloomsbury Publishing 2007) 37. This conclusion does not mean that other forms of civil liability cannot be applied. There are jurisdictions which strictly differentiate between tort and contractual liability, the former is relevant only when a patient was treated without his consent, whether an employee of the contractual partner such as a hospital issued individually, or whether a third party outside the contractual relationship was harmed (for example, Belgium). In countries where liability arising from tort or contract share common grounds or are otherwise not mutually exclusive, on the other hand, tort law principles are more generally applicable, even though in jurisdictions with at least strategic advantages for claims based on violations of contractual duties (Austria, Italy), delicts are still the less common starting point for claimants (United Kingdom). B. A. Koch (ed.), 'Medical Liability in Europe – A Comparison of Selected Jurisdictions' (Berlin/Boston: Walter de Gruyter 2011) 626–627.

1) plaintiff must show that the defendant owed a duty of care to the plaintiff. 2) that such duty was breached when the physician deviated from the standard of care. 3) that the plaintiff was harmed (and experienced damages). 4) that the plaintiff's harm was caused by the defendant's actions. For the civil liability, all these elements have to be established¹⁸. A key element in deciding whether medical malpractice has occurred is to determine whether the duty of care (standard of care) has been violated¹⁹. This element relates to physicians' willingness to use innovative medical treatment, thus it will be analysed more widely.

The duty of care is breached when the physician deviates from the standard of care. The standard of care refers to the quality of care, which has to be provided by a physician. It is important to note that it is the legal term, not a medical term²⁰. The concept of the standard of care is understood differently in various countries, especially in countries which belong to different legal systems.

Usually, in general law system countries, the breach of duty of care is evaluated according to the Bolam, Bolitho tests, established in *Bolam v Ftiem Hospital Management Committee* case, in *Bolitho v City and Hackney Health Authority*. For example, in the United Kingdom, most claims for damages are brought in the tort of negligence. Bolam and Bolitho framework establishes a two-step test in order to determine the breach: 1) whether physician's act or omission was supported by a body of peer professional opinion, i.e. whether physician acted in accordance with practice accepted as proper for an ordinary competent physician by respectable body of professional opinion (the Bolam test of breach), and 2) whether that peer professional opinion is defensible/rational/logical (the Bolitho gloss). Where both limbs of the test are met, physician's actions are not in breach. It is important to note that in the United Kingdom there are many protocols, guidelines regulating physicians' conduct in health care provision. It is claimed that non compliance with protocols and guidelines produced by professional bodies does not, in itself, preclude breach. However, it would constitute very strong evidence of adherence with a reasonable body of professional opinion, to satisfy the Bolam test of breach²¹.

According to the mentioned test and existing regulation, a physician is obliged to keep up to date with new developments in his/her particular field, but this requirement is limited. It is considered to be too demanding to require a physician to read every article appearing in the medical press which is relevant to his practice. On the other hand, the obligation to keep up to date is complicated because of the difficulty of determining when a new method has been developed. In general, when the risks of the old procedure become known, so that it can be said that an ordinary and reasonably competent physician would have changed his practice, it would be negligent to continue to use the old procedure. It is admitted that, in general, negligence would be avoided whether there is evidence that the physician acted in accordance with common practice of similarly placed physicians²².

In civil law system countries (for example, Germany, Spain, Lithuania), the standard of care is emphasised quite differently. It is claimed that a physician has to provide health care services attentively, carefully and using his/her best knowledge.

In Germany patient has the right to be treated in accordance with professional standards of care based

¹⁸ M. D. Greenberg, 'Medical Malpractice and New Devices: Defining an Elusive Standard of Care' [2009] 19:423 Health Matrix 426 427.

¹⁹ J. W. Ely, A. J. Hartz, P. A. James, C. A. Johnson, 'Determining the Standard of Care in Medical Malpractice: The Physician's Perspective' [2002] 37 Wake Forest Law Review 861.

²⁰ Ibidem 862.

²¹ R. Mulheron, 'Principles of Tort Law' (Cambridge: Cambridge University Press 2016) 363 371.

²² It is important to note that this evidence is not conclusive since the practice can be found negligent. H. Nys, European Committee on Legal Co-operation, 'Report on Medical Liability in Council of Europe Member States. A Comparative Study of the Legal and Factual Situation in Member States of the Council of Europe' [2005] https://www.coe.int/t/dghl/standardsetting/cdcj/CJSMED/CDCJ%20_2005_%203%20e%20Report%20on%20Medical%20Liability.pdf 7-12 [last viewed 09-04-2017].

on the standard of an experienced physician in the particular field of medicine²³. This implies that a physician always has to practice with the required degree of care and that it is not sufficient to act as usually accepted. Standard of care further refers to the training of the physician (specialist knowledge) as well as to his/her experience in the field and the state of science at the moment of treatment. A treatment is not considered in accordance with the required standard of care at the moment of treatment, whether at a given time a new safely method is accepted by medical science and whether the use of it complies with the required care. However, it does not mean that every new treatment has to be used immediately. It only implies that a physician should have sufficient knowledge of the state of medical research (manuals and medical journals) and should become skilled at new methods. However, this does not mean that a patient is entitled to the latest therapy. The older technique only becomes sub-standard in quality whether the new method has been sufficiently tested, applied and approved, whether the risks decrease and the chances of a successful treatment increase²⁴.

In Spain, the standard of care must conform to the *lex artis ad hoc*, i.e. the standard of conduct corresponding to a skilled professional in medicine who acts in accordance with the state of art of knowledge of medical science in the specific field of expertise to the professional belongs. Thus, it is not sufficient to perform the standards of conduct set up by technical protocols, but also it is necessary to take into account all circumstances of each case in order to adopt their conduct to all relevant specific characteristics of the case²⁵.

Meanwhile, in Lithuania the Article 6.732 of the Civil Code of the Republic of Lithuania provides that in the pursuit of his activities the provider of personal health care services must ensure such a degree of care, which may be expected from an honest provider of personal health care services. His/her activities must be based on responsibility stipulated by the relevant laws, other legal acts and professional standards of the providers of health care services²⁶. However, the question of the exact degree of care provided by the health care provider is not established in legal acts. The answer to this issue is given by the courts. The Supreme Court of Lithuania emphasises that health service provider is seized by the duty to provide health care services by putting maximum efforts, professional care and precaution. This requirement remains in force during the entire treatment procedure²⁷.

Bernhard A. Koch, after the comparative analysis of different jurisdictions in Europe, emphasised that the standard of care is quite different. In Spain, the physician must use all remedies and techniques known to medical science and required by the *lex artis* in order to heal the patient. English law, for instance, is more generous in this respect: any competing school of thought is correct as long as it is still adopted by a respectable body of opinion in the profession, unless no longer supportable by logical analysis²⁸.

Above-mentioned arguments demonstrate that in establishing whether the breach of a duty of care has taken place requires a comparison between the physicians' actions and a legal standard of care which represents what physicians are obligated by law to do when providing medical services to their patients²⁹. As

²³ B. A. Koch (ed.), op. cit. 248.

²⁴ H. Nys, op. cit. 16-17.

²⁵ B. A. Koch (ed.), op. cit. 505.

²⁶ Civil Code of the Republic of Lithuania. Sixth book. Law on Obligations [2000] Valstybės žinios no. 74-2262.

²⁷ R. P., R. I. v *Vilniaus greitosios pagalbos universitetinė ligoninė, Karoliniškių poliklinika, Mykolo Marcinkevičiaus ligoninė*, Case no. 3K-3-59/2011 [2011] Supreme Court of Lithuania. B. L. v *Biržų ligoninė*, Case no. 3K-3-603-701/2015 [2015] Supreme Court of Lithuania. R. B. v *Vilniaus universiteto ligoninės Santariškių klinikos*, Case no. 3K-3-478/2008 [2008] Supreme Court of Lithuania. K. R., A. P. v *Kauno Raudonojo Kryžiaus klinikinė ligoninė (successor – Kauno klinikinė ligoninė)* Case no. 3K-3-337/2013 [2013] Supreme Court of Lithuania. M. P., B. P., I. P., E. P. v *Marijampolės ligoninė*, Case no. 3K-3-77/2010 [2010] Supreme Court of Lithuania. V. D. v *Kėdainių pirminės sveikatos priežiūros centras, Kėdainių ligoninė*, Case no. 3K-3-170/2010 [2010] Supreme Court of Lithuania.

²⁸ B. A. Koch (ed.), op. cit. 629.

²⁹ M. D. Greenberg, op. cit. 427.

it can be seen, legal interpretation of the standard of care varies but, in all cases, it does not provide concrete conditions for the use of a new medical treatment. Thus, the physician, before applying the innovative procedures, has to evaluate all the circumstances, take into account the benefits to patient's health and his/her safety. This aspect creates uncertainty for physicians as, from one side, they have to ascertain the safety of the patient, on the other – provide the health care according to the established standard of care.

In discussing this mentioned uncertainty and the link between physician's civil liability and innovation widely, it should be noted that usually the evaluation of physicians' civil liability for inadequate health care service provision, according to the mentioned standard of care, is conferred to courts. The practice indicates that, when courts evaluate the physicians' conduct while using innovative treatment, they take into account medical standards, regulations, guidelines, as well as use the experts' testimony and opinions of other physicians.

As regards the regulation of the physicians' conduct, it should be noted that in all countries the professional standards for health care personnel are most commonly defined in rather general and broad terms firstly, in the legislation which sets down the requirements and further conditions for these professions, or secondly, in codifications of patients' rights. In some countries, the lawmakers have introduced at least some further specifications for certain aspects of health care³⁰, applied medical procedures. In Lithuania, there are also the guidelines for treatment of concrete diseases. The order approved by Health Care Minister of the Republic of Lithuania regulates the procedure of preparation the methodology for physicians to diagnose and (or) treat certain diseases³¹. Of course, these methodologies cannot in all circumstances to regulate the physicians' actions. However, it should be remembered that medical practice is not static and that new clinical interventions and technologies are constantly being developed³². Thus, it can be the situations when existing legal regulation, guidelines are not in compliance with medical progress and does not indicate the possibility to apply certain new medical procedure. The situation where new medical treatment procedures are not indicated in such regulation or guidelines for one or another disease can make impact to the physicians' willingness to act only according to the established regulations regardless of the medical progress.

As it was indicated, another important moment in the evaluation of physician's conducts are the opinions of other physicians. In broader context, it should be noted that in this evaluation process the expertise, opinions and testimony of other physicians could be used in the courts³³, as the judges are not the specialists of health care services. It is admitted that the medical profession traditionally relies on standard treatment procedures that are approved by the medical community. Several different procedures for treating a particular medical problem may be available to the medical provider. However, the design of each such procedure will have been approved by the medical community and may be said to be "standard". Thus, in the medical context, it would be much more problematic for physicians to follow nonstandard methods when providing medical care³⁴. That leads to the fact that physicians' opinions on the use of appropriate innovative medical treatment for a certain disease can be divided. The physician, in practising new treatment, cannot always be sure how this action will be evaluated by the experts, his/her colleagues, how his/her skills will be evaluated and his/her preparation to implement into practice this newly method.

The above-mentioned arguments demonstrate that there is a link between the physicians' initiatives to use new innovative procedures that are not commonly and widely accepted by the society of appropriate

³⁰ B. A. Koch (ed.), *op. cit.* 625.

³¹ Procedure of Preparation and Monitoring the Application of Diagnostic and Therapeutic Methods, Approved by the Minister of Health of the Republic of Lithuania in 17 May 2006, order no. V-395 (as amended and supplemented) [2006] Valstybės žinios no. 59-2095.

³² M. D. Greenberg, *op. cit.* 430.

³³ *Ibidem* 427.

³⁴ M. S. Madden (ed.), 'Exploring Tort Law' (New York: Cambridge University Press 2005) 216.

medical personnel and the question of physicians' liability.

2. Does the application of liability ensure or deter the use of innovation?

As it was demonstrated, the physician, in practising new treatment, cannot always be sure how this action will be evaluated by the experts, his/her colleagues, how his/her actions will be evaluated by the courts. This uncertainty creates disincentives to apply innovative medical procedures. Such conclusion is based on the surveys and phenomenon so-called defensive medicine, which is influenced by tort law³⁵.

Defensive medicine in simple words is departing from normal medical practice as a safeguard from litigation. It occurs when a medical practitioner performs treatment or procedure to avoid exposure to malpractice litigation. Defensive medicine is damaging for its potential to pose health risks to the patient. Defensive medicine may be positive or negative, depending on the situation. Negative defensive medicine comprises avoiding risky procedures on patients who could have benefitted from them, thereby excluding patients from treatment and hospital admission³⁶.

Defensive medicine is a real phenomenon. According to the results of the HealthLeaders Media Industry Survey 2010, 33 percent of the respondents cited fear of lawsuits as a major influence on decision-making when ordering tests or procedures³⁷. In 2011 a survey has been conducted wherein 2 440 Lithuanian physicians revealed that they practice defensive medicine. 66,6 percent of physicians claimed that they avoid risky patients, i.e. patients with complicated or dangerous diseases, 59,9 percent – avoid to apply necessary, but risky procedures³⁸.

Legal opinions, based also on the carried surveys, also confirm that perceived liability risks could impede the adoption of innovative procedures regardless of the actual risk of liability associated with a procedure³⁹. Looking at the conditions of tort liability, scholars note that a physician's choice to use any medical procedure is formed, in part, by a perceived risk of liability. Liability risks increase where a procedure is not currently within the standard. To the extent, innovative procedures exceed the norm, they may conflict with the prevailing standard of care identified by an expert or acknowledged by the majority of the physicians in particular specialisation, indicated in legal standards. This conflict contributes to an increased risk of liability associated with the implementation of an innovative procedure⁴⁰. The risk also increases because of the fact that physicians cannot be sure how their actions will be evaluated by the courts, what circumstances will be essential in considering their liability. These mentioned factors create disincentives to apply safe innovative treatment despite the provided benefits to patients' health.

To sum it up, it can be claimed that fear of possible lawsuits, possible risks of the applied civil liability, e.g. the physicians' breach of the duty of care, and uncertainty how their actions will be evaluated by the courts, can deter physicians from the use of safe innovative medical procedures.

3. Possible solutions

As it was mentioned before, it is difficult to deny that in general the development and use of innovative

³⁵ Ibidem 286.

³⁶ M. S. Sekhar, N. Vyas, 'Defensive Medicine: A Bane to Healthcare' [2013] 3 (2) Ann Med Health Sc Res 295-296.

³⁷ HealthLeaders Media, HealthLeaders Media Industry Survey 2010: Physician Leaders [2010] <http://www.hcpro.com/HOM-252810-100003/HealthLeaders-Media-2010-Industry-Survey-Results.html> [last viewed 09-04-2017]

³⁸ L. Labanauskas, V. Justickis, A. Sivakovaitė, 'Gynybinės medicinos reiškinių paplitimas Lietuvoje (Pagrindiniai 2 440 Lietuvos gydytojų tyrimo rezultatai)' [2011] 1(3) Sveikatos politika ir valdymas 158.

³⁹ C. H. Coleman, 'Do Physicians' Legal Duties to Patients Conflict with Public Health Values? The Case of Antibiotic Overprescription' [2009] 6(2) Journal of Bioethical Inquiry 181-185.

⁴⁰ J. J. Arias, op. cit. 102-105.

procedures offer potential benefits to the improvement of public health. However, the fear of possible civil liability should not discourage physicians' to use safe innovative medical treatment. So what solutions could be proposed in this situation?

It has to be remembered that the aim of malpractice is not to create broad disincentives to innovation, but rather to ensure that providers use appropriate care and skills in delivering medical services. Practice indicates that the issue – how the standard of care is evaluated by the courts – is important to physicians' eagerness to use innovative procedures that are not commonly and widely practiced by the society of appropriate medical personnel. Thus, in this context, clear and well-defined criteria for determining medically negligent conduct are essential⁴¹, as well as flexible interpretation of the standard of care in using new medical procedures, not recognised and used worldwide.

The courts should note that medical standards evolve over time in response to new empirical research and scientific progress⁴². Thus, health care providers have an obligation to stay abreast of new techniques and developments⁴³. Michael D. Greenberg correctly notes that the malpractice standard in 2008 is different from what it has been in 1978, less because of any changes in the law than because of changes in medical knowledge and in new technologies⁴⁴.

That leads to the suggestion that the breach of duty of care should not be determined only by the fact that physician acted not according to legal standards, guidelines for treatment of certain disease or did not apply widely accepted treatment. In such situation it should be important whether the physician acted making efforts to heal the patient according to the applicable professional standard, whether he/she acted according to his/her competence while using innovative medical procedures. The courts should assess whether the use of new medical procedure was reasonable in a particular situation and not formally limit the analysis on legal lists of medical procedures or acknowledgement of the used procedure worldwide as well as should not base their judgement for the use of innovative treatment on one physician's opinion. The Supreme Court of Lithuania correctly noted that considering whether the health care service was provided adequately, without departing from the fair, reasonable and prudent professional action standard *per se*, the facts of compliance or non-compliance with the guidelines may not always lead to a conclusion on the doctors' action legality because each disease is individual, so in all cases, the determining factor should be the medical science⁴⁵. This line should also be followed by all courts in respect of innovative medical procedures.

Of course, the safeguards for the use of safe innovative medical procedures have to exist and they shall be evaluated by the courts. Firstly, Jalayne J. Arias correctly notes that liability risks associated with innovative procedures are generally higher also because of the fact that physicians lack experience with these procedures and may not know or understand their medical risks⁴⁶. Thus, such innovative procedures should be used only when the physician is familiar with and skilled in it. Of course, the physician should not use innovative practice when the innovation carries unknown or potentially significant risks to that particular

⁴¹ L. H. Brenner, A. Tytell Brenner, E. J. Awerbuch, D. Horwitz, 'Beyond the Standard of Care: A New Model to Judge Medical Negligence' [2012] 470(5) Clin Orthop Relat Res 1358.

⁴² M. D. Greenberg, op. cit. 441.

⁴³ It can be based also on example from the case-law. The Supreme Court of Lithuania solved the case where the claimant argued that the patient died because of the old treatments methods, medicaments, for inadequate supervision. The Supreme Court of Lithuania agreed with the claimant and emphasised that the hospital had possibility to use in medicine acknowledged less risky liquid. The acts where during the operation was used distilled water, which use is more risky when other liquids, does not fit to the professional standard. *I. J., M. Č., J. Č. v Vilniaus miesto universitetinė ligoninė*, Case no. 3K-3-59/2010 [2010] Supreme Court of Lithuania.

⁴⁴ M. D. Greenberg, op. cit. 424.

⁴⁵ *K. R., A. P. v Kauno Raudonojo Kryžiaus klinikinė ligoninė (successor – Kauno klinikinė ligoninė)*, Case no. 3K-3-337/2013 [2013] Supreme Court of Lithuania. *D., A., U. v Centro poliklinika*, Case no. 3K-3-299-611/2015 [2015] Supreme Court of Lithuania.

⁴⁶ J. J. Arias, op. cit. 102-105.

patient. Secondly, regardless of whether the treatment is standard or innovative, physicians usually have a duty to provide their patients with comprehensible, adequate information about it and the alternatives⁴⁷. Thus, full, adequate information to the patient has to be provided about the actions applied to him/her and consent to such treatment has to be received.

Aforementioned interpretation will ensure safety of a patient but not deter the physician to apply safe innovative procedures.

It has to be admitted that in legal doctrine there can be found another proposals to this raised issue. For example, Xiju Zhao suggests that medical practitioners who intend to adopt the non-conventional therapy, especially the controversial therapies, may pursue a special arrangement with the patients', such as a patient's consent or assumption of risk. Of course, before subjecting, the patient is entitled to information about the merits and demerits of the proposed treatment and its alternatives⁴⁸.

To sum it up, it should be noted that innovations in medical practice are essential to the progress of medicine. Physicians should not be afraid of using safe innovative procedures in order to provide better treatment to the patient. This can be influenced by the flexible interpretation of the standard of care provided by the courts. In such cases, the courts should assess whether the use of new medical procedure was reasonable in a particular situation, whether it is based on the medical science and not formally limit the analysis on legal lists of medical procedures for certain disease or acknowledgement of the used procedure worldwide, as well as should not base their judgement for suitability of innovative procedure on one physician's opinion. The main evaluation criteria should be medical science and its progress at the time of health care provision.

However, courts shall make it clear that such innovative procedures shall be applied only when the physician is familiar with and skilled in it, after revealing the purpose, benefits, and risks of the proposed treatment to the patients, including the risks that are not quantified but plausible. But in all instances, the physician shall not use innovative practice when the innovation carries unknown or potentially significant risks to that particular patient. Every time when providing the health care services in respect to the application of safe innovative procedures, all the above mentioned circumstances have to be taken in account.

Conclusions

Most national laws are silent whether and under what particular conditions physicians can or must implement into practice legal innovative medical procedures. The willingness of physicians' to implement into practice new treatment methods relates *inter alia* to the issues of physicians' civil liability.

Usually, the questions of physicians' civil liability are settled in courts. The case-law indicates that when courts evaluate the physicians' conduct they take into account medical standards, regulations, guidelines, use experts' testimony, opinions of other physicians. When new medical treatment procedures are not indicated in such regulations or guidelines or when physicians' opinions on the use of appropriate innovative medical treatment are divided, physicians' willingness to apply innovative medical treatment can be impacted. The fear of possible lawsuits, the possible risk of civil liability, e.g. risk of the breach of the duty of care, uncertainty how their actions will be evaluated by the courts, can deter physicians from the use of innovative medical procedures.

This indicates that the issue how the standard of care is interpreted and evaluated by the courts is important to physicians' eagerness to use innovative procedures that are not commonly and widely practiced by the society of appropriate medical personnel.

⁴⁷ P. Angelos (ed.), 'Ethical Issues in Cancer Patient Care' (Springer Science & Business Media 2013) 58.

⁴⁸ X. Zhao, 'The Duty of Medical Practitioners and CAM/TCM Practitioners to Inform Competent Adult Patients about Alternatives' (New York: Springer Science & Business Media 2013) 146.

Taking into consideration that innovation in medical practice is essential to the progress of medicine, physicians should not be afraid of using safe innovative procedure in order to provide better care to the patient. This can be influenced by flexible interpretation of the standard of care provided by the courts. In such instances, the courts should assess whether the use of new medical procedure was reasonable in a particular situation, whether it was based on the medical science. Courts should not formally limit their analysis on legal lists of medical procedures or acknowledgement of the usage of the procedure worldwide, also they should not base their judgement for the use of innovative procedure on one physician's opinion. However, in all instances, courts shall emphasise that such innovative procedures shall be applied only when the physician is familiar with and skilled in it, also only after the disclosure of the purpose, benefits, and risks of the proposed treatment to the patient and after receiving his/her consent. Such interpretation would ensure the safety of a patient and would allow avoiding disincentives to implement innovations.

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BREXIT AND KOSOVO AS TWO BIG CHALLENGES FOR THE EU

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Abstract

The aim of this work is to examine how in the case of Kosovo the EU is using dialogue sessions and written agreements to find solutions for problems and institutional reform. We will try to see a parallel structure of agreements between EU and UK in the case of pending or future Brexit happening. Also we will try to see if EU is using different tools and values in achieving democracy as it is understood in a broader context in different situations? Why EU is investing huge amounts of resources into Kosovo whereas producing very little value and advancement and how is transparency of such spending being explained? We will turn to see what steps were taken in the case of Kosovo so we can apply them to the talks between EU and UK on the first initial steps towards Brexit as soon as the two “governments” know their approach, priorities and goals. In the Kosovo case the form of the basic First Brussels agreement as text on a blank page opens different questions of possible enforcement and future recognition as law. Knowing that EU in Kosovo struggles with many things among which is International Public Law and its founding principles, we would like to see how it affects some states in and outside of EU and what we can expect in future EU affairs. Kosovo which is partially administered by EU through its EULEX mission has its main policies, laws and other important decisions strongly influenced by the EU limiting its factual sovereignty. Further we also have to focus on recent agreements made between the Serbian and Kosovo* government where EU was represented by its High Representative for Foreign Affairs. Agreements and conciliation was made on a level which has a neutral view towards the status of Kosovo and its independence. Recent developments have the tendency of providing some solutions which can be broadly accepted and applied to similar cases. Unfortunately constitutions of Serbia and Kosovo simply do not reflect the recent agreements with EU in their legal solutions. EU is also torn between its own law and members who recognize Kosovo and the wider level of stakeholders committed to global peace and human rights such as the UN. The lack of broader consensus towards some inner and foreign political decisions is tearing up the EU from inside as we have seen in some recent cases related to sovereignty/autonomy demands and their recognition. We will examine the documents which were signed with a country without UN recognition and see altogether how Kosovo can advance or help understand the potential BrExit itself.

Keywords: EU, BrExit, Kosovo, EULEX, Sovereignty.

Introduction

The case of Kosovo* and its independence, as the newest country on the world, has caused turbulence in the fields of International law and Politics and started the division in the EU as well.² After many obstacles in its long history of some 60 years EU was divided by many issues and always succeeded to solve it using

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² Whilst EU recognizes Kosovo to some extent Serbia does not and that is why it deals with all the agreements and arrangements carefully and with caution, the Serbian Constitutional Court has not yet decided about the constitutionality of the Brussels agreement from 2013. This issue is a challenge for the Kosovo Constitutional court and system as well. The author has dealt with this issue in some of his previous works which are all available on-line.

different means, like courts or political agreements. Now with Kosovo in its hands EU has no clear approach and does not want to move it forward since such situations could cause various requests to arise among EU countries and wider as well. A similar neighboring case like Kosovo happened earlier in Bosnia and Herzegovina where the three confronted parties sat at the same table achieving a solution which keeps that country together until today. A strong solution has been made with a strong anti-conflict environment which no one dares, or could, change in Bosnia. On contrary in Kosovo we have a large number of experiments being done so far by various international factors like: UN, EU, OSCE³, NATO and others. It is not a surprise that people in Kosovo call EULEX mission (European Union rule of law mission in Kosovo) the “euEXPERIMENT”. The more worrying thing is that all the experiments are done without outlining a final goal or outcome, so everyone is free to judge upon its understandings or needs. This fact lead to crisis situations in many parts of the world from which maybe the most obvious ones are coming from countries neighboring EU like Georgia, Ukraine and the Crimean peninsula. The need for some kind of interim administration or regulation in such territories does not exist, people just separate whatever they need and establish own governments. What better could they expect from an interim administration which in the case of Kosovo lasts for almost twenty years. In Kosovo this administration was at some point exclusively given from UN to the EU and its EULEX mission. From this point the biggest EU nightmare began, how to deal and what to do with Kosovo towards which it has an official neutral view.

The UK, France and Germany as EU biggest members were strongly supporting independent Kosovo, now everything will be challenged on their field as UK voted to BrExit (The United Kingdom leaving the European Union). Following the unsuccessful vote for Scotland’s independence from the UK earlier, now UK voted to leave the union together with Scotland. All these would not make much sense if the results would not show that Scottish and Northern Ireland citizens voted to remain in the EU. Such decisions are definitely backed with economical considerations but in this work we will be dealing with the legal understandings of BrExit and its future. Our aim is to make a parallel between the case of Kosovo compared to BrExit and provide legal possibilities to EU and in particular to its High Representative (of the Union for Foreign Affairs and Security Policy). The future relations in EU will be established now in the period of two years of UK exiting the EU and will be based on previous arrangements, also will form a key to any future arrangements.

UK and Kosovo are definitely not of the same importance for EU but by comparing them we can see what solutions other countries can reach with EU, or if we talk about UK what they can not expect to get. Even if UK leaves the union EU will probably introduce some form of obstacle for exiting EU which would introduce a clear cost to exit. We primarily think now about less developed countries which depend on EU but can easily depend on someone else, so EU will suffer more on a political than economical ground. If this is the case Kosovo will serve as a threat of what could happen in some instances again connecting it to Ukraine and its failed way towards EU. It is essential for EU to achieve a high level of consensus with all its members towards all future policies related to the UK, if its not the case another division and protection of own interests would bring the Union to the level of a same economical, but different political interests. Additionally the two nations are having Parliamentary elections in June 2017 with a difference of only three days. Both governments have failed to some extent to satisfy requests, or treats, coming from the EU. In short elections are held to make it clear to EU what is the will of people. UK general election will be held on 8 Jun 2017 for the third time that the main question to UK citizens is whether UK should stay in the EU or BrExit should finally happen. In Kosovo Parliamentary elections will be held on 11 June 2017 and one of the main challenges is how not to implement the requests from the Brussels agreement and decide from a

³ For the role of OSCE in Kosovo see one of the authors previous works: Attila Nagy, Ana Knezevic Bojovic „OSCE and its role in resolving the interethnic conflict and the implementation of rule of law in Kosovo“ [2015] Forty years since the signing of the Helsinki final act, pp. 489-497.

position of a sovereign nation on Kosovo inner matters. Both nations will be facing serious restrictions if they vote to regain their sovereignty.

1. Kosovo and its Dependence on the European Union and its EULEX administration

Independence did not come for free to Kosovo, it was followed by an ambiguous EULEX mission established by the EU and forced from the UN. One could expect that a country/nation is mature enough to maintain and decide its future once it is independent but it was not the case with Kosovo. EULEX was hardly something they wanted but on the other hand it was not up to them to decide, as is the case with their independence as well. The EULEX was made with a Council Joint action and in Article 17 says "The Council and the Commission shall, each in accordance with its respective powers, ensure consistency between the implementation of this Joint Action and external activities of the Community in accordance with Article 3 of the Treaty. The Council and the Commission shall cooperate to this end."⁴ An agreement is hard to reach since Commission frequently treats Kosovo as an independent state whereas it should be neutral to its status. Even if Commission accepts independent Kosovo it is hard to expect the same from the Council, some Commissioners might be biased by their home country policies and try to follow that pattern better than the neutral view. It is not just the EU being divided in this regard, it is also the UN, so a court decision was sought to clarify this legal issue earlier. The International court of Justice has decided in the Kosovo case that it did not breach any other prior rule of independence declaration. „The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.“⁵ This opinion of the court opened slightly The Pandora Box and we didn't have to wait for long for other similar cases to happen. Apart from Ukraine as mentioned earlier we will see how this new wave of independent states and their case studies can be applied to Scotland and Northern Ireland in the BrExit case. Will EU support its citizens and their probable will for self determination? Most likely the answer is no, and it won't be blamed for causing conflicts, but it will certainly be responsible for solving possible conflicts inside UK. When we talk about conflicts, EU could have obviously easily prevented UK from even thinking about BrExit. If the UK government has a full right to control its expenditure EU could have clarified why EU is a cost to UK, as was the question prior to BrExit. If it is a bigger cost than benefit, help in shaping a common solution and not wait until the last moment, when UK is in fact legally leaving the Union. No one cared much in EU and brought up any statistical data or similar to show the results of EU on the field. Contrary on Kosovo EU is investing huge amounts of money to promote democracy and even the smallest advancement is of a tremendous importance. „The financial reference amount intended to cover the expenditure of EULEX Kosovo from 15 June 2016 until 14 June 2017 shall be EUR 63 600 000.“⁶ It is hard to explain why EU is investing such a big amount into a non-member country to do tasks which are usually exclusively held by every independent state.

Another issue of relevance is the administrative divide which is happening in Kosovo and which can again be widely applicable in future conflict situations. Together with EU the two governments, Serbia and Kosovo, have reached a decision to establish an Association/Community of municipalities. Following the ideas that Kosovo is a province of Serbia or an independent state this solution will definitely be an interesting example of a regional autonomy. In the First agreement from Brussels in 2013 Article 5 says: „ The

⁴ Council Joint Action (EC) 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L42/92.

⁵ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403.

⁶ Council Decision 2016/947 CFSP amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo* (EULEX Kosovo).

Association/Community will exercise other additional competences as may be delegated by the central authorities.“⁷ As a diplomat Marti Ahtisaari had a previous plan which would incorporate the UN resolutions and everything would be fine if it wasn't unacceptable for the parties to accept. This plan was the beginning of the failure of UN administration in Kosovo after what EU took over. It was the occasion when EU firstly met directly a country which is not a transitioning but a post-conflict country.

Functioning of four Northern Kosovo municipalities (North Mitrovica, Zvečan, Zubin Potok and Leposavić) elected in 2013 Kosovo local elections is very fragile in legal terms. „These municipalities still do not perform most of their duties in accordance with the Kosovo legislation, as required by the Brussels First agreement on normalization of relations. The main reason for these failures are due to Serbia's interference in both sides, first by preventing legally elected municipal structures to respect the Kosovo law and by supporting the functioning of parallel illegal municipal structures.“⁸ It is obvious that Serbia and Kosovo do not have mutual trust and every step forward is very painful, accordingly Serbia will not in this case cease to administer its municipalities until Kosovo do not form their newly agreed form of Association/Community. With this solution the polarization of Kosovo will be continued forever since it will be a constitutional category even when the constitution itself does not permit it. The Brussels outcomes from 2013 are not permitted by any of the two constitutions but still mandatory for future EU integration. The SAA in its Article 120 about Public Administration says the following: „Cooperation and dialogue shall aim at ensuring the further development of a professional, efficient and accountable public administration in Kosovo, building on the reform efforts undertaken to date in this area, including those related to the decentralisation process and to the establishment of new municipalities. Cooperation shall notably aim to support the implementation of the rule of law, the proper functioning of the institutions for the benefit of the population of Kosovo as a whole, and the smooth development of relations between the EU and Kosovo.“⁹ We believe that at this point EU is becoming an even more hybrid union and that integrating both Kosovo and Serbia together is possible, or just Serbia without Kosovo since EU is already administering Kosovo and Serbia would not mind it as long as its interests, mainly on North Kosovo, are satisfied.

For EU this was another challenge after the big integration of ex-communist states in transition and certainly provides new solutions for future demands coming out of cases such as Brexit. „As if institution-building and the promotion of rule of law in the post-conflict situation of a society with extensive clan structures was not difficult enough, the EU remains trapped between the implementation of the Ahtisaari Plan and its status-neutral engagement.“¹⁰ Learning from the previous mistakes EU took in Kosovo case a different approach of respecting state party requests and on the end getting their more local approval of what is being implemented. Accordingly we hope that EU will follow such patterns in the future since this mediating role might be needed and further developed. UN is being trapped and in the situations like in the cold war period, cases of Ukraine and Syria provide no solutions in the near future. We believe that departing of the UK which is also a UN Security Council member is just impossible and that a new integration form will be reached in an even more hybrid European Union.

2. Future steps towards an independent UK in the EU

⁷ Assembly of republic of Kosovo, Law on ratification of the first international agreement of principles governing the normalization of relations between the Republic of Kosovo and the Republic of Serbia, Law No. 04/L-199, 27 June 2013.

⁸ Ministry for Dialogue, „Brussels Agreements Implementation state of Play“ (Pristina: Republic of Kosovo Government 15. June 2016) p.10.

⁹ EU, Stabilization and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part [2016] OJ L 71/3.

¹⁰ Valeska Esch, „A European Future For Kosovo: Is the EU Loosing its Grip“ [2011] Nomos, Security and Peace, Vol.29, No. 3, p 173.

The whole story of BrExit started from the pile of un-agreed cases and policies on EU level. It is not UK solely being unhappy with such situation but only they had the courage to vote and on the end reach a positive ballot. Prior to having a conclusion we have to note that none of the UK problems will be even close to be solved after exiting EU. So it all started, among others, with hot issues such as (EU) immigrants in UK and its high payments to EU for which they lacked clear explanations. EU failed or did not want to bother with these problems and instead of explaining to its citizens living in UK how it works they simply laid back and watched what is going to happen on the „independence“ ballot. On the end Remain got 48.1% and Leave got 51.9% making it clear that a slight majority of UK citizens wants to leave EU.¹¹ This request would not be a big issue if it was not happening in an anyway complex statehood structure such as the UK. Regional disparities became very clear and worrying for the future independent state. In Scotland Remain got 62.00% and Leave got 38.00%, in Northern Ireland Remain got 55.8% and Leave got 44.2% and in UK multicultural capital London Remain got 59.9% and Leave got 40.1% of votes.¹² It is not a surprise that the majority leave votes came from rural areas which are anyway the biggest losers of EU integration not just in UK. Many EU policies and strategies are exclusively made to fight this phenomena of hindering rural areas in EU since the beginning of their integration. On the other hand the efficiency of such policies is blocked by the power of the huge common market where competition kills instantly any agricultural production which does not have some form of aid. Without support small producers would not survive and this fact puts them into a very dependant position. In history some similar cases of leaving the common EU system were present earlier when Greenland a part of Denmark left EEC because of fishery quotas what was an issue in UK earlier as well, as the Factortame case.¹³ The once French Algeria left EEC when it got independence from France. Both countries are far from the EU common interests and certainly find a better situation in cooperating with their immediate neighbours, like other overseas territories.

We can note that EU is ready for exiting countries or at least it has a regulated procedure for it. By now the famous Article 50 of the Lisbon treaty in its third paragraph says „3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.“¹⁴ The exit from EU can not happen in a period shorter than two years and in the case of UK the countdown already started. „The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom’s intention to withdraw from the EU.“¹⁵ For which Theresa May UK prime minister gave a formal notice on 29 March 2017. Interestingly an important role was given to a case following the UK tradition The Miller¹⁶ case prescribed that that actually no move towards BrExit can be done by the government without having a Parliaments approval. This fact

¹¹ The Electoral Commission, “EU referendum results” < <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> > accessed on 8 April 2017.

¹² The Electoral Commission, “EU referendum result visualisation” < <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> > accessed on 8 April 2017.

¹³ The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others, Case C-221/89 [1991] ECR I-03905. The UK fish quotas were taken by the Spanish fisherman using a back door found in EU principles of free establishment of companies.

¹⁴ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ 326/01.

¹⁵ UK Parliament „European Union (Notification of Withdrawal) Act 2017 (c.9) with received Royal Assent on 16th March 2017“ < http://www.legislation.gov.uk/ukpga/2017/9/pdfs/ukpgaen_20170009_en.pdf > accessed on 8. April 2017.

¹⁶ R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5.

has transferred the responsibility for everything from the people, which voted to leave EU, to the Parliament. Now it is on the EU to agree upon a common standpoint, what will be another challenge, to lead the whole process for the first time in history. The most important thing is that EU has to get the whole process done and to present itself as a winner, otherwise Euro-Scepticism would get even stronger in other member states.

By now there are two major scenarios depicted for leaving the EU, or better to say living next to EU. There is possibility of a „soft“ or „hard“ connection to the EU as some argue, accordingly the Brexit could have one of these two links after exiting. If UK is leaving because of immigrant people a „soft“ exit happens which would bring it to the status of Norway and would make not much sense. Norway needs labour force as much as UK do so an alternative to this is to activate an old colonial pattern from the previous century in strengthening its Commonwealth links. This option would directly harm the EU interests and is less likely to happen. This would be a „hard“ exit scenario which would cancel all EU links and would not be in the sole of EU values and future good relations. At this point only the already existing pattern of „soft“ exit looks possible. UK will then form a group of states with Norway and Switzerland which do have a strong link to the EU but at a certain monetary cost. Now that cost of having EU was one of the main arguments for leaving EU, so we end up in a circle with no end and perfect solution. If the end would be not more than removing the EU flag what might make some people happy we can conclude that BrExit has been successful and this scenario would not be a surprise at all. As earlier stated a similar situation might happen in North Kosovo where the majority of decisions will be done by Serbia without having its official signs, among others its flag.

BrExit started with the Pound losing its value on the first morning, what as seen earlier in the 1992 „Black Wednesday“ is good for the UK economy, its goods are cheaper and that way more competitive on the market, the still common EU market in this case. Also UK is a member of the WTO being in the EU so the profits can be certain at the period of exiting. UK will not leave WTO since it would bring it to trade isolation what is not an issue of BrExit anyway, even contrary. „It is clear that the UK has been very important as an export destination among EU members. therefore, the India-EU FTA loses its importance significantly from India's trade viewpoint as the most important trading partner of India from the EU disappears from the trade deal.“¹⁷ The UK will not be in a position to completely substitute its EU relations and will be dependant as is Turkey or any other non EU Western Balkan country like Kosovo. The TTIP (The Transatlantic Trade Investment Partnership) being discussed between EU and USA have a similar goal like CEFTA (Central European Free Trade Agreement) for which Kosovo is a member. Keeping strong links to the USA could bring UK into this agreement, but even without TTIP the UK can get the same treatment with the USA. Also by exiting the common market or getting any kind of restriction the UK consumers are the ones who will be the biggest losers and this was unclear to them during the BrExit ballot.

3. The Common EU policies are not always very Common

To make a comparison between the two most actual EU Foreign Policy cases, UK and Kosovo, we will further directly compare their similarities and possible future „similar“ faith on the borders of EU. Member states of the EU define the principles and general guidelines for the Common Foreign and Security Policy. On the basis of this, the Council of Ministers adopts 'joint actions' or 'common positions'. (EULEX was founded by a Joint Action.)¹⁸ maybe some detailed rules for future „Exiting“ can be set now. As EU is warned that exit is possible it will do everything to prevent it. Similarly the fail of the UN plan for Kosovo and The Ahtisaari plan failed, so EU took a different approach and brought Serbia and Kosovo to discuss closer with each other.

¹⁷ A. Roy and S. K. Mathur, 'BrExit and India- EU Free Trade Agreement' [2016] JEI Vol. 31 No. 4.

¹⁸ EULEX Kosovo, "What is EU foreign Policy?" < <http://www.eulex-kosovo.eu/?page=2,21> > accessed on 4 April 2017.

UN has more strict rules than EU, and EU is more in favour of hybrid solutions what is seen in Kosovo. Kosovo independence is generally tolerated in EU and the vocabulary frequently changed. „Aware that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order.“¹⁹ So EU treats Kosovo as it could be everything as needed or even nothing. The 2013 Brussels agreement is flexible and can be changed according to up to date needs. Such a need was made in a field not covered with the Brussels agreement and concerns an issue which some might have thought is finished. Kosovo and its Special War Crimes Court (Kosovo Specialist Chambers) is established just after all the cases came to an end in front of the court which claimed exclusive jurisdiction for the territory of ex Yugoslavia, The International Criminal Tribunal for the former Yugoslavia (ICTY). EU almost forgot these cases and if it wouldn't be reminded no one would bother opening them. Tendency to forget and forgive is deep inside EU and makes it run, so after all no one in EU will judge UK for leaving at least as much as its own citizens might. EU is all about trade and by now every state benefits from it more or less, this fact makes it attractive for all neighbouring countries waiting years/decades for integration. „EU Commissioner for Enlargement Johannes Hahn's support for the creation of a common market in the Western Balkans, raised during the recent summit of six leaders in Sarajevo, has drawn little enthusiasm in Kosovo and Albania.“²⁰ Trade is a priority and vital for EU, without trade it wouldn't be even called an Union since no other fact connects it more. Western Balkans will probably join the EU or its future form in one turn and its unification has started earlier with various development stages. As seen earlier Kosovo will not have much of a say/sovereignty in this case neither.

On the end all countries be small or big have usually the same problems in many different issues from which trade is just one. In the case of UK a challenge will be the membership in the TTIP since agriculture was the biggest factor for BrExit. „The most intricate challenge facing those negotiating the TTIP in the domain of food and agriculture is to find a way to reduce the transaction costs resulting from different regulations regarding the safety and quality of food without giving up the ability to protect—and be seen to be protecting—the health of consumers.“²¹ The case of food standards is not likely to be given up by UK and its consumers, so EU standards will most likely stay. Again similar to Kosovo in CEFTA and its future closer cooperation with its neighbours what is vital for establishing a good ground for closer cooperation with and in EU. Naturally the level of trade will benefit some countries more and an evidence can be found in previous disagreements over CEFTA in Kosovo.²²

At the moment benefits for Kosovo in EU are tremendous and vital whereas for UK the balance sheet is still not clear and will be seen in the near future. Certainly EU will give UK a slightly worse deal than to its members what UK will present as a win, otherwise EU would make no sense. A developed country such as UK can survive easier than countries like Kosovo. „Countries with relatively low levels of institutional development benefit most from prospective EU membership.“²³ Having a benefit on one side does not necessarily mean it does not exist on the other since developed EU countries do need new countries/markets. Or maybe we are wrong and it all goes to a different direction so UK just made the right step forward?

¹⁹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403.

²⁰ BalkanInsight, „Kosovo, Albania Give ‚Common Market‘ Call Thumbs Down“ <<http://www.balkaninsight.com/en/article/eu-proposal-on-joint-market-raises-eyebrows-in-kosovo-and-albania-03-20-2017>> accessed on 8 April 2017.

²¹ T. Josling and S Tangermann, 'TTIP and Agriculture: Another Transatlantic Chicken war?' [2016] Choices Vol. 31, No. 2 p. 4.

²² Regarding trade with Kosovo see authors previous work: Attila Nagy, „Kosovo as a future member of the WTO“ [2015] ESI, EFLE 2015. pp. 43-53.

²³ Nina Schönfelder, 'Impact of European Integration on Institutional Development' [2016] Journal of Economic Integration, Vol. 31, No. 3, p. 514.

4. Sovereignty Deficit as it is created by the Brussels administration

In The European Union freedom is the most valued and developed value. Still some inconsistency could be seen as the freedom on the bottom level, citizen rises whereas on the top, state level, it declines in the EU. Freedom or the Sovereignty of states is voluntarily transferred to the EU level, in some instances, not exclusively. The regulatory powers of the parliaments are cut and the governments policy making powers lowered as well. „Over the years, Parliament has passed laws that limit the application of parliamentary sovereignty. These laws reflect political developments both within and outside the UK. They include: The devolution of power to bodies like the Scottish Parliament and Welsh Assembly. The Human Rights Act 1998. The UK's entry to the European Union in 1973. The decision to establish a UK Supreme Court in 2009, which ends the House of Lords function as the UK's final court of appeal. These developments do not fundamentally undermine the principle of parliamentary sovereignty, since, in theory at least, Parliament could repeal any of the laws implementing these changes.“²⁴ So as an addition to the fact that EU citizens can not influence fully the work of EU institutions which has produced the Democratic Deficit, we now introduce another “deficit”.

Sovereignty Deficit²⁵ was always present in EU member states and only with time it became a problem which had to be changed at the cost of UK leaving the EU as a whole. As Democratic Deficit is created by the EU in its relation to its citizens similarly „Sovereignty Deficit of EU member states“ is created in the relation of the Brussels administration towards its member states and the member state institutions like the e.g. parliament. When we say member states we also mean Kosovo as it is directly administered from the EU as much as any other EU member state or even more via the EULEX mission. Introducing „Sovereignty Deficit“ in EU countries is a situation where the Brussels administration takes over some sovereign rights and decisions from a „member“ state. It can be contrary to the states interest, current will of people or public policy. The occurrence of Sovereignty deficit is shown in various forms in the political life of a certain country. It is possible only in the connotation of EU having legal or political rights to put under pressure a certain state or its government. When government is in crisis it immediately shows in the parliamentary crisis and not necessary but could lead to general elections as we have seen in the cases of UK and Kosovo. Kosovo is specific since it is not an EU member country but is under the influence of Brussels administration and literally has lost some sovereign rights to the EU. Sovereign rights have been never fully exercised by Kosovo and are held by the International community in a very interesting and complex state of law. EU is able to influence the Kosovo „sovereignty“ in various forms, e.g. introduction of a new war crimes court or the administrative division in the form of A/C of Serbian municipalities. Such a situation has confronted the will of people so we have the presence of Sovereignty Deficit and as its outcome Parliamentary elections in both Kosovo and UK.

Conclusions

The future of EU is now and it is a shame it couldn't make its last steps of unification before the dissolution started. Having such a tremendous influence on member countries really leaves little space for excuses. Brexit will lower the stability and coherence of EU, it will be fragile from now on. Another big issue in EU is the refugee crisis which is still in the hands of individual member states, so far the union was not successful in fully taking it over even though it tried. The division towards Kosovo independence ended EU

²⁴ About Parliament, “Parliamentary Sovereignty”< <http://www.parliament.uk/about/how/role/sovereignty/>> accessed on 6 Jun 2017.

²⁵ Denis J. Galligan, ‘The Sovereignty Deficit of Modern Constitutions’ [2013] Oxford Legal Studies Research Paper No. 55 p. 703.

political coherence and its strongest side, the economical integration, is also reaching its end. The overregulation and „democratic deficit“ which makes vague the intentions of various EU policies starts to have a real cost to the union. As the Kosovo case is getting a form which no one expected the same can be expected with BrExit. The EU democracy works in a way that citizens, even when voting for change, just get the same in a different form. A conclusion that UK will be independent again will be as much real as saying that Kosovo is an independent country.

The most likely viable tool to proceed with BrExit is to form an Arbitrational body for discussing and clarifying future steps. This body should also deal with future disputes between UK and EU on the other hand. A good starting point for this could be the European Court of Justice, even knowing that UK sometimes did not like its decisions and authority. Commission is way too biased, politicized and weak on member states influence. The same stands for the Council which would probably just uncover more disagreements than reach any solutions. It is also possible that BrExit will be prolonged until the next UK elections where citizens will have a new say in the case or/and be able to choose between various exit strategies. Definitely all EU member states have eyes wide open on both cases and have some ideas plans which could be used as a benefit for them in the future. BrExit was decided by the UK but its conditions will be decided by EU and interestingly its citizens will have no opportunity for consultation or opinion. As long as member states stand together in this issue their union will last if they get divided it will fail.

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TERRORISM VS. INTERNATIONAL LAW – CASE OF ATTACKS IN BRUSSELS

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Abstract

Terrorism is a phenomenon that especially in recent decades has been spreading fear across global population. Of the recent strikes that shocked the world, one was especially remarkable: an attack in Brussels on March 22nd, 2016. The terrorists linked with ISIS targeted the heart of Europe by causing an explosion at National Airport and Maelbeek metro station. The paper is focused on the discussion of juridical aspects of the attack. First, it analyses the definitions of terrorism, then presented are international law mechanisms protecting people from terrorist attacks and solutions provided by international community aimed at improving civil aviation security, particularly recently drafted Beijing Convention. Its general goal is to familiarize readers with this highly sophisticated systems of legal norms that should secure global population from attacks on civil aviation.

Keywords: terrorism. civil aviation. the Kingdom of Belgium. jurisdiction, Beijing Convention.

Introduction

March 22nd, 2016 – an everyday routine is interrupted by massive explosions in Brussels. The capital of Belgium was chosen by terrorists as their next target. The bombs blew out at Zaventem International Airport and at the metro station of Maelbeek, at the proximity of European Union institutions' premises. Not only the Belgium was shocked, but also the whole Europe, as the attack was just one of many that occurred throughout the world in a short period of time.

This tragic event provoked another discussion concerning world' population's security, particularly against the terrorism. Those the most involved in the debate are probably states willing to take maximum efforts in order to protect their citizens. And here it is vital to note that one of the most crucial element in the whole system of security is law. The hereby article shall be indeed dedicated to present the problem of terrorism on the example of attacks in Brussels from the legal perspective, especially international law and point out potential actions that can be undertaken to improve the system of legal protection against terrorists.

1. The facts on the attack.

Brussels National Airport was the first one to be bombed. At approximately 8am local time two men, Ibrahim el-Bakraoui and Najim Laachraoui, blew themselves out in the departure hall. The explosion killed 11 people and injured another 76. A person accompanying the offenders – Mohamend Abrini fled from the airport instantly after the bombing.

Then, the metro station Maelbeek was hit by explosion. The brother of Ibrahim el-Bakraoui, Khalid blew himself out in the second car of the metro train, killing 21 people and harming another 100. It did not take the police long to figure out who was to be blamed: all tracks led to Islamic State (ISIS). The organisation

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itself claimed responsibility for the massacre and expressed shortly afterwards their joy on the fact that the capital of Belgium was struck by bombs. Also it openly said that their goal was to commit a massive murder on Brussels habitants.²

In recent years, not only Brussels Airport was targeted by terrorists. The bombings also occurred at facilities such as Atatürk International Airport in Istanbul (2016), Jinnah Airport in Karachi (2015), or Domodedovo Airport in Moscow (2011) and many others. Every event of that kind pushes the experts to make a reflection on the efficiency of legal systems against terrorist threats.

2. Terrorism – how to define the term and relate it to case of Brussels

Despite the advanced security and high level of safety, aviation has always been an “attractive” target for terrorists groups. A trait of “internationalism” in air travels makes the global population learn quickly about the occurrence of a terrorist act and spreads the worldwide panic and fear.³ However, the terrorism itself changes with time, and so it affects the aviation – some decades ago airlines' passengers were mostly threatened by being hijacked during the flight and today rather different methods are preferred by terrorists, such as attacking directly the airports (see: upper paragraph).

With the evolution of terrorism, its definitions also crystallize. It is nevertheless somewhat difficult to precisely assess the term, as there are several hundred definitions thereof.⁴ Moreover, an international law act predestined to provide such definition (Convention for the Prevention and Punishment of Terrorism done in Geneva on November 16th, 1937) has never entered into force.⁵ Therefore we should refer to other definitions evoked in various other sources.

And here, International Convention for the Suppression of the Financing of Terrorism adopted by UN General Assembly on December 9th, 1999 defines a terrorist act as the one *intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*⁶ Apart from that the Convention names as 'terrorist' acts also crimes mentioned in legal documents enumerated in annex.

Federal Bureau of Investigation uses a definition calling terrorism the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.⁷

The United Nations organ the most concerned with combatting terrorism, namely Security Council, defined the phenomenon in Resolution 1566 (2004) as *criminal acts, including against civilians, committed*

² K. Yourish, *et al.* 'What Happened at Each Location in the Brussels Attacks' (22 March 2016, The New York Times, <http://www.nytimes.com/interactive/2016/03/22/world/europe/brussels-attacks-graphic.html?_r=1> [last accessed: 21 March 2017]) J. Fioretti, 'Brussels Attacks Death Toll Lowered To 32' (29 March 2016, The World Post, <http://www.huffingtonpost.com/entry/brussels-attacks-death-toll-lowered_us_56facaa4e4b0a372181b27ed> [last accessed: 21 March 2017])

L. Dearden, 'Isis supporters claim group responsible for Brussels attacks: "We have come to you with slaughter"' (22 March 2017, The Independent, <<http://www.independent.co.uk/news/world/europe/isis-supporters-claim-responsibility-for-brussels-attacks-bombings-belgium-airport-maalbeek-metro-we-a6945886.html>> [last accessed: 21 March 2017].

³ T. Aleksandrowicz, K. Liedel, 'Zwalczanie terroryzmu lotniczego. Wybrane zagadnienia i źródła prawa międzynarodowego' (Szczelno: Wydawnictwo Wyższej Szkoły Policji 2010) p. 14.

⁴ T. Aleksandrowicz, 'Terroryzm międzynarodowy' (Warszawa: Wydawnictwa Akademickie i Profesjonalne 2008) p. 20.

⁵ Z. Galicki, 'International Multilateral Treaties and Terrorism', in: K. Lankosz, M. Chorośnicki, P. Czubik *et al.*, 'Walka z terroryzmem w świetle prawa międzynarodowego' (Bielsko Biala: Wydawnictwo STO 2004), p.11.

⁶ International Convention for the Suppression of the Financing of Terrorism adopted by UN General Assembly on December 9th, 1999 (Dz.U. 2004 nr 263 poz. 2620).

⁷ T. Aleksandrowicz, *op. cit.* p. 20.

*with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.*⁸ The Security Council itself referred multiple times to fight against terrorism and condemned actions of terrorists (see e.g.: Resolutions 1368 (2001), 1530 (2004), 1611 (2005)).

North Atlantic Treaty Organisation also explained its reasoning on terrorism in the Glossary of Terms and Definitions. According thereto we should consider a terrorism *[t]he unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate governments or societies to achieve political, religious or ideological objectives.*⁹

Although the amount of the phenomenon definitions is enormous, indeed they all feature several common traits. Therefore, a particular act might be regarded as a terrorist if:

1. use of force or a threat thereof is applied.
2. is unlawful.
3. harms persons or damages property.
4. is aimed at realisation of specific goals, either religious or political.
5. results in spread of fear or threat.
6. affects entities such as state or international organisation.

Taking into account all aforementioned, the attack on Brussels National Airport can be totally qualified as a terrorist act.

Ad. 1) attackers used a force by causing an explosion at the airport premises.

Ad. 2) the act was against the law.¹⁰

Ad. 3) many people died or were injured in consequence, also large part of the airport was damaged.

Ad. 4) ISIS responsible for organising the attacks aims at forming a caliphate and conducts jihad in the most extreme form.¹¹

Ad. 5) the fear emerged upon the attack across the European society.

Ad. 6) The ISIS actions are directed against the international community, especially “Western culture”

After assessing how a term of 'terrorism' should be understood, vital is to discuss how international law regulates the matter and how the combat against terrorists is organised in juridical point of view.

3. International community on the problem.

Multiple international law acts are devoted to regulation of fight against terrorism. As it was mentioned before, no single agreement has been adopted to cover all aspects of the problem. Rather there exist sector conventions that refer to particular aspects of terrorism, like its financing, marine piracy, hijacking aircraft etc. For the purpose of hereby article, we only focus on 'aerial terrorism' – all kinds of terrorist acts directed against aerial navigation and endangering its safety.¹² And the scope of such act is larger than ever before as

⁸ United Nations Security Council Resolution nr 1566 (2004), 'Threats to international peace and security caused by terrorist acts', S/RES/1566 (2004) (8 October 2004).

⁹ NATO Glossary of Terms and Definitions AAP-06 Edition 2014.

¹⁰ Article 137 §3.1. of the Belgian Penal Code criminalizes destruction or massive damage to system of transport having in aim endangering the lives of people or generating considerable economic losses.

¹¹ W. Sacharczuk, 'Islam – Religia, a terroryzm', in J. Szafranski & K. Liedel et al, 'Problemy prawno-organizacyjne zwalczania terroryzmu w Polsce' (Szczytno: Wydawnictwo Wyższej Szkoły Policji 2011), p. 55.

¹² K. Liedel, 'Zwalczanie terroryzmu lotniczego: aspekty prawnomiędzynarodowe' (Warszawa: Jurysta 2003) , p. 12.

potential attackers have an access to modern technologies and develop sophisticated methods of offences.

For decades, International Civil Aviation Organisation (ICAO) has been working hard to increase the level of security of those travelling by air. The effect of those efforts is a set of treaties forming a Tokyo-Hague-Montreal-Beijing system. Included thereto are following acts:

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft done in Tokyo, 14 September 1963 ("Tokyo Convention").
2. Convention for the Suppression of Unlawful Seizure of Aircraft done in Hague 16 December, 1970 ("Hague Convention").
3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation done in Montreal, 23 September, 1971 ("Montreal Convention, hereinafter referred also to as "Convention").
4. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation done in Montreal, 24 December 1988 ("Supplementary Montreal Protocol", and hereinafter referred also to as "Supplementary Protocol").
5. Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation done in Beijing, 10 September 2010 ("Beijing Convention").
6. Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft done in Beijing, 10 September 2010 ("Beijing Protocol"). and
7. Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board
8. Aircraft, done at Montreal on 4 April 2014 („Montreal Protocol").

Due to regulatory subject, for the purposes of hereby article, the analysis shall only be conducted on Montreal Convention, Supplementary Montreal Protocol and Beijing Convention. The latter, as not yet ratified by required number of states, has not entered into force (as for March 2017).¹³

As the name suggests, the Supplementary Protocol has as an aim to assure accurate security of air transport passengers against acts of violence that would occur on airports' terrain by adding relevant provisions into the Convention. Currently, there are 174 parties thereto, including Belgium. According to article I of the Supplementary Protocol both its wording, as well as wording of the Convention should be read and interpreted as a one single act. So, art. 1(1) bis of the Convention stipulates that *[a]ny person commits an offence if he unlawfully and intentionally, using any device, substance or weapon [...] performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death. [...] if such an act endangers or is likely to endanger safety at that airport.*¹⁴

It is then clear that the attackers having performed a terrorist attack at Brussels National Airport committed a crime also under international law. Moreover, criminalized is also acting in accomplice with persons who commits aforementioned crime, which arises from Article 1(2) of the Convention. Practically it means that regardless of to which country being a party to to Convention Mohamed Abrini (accompanying suicide bombers) or other people involved in preparing the bombing have had fled, then probably enforcement organs would have initiated a pursuit on them. That is due to art. 5(2)bis of the Convention obliging each state-party to take any necessary measures to establish its jurisdiction in relation to an offence (including a bombing at the airport, as well as accomplice therein), if an alleged offender is present on its

¹³ Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation Done at Beijing on 10 September 2010 (ICAO Document nr 9960), list of parties, <http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Conv_EN.pdf> [last accessed: 28 March 2017].

¹⁴ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on 23 September 1971 (Dz.U. 2006 nr 48 poz. 348).

territory, and the state has not extradited them.¹⁵ Further, in paragraph 3 it is added that undertaken actions does not exclude criminal jurisdiction. Article 6 comprises procedural provisions related to proceedings against a suspect.

A “core” of the Convention constitute provisions of art. 8 relevant for extradition. It obliges in paragraph 1 a duty of including all crimes enumerated in the Convention to existing and future extradition agreements concluded between state-parties and recognizing them as justifying extradition. Moreover, those crimes cannot be excluded from extradition in future concluded agreements between states.¹⁶ However, in case that such a bilateral agreement does not exist, there is no obligation to conclude such one, but just a right to recognize the Convention as a legal basis for extradition, if a relevant motion is submitted by a state requesting extradition (art. 8 paragraph 2). Extradition of course is not required, as the state of offenders’ stay decides alone if they are to be extradited or conducts criminal proceedings against them on its own – that arises from art. 7 of the Convention. It nevertheless does not mean that an offender shall be automatically prosecuted if not extradited.

Aforementioned provisions are directly linked with a rule *aut dedere aut iudicare* being a kind of compromise between the necessity to extradite an offender (or an alleged offender) to a state on whose territory an attack was performed, or leaving him to be judged by appropriate authorities of a state, on whose territory they are present.¹⁷ An *aut dedere aut iudicare* rule is somewhat alternative obligation arising from a particular treaty concerning relevant crimes. The main goal of treaty here is to make all states of the world be bound by its provisions so that an offender or an alleged offender, regardless of where they are present would incur criminal responsibility. It is vital to add that many authors resign from equalizing the terms *aut dedere aut iudicare* and “universal jurisdiction” although that they are related to each other. *Aut dedere aut iudicare* rule is based on relevant treaties’ provisions, so applied is only to those states that are parties thereto. On the other hand universal jurisdiction, as a rule arising from customary law, is binding upon all states, regardless of treaties’ application.¹⁸

In consequence, the fate of attackers who bombed Brussels National Airport would be largely dependant on a situation of state where they were present. If that state had had no extradition agreement with Belgium and had decided not to extradite them on the request of the Kingdom of Belgium, then it would have established jurisdiction over the offenders. That would practically mean that much time would pass until they stand official trail and the potential question of their extradition would be a cause of dispute between states, especially as usually terrorist attacks are often treated as “political”¹⁹, and most treaties related to extradition of those responsible for terrorist attacks (including Montreal Convention and Supplementary Protocol) do not oblige to exclude crimes against civil aviation from those of a “political character”.²⁰ That would efficiently obstruct the offender's extradition, and further their punishment. Many states respect a rule of non-extraditing offenders of political crimes due to institution of territorial asylum²¹ – then if offenders chose

¹⁵ The Convention (along with other acts enumerated in this chapter), does not define the term *alleged offender*. The question of using the term in the text might seem problematic, as in many systems also a domestic law does not give its definition. In interpreting the word we may look into definitions present in other treaties, like Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, done in New York on 14 December 1973. It stipulates in article 1 paragraph 2 that *alleged offender* means a person as to whom there is sufficient evidence to determine prima facie that he has committed or participated in one or more of the [particular crimes].

¹⁶ M. Żylicz, 'Prawo lotnicze międzynarodowe, europejskie i krajowe' (Warszawa: LexisNexis 2011), p. 455.

¹⁷ T. Aleksandrowicz, op. cit. p. 109.

¹⁸ See: T. Ostropolski, 'Zasada jurysdykcji uniwersalnej w prawie międzynarodowym' (Warszawa: Instytut Wydawniczy EuroPrawo 2008), p. 41.

¹⁹ See more: T. Aleksandrowicz, op. cit. p. 113.

²⁰ R. Abeyratne, 'Terror In the Skies: Approaches to Controlling Unlawful Interference with Civil Aviation', [1997] 2(2) International Journal of Politics, Culture and Society, p. 247.

²¹ See: B. Ziemblicki, 'Wprowadzenie do problematyki ekstradycji', [2010] 5, Wrocławskie Studia Erazmiańskie, p. 247.

their place of stay “appropriately”, they would potentially avoid jurisdiction of a state interested in punishing them.

4. Beijing Convention – a key to better security (?)

Beijing Convention is the one destined to improve the mechanisms provided by Montreal Convention and Supplementary Protocol. Its provisions may have great influence on increase of juridical protection of air transport passengers both due to criminalization of bigger number of acts against civil aviation and amendments to provisions related to extradition. It is basically developed to “replace” Montreal Convention currently being in force. Of course, the introduction of said improvements shall be dependant on the fact if Beijing Convention comes into force.

Already mentioned extensive criminalization of acts is visible in provisions of art. 1 paragraph 3 that criminalizes even a threat of committing an offence (including a bombing at the airport) or unlawful and intentional causing that someone receives such a threat. Next, paragraph 4 criminalizes also organisation and direction of others in committing an act. Then, if Beijing Convention was in force, state-parties thereto would not only be obliged to pursue persons directly engaged in attacks in Brussels, but also those directing their actions.

Paragraph 5 constitutes a juridical basis for claiming liable terrorist groups and networks that in some way contribute to committing crimes against civil aviation. It would therefore serve as a basis for judging members of the Islamic State, that in purpose of supporting the general goal of their organisation, were engaged in attacks in Brussels.

The key amendment to be introduced by Beijing Convention is *expressis verbis* excluding from the catalogue of political crimes those acts that might prove unsafe for civil aviation – that is stipulated by article 13. According thereto, *the request for extradition and mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.*²² That is the question directly linked with widely recognized protection of terrorist attacks' victims.²³ Thanks to it, *in principio* offenders or alleged offenders of the attacks should not enjoy the right to asylum in states being parties to Beijing Convention, which should influence the facilitating requesting for extradition by state willing to punish the offenders. But the efficiency of this mechanism is highly dependant on the number of ratifications. About universal application of the treaty, and in consequence efficiency in pursuing the offenders one may say only when the provisions have worldwide range.²⁴

5. Conclusions

Civil aviation, although being fairly recognized as the safest mode of transport, still is in the target of terrorist attacks, which the latest act at Brussels National Airport only proves. International community has long ago decided to combat against terrorism and one of its elements is introduction of juridical solutions that would provide efficient protection from attacks. Unfortunately, the fight seems to be a competition between states of the world and terrorist groups using more and more conventional methods aimed at spreading a threat of air travel across the globe. It is therefore of essence that the international community maximises the efforts in introducing relevant regulations and to have an equally restricted view on terrorism and offenders

²² Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation Done at Beijing on 10 September 2010, ICAO document nr 9960, <http://www.icao.int/secretariat/legal/Docs/beijing_convention_multi.pdf> [last accessed: 28 March 2017].

²³ M. Gill, A. Piera, 'Will the New ICAO–Beijing Instruments Build a Chinese Wall for International Aviation Security?', [2014] 1(47), *Vanderbilt Journal of Transnational Law*, p. 203-204.

²⁴ See more: R. Abeyratne, 'Aviation Security Law' (Berlin-Heidelberg: Springer 2010), p. 245.

in all states. It does not concern the penalisation of offences that much, as most states' legislation provides high penalties for act committed against civil aviation, but rather the cooperation in putting offenders before trial. Those sometimes feel to be non-punishable when they find an asylum in a different country, and the latter one refuses to extradite them on purely political basis. So, those responsible for terrorist attacks in Brussels shall be punished when the whole international community has an interest therein. Then, we should consider as a priority ratification of Beijing Convention providing a wide protection from terrorist attacks by treating as responsible those not only directly involved in attacks, but also those related to terrorist networks. Moreover, due to prohibition of rejecting extradition from purely political motives, it negates the possibility for offenders to seek asylum. Aforementioned goals shall be achieved once Beijing Convention is ratified by most of states. As currently, the number of ratifications is rather small, we will need to wait for that effect for long time.

We should only hope that the attack from March 22nd, 2016, though bloody and vile, shall be a lesson for international community to make even bigger efforts for protecting humanity against terrorism.

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PERSONAL DATA AS AN ECONOMIC GOOD – MISLEADING COMMERCIAL PRACTICES AND SOCIAL NETWORKS

Ricardo Pazos¹

Abstract

In the digitised world, businesses seek different types of information, and personal data is one of them. These data allow them to economise their resources, reach a larger public and target their goods and services to the right users. All the collected information can be used, sold to or exchanged with other economic operators. This paper covers two of the large number of legal issues that arise from the increasing importance of personal data in the digitised world.

First, Internet users usually must give information in exchange of online content which is allegedly 'free'. Taking into account the economic value of that information, we might be facing a case of 'misleading advertising'. Even if it is not, the CJEU has recently developed more its case-law regarding transparency on terms that are not individually negotiated, in connection with the Unfair Terms Directive. This case-law can be used to make online content providers be subject to a special obligation of transparency on the payment through personal data.

Second, the owners of social networks require users to give access to their personal data and to transfer or share their rights on information, videos or images uploaded and diffused through the platform. Two sets of property rights play here. On the one hand, those on the network, held by its owner. On the other, those on the personal data, held by the user. A property rights approach to this interaction lead us to foster privacy and data protection rules designed by contracts between network owners and each user.

Keywords: social networks, personal data, misleading commercial practices, transparency, property rights.

Introduction

'If you are not paying for a product, you are the product'. This is becoming a common message on the Internet nowadays, expressed in many different ways. I believe it is true to a certain degree, and that it would be convenient for everybody to internalise the idea and take it into account in their everyday life. With the previous quote in mind, the starting point of this paper is that information is an economic good and an article of commerce. Sometimes, data are the end in itself. Someone simply wants to know, to possess information. In other occasions, information allows to satisfy needs and desires in a better way. It becomes a means to economise resources, a key that opens possibilities. In the digitised world, businesses focus in the latter function of information, and one of the types of information they seek is personal data.

The first issue covered in the paper, and in fact its core, points at the allegedly free of charge nature of some online contents. If information is an economic resource each Internet user has, providing some of it to get an application or a social network account makes the latter 'purchased' goods, and thus not strictly

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free². In part 1, I will present the main features of the notions 'unfair' and 'misleading' commercial practices in EU law. In part 2, I will explain why I think that offering something 'free of charge' when there is a counter-performance in the form of information or personal data does *not* amount to a misleading commercial practice. However, in part 3, I will argue that online content providers do have a special duty of transparency regarding the economic value of the information supplied, especially personal data.

The second topic I will deal with, in a much more concise way, is the proper understanding of the rights that seem to be colliding on the Internet in general, and in social networks in particular. On the one hand, we find property rights held by online content providers and social network owners. Online platforms are not public spaces, but private property. On the other hand, we find the property rights that Internet users hold on their personal data, their photos and their videos. In part 4, I will start by succinctly recalling the basic rights of the data subject according to the recent EU Regulation 2016/679. Next, I will suggest adopting a property rights approach, which leads us to the conclusion that privacy by design through contracts between network owners and network users may be a better solution than one-size-fits-all legislation.

1. Misleading commercial practices

The interest protected by rules against unfair commercial practices is twofold, as these rules aim at guarding the economic interests of both consumers and businesses. One instance of this double goal is **Directive 84/450/EEC, concerning misleading advertising**³. One example of a legal text that focus more on the consumer protection side is Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market (hereinafter, 'Unfair Commercial Practices Directive')⁴. Misleading commercial practices are one of the actions forbidden by the Unfair Commercial Practices Directive, which applies to business-to-consumer relations. Its scope is any action, omission, conduct, representation or commercial communication by which a trader approaches a consumer, connected with the promotion, sale or supply of a product⁵. It is important to remark that, for the purposes of the Directive, product means 'any goods or service including immovable property, rights and obligations', according to article 2(c). The Unfair Commercial Practices Directive follows a three-level scheme: a general clause on article 5, the particularly unfair commercial practices (misleading or aggressive, as set out in articles 6 to 9), and Annex I, which includes a list of commercial practices deemed to be unfair in all circumstances without further assessment⁶.

Article 5(1) of the Unfair Commercial Practices Directive states that 'unfair commercial practices shall be prohibited', and article 5(2) indicates the two cumulative criteria conforming the notion of unfair practices. The first one is being contrary to the requirements of professional diligence. The second is materially

² Here I use 'good' in a broad sense, as 'any corporeal or ideal reality that may provide an utility to contribute to the satisfaction of a need'. See L. DÍEZ-PICAZO, V. MONTÉS, 'Derecho privado y sistema económico' (Madrid: Universidad Autónoma de Madrid 1979) 59.

³ Council Directive (EEC) 84/450 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17.

⁴ Directive (EC) 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive). On 25 May 2016, the European Commission issued a new version of the Guidance on the application of the Unfair Commercial Practices Directive (SWD(2016) 163 final), available at http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf.

⁵ Articles 3(1) and 2(d) of the Unfair Commercial Practices Directive.

⁶ H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 81-82. and H.-W. MICKLITZ, G. HOWELLS, 'Commercial Practices and Advertising', in H.-W. MICKLITZ, J. STUYCK, E. TERRYIN (eds.), 'Cases, Materials and Text on Consumer Law' (Oxford and Portland, Oregon: Hart Publishing 2010) 96-97.

distorting, or being likely to materially distort, the economic behaviour of the average consumer whom the practice reaches or to whom it is addressed, or of the average member of the group the practice is directed to.

For the purposes of EU legislation, the average consumer is someone reasonably well-informed and reasonably observant and circumspect⁷. For an example on how the average consumer standard plays, let us recall the Court of Justice of the European Union (hereinafter referred to as 'CJEU') judgment *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* (commonly known simply as *Mars*)⁸. The wrapping of the chocolate bars were marked indicating that they contained an extra 10% of the product, but the percentage of the marked surface of the wrapping was 'considerably more' than 10%, a fact that could induce consumers into believing the increase was larger than the actual one⁹. However, the CJEU stated that the average consumer 'may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase'¹⁰.

'Professional diligence', the first element of the concept of unfair commercial practices, is defined in article 2(h) of the Directive as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'. It is an objective standard that makes irrelevant the intention of the trader. It takes into account the consumer legitimate expectations, and is expressed broadly to cover the great variety of situations that may arise in the market. At the same time, it avoids to apply the standard of the 'normal' market practices, initially present in article 2(j) of the 2003 Proposal for the Directive¹¹, so businesses cannot move down the threshold by following a less honest conduct on a daily basis¹².

Materially distorting the economic behaviour of consumers is defined in article 2(e) of the Unfair Commercial Practices Directive as 'using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'. According to article 2(k), a transactional decision is any consumer decision concerning aspects such as whether or not to purchase, how and on what terms, making a partial or a full payment, retaining or disposing of a product, or exercising or not a contractual right. The aim is to shield consumers against actions that affect their autonomy and endanger the rationality behind their economic decisions. The Directive does not require an actual distortion, but only the suitability to cause an appreciable or sufficiently high distortion. In this context, an objective standard, disregarding the intention of the trader, is also applied¹³.

⁷ CJEU judgments *Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt*, Case C-210/96 [1998] ECR I-4657, ECLI:EU:C:1998:369, paragraph 31. and *Estée Lauder*, Case C-220/98 [2000] ECR I-117, ECLI:EU:C:2000:8, paragraph 27.

⁸ CJEU judgment *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars*, Case C-470/93 [1995] ECR I-1923, ECLI:EU:C:1995:224.

⁹ *Mars*, cited *supra* note 8, paragraphs 4, 8 and 22.

¹⁰ *Mars*, cited *supra* note 8, paragraph 24.

¹¹ Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) [2003] COM (2003) 356 final.

¹² H.-W. MICKLITZ, G. HOWELLS, 'Commercial Practices and Advertising', in H.-W. MICKLITZ, J. STUYCK, E. TERRY (eds.), 'Cases, Materials and Text on Consumer Law' (Oxford and Portland, Oregon: Hart Publishing 2010) 97-98. For a detailed analysis of the notion of 'professional diligence', see J. MASSAGUER, 'El nuevo derecho contra la competencia desleal' (Cizur Menor, Navarra: Thomson Civitas 2006) 59-78.

¹³ On the requirement of distorting the economic behaviour of the average consumer, see J. MASSAGUER, 'El nuevo derecho contra la competencia desleal' (Cizur Menor, Navarra: Thomson Civitas 2006) 78-88.

In a more specific way, article 5(4)(a) of the Unfair Commercial Practices Directive stresses that practices which are misleading as set out in articles 6 and 7 will be deemed to be unfair. A practice that responds to the Directive notion of misleading is considered automatically unfair, without having to determine if it violates the professional diligence and is likely to distort consumers¹⁴. Two categories of misleading practices can be found¹⁵.

One is that of misleading actions. It means that the practice contains false information and is therefore untruthful about some elements indicated right after in article 6(1) of the Unfair Commercial Practices Directive, or that, in any way, deceives or is likely to deceive the average consumer in spite of its correctness from a factual point of view. Causing or being likely to cause to take a transactional decision the consumer would not have taken without the practice. The existence or nature of the product and its main characteristics are among the elements mentioned by the Directive.

A commercial practice may also be unfair by virtue of a misleading omission. That is, if the commercial practice omits material information that the average consumer needs in order to make an informed transactional decision. What amounts to material information depends on the factual context, and it is necessary to take into consideration all the circumstances attending, as well as the limitations of the communication medium itself. This omission must cause or be likely to cause that the average consumer makes a decision that otherwise they would not have made. It is also considered a misleading omission if the trader hides the material information, or supplies it in an unclear, unintelligible, ambiguous or untimely manner. Or even if the trader does not identify the commercial intent of the practice, in case it is not obvious from the context.

Rules on both misleading actions and misleading omissions aim at allowing the consumer to make informed decisions. They require the misleading conduct to affect core issues for the average consumer, not any element of the transaction. When the commercial practice constitutes an invitation to purchase, material aspects encompass the main characteristics of the product and the price or the manner in which the price is calculated, as well as 'the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence'¹⁶. To classify a practice as misleading for the purposes of the Unfair Commercial Practices Directive, it seems a mere abstract danger is not enough. It must be proven there is an actual, concrete risk that consumers make an economic decision they would not make otherwise¹⁷.

On the third level of the Directive scheme, we find Annex I. It contains up to 31 categories of practices which are always considered unfair. The first 23 are classified as misleading, and the other 8 are classified as aggressive. According to point 20 of Annex I, it is unfair to describe a product as 'gratis', 'free', 'without charge' or similar, when the consumer 'has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item'.

2. 'Free of charge' contents and information or personal data as counter-performance

¹⁴ H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 88-89.

¹⁵ On the notion of misleading commercial practices, see J. MASSAGUER, 'El nuevo derecho contra la competencia desleal' (Cizur Menor, Navarra: Thomson Civitas 2006) 103-107, 122-127. and H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 89-98.

¹⁶ By virtue of article 7(5) and Annex II of the Unfair Commercial Practices Directive, the elements indicated in articles 5 and 6 of Directive (EC) 2000/31 of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (Directive on electronic commerce), are regarded as material.

¹⁷ H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 92-94.

It is reasonable to say that the Unfair Commercial Practices Directive has been conceived in terms of a product-for-money-payment scheme. Its prescriptions have to be somewhat adapted to the product-for-product (digital content in exchange of information) transactions. Next, I will share some thoughts on the matter, to justify why presenting an application or a social network account as free of charge when there is a counter-performance consisting of providing information or personal data, is *not* a misleading or unfair commercial practice.

Most consumers would define ‘free’ as ‘no price to be paid’ or ‘not having to pay money’. Indeed, let us look at the 2015 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content¹⁸. The Directive would apply to contracts where digital content is supplied to a consumer in exchange of a price or a counter-performance in the form of personal or any other data¹⁹. Article 2(6) of the Proposal defines ‘price’ as ‘money that is due in exchange for digital content supplied’. Therefore, provided that no payment of money is due, to offer something ‘free of charge’ when there is an actual demand of information or personal data in exchange may not be totally correct from an economic point of view, but it is not false from a legal perspective. I do not think such an offer is contrary to the requirements of professional diligence, and I do not think it materially distorts the economic behaviour of the average consumer. I would not qualify it as untruthful from the legal point of view. And even if presenting the service as free of charge is not factually correct economically speaking, it is not likely to deceive the average consumer at all²⁰.

This explains why the practice analysed does not fall into point 20 of Annex I of the Unfair Commercial Practices Directive. This provision states that it is unfair to describe something as free when the consumer has to ‘pay anything other than...’. The rule is to be interpreted in accordance with its ultimate goal, which is protecting consumers against deception. Since most consumers link ‘payment’ to the notion of ‘price’, and the notion of ‘price’ with that of ‘money’, it is questionable that point 20 of Annex I covers supplying information in exchange of a good or a service. So far, people do not think they are ‘paying’ when they give personal data. And the best evidence for that is that there is not a big reaction from Internet users against companies. If people really thought they are being deceived, they would speak out against it and there would be a high demand for changes in commercial speech.

As some scholars have put it, making a reference to the CJEU judgment X (commonly known as *Nissan*)²¹, ‘not all false or deceptive information is prohibited by article 6 of the Directive’. Nevertheless, they have warned that the standard set in this case might not work on a general basis for the Unfair Commercial Practices Directive, because the issue at stake affected parallel imports, and the Court is usually suspicious of any attempt to protect national markets²². In that case, some cars were advertised as new and cheaper than those sold by other dealers. However, the cars had been registered before importation, and their lower price was matched by a reduction in the number of accessories²³. The CJEU considered that a car is new

¹⁸ COM(2015) 634 final.

¹⁹ An exception is made when processing the data requested is ‘strictly necessary’ for the performance of the contract or for meeting legal requirements, as long as the digital content supplier does not go further in the use of the data, processing them in an incompatible way with that purpose. See articles 3(1) and 3(4) of the Proposal.

²⁰ A different view is held by C. LANGHANKE, M. SCHMIDT-KESSEL, ‘Consumer Data as Consideration’ [2015] 4 Journal of European Consumer and Market Law 218 (‘this formula ‘for free’ mainly refers to the fact that the contract does not provide for a monetary consideration, whereas the fact that the supplier is provided with personal data of the other party and that the other party’s consent to deal with the personal data is widely ignored in the descriptions given in (*insofar misleading*) advertisements and contract terms’) (emphasis added).

²¹ CJEU judgment X, Case C-373/90 [1992] ECR I-131, ECLI:EU:C:1992:17.

²² H.-W. MICKLITZ, G. HOWELLS, ‘Commercial Practices and Advertising’, in H.-W. MICKLITZ, J. STUYCK, E. TERRY (eds.), ‘Cases, Materials and Text on Consumer Law’ (Oxford and Portland, Oregon: Hart Publishing 2010) 118-120.

²³ *Nissan*, cited *supra* note 21, paragraphs 11-13, and 16.

until it is first driven on a public road. Therefore, the commercial practice would be misleading only if it sought to conceal that the cars were registered before importation, and if a significant number of consumers would not have purchased the cars had they known it. Regarding the price issue, a claim that the cars are cheaper would only be misleading if a significant number of consumers targeted by the advertising made their decision to buy ignoring the correspondence between the lower price and the lower number of accessories on the cars²⁴.

The Unfair Commercial Practices Directive demands transparent and truthful information about the existence and nature of the product and its main characteristics, forbidding material omissions. One could argue that Internet users are actually the product, and that it would be misleading not to tell them that they are being sold. But this argument is far from being decisive, because the information of the user is not the only product sold in the transaction. The consumer is both a customer and a product (that is why 'if you are not paying for a product, you are the product' is true only to a certain degree)²⁵. Therefore, traders satisfy their disclosure obligations by just informing about the essence of their own product—the main features of the relevant application or social network.

It is also important to address the consequences of article 5(3) of the Unfair Commercial Practices Directive. If the distortion caused by a commercial practice is likely to affect only a clear identifiable group of particularly vulnerable consumers, the assessment of the commercial practice must be made on the basis of the average consumer of that group. As causes for that weakness, the Directive explicitly mentions mental and physical infirmity, age and credulity. This provision requires that the trader can reasonably be expected to foresee that the practice is likely to affect a given group of consumers. On the contrary, it is not necessary for the practice to be specifically directed towards that group²⁶. This could be more important that it might appear. As time passes and more people have downloaded an application or joined a social network, most of new users will probably not be adults, but underage. The offer to download an application or join a network will be general, but it will reach mostly children, a vulnerable group. The possible unfairness of the commercial practice will have to be assessed from the point of view of the average underage consumer.

At this moment in time, I do not think this changes the conclusion that presenting online content as free when the user needs to provide some counter-performance in the form of data is not a misleading commercial practice. In the future, however, the assessment regarding both groups of people, that of general consumers and that of underage ones, can produce different results. With the development of digital contents, adults will presumably get used to pay for services through personal data and other types of information. They will get more and more aware of the fact that it is a form of payment. And this might change the concept of 'free of charge'. If this is the case, it is unsure whether underage can follow the same path. Because of their youth and inexperience, they will be less aware, and they will probably continue to understand free of charge as 'no money payment'. This reasoning leads us to a surprising and even paradoxical outcome. A given commercial practice, while being misleading for the average consumer, will not be misleading for a particularly vulnerable group of consumers, such as underage.

3. Transparency regarding information and personal data as counter-performance

Even if presenting a service as free when there is a payment in the form of information does not constitute a misleading commercial practice, I think traders have a special duty of transparency towards

²⁴ *Nissan*, cited *supra* note 21, paragraphs 14-16.

²⁵ I. WINKLER, 'Facebook is not free' [2011] October 17, 2011. Available at <http://www.computerworld.com/article/2499036/web-apps/facebook-is-not-free.html>.

²⁶ See H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 87-88.

consumers. They must highlight that the user is going to supply personal data and other types of information, so the user is truly aware of the rationale behind the transaction. Now I turn into **Directive 93/13/EEC on unfair terms in consumer contracts**²⁷. Article 4(2) excludes the assessment of the unfairness of terms that define the main subject matter of the contract, and also of the adequacy of the price paid. However, this rule is subject to a requirement. In order for the terms to be excluded from assessment, they must be in plain intelligible language. Next, article 5 starts by setting out that contract terms offered in writing must always be drafted in plain, intelligible language.

In my view, contract terms that establish the counter-performance the user must provide fall within the terms that define the subject matter of the agreement, because they allow us to determine the type of transaction at issue and classify it as a bargain although there is no price in terms of money. However, the importance of whether or not those terms belong to the subject matter of the contract is not very high, since the CJEU has concluded that the transparency requirement in articles 4(2) and 5 of the Directive has the same scope²⁸. Both sets of terms have to be offered in a transparent way, because it is of fundamental importance for the consumer to have the relevant information before concluding a contract²⁹.

Transparency must be understood in a broad sense, which means it cannot be reduced to formal and grammatical intelligibility. Taking into account all the relevant facts, including pre-contractual information, the judge must examine whether or not an average consumer can know in advance the actual functioning of the clause at stake and its hypothetical consequences. This high standard of transparency has been developed in a recent case-law of the CJEU that encompasses the judgments *Kásler and Káslerné Rábai* (concerning a credit contract denominated in foreign currency)³⁰, *Matei* (on a consumer credit agreement)³¹, *Van Hove* (regarding an insurance contract)³² and *Bucura* (also a consumer credit agreement)³³, and it is now a well-settled case-law.

It should be clear that the CJEU has developed the duty of transparency focusing on the payment obligations the consumer will be bound to. The Court points to the 'economic consequences' of the agreement, and its main goal is that the consumer knows the cost of the goods or services. The perspective certainly is that of a payment in the form of money. But transparency requirements are a protective measure in favour of consumers, something that compels us to interpret them extensively. For that reason, it is convenient to apply that case-law to social networks and other digital content supplied in exchange of personal data. Traders must disclose the kind of data they get, process and use themselves or transfer to others, and the reasons for that. We cannot forget that the screen size of a laptop, a tablet or a mobile phone is limited. It is simply impossible to offer all the relevant information at once. But businesses can and must make that information easily accessible.

Free of charge social networks operate in the market of 'targeted eyeballs'. Network owners offer a platform consumers want, the use of the platform produces information which is collected, and that information allows network owners to target advertising to the right consumers, obtaining a revenue in the process³⁴. I think the duty of transparency requires businesses to clearly tell this to each new user who wants

²⁷ Council Directive (EEC) 93/13 on unfair terms in consumer contracts [1993] OJ L95/29.

²⁸ CJEU judgments *Kásler and Káslerné Rábai*, Case C-26/13 [2014] ECLI:EU:C:2014:282, paragraphs 68-69. and *Matei*, Case C-143/13 [2015] ECLI:EU:C:2015:127, paragraph 73.

²⁹ *Kásler and Káslerné Rábai*, cited *supra* note 28, paragraph 70. and CJEU judgments *Van Hove*, Case C-96/14 [2015] ECLI:EU:C:2015:262, paragraph 41. and *Bucura*, Case C-348/14 [2015] ECLI:EU:C:2015:447, paragraph 51.

³⁰ *Kásler and Káslerné Rábai*, cited *supra* note 28, paragraphs 71-75.

³¹ *Matei*, cited *supra* note 28, paragraphs 73-78.

³² *Van Hove*, cited *supra* note 29, paragraphs 41-50.

³³ *Bucura*, cited *supra* note 29, paragraphs 49-56.

³⁴ G. A. MANNE, W. RINEHART, 'The Market Realities that Undermined the FTC's Antitrust Case Against Google' [2013] Harvard Journal of Law & Technology Occasional Paper Series (July 2013) 8-9.

to join the network, because that is the essence of the agreement users sign³⁵. People who do not want to give access to their data and let the network target them can refuse to join a free of charge social network. If many consumers refuse to deal, or even if they deal but they actively express their unsatisfied preferences, there will be an incentive to create social networks where profits are made out of users' fees. At the same time, social network owners will have an incentive to offer both free-of-money-payment and free-of-information-collecting accounts.

What is important to understand is that the efficiency of the market of 'targeted eyeballs' depends on the amount of information collected and the quality of its processing. Concealing information is a right everyone has, as an expression of the right to privacy. But you cannot keep all the information for yourself, use social networks whose profitability depends on knowing your interests and patterns, and expect those networks to be highly interesting and to offer a large range of possibilities³⁶. If consumers want to enjoy social networks without paying fees, they have to pay the non-monetary price. Simply stated, *the less you want to be a product being sold, the more you must be willing to pay for the product yourself*. And, at least for now, it looks like most consumers are more willing to give some personal information than money³⁷.

4. The rights of the personal data subject and a property rights approach on social networks

The development of the information society has led us to make changes in EU law regarding personal data. For example, Directive 95/46/EC on personal data³⁸ was thought to be outdated, and rightly so. In 2012, a Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data was issued³⁹. And some CJEU judgments from 2014 on showed reforms were needed⁴⁰. Finally, Directive 95/46/EC has been repealed with effect from 25 May 2018 by Regulation (EU) 2016/679 on personal data (hereinafter, the 'General Data Protection Regulation')⁴¹. This Regulation is already into force, but it will apply from 25 May 2018.

The General Data Protection Regulation strengthens data subject rights. Chapter III, encompassing articles 12 to 23, set out rights such as those to transparency, to information, to access, to rectification, to restriction of processing, to data portability, to object to processing, a right not to be subject to a decision based solely on automated processing (including profiling), and a right to erasure or the so-called 'right to be forgotten'. This last right received a boost in 2014 by the CJEU through its judgment *Google Spain and Google* regarding search engines⁴², and the General Data Protection Regulation goes further. Even if the

³⁵ On the personal data Facebook collects, and how it uses it, see L. GARCÍA MONTORO, '¿Utiliza Facebook nuestros datos personales con fines desleales?' [2016] 'CESCO Blog' 2-6. Available at <http://blog.uclm.es/cesco/files/2016/03/Utiliza-Facebook-nuestros-datos-personales-con-fines-desleales.pdf>.

³⁶ On how information concealing reduces the efficiency of a market, see R. A. POSNER, 'The Economics of Privacy' [1981] 71 *American Economic Review* 405-406.

³⁷ O. BEN-SHAHAR, L. J. STRAHILEVITZ, 'Contracting over Privacy: Introduction' [2016] 45 (no. S2) *Journal of Legal Studies* S5.

³⁸ Directive (EC) 95/46 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

³⁹ COM(2012) 11 final.

⁴⁰ M. BURRI, R. SCHÄR, 'The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy' [2016] 6 *Journal of Information Policy* 482-488.

⁴¹ Regulation (EU) 2016/679 of the European Parliament and of the Council 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 [2016] OJ L119/1 (General Data Protection Regulation).

⁴² CJEU judgment *Google Spain and Google*, Case C-131/12 [2014] ECLI:EU:C:2014:317.

right to be forgotten is just one among others, it comes as no surprise that it is the feature of chapter III that receives most of the attention⁴³.

Data protection rules are ultimately designed to give consumers more power and control over information about them. This praiseworthy concern, however, should not make us forget the possible conflicts we can create. Internet users are not acting in a vacuum, they are enjoying online platforms which are private property. Therefore, the more we enlarge data subject rights, the higher the risk we excessively limit private property and invade individual liberty. With this in mind, I believe it is necessary to think more about privacy and data protection settings designed through private contracts.

It has been said, and it does not miss the mark, that there is a conflict between Americans and Europeans concerning what privacy means and should mean. Although there are some common ideas, both have indeed different sensibilities. Americans consider intrusions actions that Europeans regard as justified, and vice versa. It is argued that Europeans understand privacy more as connected to individual dignity and what can be called 'informational self-determination', while for Americans the issue is linked to liberty, mostly liberty from the State, and the protection of one's home⁴⁴.

It is obvious that we can draw some general conclusions on what privacy and personal data protection means for Americans and for Europeans. Nevertheless, I think the right approach is to protect minorities. And, more specifically, the smallest minority of them all—the individual. In a recent judgment of 15 February 2017, the Plenary of the Civil Chamber of the Spanish Supreme Court⁴⁵ has stated that a photo which is displayed in Facebook and available to the public in general (not only for the members of the social network), cannot be used by the media without the consent of the user. The photo was not related to the newsworthy event, and use by the media does not amount to a 'natural consequence' of the accessibility of the data uploaded and publicly displayed in a social network. According to the Spanish Supreme Court, the user gives their consent for the purposes of the network, not for third-party uses.

Taking this example, what I would like to underline is that it should not be for a legislature or a court to determine what purposes users of a social network give their consent for, nor what are the 'natural consequences' of publicly displaying a photo or a video in it. Within a network—its owner's private property, it is for the owner to set the rules others have to comply with. The network owner and the user can agree to different privacy settings and rules, more or less protective, for free or in exchange of a fee. That is, data protection rules may be better implemented as general default rules susceptible to design by way of a contract. Some data subject rights can certainly be classified as inalienable, but many others should have an opt in or opt out nature, or be modifiable. Of course, this entails some risks. How contract can play for privacy issues in a digitised world is still to be analysed. We will have to look at externalities, transaction costs, the proper default rules, the nature of the rules, asymmetries of information and information overload, the eventual contract formation provisions, etc.⁴⁶. But from my perspective, what we should not do is taking a one-size-fits-all model. Privacy and personal data are, precisely, deeply private and personal, and that means one size truly fits only one individual.

5. Conclusions

⁴³ M. BURRI, R. SCHÄR, 'The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy' [2016] 6 *Journal of Information Policy* 490-492. and G. MINERO ALEJANDRE, 'Presente y futuro de la protección de datos personales. Análisis normativo y jurisprudencial desde una perspectiva nacional y europea' [2017] 50 *Anuario Jurídico y Económico Escorialense* 38-40.

⁴⁴ J. Q. WHITMAN, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' [2004] 113 *Yale Law Journal* 1154-1164.

⁴⁵ Reference in Aranzadi – Westlaw legal database: JUR 2017, 36954.

⁴⁶ O. BEN-SHAHAR, L. J. STRAHILEVITZ, 'Contracting over Privacy: Introduction' [2016] 45 (no. S2) *Journal of Legal Studies* S1-S11.

This paper started with the sentence 'if you are not paying for a product, you are the product'. I have tried to explain why this is true, but not all the truth. Internet users provide a product, information, and they receive other products, such as applications and social network accounts. Since 'free of charge' is commonly understood in the sense that one can obtain something without paying *money*, it is not misleading or unfair to present something as 'free' when it is supplied in exchange of information and personal data. However, traders have a special duty of transparency, in order for consumers to know why they are getting what they are getting without a money payment. If we take into account the product-for-product (digital content in exchange of information) scheme, we come to the conclusion that privacy and data protection rules are limiting the product Internet users can trade with. It is therefore needed a cautious exam of what features of the consumers' rights have to be set out following a one-size-fits-all model, and which ones can be subject to private design through contract.

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FULLY AUTONOMOUS WEAPONS SYSTEMS AND THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

Mateusz Piątkowski¹

Abstract

The development of military technology during the 20th Century is increasing the capabilities of the machines and computers while downgrading the number and complexity of tasks conducted by the personnel of the armed forces. However, the autonomy delegated to the machines was never involving the making of lethal- decision. With the arrival of the highly advanced systems like Aegis Anti - Missile Ship Defense System, the introduction of the aerial, land and maritime systems is likely to significantly reshaped the current battlefield. However, this futuristic weaponry would certainly become a major challenge for the existing framework of the international humanitarian law.

Key words: international humanitarian law, autonomous systems, CCW.

Introduction

The concept called 'dehumanization of warfare' is not a novelty in history. Since the deployment of the arrows and crossbows the distance between the *operator* and weapon is constantly increasing. However, one crucial element of targeting process remains intact – the decision whenever to fire or not still require human activity (with the unique exception of the naval contact mines). This phenomenon remains active with the introduction of the artillery, aviation and unnamed military machines. Contemporary, theUCAV (Unnamed Combat Aerial Vehicles) like the most commonly used by the USAF and RAF *Predator* and *Reaper* drones are operating in the manned system, where the operator is remotely controlling movement and targeting . However, the introduction of the artificial intelligence (AI) will likely completely exclude the human factor in the process of targeting and will likely indicate an possible breakthrough both on legal and non-legal backgrounds.

The aim of the article is to analyze the possible deployment of the Lethal Autonomous Weapons Systems (LAWS) from the perspective of international humanitarian law (IHL). The Part I will presented the definition of the existing autonomous war machines. Part II will present historical experiences arising from the existence of automation in context of maritime warfare. Part III, IV, V will examine the legality of LAWS from the perspective of IHL. Finally, the paper will present the emerging idea of *meaningful human control* as a contrary response to the 'dehumanization' of autonomous weapons.

1. Technological remarks.

The first legal examination of the military drones using artificial intelligence had been undertaken by

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Human Rights Watch in the NGO report under very compelling title *Losing Humanity The Case against Killer Robots*². Since this endeavor, the question of autonomous military robots has been brought to the international attention. In 2013 the UN Special Rapporteur Christof Heyns in his detailed conclusions emphasized the need of proactive moratorium on the *Lethal Autonomous Robots* (LAR) until the comprehensive framework governing the LAR's use will be established³. In 2014 the ICRC established the term *Lethal Autonomous Weapons Systems* (LAWS) which is contemporary the most accepted⁴. ICRC also made an important distinction between the 'critical functions' – which generally might be described as essential tasks conducted in the targeting process. Such observation has significant consequences for the future development of the autonomous systems that are not involved in lethal decision on the battlefield, i.e., the medical, transport or reconnaissance autonomous platforms. It should be although underlined that the LAWS definition is far from consensus (mostly from the technical and accountability viewpoints)⁵.

The word *autonomy* is sometimes used interchangeably with the word *automation*. Thus, such way of interpretation is wrong in principle – the automation does not specifically involved the presence of the AI and generally operates in schematic plan of simple orders (e.g., the robots in car manufacture)⁶. The *automated* devices are mostly preprogrammed and are working in preprogrammed, close environment. *Autonomy* is a far greater concept, where the machine (or part of it) is working intelligently in an open and unpredictable environment⁷. As pointed out by M. Wenger, autonomous devices, according to the level of their AI might be able to perform inestimable decisions⁸.

They are different methods to measure the scale of autonomy. One of them was presented by the National Institute of Standards and Technology in 2008 *Autonomy Levels For Unnamed Systems* report. The autonomous systems had been divided into three categories: remotely controlled, teleoperated, semi-

² <<The term “fully autonomous weapon” refers to both out-of-the-loop weapons and those that allow a human on the loop, but that are effectively out-of-the-loop weapons because the supervision is so limited.[3] A range of other terms has been used to describe fully autonomous weapons, including “lethal autonomous robots” and “killer robots.” >> Human Rights Watch, 'Losing Humanity The Case against Killer Robots' available on <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots> (access 14.04.2017).

³ <<the term LARs refers to robotic weapon systems that, once activated, can select and engage targets without further intervention by a human operator. The important element is that the robot has an autonomous “choice” regarding selection of a target and the use of lethal force>> UN Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 9 April 2013, A/HRC/23/47 , para. 38.

⁴ <<Any weapon system with autonomy in its 'critical functions.. This is, a weapon system then can select (i. E search for or detect, identify, track, select) and attack (i.e., use force against, neutralize, damage or destroy) targets without human intervention>> Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) 11-15 April 2016, Geneva Views of the International Committee of the Red Cross (ICRC) on autonomous weapon system 11 April 2016.

⁵ <<autonomous weapon system. A weapon system that, once activated, can select and engage targets without further intervention by a human operator. This includes human-supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation >> United States Department of Defense Directive Number 3000.09/2012. <<An autonomous system is capable of understanding higher level intent and direction. From this understanding and its perception of its environment, such a system can take appropriate action to bring about the desired state. It is capable of deciding a course of action, from some alternatives, without depending on human oversight and control, although these may still be present. Although the overall activity of an autonomous unmanned aircraft will be predictable, individual actions may not be. >>Joint Doctrine Note (JDN) 2/11 the 'UK pproach to Unmanned Aircraft Systems p. 2-2, 2011.

⁶ P. Scharre, 'Autonomous Weapons and Operational Risk Ethical Autonomy' [Center of New American Studies 2016] 12.

⁷ J. F. Murphy, 'Mission Impossible? International Law and the Changing Character of War', International Law Studies [87/2011] 25.

⁸ M. Wagner, 'The Dehumanization of International Humanitarian Law: Legal, Ethical and Political Implication of Autonomous Weapon Systems', Vanderbilt Journal of International Law, [47/2014] 13.

autonomous and fully autonomous⁹. The study also made a distinction between different levels of human control over (HRI – Human Robot Interference). However, where does the real autonomy begins? This issue is still a matter of academic and scientific discussion since the official introduction of the autonomous systems has been observed in the civil environment (Google autonomous car, Tesla auto-pilot systems)¹⁰. The controversy is concerning the role of the human operator, and the scale of the exercised control over system¹¹. It has been suggested that in the future the development of the artificial intelligence (an vital component of the future autonomous platforms) will achieve a degree of self-adapting, self-governing self-learning and possible presenting the behavioral abilities (by establishing the communications or relationships)¹². Nevertheless, some authors agreed that full autonomy is never to be obtained due to impossibility of removing the human interference during the design process. In my opinion, the *ideal autonomy* is achieved when the autonomous device will independently 'manufacture' another fully autonomous system without human-in-the-loop and became possible a full subject of law¹³.

It is important to emphasize the impracticality of the term *autonomous system*. The phrase *system*, in case of remotely piloted drones, generally refers to the set of elements including the unnamed vehicle and the crew personnel¹⁴. In addition, *system* is usually manned. Consequently, the *autonomous system* term might be misleading when specifying the role of human operator¹⁵.

3. Naval mines and the autonomous weapons systems

The technical characteristics of the naval mines had a lot of common with the LAWS. Mines were extensively deployed during the Civil War (1863-1865) and Russo-Japanese War in 1905, proving to be very effective weapon¹⁶. Once delivered on the minefield, the contact mines without any further interference from the human operator, automatically explode when the surface vessel approaches (e. g contact mines, magnetic mines). Although not possessing any artificial intelligence, the effective human control over the

⁹ <<(…)UMS accomplishes its assigned mission, within a defined scope, without human intervention while adapting to operational and environmental conditions. >> Autonomy Levels for Unmanned Systems (ALFUS) Framework Volume I: Terminology Version 2.0 Contributed by the Ad Hoc Autonomy Levels for Unmanned Systems Working [National Institute of Standards and Technology 2008] 22.

¹⁰ T. Litman, 'Autonomous Vehicle Implementation Predictions: Implications for Transport Planning' Victoria Transport Policy Institute [2017] 1-17.

¹¹ <<Keeping in mind the given human control and the operational environment, some questions still remain: Where do automation processes end and (full) autonomy is reached? How can different degrees of automation be distinguished? One thing is certain: One will not be able to draw a sharp line anyway. >>C. Alwardt, M. Krüger 'Autonomy of Weapon Systems', (Hamburg: Institute for Peace Research and Security Policy at the University of Hamburg 2016) 3.

¹² A. Williams, 'Autonomous Vehicle Implementation Predictions: Implications for Transport Planning' Victoria Transport Policy Institute [in] A. Williams, P. Scharre (ed.), *Autonomous Systems Issues for Defence Policymakers* [Norfolk] 33

¹³ <<Consequently the standard for rational belligerency is whether an opposing combatant views the AWS as virtually indistinguishable from any other combatant>> J. D. Ohlin, 'The Combatant's Stance: Autonomous Weapons on the Battlefield', *International Law Studies*, [92/2016] 16.

¹⁴ <<Aemptng to create a definition for "autonomous system," "autonomous platform," or otherwise, is inherently misleading without appropriate caution. Ideally, the term "autonomous system" should not be used. However, this is an impractical suggestion given the prevalent usage of the term. The key point is that using autonomous + [system / platform / robot/machine etc.] detracts from the real issue most relevant to policy, legal and engineering issues—the level of human control necessary and possible over a machine. Furthermore, it singles out "autonomy" as a descriptor for the machine over and above all the other features and capabilities of the machine >>Multinational Capability Development Campaign (MCDC) 2013-2014 Focus Area Role of Autonomous Systems in Gaining Operational Access" Policy Guidance Autonomy in Defence Systems, [NATO, Norfolk 2014], 11.

¹⁵ K. Anderson, 'Why the Hurry to Regulate Autonomous Weapon Systems- But Not Cyber-Weapons', *Temple of International and Comparative Law Journal* [30/2016] 24.

¹⁶ D. G. Stephens, M.D. Fitzpatrick, *Legal Aspects of the Contemporary Naval Mine Warfare*, 21 *Loyola. Law. International & Comperative.Law Review*. [553/1999] 557.

weapons outcome was over when the mine was deployed on the minefield. The ultimate 'decision' or rather 'mechanism' that finally led to the distribution of the kinetic and possible lethal force occurred without further human involvement. In the case of conventional artillery and military aviation, the process of targeting is still directly connected to the human operator in charge. The time amount between the decision, execution and the kinetic outcome is relatively close and possibly to observe at a distance via sight or at least remotely. In the context of minefield activities, the span of time between the actual weapon deployment and the final consequences arising from its explosion is so long, that the eventual human control over the chain of events is just an illusion. Giving regards to that phenomenon in 1907 the state signatories decided to adopt the VIIIth Hague Convention relative to laying of unanchored automatic contact mines if they are not able to be deactivated after one hour after the laying or after they have broken loose from their moorings (so – called 'risk control')¹⁷. This construction suggests that according to the delegates' view the free-roam operations of mine laying should not exceed the specific amount of time and offer at least the possibility to exercise the minimum control level and prevent the danger for neutral vessels¹⁸.

This concept of 'blind autonomy' or rather 'blind automation' is nothing new in maritime warfare. During the last World War, the German Kriegsmarine used the torpedoes (GNAT) that detect the sound of the ship's propeller and then pursue the echo¹⁹. Another modification of the torpedoes allowed them to seek and destroy the enemy ships sailing across the path of a convoy by operating in the pre-planned pattern. Later those patents were developed and expanded vastly after the war. Contemporary torpedoes like British-made 'Spearfish' had an ability to autonomously seek, track and destroy vessels by recognizing their acoustic and sonar signature²⁰.

Nevertheless, the conditions of maritime warfare are slightly different when adhering to realities in land or aerial combat. In naval combats, the primal target is 'dehumanized' at first hindsight. Ultimately, the specific environment of the naval encounters seems to be more favorable towards the use of automated/autonomous weapons systems due to the lack of close-hand combat²¹. The distance between the operator and projectile had been increasing with the implementation of the naval guns, cannons and lastly, anti – ship missiles. This seems more permissible, even ethically – sailors obviously suffer from the consequences of the fire exchange. However, they still have an ability to protect themselves by armor plates and defense systems of their war vessel. In fact, probably the first fully developed autonomous (or highly automated) systems had been already installed on ships (e.g., Aegis ship – protection system)²².

However, it should be highlighted that they are voices who claim that the missiles e.g., Cruise and Tomahawk systems are not considered to be examined in the light of LAWS legality²³. According to P.

¹⁷ Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. The Hague, 18 October 1907 full text available on: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/215> (access 14.04.2017) W. Heintschel von Heinegg, 'The International Law of Mine Warfare at Sea'. [in:] Y. Dinstein [ed.] 'The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights, An Anniversary Volume (Leiden: Martinus Nijhoff Publishers 2011) 384-385.

¹⁸ <<As previously noted, the Hague rules were not designed to prohibit mines as a weapon, but rather to place limitations upon their use that relate to maintaining control over them to protect neutral shipping. >> T. A. Clingan, 'Submarine Mines in International Law', *International Law Studies* [64/1991] 354.

¹⁹ P. Kemp, 'Friend or Foe: Friendly Fire at Sea 1939-1945', (London: Leo Cooper 1995) 159.

²⁰ BAE Systems, Spearfish Heavyweight Torpedo Datasheet, available on: <http://www.baesystems.com/en/download-en/20151124114138/1434555560842.pdf> (access on 14.04.2017).

²¹ R. Geiss, 'International Law Dimension of Autonomous Weapons Systems', Friedrich Ebert Stiftung Study [October 2015] 7.

²² United States Navy Fact File, Mk – 15 Phalanx Close-In Weapon Systems (CWIS), available on http://www.navy.mil/navydata/fact_display.asp?cid=2100&tid=487&ct=2 (access 14.04.2017).

²³ <<Because a human makes the ultimate decision to launch advanced guided munitions at targets, these weapons are often excluded from many discussions of autonomous killing machines. Instead, "target recognition technology" is emphasized, along with a focus on "matching specific sensor information with predictive templates of the intended target."³⁷ Yet the appearance

Springer, weapons above are designed to be non-recoverable after first use²⁴. However, this restriction has fundamental flaws, while from the technical point of view the highly advanced 'fire and forget' missiles has the autonomous abilities very similar to those anticipated in the context of LAWS.

4. LAWS – *illegal per se*?

The analogy in weapons law might be misleading. The technical differences between certain type of weapons and the consequences arising from their use are making difficult to provide by international humanitarian law the acceptable legal framework. Going further, sometimes the consequences might be even catastrophic. Recalling a historical example concerning the effort to regulate use of aircraft in war analogously to maritime and land warfare might serve as a warning²⁵. From the state practice must be concluded that the analogy in law of weapons is not manifested. Although some armament presented similar capabilities, it must be observed that each type of weaponry is regulated by the specific, treaty regulations. In the relevant IHL documents one might find the prohibition concerning arms that cause *superfluous injury* and *unnecessary suffering*, and it should be pointed out that the mentioned principles are considered to be a legal basis for future regulation, not the source of prohibition *per se*²⁶. The same conclusion arises from the *Martens* clause – in this aspect *ratione materiae* concluded that every new weapon should be deployed at least with accordance to already existing rules of international humanitarian law²⁷. This approach is reinforced by the relevant provision of article 8(2)(b)(xx) of the ICC Statute²⁸. Nevertheless, the weapon might be considered illegal by its characteristic if it is not-controllable. Classically, the V-1 and V – 2 missiles were claimed to be indiscriminate by nature – their accuracy level was so low that they were used only against large urban areas. In this place it vital to recognize the distinction between the *means* and *methods* of combat – in fact even the legitimate tools of warfare might be used in an illegal way, becoming prohibited weapon in certain conditions²⁹. This notion was partially simplified by ICTY Martric ruling, when the Trial Chamber outlawed the M-87 Orkan Multi Barrel Rocket Launcher in urban conditions³⁰. Indeed, the Soviet-origin weapon is

of ultimate human control here may be misleading >> J. M Beard, 'Autonomous Weapons and Human Responsibilities, Georgetown Journal of International Law [45/2014] 629.

²⁴ J. H Stuard, J. McGhee, 'Is Skynet Anserw? Rules for Autonomous Cyber Response Capabilities' [in:] M. Blwoers [ed.] Evolution of Cyber Technologies and Operations to 2035 (Cham: Springer 2015), 160.

²⁵ See generally M. Piątkowski, 'Security of the Civilian Population from the Consequences of Aerial Warfare in the Light of the Hague Rules of Aerial Warfare of 1923'. [In:] 3rd International Conference of PhD Students and Young Researchers SECURITY AS THE PURPOSE OF LAW CONFERENCE PAPERS 9-10 April 2015 (Vilnius, Lithuania Vilnius 2015).

²⁶ J. S Thurmer, 'Means and Methods of the Future: Autonomous Systems' [in:] P. Ducheine, M. N. Schmitt, F. P.B. Osinga [ed.] 'Targeting: The Challenges of Modern Warfare', [Springer Hague 2016] 186 <<The Declaration thus makes clear that "the principles" expressed in the Preamble are not applicable in and of themselves: their application depends on the adoption, by convention, of specific rules pertaining to new types of weapons - or to a certain type of weapon that has existed for years in the arsenals of certain States but has not yet been generally recognized to be unlawful - whose use is deemed to be contrary to the stated "principles" >> H. Meyrowitz, The principle of superfluous injury or unnecessary suffering - From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977 , International Review of the Red Cross [1994/299] 117.

²⁷ D. Wallace, S. Reeves, 'Modern Weapons and the Law of Armed Conflict', [in:] G Corn, R.E. VanLandingham, S.R. Reeve, (ed.) 'U.S. Military Operations: Law, Policy, and Practice', (Oxford: Oxford Univeristy Press, 2016) 63.. N. Mickeviciute, Lessons from the past for weapons of the future, International Comparative Jurisprudence [2016] 5.

²⁸ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 12 April 2017].

²⁹ M. N Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics', Harvard National Security Journal Features [2013] 10.

³⁰ <<The Trial Chamber, therefore, concludes that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. For these reasons, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of

imprecise, however as pointed out by T. Chengeta, precision should not be mistaken with accuracy – the actual *use* of the weapon in a specific environment is determining the lawfulness of deployed weapon³¹. The same approach should be applied when the weapons is examined in the light of superfluous *injury* and *unnecessary suffering* principle – the *per se* lawful weapon might be used in manner that *will* cause negative medical and physical consequences exceeding the level of acceptable injuries and suffering (according to Commentary to the I Additional Protocol (I AP) to the Geneva Conventions of 1977, the provision of the article 35 of the is 'not a direct a prohibition on the means')³².

At first hindsight, the LAWS are not illegal *per se* under the relevant provisions of international humanitarian law³³. The weapon is not banned under any disarmament treaty. Being 'autonomously' does not stamp the LAWS unlawful by its characteristic³⁴. Multiple highly 'automated' means of combat are already deployed and their compliance with international humanitarian law is not questioned³⁵. In the context of *indiscriminate* consequences arising from the LAWS deployment, two solutions are possible. The first is concerning the specifics of the LAWS armament. It unlikely that LAWS will be equipped in other fashion than currently involved in teleoperated operations *Predator* and *Reaper* drone – this includes the exclusive use of the precision guided ammunition³⁶. In this aspect, the LAWS might be possible the most precision weapon ever developed, which is desirable according to *its in bello targeting* requirements. On the other side, while analyzing whenever weapon is inherently indiscriminate, it is vital to examine if its predictability fits the framework of accepted level. This scope of examination might be at this moment more problematic for the LAWS to be achieved – however only in the question of fully autonomous/ideally autonomous weapons. In consequences, the LAWS illegality might possible occur due to uncontrollability of the weapon. In the aspect of *superfluous injury* and *unnecessary suffering* the issue is not related directly to the LAWS itself, rather the principle will be triggered during the process of arming the LAWS in certain type of ammunition³⁷. More legal ambiguities will raise when examining the actual *use* of the autonomous weapons³⁸.

5. The principle of military necessity

severe casualties. By 2 May 1995, the effects of firing the M-87 Orkan on Zagreb were known to those involved>>. *Prosecutor v. Milan Martić* (Judgment), IT-95-11-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2007, para. 463.

³¹ T. Chengeta, Measuring Autonomous Weapon System Against International Humanitarian Rules, *Journal of Law and Cyber Warfare* [66/2016] 129.

³² Y. Sandoz, C. Swiniarki, B. Zimmerman, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949'. (Geneva: International Committee of the Red Cross 1987) 409. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 full text available on: <https://ihl-databases.icrc.org/ihl/INTRO/470>.

³³ B. Boothby, 'Autonomous Attack – Opportunities or Spectre?' *Yearbook of International Humanitarian Law* [2013], 86

³⁴ M. W Meizer, 'Lethal Autonomous Weapons Systems (LAWS): Conducting a Comprehensive Weapons Review', *Temple International and Comparative Law Journal*, [30/ 2016] 127.

³⁵ K. Anderson, D. Reisner and M. Waxman, 'Adapting the Law of Armed Conflict to Autonomous Weapon Systems', *International Law Studies* [90/2014] 393.

³⁶ <<there is no evidence to suggest that an AWS would violate this rule. To do so, an AWS would first have to be armed with on-board weapons or munitions which cause uncontrollable effects. This is possible but highly unlikely, given the blanket prohibitions against such munitions (e.g., biological weapons), regardless of the delivery system>> C. Toscano, "Friend of Humans": An Argument for Developing Autonomous Weapons Systems', *Journal of National Law and Policy* [8:189/2015] 207.

³⁷ G. D Solis, 'The Law of Armed Conflict, International Humanitarian Law in War,' p (Cambridge: Cambridge University Press 2016) 541.

³⁸ <<The most significant effect of this targeting rule is that although use of autonomous weapon systems is not illegal *per se*, their lawful use—the ability to distinguish lawful from unlawful targets—might vary enormously from one system's technology to another >> K. Anderson and M. Waxman, 'Law and Ethics for Autonomous Weapon Systems Why a Ban Won't Work and How the Laws of War Can' *A National Security and Law Essay* [2013] p. 11.

The idea of belligerent privileges entitled the adversaries to conduct the acts of warfare. They are two perspectives of this notion. In strategical context, the theories of Carl von Clausewitz partially remains actual, and the ultimate goal in war is achieving the political targets by defeating the armed power of the opponent. They are partially actual contemporary, primary the doctrine of *Kriegsraison* which emerged at the begging of 20th Century, had little regards towards the *ius in bello requirements*³⁹. However, the overall origins of hostilities remains intact, and the belligerents are allowed to pursue the ultimate victory, bearing in mind the relevant rules of war⁴⁰. From tactical perspective, the 'use of means and methods of warfare is not unlimited' (art. 22 of the IV Hague Convention of 1907) and only legitimate objective is to 'weaken the military forces of the enemy' by ' disabling the greatest possible number of men' (St. Petersburg Declaration of 1868 concerning the use explosive projectiles). These two approaches are setting the foundations of the principle of military necessity, which allows the adversaries to use lethal and destructive force against the strictly defined military objectives (Art. 52(2) of the I AP). From the strategic concept, the LAWS are envisaged to became a useful military machine⁴¹. Tactically, they ability to respect the relevant *ius in bello* will be discussed below.

6. Principle of distinction

In 2015 Russian Armed Forces introduced in the active service Russian tank 'Armata'. This highly sophisticated battle platform is equipped with hi-tech surveillance sensors and improved protection systems. One of them is being reported to have the autonomous ability to detect and response to any external factor, that had been recognized by central computer as a threat⁴². While more details are still unknown and they are definitely a protect secret, let`s us imagine the predictable 'behavior' of the autonomous tank devices. It is very likely that in the future combat, the extensive use of the anti-armor misses (e.g., Javelin) will seriously downgrading the capacity of the armored vehicle to survive the eventual encounter. How should the system be designed to become effective? Just like in maritime warfare, the time of reaction should be shorted to the minimum. The autonomous protection system will be able to scan, detect, recognize and response to any threat to tank and crew – in consequences the tank will independently turn the main vehicle gun and fire a projectile (or imply other measures used in the reactive or active armor plate). The sensitivity of the sensor might be able to detect the sound of gun fire and imminently trigger the response beyond the human control. However, contrary to the 'dehumanized' conditions of the maritime warfare, in the urban environment the threat might be 1) arising from human activity and 2) associated with clearly civilian character.

According to the International Court of Justice, the principle of distinction plays a pivotal role in the international humanitarian law framework⁴³. Bitter consequences of unrestricted warfare (especially during aerial bombing in WWII) demanded from international community to regulate in specific provisions this primal duty on a battlefield. According to principle, all belligerent parties need to constantly distinct between the civilians and military objects and between civilian population and combatants (art. 48 of the I Additional

³⁹ D. Desierto, 'Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation' (Leiden: Martinus Nijhoff Publishers 2012) 26.

⁴⁰ M. Ellen O'Connell, Historical Developments and Legal Basis' [in:] D. Fleck [ed.] The Handbook of International Humanitarian Law (Oxford: Oxford University Press 2013) 37.

⁴¹ D. Hollis, 'Setting the Stage: Autonomous Legal Reasoning in International Humanitarian Law', Temple International and Comparative Law Journal, [30/1/2016] 13. <<LARs, through objective assessment of the battlefield and algorithmic calculations, may be able to conduct precision targeting of the opposing side's center of gravity to bring an end to the conflict sooner. Furthermore, the use of LARs puts fewer humans in danger during combat operations. >> P. B. Postma, 'Regulating Lethal Autonomous Robots in Unconventional Warfare', Universty. Saint Thomas Law. Journal [300/2014] 306.

⁴² Russia's new Armata tank: step toward fully robotic vehicles <https://phys.org/news/2015-06-russia-armata-tank-fully-robotic.html> (access 14.04.2017).

⁴³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, para. 78.

Protocol)⁴⁴. The civilian population shall not be an object of attack (unless they are taking actively part in hostilities – art. 51(1)(3) of the I AP). It also prohibited to launch attacks that are targeting unspecified objects, and deploy uncontrolled means or methods of combat (art. 51(5) of the I AP). Finally, the art. 52(2) provides the definition of military objective. The distinction rule will be a necessary component of the LAWS decision – making process. Certain implications arise when adhering the issue in the context of autonomy. However, the scale of legal inputs will vary, depending on the environment. In closed, remote areas e. g desert, where the presence of the civilians objects is minimal or even non-existing it is not required from LAWS to exercise highly advanced abilities to distinct between combatants and non-combatants⁴⁵. Some sorts of warfare are even completely 'dehumanize' – especially in naval combat. The Aegis Ship Protection System, servicing in U. S Navy since 80's, can operate if full autonomous mode (so – called 'casualty' mode) and independently destroys any incoming threat. While in almost 90% cases, the danger will be cause by incoming unnamed anti-ship missile, the autonomy in this environment is not constituting any significant legal disturbances⁴⁶. In other 10% incidents, they are already reported information about the 'friendly fire' accident in 2003, when the Patriot battery fires towards the allied aircraft and destroyed it – after the fault in communication with the command center, the battery considered it as non-functional and operates in self-defense autonomous mode⁴⁷. As it was stated above the operational conditions will determine the legal 'yes' or 'no' on LAWS by the case-by-case basis. It should be emphases that during the compliance review conducted under the art. 36 of the I AP the reviewers of LAWS should clarify and determine the clear boundaries for LAWS to be operational in a various battlefield environment. It is agreed that the level of requirements and duties binding on the attacking belligerent is rising when combat operations are executed in urban areas. Although the certain IHL ambiguities are common issues, irrespective to manned and unnamed weapons, still the high burden of responsibilities must be respected by the LAWS in full spectrum⁴⁸. This creates a serious difficulties in conditions of insurgency and guerrilla warfare – how the AI of the autonomous systems would cope with the requirements concerning the distinction between the persons directly participating in hostilities (art. 3 of the IV GC) and civilian? At this moment such demand is beyond the LAWS abilities, and consequently, military lawyers should light a red light for the autonomous weapons deployment in urban areas.

Additionally, regardless of the actual area operation of LAWS (with the exception of dehumanized battlefield), one IHL requirement is constant – the protection of the *hors de combat* status⁴⁹. The act of surrender, if met the requirements of clear intent and is not treacherously in core, is simultaneously establishing a binding legal obligation over the adversary who exercises the control over the combatant. It has been reported that tested in Korean DMZ SGR-1 Samsung autonomous sentry gun has an ability to recognize the intent of surrender. However, respecting the *hors de combat* status entitles the duty not to engage those who are injured and unable to defend themselves – a far greater technical threshold for the AI

⁴⁴ J- F Queguiner, *The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law* [In:] M. Henschel [ed.] 'The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict' (New York: Routledge 2006) 171.

⁴⁵ B. Kastan, *Autonomous Weapons System: „A Comming Legal Singularity?“*, *Journal of Law, Technology & Policy* [45/2013] 61. Although for J. Foy, such restriction is unrealistic J. Foy, 'Autonomous Weapons System, Taking the Human Out of International Humanitarian Law,' *Dalhousie Journal of Legal Studies* [23/2014] 57.

⁴⁶ Gill, T. Heinsch, R. Geiss, ILA study group 'The conduct of hostilities and international humanitarian law: challenges of 21st century Century Warfare,' (Intenational Law Association 2014 London) 8.

⁴⁷ https://www.theregister.co.uk/2004/05/20/patriot_missile/ (access 14.04.2017).

⁴⁸ M. Wagner, 'Autonomy in the Battlespace, Independently Operating Weapon Systems and the Law of Armed Conflicts, [in:] D. Saxon [ed.], *International Humanitarian Law and the Changing Technology of War*, (Leiden: Maritnus Nijhoff Publishers 2013) 109 – 115.

⁴⁹ M. Lark, 'The Future of Killing: Ethical and Legal Implications of Fully Autonomous Weapon Systems', *Salus Journal* [5/2017] 65.

to comply⁵⁰. In fact, the commander deploying the LAWS that won't have the potentiality to respect the status of *hors de combat* will be examined in the light of the art. 40 of the I AP. According to the Commentary to I AP, the article 40 scope 'raises a problem about weapons, both conventional and others (...) Parties in conflicts forgo using (weapon. *Ed M. P*) it in such a way that it would amount to a refusal to give quarter'⁵¹. The argument presented in Commentary is clear – the specific *method* of conducting military operations should be granted the possible respect towards the recognition of the surrender. Solely deployment of LAWS having no technical distinction between the active and surrendering combatants will be qualified as the breach of the 'no quarter' prohibition.

The core of the distinction principle implies the duty to limit the attacks only to military objectives. The targets need to '*effectively contributed*' to the military actions, and their elimination offers " *a definite military advantage*.' Currently, the highly advanced striking systems like Brimstone or SMART can successfully destroy the 'classic' military objectives e.g., tanks or artillery (although not without controversy in case tracking the thermal signature of vehicle)⁵². More complicated seem to establish whenever the objective turned its status from civilian to military and resolving the problem of *dual-use* infrastructure. Both dilemmas formed a legal requirement to be respected by the artificial intelligence of autonomous war machines. The scholarship of the IHL underlines that considerable doubts exist whenever the LAWS is able to measure the 'definite military advantage' subjective and dynamic decision mechanism.

To summarize, the artificial intelligence of the LAWS shall implement ability of the system to effectively 1) distinguish civilians and combatants 2) recognize the *hors de combat* status 3) be able to examine whenever a destruction of a certain objectives *effectively contributed* to the adversary war effort 4) assess the existence of the *definite military advantage*. Undoubtedly, that's a serious set of rules and obligation, but as it was previously stated, the specific framework of international humanitarian law will vary, depending on the conditions present in specific combat environment⁵³.

4. The principle of proportionality. Necessary precautions during the attack

Shaped historically by the Hague Rules of Aerial Warfare in 1923, the principle of proportionality embodies a difficult compromise between the 'military necessity' and 'humanitarian' perspectives of international humanitarian law. In some strict situation, the civilian casualties are permissible, if their level is not excessive to 'direct' and 'concrete military advantage'⁵⁴. The practical applicability of the rule is one of the most problematic contemporary issues of international humanitarian law. In this highly subjective, dynamic

⁵⁰ <<Identifying when enemy forces have surrendered or are otherwise "hors de combat" is also a profound challenge for any autonomous system. Perhaps it will be possible to program AWS to recognize the white flag of surrender or to promulgate a convention that all combatants will carry a "surrender beacon" that indicates when they are no longer participating in hostilities. These measures would not resolve the problem of identifying those who are hors de combat. An unconscious and gravely wounded soldier separated from his or her comrades is not a legitimate target even if he or she has not indicated the desire to surrender (indeed, he or she may have had no opportunity to do so) but may be extremely hard for a computer to distinguish from a soldier lying in ambush. >> R. Sparrow, 'Robots and respect: Assessing the case against Autonomous Weapon Systems'. *Ethics and International Affairs* [30(1)2016] 11.

⁵¹ Y. Sandoz, C. Swiniarki, B. Zimmerman, op. cit. p. 409.

⁵² <<The Dual Mode Brimstone antiarmor missile, currently in use by the United Kingdom's Royal Air Force, uses advanced semi-active laser and millimeter wave radar guidance systems to search for targets autonomously while in flight, and strikes only armored vehicles that match a programmed signature, while ignoring other vehicles, such as cars and buses >> S. Groves, 'The U.S. Should Oppose the U.N.'s Attempt to Ban Autonomous Weapons', *Backgrounder* [2995/2015] 3.

⁵³ J. Lewis, *The For Regulating Fully Autonomous Weapons*, *The Yale Law Journal* [123/2015] 1315.

⁵⁴ M. Sassoli, L. Cameron, 'The Protection of Civilian Object – Current State of Law and Issues *de lege ferenda*' [In:] G. Venturini, N. Ronzitti [ed.], *The Law of Air Warfare: Contemporary Issues* [Eleven International Publishing : Utrecht 2006] 63-64. N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press 2006) 361-362.

and complex decision mechanism, the attacking party needs to weigh both the status of military objective and the negative civilian outcomes and decide whenever the action is disproportionate or not⁵⁵. The final act is being legally reviewed in the light of data and information available during the time of planning and executing. They are various interpretations and methods how to actually 'balance' the importance of the attack in relation to civilian casualties⁵⁶. Some authors claim that in fact, the armed forces apply just a quantitative solution, by simply 'matching' the numbers.' This led M. Schmitt to the conclusion that the LAWS following programmed scheme of a permissible number of civilians to be killed will be no worse than a soldier following the 'matching the numbers' model. From the technical viewpoint such a mechanism will be pretty easily designed in the context of LAWS⁵⁷. Nevertheless it should be emphasized that the assessment should not be limited to mathematical algorithms and it does involve the analysis of overall tactical (and sometimes extralegal) context of the attack. Achieving such complexity in an autonomous war machine is at this moment unlikely⁵⁸. Again, this still does not inherently outlaw the use of LAWS in environments which do not require the proportionality calculations⁵⁹.

According to art. 57 of the IAP the commander shall implement all *feasible precautions* during the time of the attack, and choose the means and methods that will be limited only to the military objectives and minimize the level of possible civilian casualties. The standard is based on *good faith* and *common sense* rather than the absolute demand⁶⁰. In this area of battlefield legal requirements, the deployment of the LAWS might be desirable⁶¹. As previously observed, the main drawback of the autonomous war machine is their 'dehumanization.' In fact, in the scope of the art. 57 I of the AP obligation, LAWS offered a variety of tactical possibilities. In fact, there will be no more incidents like e.g., the famous '15 000 feet' rule. To protect the crew of NATO warplanes from the Serbian air defense during the 1999 Serbia bombing, the NATO HQ instructed the pilots to fly above the level of 15 000 feet. The order led directly to the incident in Djakovica where the convoy of Albanian refugees were mistakenly recognized as a Serbian military column and finally destroyed⁶². Ultimately, LAWS ability to process quickly a vast number of data, not involving the psychological human weaknesses (fear, stress, revenge) is one of the factors supporting the deployment of especially non-lethal LAWS⁶³. In other circumstances the military robots might be sacrificed in order to ensure the protection

⁵⁵ <<The calculus of proportionality is not always confined to a single soldier's determination. Although the onus to prevent excessive damage to civilians does fall on every combatant, international law does not require decisions concerning proportionality to be made within a vacuum.>> A. Hauptman, *Autonomous Weapons and the Law of Armed Conflict*, *Military Law Review* [218/2013]178.

⁵⁶ T. Hattan, 'Lethal Autonomous Robots: Are They Legal under International Human Rights and Humanitarian Law', *Nebraska Law Review* [Vol. 93, 4/2015]1050-1051.

⁵⁷ <<Theoretically, a robot could be programmed to meet this requirement in one of two ways. The first is an algorithm that can carry out a proportionality analysis, and the second is with an individual answer on how to respond to each of the seemingly countless situations that the weapon may encounter. Using an algorithm is not yet a viable solution because currently no metric exists that can objectively measure excessive destruction >> K. Cass, 'Autonomous Weapons and Accountability: Seeking Solutions in the Law of War', 48 *Loyola Law A. L. Rev.* [1017 2015] p. 1037.

⁵⁸ K. Neslage, 'Does "Meaningful Human Control" Have Potential for the Regulation of Autonomous Weapon Systems?', *National Security and Armed Conflict Law Review* [151/ 2015-2016] 162.

⁵⁹ U. Gunwareda, *Legality of Lethal Autonomous Weapons aka Killer Robots*: <https://ssrn.com/abstract=2892447> (access 14.04.2017) 8.

⁶⁰ <<The obligation to do everything feasible is high but not absolute. >> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia para. 29.

⁶¹ R. Arkin, 'Lethal Autonomous Systems and the Plight of the Non-combatant', *AISB Quarterly* [137/2013] 2-9.

⁶² See generally A. P. V. Rogers, *Zero Casualty Warfare*, *International Review of the Red Cross* [837/2000]

⁶³ M. Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' *International Law Studies* [90/2014] 310.

of civilian population (e.g the during the search of buildings)⁶⁴.

5. Meaningful human control – a way out

During the informal Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW) expert meetings, the Article 36 NGO's submitted a proposal under which the production and deployment of LAWS beyond the '*meaningful human control*' should be prohibited⁶⁵. The concept mentioned above is a response to certain legal challenges arising from the so – called *accountability gap* that would be a drawback of the highly developed autonomy⁶⁶. According to the presented idea, the human should remain *in the loop* during the LAWS targeting process. In other words, the autonomy in 'critical functions' is no longer considered as a *fully autonomous* mode, rather downgrading the autonomous capabilities to the level of *semi-autonomous*. It is generally accepted the control level is not 'meaningful' when human operator is only approving the solutions presented to him by LAWS, without the overall tactical context and data concerning the possible attack. In boarder spectrum, the idea also embodies the requirement of proper interaction between the machine and human, where the operator is aware of the LAWS capabilities and machine is informing the human about its limitation (e. g the example of communication: ' I detect the presence of civilians on the battlefield, take control or ' I' m unable to operate in such condition - manual control required')⁶⁷. The Article 36 NGO` s expanded the notion by introducing additional elements regarding the technology: predictability, reliability, transparency, accuracy, timely intervention from human operator⁶⁸. They are various interpretation of the concept, presented both by scholarship and NGO`s viewpoint and despite it imprecision, it received the general recognition among state representatives⁶⁹. During the Fifth Review Conference (December 2016) the delegates of CCW parties decided to established an open-ended Group of Governmental Experts that will examine the proposals submitted during the informal expert panel⁷⁰. The general direction of the discussion is indicating an encouraging final result. However it is still premature to draw a clear argument for that matter. In the meanwhile, the number of states opposing the deployment of LAWS and calling for total ban is stable. How finally will the discussion end? In my opinion

⁶⁴ <<For example, if an AWS is confronted with a targeting scenario complicated by the unanticipated presence of civilians - a crowd in an urban scenario, a civilian fishing vessel in a maritime environment- it can choose to loiter or await the dispersal of the civilians, employ lower-yield weapons, or not engage at all.>> C. P Toscano, "Friend of Humans": An Argument for Developing Autonomous Weapons Systems Journal of National Security Law & Policy [8/1 /2015] 212.

⁶⁵ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980. full text available on <https://ihl-databases.icrc.org/ihl/INTRO/500?OpenDocument> (access 14.04.2017). Article 36 Key elements of meaningful human control, Background paper to comments prepared by Richard Moyes, Managing Partner, Article 36, for the Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) Geneva, 11-15 April 2016

⁶⁶ The United Nations Institute for Disarmament Research (UNIDIR), 'The Weaponization of Increasingly Autonomous Technologies: Considering how Meaningful Human Control might move the discussion forward ' [Geneva 2014].

⁶⁷ M. C Horowitz, P. Scharre, *Meaningful Human Control in Weapon Systems: A Primer*, CNAS Working Paper [March 2015] 4.

⁶⁸ Article 36, Meaningful Human Control, Artificial Intelligence and Autonomous Weapons, Briefing Paper for delegate at the Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), Geneva 11-15 April 2016.

⁶⁹ Report of the 2016 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) Submitted by the Chairperson of the Informal Meeting of Experts, 10 June 2016, CCW/CONF.V/2, para. 15.

⁷⁰ <<To establish an open-ended Group of Governmental Experts (GGE) related to emerging technologies in the area of lethal autonomous weapons systems (LAWS) in the context of the objectives and purposes of the Convention, >>Fifth Review Conference of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Final Document of the Fifth Review Conference, 12 – 16 December 2016, CCW/CONF.V/10.

they are following solutions: 1) implementation of the new Protocol to the CCW banning the use of LAWS. 2) implementation of the new Protocol to the CCW implementing the *meaningful human control* requirement (relating both to disarmament and the actual conduct of hostilities 3) code of not – binding practices (U. S Proposal) 4) no agreement⁷¹. Especially, the last option seems to be equally possible. As pointed out R. Crooft, it also not necessary to adequately define the term meaningful human control, leaving this task for general scholarship, state – practice and possible jurisprudence⁷². On the other hand, the general recognition of the *meaningful human control* concept might indicate the emerge of the *opinio iuris* that will possible clarified as a new norm of customary international law (see General Comment No. 3 on the African Charter on Human and Peoples' Rights)⁷³. Nevertheless, at this moment such a conclusion is yet to achieved.

Conclusions

The arrival of the LAWS technology might be considered -aside with cyberwarfare – as a 'game-changing' factor on the modern battlefield. The military advantages of using the autonomous military devices are difficult to measure. As mentioned above, some highly automated/autonomous systems are already been existing and their deployment is not been considered to be contrary to international law. From the humanitarian perspective, the basic principle of laws of war are safeguarded by the relevant provisions of the I Additional Protocol and customary international law. This situation is more optimistic, than the stance of laws of nation before the adoption of the Additional Protocols in 1977. At least, even without the dedicated framework concerning the use of the LAWS, the possible deployment must be conducted in accordance with the currently relevant provision of military necessity, distinction and proportionality. Nevertheless, the LAWS are not *illegal per se*, although in complex combat situation the legal concerns are serious. There are remarks suggesting that the from the technical standpoint, the AI of the autonomous war machines in unable to cope with ambiguities of contemporary asymmetric warfare and subjective mechanisms required by the IHL. The 'meaningful human control' notion is departing point of further discussion. The idea to, became an successful effort, need to attract the attention of state and be acceptable in terms of technology. Undoubtedly, the question whether the decision concerning human life should be delegated to autonomous machine is an controversial issue in contemporary international relationships, when the legal aspects are just a part of discussion. Probably the answer might be found in the Robotic Laws examined by the Isaac Asimov in his book 'Roundaround' (1942) : *A robot may not injure a human being or, through inaction, allow a human being to come to harm*⁷⁴.

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⁷¹ F. Sauer, Stopping 'Killer Robots': Why Now is the Time to Ban Autonomous Weapons Systems, Arms Control Association [October 2016].

⁷² R. Crooft, A Meaningful Floor, For ' Meaningful Human Control' Temple Journal of International and Comperative Law [30/2015] 58 – 62.

⁷³ <<The use during hostilities of new weapons technologies such as remote controlled aircraft should only be envisaged if they strengthen the protection of the right to life of those affected. Any machine autonomy in the selection of human targets or the use of force should be subject to meaningful human control. The use of such new technologies should follow the established rules of international law >> General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia 15.

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ARE CROWDWORKERS WORKERS? REFLECTIONS ON THE EMPLOYMENT RELATIONS IN GIG-ECONOMY

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Abstract

The technical revolution and emerging digital forms of work (crowdwork) dramatically alter traditional employment relations. There is an utter confusion about the classification of individuals providing services in gig-economy, as they seem not fit into either of the traditional employment categories of employees or self-employed. Determining the employment status is pivotal to applying the provisions of labour law. Crowdworkers are commonly regarded as independent contractors and are therefore exempted from labour protection, which is reserved exclusively for employees. The article reviews the current tests for employment status and pinpoints problems with its application to workers in gig-economy. Further, it discusses some recent proposals concerning the creation of a third, intermediate category of workers- “dependent contractors” and questions their viability to address the challenges of digital work. Finally, the following contribution raises a general question of how labour law can face the new economic reality and grant a due protection to crowdworkers.

Keywords: crowdworking, digitalisation, employment status, labour rights.

Introduction

The advancement of technology irreversibly changes industrial relations and creates new business models. In the so-called gig economy (also referred to as platform economy, on-demand economy or collaborative economy), companies use online platforms or mobile applications to match service providers (*sellers, crowdworkers*) with clients (*buyers, requesters* or *crowdsourcers*)². In this way, different sides of the market can easily find each other and engage in mutual transactions in exchange for remuneration³. Gig-economy creates a highly innovative market for personal services, where transaction costs and labour frictions are almost non-existent. Clients get an instant access to a large pool of service providers (to a “crowd”) and can digitally outsource their services to an undefined group of workers. This way of provision of services is considerably faster and cheaper than the traditional one.

That being said, new forms of work bring about numerous novel challenges to the legal system. In the following article, the author aims to present some of the currently much-discussed problems regarding the classification of “on-demand” workers into either of the existing categories of employees or self-employed. This issue attracts growing attention in the academic, social and political debate. Albeit this contribution analyses crowdworking from the employment law perspective, it should be noted that misclassifying employees has serious implications in the ambit of, among others, tax law and competition law.

When addressing the challenges for labour law arising in the gig-economy, the question about the employment status of crowdworkers is crucial, as it determines if employment law applies to the “digital workers”. As will be demonstrated in the following contribution, giving a definite answer to the title question

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² Eurofound, ‘New forms of employment’, Publications Office of the European Union (2015), p. 109.

³ J. V. Kennedy, ‘Three Paths to Update Labor Law for the Gig Economy’, (2016) Information Technology & Innovation Foundation, p. 4.

of whether crowdworkers are workers is highly problematic. The boundaries between employee and self-employed are increasingly blurred. The notion of “control” and “subordination” are considerably changing. This tendency, characteristic for all forms of non-standard employment, is deepened by digitalisation and evolution of platform economy. In many respects, the current legal dichotomy between employee and independent contractor is argued to be inefficient and outdated. It is maintained that the 20th-century labour regulations are not well-suited to determine employment relations dictated by the 21st-century gig economy. The article demonstrates that ambiguity and lack of specific regulations are factors enabling the ongoing process of escape from employment law. Further, it reflects on some proposals of modernising labour law.

1. Crowdwork- multifaceted phenomenon with common problems

At the outset, a few terminological caveats should be made. The following article applies a broad understanding of “crowdwork”. For the coherence of the publication, this term will be understood as covering all kind of work mediated through digital platforms provided in exchange for payment. Crowdwork (also: crowd employment or on-demand work) is commonly defined as work assigned to an indefinite number of individuals through online platforms or mobile application in the form of an open call⁴. The platforms provide a connection between customers with service providers and enable virtual fulfilment and submission of tasks. In a narrow sense, crowdwork refers solely to work which is both assigned and fully effectuated on online platforms. Crowdworkers remain invisible throughout the working process, they perform their services globally and have no personal contact with clients. Best known crowdsourcing platforms are Amazon Mechanical Turk, UpWork, CoContest, Clickworker, or CrowdFlower. Currently, the Europe’s largest crowdsourcing platform is Twago, with over 500, 000 registered online freelancers. From crowdwork *sensu stricte* “work on-demand via apps”, which can be described as “specific off-line crowdwork”⁵, should be distinguished. In this business model, work is addressed through mobile applications, but performed locally, in the “real world”. The prior example of such a mobile application is Uber- a car-hailing company that became a paradigm for many companies operating in the collaborative economy. In literature such term as “Uberisation⁶” of the economy has been coined, sometimes the “Uber economy” is even used as a synonym for platform economy.

The new forms of work are a multifaceted phenomenon. The services that are mediated through platforms range from uncomplicated, repetitive microtasks (i.a. tagging images, collecting data or completing surveys) to more complex ones which require special skills, such as providing legal advice (UpCounsel), medical services (Medicare) or design (Upwork). Gig-economy platforms facilitate transactions between sellers and buyers in different manners. Some platforms act as intermediaries or agents, without direct involvement in the relations between workers and clients. Such platforms as Freelancer.com, InnoCentive or Twago explicitly stipulate that the legal relationship exists between the crowdworker and the client⁷. Other ones set conditions determining the mode of service provision. In many cases it does not come to any formal contractual relation between requesters and providers, the terms and conditions are set out by the

⁴ V. De Stefano, ‘The rise of the „just-in-time workforce”: On- demand work, crowdwork and labour protection in the “gig-economy’, (2016), Conditions of Work and Employment Series No. 71, International Labour Organisation, p. 2.

⁵ A. Todolí- Signes, ‘Uber economy”: employee, self-employed or the need for a special employment regulation?’, accepted for publication in the Transfer: European Review of Labour and Research, p. 2.

⁶ Such terms as “uberise” and “uberisation” can be even found in the online versions of Collins Dictionary and Cambridge English Dictionary. Collins Dictionary defines the verb “uberise” as subjecting (an industry) to a business model in which services are offered on demand through direct contact between a customer and a supplier, usually via mobile technology, see: <https://www.collinsdictionary.com/dictionary/english/uberize>.

⁷ W. Däubler, T. Klebe, ‘Crowdwork: Die neue Form der Arbeit- Arbeitgeber auf der Flucht?’ (2015), Neue Zeitschrift für Arbeitsrecht, p. 1033.

intermediating platform. In some platforms communication between clients and workers is possible solely through the platform, while others allow for a direct contact with clients and workers.

Being aware of those differences between gig-economy companies, it is useful to undertake their joint analysis. The common feature of crowdsourcing platforms and mobile on-demand apps operating in gig-economy is that the use of the Internet and mobile technology makes it possible to match workers with consumers and to control the service performance⁸. It comes to a triangular relationship between crowdworkers, crowdsources and intermediaries. However, as will be explained below, the role and legal position of each of the actors in gig-economy is far from clear.

2. The thorny issue of employment status

The vast majority of gig economy companies deny the employment status of service providers and define them as independent contractors. In most cases, the terms and conditions stipulated by platforms are extremely one-sided and explicitly exclude any liability. By doing so, companies circumvent the statutory provisions governing employment relations and exempt workers from fundamental labour law protection. Crowdworkers are left with no recourse to the regulations regarding, among others, minimum wage, sick and holiday pay, working time or protection against unfair dismissal. Neither do they have the right to collective bargaining and strike.

Companies call themselves intermediaries, merely online databases or labour brokers giving opportunities to combine crowdsourcers with crowdworkers. Uber does so even in capital letters, as if it intended to thereby resolve any doubt regarding the status of its' drivers. They maintain that they only provide technology enabling to connect individuals seeking service providers with those offering their work. Theoretically, they just match a client with worker and help to establish a relationship between them. Crowdworkers are, in contractual terms, independent, flexible and free entrepreneurs who are supposed to work directly for the market. Gig-economy companies could be described as a mosaic of thousands of small businesses linked by a common platform⁹.

Were it true, contractors should be fully independent of the intermediaries in determining the mode of service provision. However, as will be exemplified below, this affirmation is highly arguable and not always in accord with the reality.

Under traditional tests for employment status, a crucial role in determining whether individuals are employees or self-employed is attributed to the degree of employers' control. A great extent of control that can be exerted on the actions of individuals is indicative of the existence of employment relationships. The key question is whether the employer can determine the manner in which the other party performs her tasks¹⁰.

This apparently straightforward question poses in practice many challenges. The reason for that lies in the fact the abstract notion of control is not quantifiable and is subject to highly subjective evaluations. How much control must be exerted in order to assume the existence of an employment relation? How much independence can a dependent worker have before he becomes an independent contractor? Digitalisation and growing casualization and informalisation of employment relations make the answer to these questions even more confuse.

Gig economy companies exert sometimes far-reaching control over service providers registered on their platforms, which is interwoven with a relatively large degree of crowdworkers' independence. Internet

⁸ V. De Stefano, *op. cit.*, p. 3.

⁹ This expression alludes to the comment of UK Employment Tribunal in *Aslam and others v. Uber BV and others* case, in which "the notion that Uber is a mosaic of 30, 000 small businesses linked by a common 'platform'" was held to be "faintly ridiculous".

¹⁰ I. Lloyd, 'Uber Drivers in London: 'To Be Or Not To Be' An Employee?', (2016), *Computer Law Review International*, 6/2016. p. 164.

platforms adapt certain mechanisms that aim to ensure the high quality of services provided to their clients. Companies are aware of the fact that their reputation depends on the way in which service providers perform their job. For this reason, in most cases, there is an authorisation process which sets out a number of specific requirements. For example, to register on some of crowdworking platforms, such as Topdesigner.cz or Clickworker, workers go through a verification process involving submission of samples of work and completion of tests¹¹. In order to become an Uber driver, during the “onboarding process” candidates are asked to provide the company with their driving licence, car registration number and car insurance.

There are few factors which indicate that crowdworkers are indeed self-employed. Firstly, they are not offered any specific training. It is assumed that they possess specific skills that allow them to provide services. They own tools and materials needed for work. However, sometimes the platforms set out certain requirements as for the standard of the tools. Taking Uber as an example, drivers cannot use cars that are older than 10 years. Secondly, crowdworkers bear all business risk and incur work-related losses. Thirdly, they are free to choose their working hours. The platforms do not give any specific instructions regarding the working schedule. Flexibility implies freedom to work or not to work, meaning that workers are free to accept or not to accept a certain task. Theoretically, crowdworkers can indeed autonomously decide if they take a task or not. They are under no obligations to show up for work. Once they log on a platform, they receive “clients’ requests” for the service provision and only when they click the “accept button” will they be provide with the details of this service.

However, upon closer examination, it becomes apparent that this flexibility is often illusory. At the majority of the crowdsourcing platforms, the freedom to accept or not to accept task is not without boundaries. This can be illustrated by the example of workers on TaskRabbit who are bound by the information they have provided as regards times and location of their availability. Accordingly, they ought to accept at least 75% of the offers that appear at a given time and place. Gig workers are also required to complete those tasks that have been already accepted by them. Moreover, they need to complete at least 85% of the accepted tasks. Secondly, workers have to be constantly in a “stand-by modus”. They must communicate whether they decide to accept the proposed tasks at a very short notice (in case of Uber it is 30 seconds), as otherwise the offer is instantly passed to other gig-workers. Thirdly, the relatively low acceptance rate is not without consequences for workers. Companies deactivate accounts of those service providers who fail to frequently enough accept the tasks. This exerts a pressure on the workers to accept greatest possible number of tasks. Also the freedom to determine working hours occurs to be quite limited. Workers must be especially available times of high-demand¹². The companies resort to various practices that even unconsciously incite workers to accept tasks when it is most needed, in order to optimise the companies’ management¹³.

Another factor that is taken into consideration by determining employment status is the workers’ discretion over the way of service provision. Crowdworkers, were they genuinely independent contractors, should be able to autonomously decide over the details of their work performance. Platform companies do, however, retain a certain form of monitoring the crowdworkers’ performance, although it differs greatly from the traditional model of the employers’ direct control. The control over the quality of performance is vested into the crowdsourcers, who are asked for workers’ evaluation after each completion of service. The process of control is delegated to clients, but still is executed by the platforms at the final stage. Such a mechanism eliminates the costs of the supervision and maximises the monitoring process- workers are under a constant

¹¹ Eurofound, op.cit., p. 110.

¹² R. Smith, S. Leberstein, ‘Rights on demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy (2015)’, p. 6.

¹³ N. Scheiber, ‘How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons’, (2017) The New York Times, available at: https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=photo-spot-region®ion=top-news&WT.nav=top-news&_r=0.

observation, their every single performance is evaluated¹⁴. Without controlling the means, the mobile applications (or internet platforms) control the results. As a matter of fact, workers are under constant observation. The unsatisfactory ratings are a ground for automatic dismissals. Speaking of Uber, drivers' accounts are automatically deactivated if they have less than 4,5 out of 5 stars. The so-called "firing by algorithm"¹⁵, without any right to appeal against it, is an entirely new phenomenon and is one of the most problematic and controversial issues in gig economy.

In many cases, the workers are not free to determine the details of payment. More often than not, platforms stipulate the exact or minimum remuneration for services. Clients issue the payment to the platforms, which then transfer it to service providers, charging approximately 10-20 % commission¹⁶. This is yet another fact that speaks against classifying crowdworkers as independent contractors.

The extent of employers' control is not the only factor determining the employment status of an individual. The so-called "economic reality test" is applied to investigate whether the worker constitutes an integral part of employer's business. In other words, it is taken into consideration whether the performed work is a key element of the company's operation. Self-employed individuals, as opposed to employees, perform tasks that are tangential to the standard operations of clients' business¹⁷. This seems not to be the case in gig-economy. Uber drivers are indubitably at the core element of the company's business, drivers are fully integrated into its structure¹⁸. In other words, the company carries out its' services completely through workers who are allegedly self-employed.

Another question that must be while investigating the employment status is whether the worker is economically dependent on the company. If so, is the bargaining power similar to the balance of power in case of "traditional" employment?¹⁹ In gig-economy there is no balance of power between parties. the platform has a clearly dominant position. The user has to accept preformulated conditions the moment he registers on the platform, there is no room for negotiations. Thereby he/she accepts the disclaimed warranties, restricted liability, applicable law and forum for dispute resolution. Platforms reserve the right to alter their terms and conditions.

As regards the employment dependence of crowdworkers, it is impossible to give a uniform answer for gig-economy. In most cases, crowdworkers treat their digital tasks as an additional source of income. However, there are some workers for whom crowdsourcing provide more than a half of their income, or who work full-time for only one crowdsourcing company²⁰. For example, for approximately 40 % of crowdworkers their work on Amazon Mechanical Turk is a full-time occupation²¹.

3. Judicial reclassification

¹⁴ A. Todolí- Signes, *op.cit.*, p. 8.

¹⁵ M. A. Cherry, 'Beyond Misclassification: The Digital Transformation of Work', *Comparative Labor Law & Policy Journal*, Forthcoming (2016). Saint Louis U. Legal Studies Research Paper, p. 22.

¹⁶ Eurofound, *op.cit.*, p. 110.

¹⁷ Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, M. Schmi-Drüner European Parliament, 'The situation of workers in the collaborative economy', (2016), p. 5.

¹⁸ In *O'Connor et al. v. Uber Technologies, Inc., et al.*, District Court stated that "Uber would not be a viable business entity without its drivers" (p. 10-11).

¹⁹ R. R. Carlson, *Employment by Design: Employees, Independent Contractors and the Theory of Firm*, p. 34.

²⁰ European Agency for Safety and Health at Work, 'Online Labour Exchanges, Or 'Crowdsourcing': Implications For Occupational Safety And Health', (2015), p. 5.

²¹ Milland.K., *Crowd work: the fury and the fear, In: the digital economy and the single market- Employment prospects and working conditions in Europe* (2016), p. 84.

There are a growing number of court litigations aiming to resolve the discussed issue. The class-actions against some gig-economy mobile applications have been first initiated in the United States²², and have been spreading recently over Europe. In the US, most well-known cases involved car-hailing companies Lyft and Uber. In Uber case, drivers demanded reimbursement of their business expenses, according to the Californian labour regulations. Lawsuits have been initiated also against other on-demand companies operating in the sector of home services and delivery, such as Homejoy²³, Handy, Postmates²⁴. The outcome of these actions was varied. Some of them ended with a settlement, like in the case of one of the leading crowdworking platforms- Crowdfunder, who has paid 585,000 dollars to their workers who requested the minimum wage²⁵ or in the case of Lyft, where the drivers claimed employee benefits and cost reimbursement. Also the Californian Uber case ended up with a nearly 1 million settlement, while the issue of the employment status of drivers remained unresolved.

The same question has been presented before the UK Employment Tribunal in the *Aslam, Farrar and others v. Uber BV and others* case²⁶, which unequivocally decided that Uber drivers were workers in the meaning of the Employment Rights Act, and, therefore, should be granted the whole scope of its protection. The Tribunal denied Uber's allegations that it was not a transportation company but merely a technology platform. Uber has appealed against this ruling, reiterating its former arguments. A similar ruling has been handed down in an employment lawsuit against City Sprint, in which the Tribunal has given the bike courier the right to a paid holiday leave²⁷. There are currently pending lawsuits against Deliveroo- a company offering a takeaway delivery from restaurants, and it remains to be seen if the Tribunal reaches the same conclusions. It must be also noted that the question of whether Uber provides a transportation service is currently pending before the Court of Justice of the European Union²⁸.

As the above considerations have illustrated, identifying crowdworkers as either employees or independent contractors indeed is problematic. As one judge in the Californian Lyft Case framed it, struggling to answer the question whether workers in gig-economy are employees or independent contractors resembles trying to fit a square peg into a round hole²⁹.

Under a closer scrutiny, it becomes apparent that those platforms are "something more than just a database"³⁰. Citing the sentence of Employment Tribunal in *Aslam, Farrar and others* case, "simple common sense argues to the contrary". Given the considerable degree of managerial control, it is unacceptable to assume that crowdworkers are genuinely self-employed. Simultaneously, crowd employment bears little resemblance to the traditional one. In collaborative economy, the traditional linear employer-employee relationship is being transformed into the triangular relationship between intermediaries, independent contractors and service users. Work is fragmented into microtasks, often workers work for a multitude of platforms and clients, which makes the determination of an employer even more difficult³¹.

From a human rights' and labour rights' perspective, scholars advocate for the full recognition of crowdworkers as employees³². Unless this is the case, workers in platform economy are exempted from

²² Some studies indicate that as for 2015, Uber faced over 100 lawsuits, see R. Smith, S. Leberstein, op. cit., p. 8.

²³ Homejoy ceased to operate after four actions have been filed by the cleaners, who claimed to be misclassified as independent contractors.

²⁴ These examples of these lawsuits, with further references, are listed in R. Smith, S. Leberstein, op.cit., p. 8.

²⁵ Otey v. Crowdfunder, Inc. et al, No. 3:2012cv05524.

²⁶ ET/ 22022550/15.

²⁷ Dewhurst v CitySprint UK Ltd ET/2202512/2016.

²⁸ Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015 — Asociación Profesional Élite Taxi v Uber Systems Spain, S. L. (Case C-434/15).

²⁹ Cited by V.De Stefano, op.cit., p. 18.

³⁰ A.Todoli- Signes, op.cit, p. 5.

³¹ V.De Stefano, op.cit., p. 8.

³² Ibidem, p. 21.

basic labour protection and are extremely vulnerable. On the other hand, classifying crowdworkers working as independent contractors as employees is likely to inhibit the advancement in gig-economy and collapse the entire business model of such platform-based companies. For example, Homejoy- one of the on-demand companies, claimed that the four misclassification lawsuits were a determinant factor that brought business to the end. Companies opt for gig-economy business models because it allows them to spare the workforce costs. It is the very assumption that service providers are self-employed that underpins the business model of the gig-economy platforms and allows them for the competitive advantage. Recognition of crowdworkers as platforms' employees would be against the nature of the on-demand business model.

4. Do we need a third category of workers?

Modernisation of employment law seems a prerequisite to bring clarity and to allow for a further development of companies operating in the on-demand economy model. There are proposals to create a new, third category of workers- "dependent contractors" or "independent workers". This idea, presented in the United States in a frame of an in-depth Hamilton Project, has stirred an intensive political and academic debate. The employed term "independent workers" refers to workers who connect with their customers through an intermediary. Its proponents claim that such a regulation would precisely address the situation of workers in gig-economy, including their particularities. It would eliminate the problem of the difficult application of employment test to crowdworkers and bring clarity. Such a proposal seems to compromise two opposite positions which either completely exclude crowdworkers from labour law protection or recognise them as employees and grant them full scope of protection. Crowdworkers classified into the intermediate category would be granted some of the fundamental employment rights, such as the right to collective bargaining or antidiscrimination protection, but the companies would not be bound by such provisions as minimum wage and overtime payment.

This proposal has been harshly criticised by labour law scholars. The major objection has been raised that such a regulation would only replace the current two into three rigid categories, without really addressing the classification problems³³. The problem of leaving some workers without core employment protection would remain unresolved³⁴. The introduction of such a category leads to an automatic exclusion of crowdworkers from part of the employees' protection, without individual investigation of whether they should be classified as employees. This could easily deprive misclassified workers of the full scope of employment protection. Such a "one-size fit all" solution in gig economy would not be viable, given a huge heterogeneity of crowd employment platforms, which cannot be gauged together. Whether a crowdworker is an employee or a genuine self-employed needs to be established individually, on the case-by-case basis.

When considering the introduction of a dependent contractor category, it should be noted that in some legal systems such intermediate solutions have been present long before the digital revolution. In Italy, a similar institution of "parasubordinate workers" (*lavoratori parasubordinati*) has been misused as an alternative for a standard employment contract and in the end had adverse effects. Instead of eliminating precariousness and protecting flexible workers it became a gateway for companies to avoid full employment-related obligations and contributed to even more legal uncertainty³⁵. Consequently, this institution was withdrawn in 2015 by the "Jobs Act". In Spain, a category of "economic dependent self-employed" workers (*Trabajador Autonomo Economicamente Dependiente*, TRADE) has been adapted. It guarantees a high level

³³ J. V. Kennedy, *Three Paths to Update Labor Law for the Gig Economy*, 2016, Information Technology & Innovation Foundation, p. 2. V. De Stefano, *op.cit.*, p.18-21 . M. Cherry, A. Aloisi, 'Dependent Contractors' in the Gig Economy: A comparative Approach'(2016). Saint Louis U. Legal Studies Research Paper No. 2016-15.

³⁴ E. Dagnino, *Labour And Labour Law In The Time Of The On-demand Economy*, p. 20.

³⁵ M. Cherry, A. Aloisi, *op.cit.*, p. 23.

of protection, including the right to minimum wage, annual leave, protection against unfair dismissal and right to collective bargaining³⁶. In practice, only a marginal part of self-employed can be classified as TRADEs, as there is a strict economic burden of 75% of economic dependence on the employer to be made. This renders TRADE an “artificial” category, which is unlikely to be applied to on-demand workers, as they are typically engaged in working relations with multiple platforms³⁷.

In Germany it is currently discussed whether crowdworkers could be regarded as “employee-like persons” (*arbeitnehmernähnliche Person*)³⁸. It could be the case if crowdworkers were economically dependent on a given crowd employment platform and their economic position resembled that of an employee. The classification of crowdworker as an employee-like person would, therefore, require a detailed investigation of individual circumstances. However, given that very often crowdworkers are bound by contractual relations with various companies on different platforms, the possibility of categorising them as such would be rather remote³⁹. Moreover, applying the dependent contractor category to employment relations in gig economy would not be desirable, as the income of crowdworker is especially hard to predict in advance⁴⁰.

Drawing from the experiences of the above-mentioned Member States one comes to the conclusion that a category of dependent workers is not a panacea for the problems with workers’ classification. It is unlikely that introducing such a legal category would resolve the problems arising in gig economy.

5. Rethinking labour law?

Shall we reject the creation of a third category of workers as a viable solution, we should reflect on the further possibilities of the inclusion of crowdworkers into the scope of labour law protection. Some scholars argue that relying on the employment status of workers to determine the scope of their protection does not correspond to the new economic reality. Neither can tests for employment status be effectively adapted to decide whether crowdworkers are workers nor can the creation of the intermediary category of dependent workers solve the problem. Therefore, a universal set of labour protection should be granted to all workers, irrespective of their type of employment. The system of employment law should be reconceptualised so that labour and social protection coverage could be separated from the employment status⁴¹. In other words, the scope of labour protection should be expanded beyond employment⁴². Such an approach would allow putting crowdworkers into the ambit of labour protection without recurring to the employment categories.

Alternatively, some authors try to approach the problem by adapting a novel, functional concept of employer⁴³. Their argument bases on the premise that with the fragmentation of work comes along with the dilution of the employer functions which are taken over by various parties. Consequently, it may come to a shared responsibility between platform, client and worker. In a triangular relationship, neither the employer nor client can be regarded as an employer⁴⁴.

6. Conclusions

³⁶ Ibidem, p. 27.

³⁷ Ibidem, p. 31.

³⁸ W.Däubler, T.Klebe, op.cit.,p. 1035.

³⁹ Ibidem.

⁴⁰ E. Dagnino, op. cit., p. 20.

⁴¹ Ibidem, p. 21, with further reference.

⁴² M. Cherry, A. Aloisi, op.cit., p. 42, with further reference.

⁴³ J. Prassl, M. Risak, ‘Uber, TaskRabbit & Co: Platforms As Employers? Rethinking the Legal Analysis of Crowdwork’, (2016), Comparative Labour Law and Policy Journal, Forthcoming.

⁴⁴ M. Cherry, A. Aloisi, op. cit., p. 9.

The digital revolution and emerging new forms of work dramatically alter the employment relations. As for now, the classification of workers as employees is a prerequisite for applying labour protection to them. Since crowdworkers are in legal terms self-employed, they are ineligible to basic employment protection. They are an extremely vulnerable group that is not only exposed to common problems in atypical employment relations, but also to certain specific factors, which make their work even more precarious.

Applying standard tests for employment status leads to an indefinite outcome. While some factors (such as control mechanisms and constant surveillance) indicate an employee relationship, others (like the great flexibility in working schedule) point toward an independent contractor relationship. The question of whether crowdworkers are misclassified as independent contractors remains unresolved.

The current labour law framework is obsolete and inadequate to effectively address the exponentially developing crowdwork. Some well-thought, specific legislative responses that would include particularities of new employment relations are needed. The modernisation of labour law cannot proceed at the expense of basic labour rights. The collaborative economy must respect current legal framework. It should be developed in a sustainable manner and cannot exist on the verge of the regulations, being a “parallel economy”⁴⁵. Its’ innovative character cannot be the only reason for adopting an exception for it⁴⁶. The model of platform economy and protection of labour rights should be reconciled. Ideally, the much-desired flexibility should be assured and simultaneously the labour law standards should be maintained and legal certainty should be granted. Unless the traditional system of labour law is rethought, crowdsourcing platforms will further take advantage of the grey employment zone and will develop their innovative business model on the verge of employment law.

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⁴⁶ *Ibidem*.

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E-WASTE: LEGAL CHALLENGES OF A DETERIORATING GLOBAL PROBLEM

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Abstract

One of the various side-effects of the radical changes in technology, science and media is the fast-growing surplus of electronic waste around the world. “Waste Electrical and Electronic Equipment (WEEE) or “e-Waste” is defined as discarded computers, office electronic equipment, entertainment device electronics, mobile phones, television sets, and refrigerators.

According to UNEP report “Waste Crime – Waste Risks”, the world is currently generating 42 million tons of global e-Waste every year, and warns that growing demand could see that figure increase by 10 million tons annually over the next two years. Among the worst affected countries are Nigeria, the Democratic Republic of Congo, China, India, Pakistan and Ghana. These regions have become international hot spots for digital dumping generally, since they receive daily shipments of large containers filled with nonworking electronic components.

E-Waste contains harmful chemicals such as arsenic, barium, beryllium, and many others. If not disposed of properly, these substances can be extremely harmful to human health and the environment. This illegal disposal of electronic appliances poses undeniably a threat to both human health and the environment. In addition to this, this e-waste crisis does not stop at environmental and health detriments, but it also leads to an upsurge in cybercrime. A recent study by the National Association of Information Destruction (NAID) found that 30 percent of recycled computers had hard drives that still contained sensitive personal data.

Given this unprecedented amount of e-Waste rolling out over the world, e-Waste management regulation constitutes a major challenge for the legal and market sector. With respect to legal aspects many questions arise concerning the efficiency and the practical implementation of the Directive 2012/19/EU on WEEE. Emphasis is given particularly to the ways to achieve better product design, to increase the collection and recycling rates, to strengthen the contribution of e-waste to the circular economy as well as to reinforce consumer’s awareness on that issue.

Keywords: e-waste, Directive 2012/19/EU, e-waste recycling, e-waste management regulation.

Introduction

Over the last thirty years, the electronics industry, and the information and communication technology industry in particular, have revolutionized the world. electrical and electronic equipment (EEE) have become ubiquitous around the planet: electronic devices (i.e. computers, servers, monitors, TVs, display devices), telecommunication devices (i.e. mobile phones), printers, scanners, fax machines, air conditioners, washing machines and microwave ovens, recording devices (i.e. DVDs, CDs, floppies, tapes), electronic components (i.e. chips, processors, mother boards) and industrial electronic (i.e. alarms, sirens, security devices, automobile electronic devices)². Waste Electrical and Electronic Equipment (WEEE) or e-Waste is one of the

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² U. Kumar, D. N. Singh, ‘E-Waste Management through Regulations’ [2013] 3(2) International Journal of Engineering Inventions 7.

rapidly growing domains of the manufacturing industry in the world, given that the production of electrical and electronic equipment (EEE) is one of the fastest expanding global manufacturing activities.

Rapid economic growth, coupled with urbanization and a constant demand for consumer goods, has increased both the consumption and the production of EEE. New electronic gadgets and appliances have infiltrated every aspect of our lives, providing our society with more comfort, health and security and with easy information acquisition and exchange. Every year, manufactures release new and updated electronic onto the market, and consumers rush to keep up leaving behind large numbers of unwanted and unused products. Thus, this waste flows are projected to grow at 3-5% per year in Europe³, whereas it is estimated that global e-Waste generation is growing by about 40 million tons a year⁴.

The impressive pace at which electronic products become available, accessible and obsolete together with the intense digitalization of developing economies, make the poorest countries become the most prevalent source of e-Waste generation in the near future, since they also receive daily illegal shipments of large containers filled with nonworking EEE. The shocking photos of the town of Guiyu in China have attracted much attention from non-governmental organizations, scientists and public as a booming e-waste town. It is probably the largest e-waste recycling site in the world, since it employs about 100000 people in this activity, representing about 80% of the town's population⁵.

This paper aspires to present a coherent overview of the principal issues related to e-Waste. Already the definition of e-Waste raises important questions, since there is no global consensus on it. Moreover, the magnitude of e-Waste together with the globalized nature of its effects hinders the efforts to control effectively the acute health and environmental hazards that entail. In this context, emphasis will be given on the selected regulatory regimes that deal legally with the main aspects of e-Waste management assessing their efficiency as well as their weaknesses. Finally, given the extent and the complexity of the social, economic and ecological impacts of e-Waste management and transboundary trading, it is important to highlight some recommendations for future action on this area.

1. e-Waste: a sui generis waste category

Given the fragmentation of the legal texts regarding e-Waste and the resulting lack of consensus for the legal definition of "e-Waste", it is essential to begin with some terminological clarifications. Thus, for the purpose of this paper "Electrical and Electronic Equipment" (EEE) means equipment which is dependent on electric currents or electromagnetic fields in order to work properly and on equipment for the generation, transfer and measurement of such currents and fields designed for use with a voltage rating not exceeding 1000 volts for alternating current and 1500 volts for direct current⁶.

Products consisting of computers, mobile phones, monitors, keyboards, video cameras, stereos, photocopiers, televisions, microwave ovens, washing machines, VCRs, dishwashers, fax machines, digital cameras qualify normally as EEE or e-product. These electronic and electrical products are largely classified under three major heads: as "white goods", comprising of household appliances like air conditions, dishwashers, refrigerators and washing machines. "brown goods", comprising of TVs, cameras etc. and "grey

³ Eurostat, available at: <http://epp.eurostat.ec.europa.eu/portal/page/portal/prodcom/data/database>.

⁴ M. Schluep et al., Recycling: From e-waste to resources, Sustainable Innovation and Technology Transfer Industrial Sector Studies [2009].

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⁶ Definition set out in Article 3(1)a of the Directive 2012/19/EU.

goods”, like computers, printers, fax machines, scanners. The “grey goods” are comparatively more complex to recycle due to their toxic composition⁷.

“Waste Electrical and Electronic Equipment” (WEEE) or e-Waste is a term used to cover items of all types of electrical and electronic equipment (EEE) and its parts that have been discarded by the owner as waste without the intention of re-use⁸. E-Waste is a *sui generis* waste category because it contains both very scarce and valuable as well as very toxic components. On the one hand, the valuable components of these products create economic incentives leading to favor illegal trading and market as well as informal sectors. The primary driver of this trade is that e-waste is easy to source and relatively cheap to ship, and the risk of being caught is generally low⁹.

On the other hand, the composition of e-Waste is very diverse, since it contains more than 1000 different substances, many of which are toxic, such as lead, mercury, arsenic, cadmium, selenium, hexavalent chromium, and flame-retardants that create dioxins emissions when burned. Hence, the uncontrolled disposal and recycling of e-Waste in informal sector, also called “backyard recycling”, is the principal concern in this field. While an individual electronic device may not have dangerously high levels of a given toxic material, the cumulative impact of large volume of e-Waste being disposed of in a solid waste landfill has become troubling worldwide. Thus, the increasing practices of liberalized e-Waste trading and management pose serious health and environmental challenges in management, disposal and recycling to both developed and developing countries.

2. The globalized nature of e-Waste problem

E-Waste is a cross-cutting issue with global significance and it therefore requires cross-sectoral implementation. Many stakeholders are involved, including industry players, governments, custom authorities, regulatory agencies, intergovernmental organizations, civil society. Moreover, the main problems in this domain, such as informal e-Waste work, illegal transboundary e-Waste trade, growing employment sector affects simultaneously many countries worldwide.

Due to its aforementioned heterogeneous nature and the number of stakeholders involved, compared to other waste streams it is hard to define the quantities of EEE put on the market and the quantities of WEEE generated. Moreover, it is difficult to find out the quantities of WEEE collected and treated on a national level by the compliance schemes versus complementary recycling, and how many other complementary collection streams exist. In addition, the collection of data for WEEE in residual waste from households or businesses as well as for e-Waste illegal exports is particularly difficult¹⁰.

It is estimated that global e-Waste generation is growing by about 40 million tons a year¹¹. Recycling rates currently believed to be growing at an average rate of 18 per cent per year, whereas the trade in e-Waste has grown not only between the developed and developing countries but also among the developing countries themselves¹². Almost five million tons of e-Waste were mismanaged or traded under the table within

⁷ V. N. Pinto, ‘E-waste hazard: The impending challenge’ [2008] 12(2) Indian J Occup Environ Med. 66.

⁸ United Nations University/Step, One global definition of e-Waste, Initiative White Paper, (2014), 4.

⁹ Interpol, 2010.

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¹¹ M. Schluep et al., Recycling: From e-waste to resources, Sustainable Innovation and Technology Transfer Industrial Sector Studies [2009] available: http://www.unep.org/PDF/PressReleases/E-Waste_publication_screen_FINALVERSION-sml.pdf

¹² K. Lundgren, The global impact of e-waste: Addressing the challenge, SafeWork and SECTOR – International Labour Organization, (2012) 14.

the EU in 2012, and 1.3. Million tons were illegally exported out of the EU, mostly to Africa and Asia, while only one third of Europe's e-Waste is properly recycled¹³.

It is evident that enforcing regulatory compliance and eliminating the health and the environmental hazards related to e-Waste dismantling remains challenging due to the potential financial benefits of illegal e-waste transboundary migration and handling worldwide. Experience shows that simply prohibiting or competing with informal recyclers is not an effective solution. The future of e-Waste management depends not only on the effectiveness of local governments and the operators of recycling services but also on community participation, together with national, regional and global initiatives¹⁴.

3. Impacts of e-Waste

E-Waste is usually regarded as a waste problem that can cause environmental damage and severe consequences to human health if improperly managed. Given that much of the domestic and imported/exported WEEE ends up in illegal dismantling, recycling and disposal, the environmental and health hazards are inevitable. Due to the lack of proper facilities for workers the consequences on their health are dramatic working under these circumstances¹⁵. However, in addition to human health concerns relates to workers' exposure, e-Waste has various indirect effects on larger population and more vulnerable segments, such as children.

E-Waste is a complex and difficult form of waste to recycle, and problems such as elevated concentrations of heavy metals in the air have been found in state-of-the-art facilities in developed countries. Workers and local residents are exposed to toxic chemicals through inhalation, dust ingestion, dermal exposure and oral intake¹⁶. Overall human health risks from e-waste including breathing difficulties, respiratory irritation coughing, pneumonitis, tremors, neuropsychiatric problems, convulsions, coma and even death¹⁷.

With respect to the environment, atmospheric pollution due to burning and dismantling activities seems to be the main cause of occupational and secondary exposure¹⁸. Informal sector e-Waste activities are also a crucial source of environment-to-food-chain contamination, as contaminants may accumulate in agricultural lands and be available for uptake by grazing livestock¹⁹. Aware of such health and environmental hazards due to crude recycling, some countries have now banned e-Waste imports, such as Nigeria, Cambodia, China, India, Malaysia, Pakistan and Vietnam²⁰.

¹³ C. Stupp, 'Only one third of EU's e-waste recycles properly' [2015] EURACTIV.COM.

¹⁴ K. Lundgren, see above: 12, 42.

¹⁵ F. Magalini, R. Kuehr, C. P. Baldé, eWaste in Latin America – Statistical analysis and policy recommendations, (Bonn, Germany: United Nations University, IAS-SCYCLE 2015), 8

¹⁶ J. Lepawsky, C. McNabb, 'Mapping international flows of electronic waste' [2010] 54(2) Canadian Geographer 184 .

¹⁷ J. Yu, R. Welford, P. Hills, 'Industry responses to EU WEEE and RoHS Directives: Perspectives from China' [2006] 13(5) Corporate Social Responsibility and Environmental Management 291-292.

¹⁸ A. Sepulveda et al., 'A review of the environmental fate and effects of hazardous substances released from electrical and electronic equipment during recycling: Examples from China and India' [2010] 30(1) Environmental Impact Assessment Review 31-32.

¹⁹ C. Frazzoli, O.E. Orisakwe, R. Dragone, A. Mantovani, 'Diagnostic health risk assessment of electronic waste on the general population on developing countries' [2010] 30(6) Environmental Impact Assessment Review 390-391.

²⁰ BIO Intelligence Service, Equivalent conditions for waste electrical and electronic equipment (WEEE) recycling operations taking place outside the European Union, Final report prepared for European Commission – DG Environment (2013), 25.

4. e-Waste existing Legislation

Given the aforementioned magnitude and complexity of the e-waste the developed and the developing countries have come up with measures and regulations for controlling, dealing and combating e-Waste consequences. Thus, in this section it will be presented briefly a panorama of the most important and representative regulations dealing with e-Waste on international, regional and national level.

4.1. The Directive 2012/19/EU

The EU has addressed e-Waste problems already from '90s and has progressively adopted a sound set of regulations on that issue. The Waste Shipment Regulation (WSR) passed in 1993 (and amended in 2007) was the first regulation regarding e-Waste. It highlights that no EU member state is allowed to export e-waste classified as hazardous to non-OECD countries. In 2003 the EU adopted the RoHS Directive (Restricting the Use of Hazardous Substances, 2002/95/EC), which deals with the beginning of the EEE life cycle by attempting to eliminate hazardous substances such as mercury, lead and fire retardants in domestically produced or imported electrical and electronic products. The same year the EU passed the first e-Waste Directive, which concentrates on the end-of-life stages of EEE.

The aim of this legislation is the prevention of e-waste generation and the promotion of reuse, recycling and other forms of recovery of such waste so as to reduce its disposal. It also seeks to improve the environmental performance of all operators involved in the life cycle of the EEE and, in particular, those operators directly involved in the treatment of e-Waste²¹. It is based on the principle of producer's responsibility and promotes green design and production of electronic products. It includes separate collection of e-waste, and the use of the best available treatment, recovery and recycling techniques, and makes producers responsible for financing the take-back and management of e-waste²².

To deal with the Directive's insufficient effectiveness, the EU revised it by adopting the WEEE II Directive 2012/19/EU. Several modifications were affected and have contributed to the reduction of illegal e-waste exports to non-OECD countries. Briefly, the fundamental contribution of the new WEEE Directive has to do with the widening of the scope of this EU regulation by adding three additional products (i.e photovoltaic panels, luminaires in households, and electric two-wheel vehicles which are not type-approved) and by making explicit the exclusion of some EEE that were already rather considered as excluded in the old WEEE Directive²³. Further, new ambitious collection targets are laid down in the new WEEE Directive ensuring the improvement of e-Waste collection²⁴, whereas there were adopted tools to fight against illegal e-Waste shipments more efficiently and implanting acts towards the harmonization of registration and reporting requirement of EEE products²⁵.

²¹ K. Lundgren, see above: 12, 36.

²² J. Dickenson, 'Electronic signals: A year into the EU WEEE Directive', Waste Management World, available at: www.waste-management-world.com/index/display/article-display/271243/articles/waste-management-world/volume-7/issue-7/features/electronic-signals-a-year-into-the-eu-weee-directive/html

²³ BIO Intelligence Service, Review of the scope of the Directive 2012/19/EU on Waste Electrical and Electronic Equipment (WEEE), Final report prepared for European Commission – DG Environment (2013), 5.

²⁴ From 2016, the minimum collection rate shall be 45% of the average weight of EEE placed on the market in the three preceding years in that Member States (MS). From 2019, the minimum collection rate to be achieved annually shall be 65% of the average weight of EEE placed in the market the three preceding years in the MS concerned, or alternatively 85% of WEEE generated in the territory of that MS.

²⁵ N. Seyring, M. Kling, J. Weißenbacher (BiPRO), M. Hestin, L. Lecerf (BIO Intelligence Service), F. Magalini, D. S. Khatriwal, R. Kuehr (UNU), Study on WEEE recovery targets, preparation for re-use targets and on the method for calculation of the recovery targets, Final Report prepared for the European Commission, (2015), 27.

4.2. The Basel Convention

The foremost global initiative aimed at tackling the WEEE issues is the Basel Convention and Ban. This multilateral environmental agreement, initiated in 1992, aimed at regulating the movement of hazardous waste, including WEEE, between countries. The Convention largely regulates trade measures, although it also includes several non-trade measures. It presents four main aims related to the waste hierarchy of prevention, reduction, recovery and final disposal. Thus, it attempts: first, to reduce hazardous waste generation at its source. second, to promote and ensure the environmentally sound management of hazardous waste. third, and to promote the proximity principle and fourth, to regulate and monitor the remaining transboundary movements of hazardous waste²⁶.

However, the Basel Convention's potential to offer a meaningful level of human health and environmental protection against hazardous e-Waste has been severely restricted due to the provision of the Annex IX, which excludes from the general control rule the used electrical and electronic equipment (UEEE) intended for "direct reuse" from the hazardous waste definition. Annex IX stipulates that UEEE for direct reuse qualifies as non-hazardous waste, and additionally mentions that in some countries this stream of UEEE is not considered waste at all. Consequently, this reuse exception from the waste control enshrined in the text of the Basel Convention did not hinder developing countries access to second-hand technologies, which continue to be an essential factor to their economic growth and digital and social advancement²⁷.

4.3. The Durban Declaration

In 2008 Durban Declaration on e-Waste Management in Africa followed the 2006 Nairobi ministerial declaration on e-Waste developed for COP8 of the Basel Convention. It requires countries to follow their own process to define their responses and formulate actions in relation to the e-Waste problem. Furthermore, it requires countries to review existing legislation, improve compliance with existing regulations and amend existing e-Waste management²⁸.

4.4. e-Waste Regulation in China

The Chinese government has issued a variety of environmental laws, regulations, standards, technical guidance and norms related to e-Waste management over the past years, while it has ratified both the Basel Convention and its BAN Amendment. The most recent "*Regulation on Management of the recycling and disposal of Waste Electrical and Electronic Equipment*" was enacted in 2011 and stipulates that e-Waste should be collected through multiple channels and recycled by licensed recycling enterprises. Additionally, the regulation established a "specialized fund" to subsidize the formal collection and recycling of e-waste. Producers and importers of electronic products are required to contribute to this fund²⁹.

The informal sector has not yet been included in the legislative framework, and the effectiveness of the available regulations on informal recyclers seems to be rather weak. China should take the informal sector into account, since informal recycling operations are strong and pervasive and influence the pattern of e-Waste recycling in the country³⁰. Thus, the situation in the country remains serious due to the widespread

²⁶ K. Lundgren, see above:12, 33.

²⁷ S. Ahmad Khan, E-products, E-Waste and the Basel Convention: Regulatory Challenges and Impossibilities of International Environmental Law, [2016] 25(2) RECIEL 253-254.

²⁸ S. Marriott, 'E-Waste: a growing environmental problem for Africa', [2011] SANGONeT: NGO News & Views, available at: www.ngopule.org/article/e-waste-growing-environmental-problem-africa.

²⁹ U. Kumar, D. N. Singh, see above: 2, 10.

³⁰ K. Lundgren, see above: 12, 39.

illegal activities. There is no lack of laws and regulations³¹, but unfortunately they are often enacted without adequate resources allocated for enforcement.

4.5. e-Waste Regulation in the USA

The US is one of the few countries that are not signatories to the Basel Convention. It is therefore legal to export e-Waste from the US to developing countries. The US also lacks coherent and consistent federal legislation on most e-Waste apart for CTR monitors³², which are considered to be hazardous because of their lead content. So far, 25 states have passed legislation mandating state-wide e-Waste recycling using the EPR approach and banning e-waste in landfills. There are also certification systems for e-waste recyclers in place, such as e-stewards standard, which requires companies to eliminate exports of e-waste to developing countries and ban e-Waste in municipal landfills or incinerators³³.

Recently, the EPA added the disposal of e-Waste to its top priorities list. However it still allows that e-Waste can be safely disposed of in municipal solid waste landfills. In addition to this, in 2010 President Obama commissioned a Task Force on Electronics Stewardship to create “a national strategy for electronics stewardship including procedures for how agencies manage their own waste”³⁴.

5. Extended Producer Responsibility (EPR) Policy

Extended Producer Responsibility (EPR) constitutes a new era of industrial ecology and environment sustainability³⁵ and can be defined as “...a policy principle to promote total life cycle environmental improvements of product systems by extending the responsibilities of the manufacturer of the product to various parts of the products lifecycle, and especially to the take-back, recovery, and final disposal of the product”³⁶. In an effective EPR scheme, the true cost of waste management is internalized within the retail price by the producer. The aim is to provide an incentive to produce less toxic equipment that is cheap and easy to recycle. Moreover, EPR policies could drive green design of products because it is assumed that if producers have to deal with their own product waste, they will have more incentive to use recyclable materials or materials that will not generate the costs of hazardous waste management³⁷. Consequently, companies are pushed to address the life issues of products, especially end-of-life issues.

The emergence of EPR concept is based on the “polluter pays principle”, which imposes the inclusion of the costs of treatment and disposal into the price of products, and reflects several general trends in environmental policy making. Namely, the prioritization of preventive measures over end-of-pipe approaches, the enhancement of lifecycle thinking and a shift from the “command and control” to a non-prescriptive, goal

³¹ In 2000 it was passed a “Catalogue for Managing the import of wastes”, in 2006 it was enacted the “Technical Policy on Pollution Prevention and Control of WEEE”, in 2007 the “Ordinance on Management of Prevention and Control of pollution from Electronic and Information Products was implemented” and in 2008 “Administrative Measures on Pollution Prevention of Waste Electrical and Electronic Equipment” were adopted. See, U. Kumar, D. N. Singh, see above: 2, 9.

³² The Environmental Protection Agency (EPA)’s CRT Rule.

³³ Electronics TakeBack Coalition, [ETBC] 2011.

³⁴ K. Lundgren, see above:12, 40.

³⁵ J. Halluite, J. Linton, J. S. Yeomans, R. Yoogalingam, ‘The Challenge of hazardous waste management in a sustainable environment: Insights from electronic recovery laws’ [2005] 12(1) Corporate Social Responsibility and Environmental Management 34.

³⁶ T. Lindqvist, Extended Producer’s in cleaner pollution, The International Institute for Industrial Environmental Economics (IIIEE) (Lund, Sweden: 2000) 58.

³⁷ M. Nimpuno, C. Scruggs, Information od chemicals in electronic products: A study in needs. Gaps, obstacles and solutions to provide and access information on chemicals in electronic products (TeamNord) [2011] available at: www.Chemsec.org/get-informed/global-initiatives/unep-cip-study-on-electronics.

oriented approach³⁸. The policy instruments under the EPR umbrella include different types of product fees and taxes, product take back mandates, virgin material taxes, waste collection charges, pay-as-you-throw mechanisms³⁹.

The EPR policy is considered by OECD⁴⁰ as well as the EU as one of the most promising means to combat the increasing generation of waste and pollution. It has been recognized as a concept which changes the allocation of responsibility among the actors of a product's life cycle with a special attention to the end of a product's life⁴¹. Moreover, EPR is a valuable tool for achieving sustainable development because it creates economic, environmental and social benefits. Types of implementation of the EPR are: the mandated product take back (for example, the government may require that each producer meet a recycling rate goal of 75% for its products), the voluntary product take back (the producers agree to organize a take-back system for their products and set recycling goals), the development of economic instruments (i.e. advanced recycling fee, advanced disposal fee and deposit fund schemes)⁴².

6. Recommendations and Perspectives

Given that the pervasion of human-computer interaction in all aspects of daily life is a salient feature of the contemporary global economy⁴³, it is undeniable that e-Waste will remain a complex waste stream to apprehend. In this framework, it is essential to support multilevel interventions. Namely, on technical interventions level, emphasis should be given to sustainable product design and engineering techniques (carbon neutral, minimize toxicity, plan for recyclability and reuse, maximize design for repairability and durable use)⁴⁴ as well as to restricting recycling and establishing "Remanufacturing Centers" especially in developing countries where "repair", "refurbishing" and "remanufacturing" activities can be carried out.

Furthermore, regarding policy-level interventions the main actions are related to the designing clear definition of e-Waste for regulation, import and export regulatory regime, an integrated IT management policy and take back policies as well as to the establishment of standards and of a certification system for second hand appliances, and recycling. With regard to the implementation interventions, the principal priorities should be the following⁴⁵: development of national e-Waste monitoring strategies, improvement of the current methods for calculating e-Waste indicators, establishment of reporting obligations for all actors collecting e-Waste products, use of the same codes that allow comparability in reporting processes, development and harmonization of reuse standards and guidelines.

³⁸ C. Van Rossem, N. Tojo, T. Lindqvist, Extended Producer Responsibility: an examination of its impact on innovation and greening products. The IIIEE Report commissioned by Greenpeace International, Friends of the Earth Europe and European Environmental Bureau (2006).

³⁹ S. Oh, S. Thompson, Do Sustainable computers result from designing for environment and extended producer responsibility? : analyzing e-waste programs in Europe and Canada, ISWA/DAKOFA Annual Congress (2006)

⁴⁰ According to its definition, "*an environmental policy approach in which a producers' responsibility for a product is extended to the post-consumer stage of a products life cycle including its final disposal*" (OECD, 2001).

⁴¹ G. Roller, M. Führ, 'Individual Producer Responsibility: A Remaining Challenge under the WEEE Directive', [2008] 17(3) RECIEL 278-279.

⁴² I. C. Nnorom, O. Osibanjo, Overview of electronic waste (e-waste) management practices and legislations, and their poor applications in the developing countries, [2008] 52 Resources Conservation & Recycling 846.

⁴³ S. Ahmad Khan, see above: 27, 248.

⁴⁴ ETBC, 2011.

⁴⁵ J. Huisman, I. Botezatu, L. Herreras, M. Liddane, J. Hintsa, V. Luda di Cortemiglia, P. Leroy, E. Vermeersch, S. Mohanty, S. van den Brink, B. Ghenciu, D. Dimitrova, E. Nash, T. Shryane, M. Wieting, J. Kehoe, C. P. Baldé, F. Magalini, A. Zanasi, F. Ruini and A. Bonzio, Countering WEEE Illegal Trade (CWIT) Summary Report, Market Assessment, Legal Analysis, Crime Analysis and Recommendations Roadmap (2015) 31-37.

In addition to this, emphasis should also be given to the enhancement of multi-stakeholder networking, the harmonization of the penalty systems and the improvement of waste codification and collection (more secure and more easily accessible and visible collection points). Finally, public awareness forms an integral part of an efficient e-Waste management regime⁴⁶. Engage consumers and promote e-Waste management programmes and campaigns that highlight the societal opportunities related to reuse and recycling of products, particularly from a resource management perspective. Campaigns must also include transparent and effective information on the best practices and success case in the region⁴⁷.

All in all, it is clear that there is an urgent need for the introduction of both government-driven (mandated) and industry-driven (voluntary) EPR programmes in the developing countries to check the repeat or the colossal environmental contamination at Guiyu e-Waste recycling village in China⁴⁸.

Conclusions

To date, it is evident that the major initiatives and efforts by different developed and developing countries, organizations and EU do not deal sufficiently with the acute and constantly growing problem of e-Waste. The majority of the measures and regulations have an ad hoc character without designing a global solution based on the following principles: extending the life time of products, reusing products and materials, and recycling.

Today, as manufacture, recovery and reuse of EEE becomes high profile issue, it is becoming more and more important to appropriately define system boundaries, embrace life cycle thinking, and apply the three principles of sustainable development, namely, ecological balance, economic growth and social progress. In order to achieve sustainable development, there is a need for the implementation of sustainable consumption. WEEE Directive represents one part of the moves within the EU towards sustainable resource and waste management practice and more responsible behavior by producers and consumers⁴⁹.

Moreover, the discussion about e-Waste has revived at the EU law landscape due to the adoption of the circular economy package, which is intended to increase recycling levels and tighten rules on incineration and landfill. This policy priority of EU consists of six bills on waste, packing, landfill, end of life vehicles, batteries and accumulators, and waste electronic equipment⁵⁰. Hence, promotion and enhancement of e-Waste management and regulation issues will be again at the heart of EU policy.

To sum up, it is undeniable that the e-Waste problem needs urgently a multifaceted approach on technical and policy-level enhancing implementation of the regulations and increasing public awareness. The nations need to identify the e-Waste problem in major way and enact regulations dedicated to these with open eyes and aims to see the environment is safe and livable⁵¹.

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⁴⁷ F. Magalini, R. Kuehr, C. P. Baldé, eWaste in Latin America – Statistical analysis and policy recommendations, (Bonn, Germany: United Nations University, IAS-SCYCLE 2015) 34-35.

⁴⁸ I. C. Nnorom, O. Osibanjo, see above: 42, 856.

⁴⁹ I. C. Nnorom, O. Osibanjo, see above: 42, 849

⁵⁰ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Circular Economy Action Plan, Brussels, 26.1.2017, COM(2017) 33 final.

⁵¹ U. Kumar, D. N. Singh, see above: 2, 14.

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LAW ON STATE LIABILITY: LATVIAN AND ESTONIAN PERSPECTIVE

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Abstract

State liability is a contemporary phenomenon. During the Russian empire times, Soviet Union times, as well as in Latvia's first period of independence an idea of state liability was weakly developed. State was either liable for embezzlement or squandering of money that according to law was entrusted to judges (Russian empire times and first period of independence of Latvia), or was liable for unlawful conviction or arrest (Soviet Union times).

Nowadays in Latvia state liability has formed as separate legal liability form. Both in Estonia and Latvia in order to attract state liability no relevance is given to fault of particular authority or state official. However, a state may be relieved from liability if the damage could not be prevented even fully observing diligence necessary for the performance of public duties.

State is liable for every action of its branches – legislative, executive and judicial branch. In Estonia and Latvia private law norms are applied subsidiary, if it does not contradict the idea of state liability, and in both countries under certain circumstances it is possible to receive compensation for lawful administrative act.

In Latvia legal person may be subject to non-pecuniary loss, whereas in Estonia only natural persons may be subject to non-pecuniary loss. In Estonia all issues related to state liability are mostly stipulated in one legal act – State liability act. This Law also prescribes a procedure on grant of compensation for damages caused by normative acts. As to Latvia there are no legal regulations in this regard. The understanding of state liability in Latvia is very similar to one that exists in Estonia. However, for both there is place for improvements.

Keywords: State liability, Public tort, Liability of public authorities, Damages.

Introduction

In absolute monarchies monarch was beyond the law. Monarch was always right, and it was impossible to doubt that, as monarch was protected by so called crown immunity. Famous is expression of King Louis XIV "I am the state" (*In french: l'etat c'est moi*). It was deemed that if monarch is the state and monarch does not bear any responsibility towards its citizens, then also the state may not be held liable for its actions in public sphere (state immunity).

Changes as to immunity of state started to develop along with development of ideas of constitutionalism and rule of law. More and more developed an idea that also the state is bound by law, and if the state has to comply with law, then the state may also violate it.

Latvia is a legal state and in Latvia state liability has commenced to form a separate form of legal liability along with civil liability, criminal liability and other forms of legal liability. Pursuant to doctrine of state liability a state has to bear responsibility of its actions and reimburse all loss caused to individuals in public law sphere, opposite to civil liability which pertains to actions in private law sphere. In this article the author will focus on development and understanding of idea of state liability in Latvia, comparing it with understanding that exists in Estonia.

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1. Understanding of state liability in Latvia: a short insight in history

1.1. Latvia as a part of the Russian empire (18th century – 1918)

In 18th century after the end of Great Northern War and partition of Poland contemporary Latvian territory was added to the Russian empire.² In the Russian empire the idea of state liability was weakly developed. It was widely accepted that the state may not bear responsibility of loss that have been caused to its citizens, as the officials should act only according to the law. All actions that deviated from the law was deemed as not the actions of the state, but actions of particular officials, and such actions were not attributed to the state.³ The officials bore personal responsibility for actions that deviated from the law. Roots for such interpretation comes from maxim that King can do no wrong i.e. if state cannot commit any wrongs, then all actions that are unlawful must not be attributed to the state, but to the officials themselves.

Not only regular officials such as heads of institutions had to bear personal responsibility, but also judges, prosecutors and other court officials, as well as even elected officials. If the actions of these officials were unlawful, citizens could claim a compensation for damages in ordinary courts according to the procedure prescribed in Code on Civil Procedure and Code on Criminal procedure.⁴ If a person wanted to bring a claim against a judge, prosecutor or other court official, he had to receive a prior permission. Such permission was usually given by the Civil department of the Supreme Court (*in Latvian: Senāta Civilais departaments*) or by Court's chamber (*in Latvian: Tiesu palāta*). It was examined whether a claim had any legal grounds i.e. whether it was not truly unfounded. As to other officials, no prior permission was required.

Compensation issues was governed by civil norms, and usually compensation was granted in civil procedure. A person was also entitled to bring a civil claim in criminal procedure in regard to the crime the official committed.⁵ On such occasion civil norms applied.

Although in the Russian empire the idea of state liability was weakly developed, it was accepted that state entails liability in cases of embezzlement and squandering of money that was entrusted to state officials. In 1892 the Supreme Court altered its long lasting case law and established a precedent that in cases where law (e.g. inheritance matters) provides that money should be entrusted to judges (*In Latvian: mirtiesnesis*), and the judge has embezzled or squandered it, the state entails liability to compensate all damages that were caused because of embezzlement and squandering.⁶

There was also a debate that state should entail liability also in cases when individuals are unlawfully convicted, detained or arrested. When the judicial reform of Alexander II started in 1864, its authors tried to persuade the monarch that state liability should also cover this sphere. However, the initiative did not succeed, and it was decided that it would be sufficient to leave grant of compensation to monarch's discretion, that is, the courts were conferred with rights to ask the monarch such compensation, but the monarch had no obligation to grant it whatsoever.⁷ Nonetheless, according to the legal doctrine in some cases, such compensation was given, but, as such rights lied wholly in monarch's discretion, they could not be regarded as effective.⁸

In comparison, such form of state liability was not well known also in European countries i.e. in Portugal it was introduced only in year 1884, in Sweden – 1886, Norway – 1887, Denmark – 1888, Austria - 1892,

² K. Voldemārs, 'Latvijas PSR valsts un tiesību vēsture II' (Rīga: 1980) 193-197.

³ O. Ozoliņš, 'Valsts atbildība par ierēdņiem' [1935] Tieslietu Ministrijas Vēstnesis 2 283-295.

⁴ V. Bukovskis, 'Civīlprocesa mācība grāmata' (Rīga: 1933) 138, 155, 553-554.

⁵ V. Bukovskis, 'Civīlprocesa mācība grāmata' (Rīga: 1933) 138, 155, 553-554.

⁶ Case no. 92/52 [1892] Joint meeting of Supreme Court of Russian Empire.

⁷ A. Langenfelds, 'Valsts atbildība nevainīgi pie tiesas sauktiem' (Rīga: 1938) 11-12.

⁸ L. Kantors, 'Atbildība personām, kas bez vainas sauktas pie kriminālatbildības' [1927] Tieslietu Ministrijas Vēstnesis 10/11 348-354.

France – 1895, Germany – 1898 and in Hungary - 1890.⁹

No significant changes were introduced until the collapse of the Russian Empire. They were not introduced by Law on administrative courts that was adopted in 30 May 1917.¹⁰ In addition, the scope of state liability was not broadened even notwithstanding that in France on whose practice the Russian Empire relied a notion of service fault (*in French: faute de service public*) was established, providing that all actions of state officials performing state duties are attributed to the state, and therefore state entails liability for damages caused because of them.¹¹

1.2. Latvia in its first period of independence (1918 – 1936)

Latvia declared its independence in 18 November 1918, and for a long time laws that were in force in the Russian empire were applicable also in Latvia insofar as they did not contradict the whole idea of independent Latvia.¹² For that reason the Supreme Court of Latvia (*In Latvian: Latvijas Senāts*) established the same principle of state liability in cases of embezzlement and squandering of money entrusted to judges.¹³ In other cases state was not liable for unlawful actions of its officials.¹⁴

Latvia preserved a principle that was established in Russian Empire times i.e. principle of personal responsibility according to which the officials bore a responsibility for their unlawful actions.¹⁵ Fault of particular officials was one of the conditions that should be met in order to receive a compensation. In other words officials bear a responsibility for their faults.¹⁶

In 15 February 1922 the Constitution of Latvia (*In Latvia: Satversme*) was adopted. The initial Constitution had no human rights catalogue, as the second part on the Constitution was never adopted. However, even if the second part of the Constitution had been adopted, it would not contain any state liability related rights.¹⁷ Article 91 of the Constitution only provided that officials may be brought to liability for their unlawful actions in ordinary courts without receiving a permission from its superiors (elimination of administrative guarantee).

In 4 March 1921 Law on administrative courts was adopted. However, administrative courts had no competence to examine cases on compensation of damages against the officials or public authorities. The administrative courts would not be competent to examine such cases even if the new Law on administrative courts had been adopted that was elaborated in 1940 and was not adopted because of occupation of Nazi

⁹ A. Langenfelds, 'Valsts atbildība nevainīgi pie tiesas sauktiem' (Rīga: 1938) 11-12.

¹⁰ V. Bukovskis, 'Administratīvās tiesas reforma' [1925] Tieslietu Ministrijas Vēstnesis 7-9 820, J. Kalacs, 'Pārdomas par administratīvo tiesu' [1937] Tieslietu Ministrijas Vēstnesis 2 318.

¹¹ O. Ozoliņš, 'Valsts atbildība par ierēdņiem' [1935] Tieslietu Ministrijas Vēstnesis 2 283-295, M. Butāns, 'Valsts atbildības izpratne' [1999] Likums un Tiesības 1.sējums 4 108.

¹² Autoru kolektīvs, 'Latvijas valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri' (Rīga: 2015) 299.

¹³ Case no. 1/32 [1932] Joint meeting of Latvian Supreme Court.

¹⁴ O. Ozoliņš, 'Valsts atbildība par ierēdņiem' [1935] Tieslietu Ministrijas Vēstnesis 2 283-295, O. Ozoliņš, 'Vai valsts atbild par ierēdņu darbību' [1935] Rīts 268 16.

¹⁵ F. Kamradziuss, 'Kriminālprocesa likumi pēc 1926.gada izdevuma, ar vēlākiem pārgrozījumiem un papildinājumiem, izsludinātiem līdz 1934.gada 15.februārim un Senāta paskaidrojumiem, kas doti laikmetā no 1919.gada līdz 1934.gada 15.februārim' (Rīga: 1934) 10.

¹⁶ P. Mucinieks, 'Valsts darbinieku atbildība' [1935] Pasta-Telegrāfa Dzīve 5 332-335, [U.a], 'Valsts darbinieku atbildība' [1933] Jaunais Ceļš 12 1-2.

¹⁷ [U.a], 'Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922). Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana' (Rīga: 2006), Autoru kolektīvs, 'Latvijas valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri' (Rīga: 2015) 59.

Germany and Soviet Union.¹⁸

During the first period of independence a Law was elaborated which anticipated that Latvia will entail liability for unlawful arrests and detainments. It was submitted to Constitutional Assembly (*In Latvian: Satversmes sapulce*) in 1921 and was named "Law on compensation to individuals that have been unlawfully kept in prison".¹⁹ However, the law was not adopted.²⁰

One of the most colourful expression that reflects that time understanding of state liability is expression of one of Supreme Court's judges: "*state may not act as an insurance company towards their citizens*".²¹ Therefore, notwithstanding that the Russian empire was absolute monarchy, while in Latvia there was democracy, the understanding of state liability did not differ. The state entailed liability only in cases of embezzlement and squandering of money that was entrusted to judges if the law provided that money should be entrusted to judges.

1.3. Latvia under occupation of the Soviet Union (1940-1992)

In 1939 Latvia was occupied by the Soviet Union, and soon after Latvian Soviet Socialist Republic was established. The Soviet Union was a totalitarian country, and in such countries it is widespread that reality differs from legal norms i.e. state does not comply with legal norms. As one of the Australian Latvians Kārlis Ātrens has mentioned "*Constitution of Soviet Union is not a constitution, but merely a propaganda document to mislead the others that Soviet Union is similar to Western Europe Countries*".²²

First Constitution of Soviet Union was adopted in 7 October 1977, so called Constitution of Brezhnev. Article 58, Paragraph tree of the Constitution provided that citizens of the Soviet Union are entitled to bring a complaint against the officials, as well as receive a compensation for damages that are caused to them because of unlawful action of public authorities, organizations and state officials in exercising state duties. The same was provided in Article 56 of the Constitution of Latvian Soviet Socialist Republic (hereinafter – LSSR).²³ However, these rights were conferred only to citizens of Soviet Union. As to foreigners a separate law was adopted, but it did not contain any similar rights to those conferred to the citizens i.e. it did not contain any rights to compensation, but it contained a right to court.²⁴

In 18 May 1981 the Soviet Union adopted a decree "On compensation of damages that are caused to citizens because of unlawful action of public authorities, organizations and state officials in exercising state duties". It did not provide a right to compensation for non-pecuniary loss.²⁵ In legal doctrine this law was named as dead law, as in practice it was not applied.²⁶ The individuals may recourse to the court in regard to public law relationships only in small number of cases, that is, cases in regard to mistakes in elections and imposition of monetary fines.²⁷ That was the reason why the aforementioned law was nearly not applied. Sometimes it was applied in cases related to unlawfully convicted and arrested individuals.²⁸

In 30 June 1987 in order to rectify the said situation a new law was adopted. It stipulated the procedure

¹⁸ [U.a], 'Likumprojekts par administratīvo procesu' [1940] Tieslietu Ministrijas Vēstnesis 4 715-724, [U.a], 'Būs jauns likums par administratīvām tiesām' [1940] Latvijas kareivis 116 6.

¹⁹ A. Langenfelds, 'Valsts atlīdzība nevainīgi pie tiesas sauktiem' (Rīga: 1938) 11-35.

²⁰ A. Langenfelds, 'Valsts atlīdzība nevainīgi pie tiesas sauktiem' (Rīga: 1938) 11-35.

²¹ O. Ozoliņš, 'Valsts atbildība par ierēdņiem' [1935] Tieslietu Ministrijas Vēstnesis 2 283-295.

²² K. Ātrens K, 'Vai Padomju Savienības konstitūcija ir konstitūcija' [1983] Austrālijas latvietis 1682 5-6.

²³ Latvian Soviet Socialist Republic Constitution [1977] Article 56.

²⁴ Parliament Law on Legal condition of foreigners in the Soviet Union [1981].

²⁵ M. Svīre, 'Cik tālu esam no tiesiskas valsts' [1989] Padomju Jaunatne 8 4, [U.a], 'PSRS Augstākajā tiesā' [1998] Cīņa 298 1.

²⁶ V. Skudra, 'Kādai būt tiesiskai valstij? Par likumu virsvaldību... zem cauriem jumtiem' [1988] Padomju Jaunatne 232 2

²⁷ Parliament LSSR Code on Civil procedure [1963] Chapter III.

²⁸ M. Svīre, 'Cik tālu esam no tiesiskas valsts' [1989] Padomju Jaunatne 8 4.

on bringing claims at court against actions of the officials if such actions infringe their rights.²⁹ The law was anew adopted in 2 November 1989. Slight changes were made.³⁰ On the basis of this law, LSSR amended Code on Civil procedure, appending the law with new section stipulating the procedure on how individuals may bring claims at court against actions of the officials.³¹ However, soon after its adoption the Soviet Union collapsed, and therefore it was not widely applied. The author has not find any records of application of the law thereof.

To conclude it has to be said that in the Soviet Union grant of compensation was confined with cases where citizens were unlawfully convicted or arrested. It was not possible to receive compensation for non-pecuniary loss, and no personal liability principle, as understood in Russian empire times, was known in the Soviet Union. As to the foreigners, the foreigners did not had any rights to the compensation, including in unlawful conviction or arrest cases.

2. Understanding of state liability in contemporary Latvia (as from 1992)

After the Second World War and atrocities that were made by sovereign states, a protection of human rights gained international attention.³² Nowadays states may not unilaterally choose what to do with their citizens, as states have to comply with principles of human rights. Therefore if states are constrained by human rights, the states could entail liability if human rights are violated. It is not impossible to escape from the liability for violating human rights, as it was possible before widely accepted endorsement of human rights. Not the officials, but state bears full responsibility, as the state could only act by its officials. The state is liable for every action that is taken by its branches – executive, legislative and judicial branch.

In 1992 law “Rights and obligations of humans and citizens” was adopted.³³ It is named as constitutional law, but that is not true, as it was adopted in regular legislative process. It was a regular law. Article 18, Paragraph 7 of the law provides entitlement to compensation for non-pecuniary and pecuniary loss caused to unlawfully convicted or arrested individual. It was the first time, when a person was granted with a right to compensation for non-pecuniary loss.

In 15 October 1998 VIII chapter “Human Rights” was adopted. Third sentence of Article 92 of the Constitution entitles a person to adequate compensation for unlawful infringement of his rights. The Constitutional Court has held that in this article a general guarantee is enshrined - if state has infringed rights of individual, the individual is entitled to adequate compensation.³⁴ This quote symbolises what is called a legal state i.e. state is not a subject beyond the law, and also the state, including the parliament is bound and in the meantime constrained by the law.

At the time when VIII Chapter of the Constitution was adopted, until the third reading the only norm that provided compensation was the second sentence of Article 94: “*Individuals who are unjustifiably arrested are entitled to compensation*”. Only one month before the adoption of the Constitution, that is, on 3 September 1998 Legal bureau of the Parliament suggested to append the Constitution with more universal norm.³⁵ The norm provided compensation for all persons not only in cases of unjustified arrests, but in all situations when

²⁹ Parliament Law on Procedure on bringing a complaint about unlawful actions of state officials that infringe rights of citizens [1987].

³⁰ Parliament Law on Procedure on bringing a complaint about unlawful actions of state officials that infringe rights of citizens [1987].

³¹ Parliament Amendments to LSSR Code on Civil procedure [1990].

³² M. Kēnigs, ‘Cilvēktiesības’ (Rīga: 2010) 43.

³³ Parliament Constitutional law on Rights and obligations of humans and citizens [1992].

³⁴ Case no. 2011-21-01 [2012] Latvian Constitutional Court, Case no. 2014-06-03 [2014] Latvian Constitutional Court, Case no. 2014-13-01 [2015] Latvian Constitutional Court.

³⁵ Letter of Parliament Legal Bureau no. 12/17-702 [1998]. Available at Parliament’s archive.

their rights have been violated. This norm is prescribed in the third sentence of Article 92 of the Constitution.

In 3 November 1998 a new law concerning state liability was adopted. It stipulates conditions on which a person, for example, who has been unlawfully arrested, detained or convicted may receive a compensation for non-pecuniary and pecuniary loss.³⁶ The law provides that claim for non-pecuniary loss are heard under the procedure prescribed in the Law on Civil procedure, whereas claim for pecuniary loss – under the Law on Administrative procedure. In its content this law is similar to the Soviet Union decree that was adopted on May 1981. It should be mentioned, that it is intended to replace this law with a new law, providing that all state liability cases in this regard will be heard by administrative courts, nor by ordinary courts. Currently, the law is being adopted in the Parliament, and it is planned to be adopted within year 2017.

In 1 February 2004 Law on Administrative procedure was adopted. Article 92 entitles a person to compensation for non-pecuniary and pecuniary loss caused by administrative acts, administrative agreements and others actions by public authorities. In 2 June 2005 Law on Compensation for Losses Caused by State Administration Institutions was adopted. This law particularizes Article 92 of Law on Administrative procedure, providing more-specific norms as to the compensation for non-pecuniary and pecuniary loss. Also legal persons may be subject to non-pecuniary loss.³⁷ These cases are heard by administrative courts.

Law on Compensation for Losses Caused by State Administration Institutions obliges the injured person to avert and mitigate the loss insofar as it is possible, taking into account the specific circumstances of the case. If the injured person deliberately causes loss or increases the amount of loss, the person is not entitled to compensation in this regard.³⁸ Also the relevance is given to the fact on how much the loss was foreseeable, albeit the law does not provide that. Foreseeability is taken into account assessing whether a causal link exists.³⁹

Latvia recognizes also liability for breach of European Union law.⁴⁰ Such cases are very rare, and they are heard by ordinary courts. Latvia has not adopted any legal regulation in this regard, and that is one of the largest reasons why in Latvia such claims are not brought at court. Also Latvia has not adopted any legal regulation as to liability for loss caused by legal acts, albeit the Supreme Court has held that according to Article 92, third sentence of the Constitution individuals are entitled to compensation also in such occasions.⁴¹ Such claims are heard by ordinary courts on the basis of Article 92 of the Constitution (direct applicability).⁴²

In Latvia no relevance is given to fault of particular public authority or state official. Fault is not a prerequisite to hold state liable for actions of its authorities and officials. If public authorities have acted unlawfully, then state in accordance to relevant laws must bear liability for damages that are caused to individuals. In Latvia it is widely accepted that actions of public authorities and state officials are attributable to state.

3. Understanding of state liability in contemporary Estonia

In contrast to the pre-World War II Constitutions, the 1992 Constitution sets forth a fundamental right

³⁶ Parliament Law on Compensation of damages caused by unlawful or unjustified action of investigative authorities, prosecutor's office or court [1998].

³⁷ Case no. 2011-21-01 [2012] Latvian Constitutional Court.

³⁸ Parliament Law on Compensation for Losses Caused by State Administration Institutions [2005] Article 10.

³⁹ Parliament Law on Compensation for Losses Caused by State Administration Institutions [2005] Article 6.

⁴⁰ M. Haba, 'The case of state liability: 20 years after Francovich' (London: 2015) 70.

⁴¹ Case no. SKA-16/2012 [2012] Latvian Supreme Court.

⁴² Case no. 2011-21-01 [2012] Latvian Constitutional Court.

to the compensation for damage caused by an unlawful action.⁴³ Article 25 of the Constitution provides that everyone has a right for moral and material damage caused by unlawful action of any person. Pursuant to this article, a person may bring a claim at court against public authority even if there is no law governing the compensation for damage (direct applicability). The Supreme Court of Estonia has decided that under such circumstances the general principles of compensation for damage must be taken into account.⁴⁴

The compensation for damage caused by public authority is regulated by the State liability act (hereinafter – Liability act).⁴⁵ It was adopted in 2 May 2011, and it is applicable only in public law relationships, including in administrative matters, and individuals may even claim a compensation for damages caused by legal acts (laws etc.) and in certain circumstances by unlawful judgments. If damages are caused in private law relationships, damages are not compensated under Liability act, but mainly under Law of Obligations Act.⁴⁶

In addition to Liability act, in Estonia there are some specific laws that regulate the compensation for damage caused by public authority, for example, Act on Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty.⁴⁷ Pursuant to this act a person may request a compensation for being detained on suspicion of a criminal offence but released when the suspicion ceased to exist. It should be mentioned that this act is not only applicable in public law relationships, but also in private law relationships.

In Estonia damages are mainly compensated under public law provisions. However, Liability act provides that if it not in conflict with the nature of public law relationships also private law provisions concerning compensation for damage may be applicable.⁴⁸ Therefore under certain circumstances also provisions of Law of Obligations Act may be applied. In Latvia it is similar to Estonia – private law provisions in regard of compensation for damages may be applied in sphere of state liability, unless the law provides otherwise or application of private law provisions contradicts provisions of Constitution, especially Article 92 of the Constitution.

In Estonia compensation for damages is not based on fault of particular authority or individual that adopted unlawful decision, including administrative act. However, a state may be relieved from liability if the damage could not be prevented even fully observing diligence necessary for the performance of public duties.⁴⁹ Under Liability act damages are compensated if the following conditions are met:

- unlawful action of the public authority in public law relationships.
- violation of a right of particular individual.
- damages are caused to particular individual.
- causal link between the violation of a right and the damages.
- a person has exhausted obligatory primary legal remedies (Article 7 (1) of Liability act).⁵⁰ In general, the same conditions apply to non-pecuniary loss.⁵¹

Liability act provides that non-pecuniary loss may be caused only to natural persons, and financial compensation for non-pecuniary loss may be claimed only concerning to wrongful degradation of dignity, damage to health, deprivation of liberty, violation of the rights to home, private life, correspondence and

⁴³ W. Baginska, 'Damages for Violations of Human Rights' (London: 2016) 44.

⁴⁴ Case no. 3-3-1-35-10 [2011] Estonian Supreme Court.

⁴⁵ Parliament State Liability Act [2001].

⁴⁶ Parliament Law of Obligations Act [2001].

⁴⁷ Parliament Act on Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty [1997].

⁴⁸ Parliament State Liability Act [2001] Article 7 (4).

⁴⁹ Parliament State Liability Act [2001] Article 13 (3).

⁵⁰ W. Baginska, 'Damages for Violations of Human Rights' (London: 2016) 50.

⁵¹ W. Baginska, 'Damages for Violations of Human Rights' (London: 2016) 50.

defamation.⁵² In Latvia the law does not provide an exhaustive list of rights in regard to which a compensation for non-pecuniary loss may be claimed, as it is not possible to name all rights that are enjoyed by natural and legal persons.⁵³ Therefore in Latvia individuals may claim a financial compensation also if their freedom of expression is violated, while in Estonia it is impossible, as the law does not provide that. It raises a question whether such restriction is compatible with the European Convention on Human Rights.

In Estonia legal persons such as companies, associations may not claim compensation for non-pecuniary loss, as it is accepted that such loss may not be caused to legal persons. However, it should be taken into account that European Court of Human rights recognizes legal person's rights to compensation for non-pecuniary loss i.e. also non-pecuniary loss may be caused also to legal persons.⁵⁴ That being said, such understanding of non-pecuniary loss may violate the European Convention on Human rights. In Latvia it is widely accepted that also legal persons may be subject to non-pecuniary loss.

Usually in order to claim a compensation one of the prerequisites is unlawful action of the state. However, in Estonia it is accepted that under certain circumstances compensation may be claimed also concerning to lawful actions, for example, lawful administrative act, which extraordinarily restricts the fundamental rights or freedoms of the person. Meanwhile, the Liability act provides that compensation in such situations may not be claimed, for instance, if the restriction of fundamental rights or freedoms was in the interests of particular person or if the person may claim compensation from elsewhere, for example, from insurance company.⁵⁵

In Latvia persons may also claim compensation for lawful administrative act. One of the cases is where lawful administrative act is repelled because of changes in factual or legal circumstances that if such circumstances had existed at the time of issuance of administrative act it would not have been issued.⁵⁶ There are also other cases when compensation may be claimed, and Council of Europe has even adopted a recommendation in this regard.⁵⁷

Conclusions

State liability is a contemporary phenomenon. During the Russian empire times, Soviet Union times, as well as in Latvia's first period of independence an idea of state liability was weakly developed. State was either liable for embezzlement or squandering of money that according to law was entrusted to judges (Russian empire times and first period of independence of Latvia), or was liable for unlawful conviction or arrest (Soviet Union times).

Nowadays in Latvia state liability has formed as separate legal liability form. Both in Estonia and Latvia in order to attract state liability no relevance is given to fault of particular authority or state official. However, a state may be relieved from liability if the damage could not be prevented even fully observing diligence necessary for the performance of public duties.

State is liable for every action of its branches – legislative, executive and judicial branch. In Estonia and Latvia private law norms are applied subsidiary, if it does not contradict the idea of state liability, and in both countries under certain circumstances it is possible to receive compensation for lawful administrative act.

⁵² Parliament State Liability Act [2001] Article 9.

⁵³ Parliament Law on Compensation for Losses Caused by State Administration Institutions [2005] Article 8-9.

⁵⁴ *Comingersoll S.A. v. Portugal*, Case no. 35382/97 [2000] European Court of Human Rights, J. Priekulis, 'Personiskā kaitējuma atbildzinājums juridiskai personai administratīvajā procesā' [2014] 33 (835) 21-27.

⁵⁵ Parliament State Liability Act [2001] Article 16.

⁵⁶ Parliament Law on Administrative procedure [2004] Article 85.

⁵⁷ Council of Europe recommendation no. R (84) 15 to member states relating to public liability.

In Latvia legal person may be subject to non-pecuniary loss, whereas in Estonia only natural persons may be subject to non-pecuniary loss. In Estonia all issues related to state liability are mostly stipulated in one legal act – State liability act. This Law also prescribes a procedure on grant of compensation for damages caused by normative acts. As to Latvia there are no legal regulations in this regard. The understanding of state liability in Latvia is very similar to one that exists in Estonia. However, for both there is place for improvements.

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A NEW WAR FOR THE LAND? CLIMATE REFUGEES' STRUGGLES WITH SEARCHING FOR A NEW HOME

Anna Reterska-Trzaskowska¹

Abstract

We are living in an age when more people than ever are being uprooted. According to the International Federation of Red Cross, climate change disasters are currently a bigger cause of population displacement than war and persecution.

The scarcity of available territories, restrictive migration policies and lack of international regulations referring to the problems of climate refugees makes, that this group remains unprotected. As the climate change effects are increasing, the need to find a stable solution is urgent.

Climate refugees from small island states feel, that time is running out. In case of inaction, the whole states will become uninhabitable and, finally, inundated. That is why many of these nations perceive the mass resettlement of these nations as the only durable solution. The idea of seasteading could avoid the complicated and politically unstable actions.

Key words: climate refugees, territory, island states, resettlement, migration, climate change.

Introduction. Situation of climate refugees.

We are living in an age when more people than ever are being uprooted. According to the International Federation of Red Cross, climate change disasters are currently a bigger cause of population displacement than war and persecution. Estimates of climate refugees currently range from 25 to 50 million, compared to the official refugee population of 20.8 million².

Increase of the global temperature, desertification, sea level rise, storms, ocean acidification, weather induced floodings, earthquakes, landslides and other catastrophes will likely displace many more millions of people. What is more, the populations of developing countries are more likely to occupy disasterprone and dangerous locations, such as coast lines, flood plains, steep slopes, and settlements of poor shanty homes³, what makes them more vulnerable to these phenomenons. S. Martin states, that the trapped populations are in danger just as much as those who move⁴.

As R. Andreas Kraemer notices, international policy and law are being built on the false assumption that displaced people and refugees can return to their place of origin when conditions improve, conflicts subside or homes are rebuilt. But it is not true for many of those affected by climate change⁵.

Especially the small island states struggle with severe and irreversible impacts of climate change. The inhabitants of the Carteret Islands are the first climate refugees forced to relocate due to sea level rise

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² T. Perez, 'Climate Refugees. The Human Toll of Global Warming' (07.12.2006), <https://www.americanprogress.org/issues/green/news/2006/12/07/2428/climate-refugees/>

³ T. Perez, op.cit.

⁴ S. Martin, 'The state of the evidence' [in:] Disasters and displacement in a changing climate, [May 2015] issue 49 Forced Migration Review 12.

⁵ R. A. Kraemer and others, 'Building Global Governance for Climate Refugees', G20 Insights, (Germany 2017) 1.

attributed to global warming. The Papua New Guinean government authorized a total evacuation of the islands in 2005⁶.

The Intergovernmental Panel on Climate Change (IPCC) indicated, that the average air temperature is projected to increase about 1.2 to 1.4 °C⁷. W. Steffen predicts, that sea level is likely to increase by 0.4 to 1.0 m through the 21st century. In their opinion a sea-level rise of only 0.5 m would significantly increase the floods occurrence⁸. It would also inundate three million hectares in Bangladesh, and displace another 15-20 million people⁹.

The above examples indicate, that climate change triggered migration is a multifaceted phenomenon. As Jane McAdam underlines, interests in environmentally-driven population movement can be identified across the fields of environment, development, human rights, disaster management, migration and humanitarian relief¹⁰.

For these reasons there is an escalation of pressures on the ground of land scarcity. The whole communities are looking for the new safe places to resettle, entering the faint ground of climate refugee.

1. Who climate refugees are?

There is no legal definition of people, who are struggling with the effects of climate change and due to these changes have to migrate from their homes. They don't qualify as refugees under Convention relating to the status of refugees of 1951¹¹. There are a lot of different terms that describe this phenomenon: environmental refugees, climate refugees, environmental/climate migrants, environmental displacees and environmentally displaced persons (EDPs). The distinction among these terms occur due to intensification, character, and reversibility of the of the factors that cause migration.

Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, has identified five displacement-triggering scenarios. This classification was adopted by the Inter-Agency Standing Committee Working Group on Migration/Displacement and Climate Change. W. Kälin identified:

1. The increase of hydro-meteorological disasters, such as flooding, hurricanes, typhoons, cyclones and mudslides. The African and Asian mega deltas as well as certain islands are likely to be most affected. Such disasters can cause large-scale displacement, but depending on the effectiveness of recovery efforts the ensuing displacement need not be long-term. Most of the displaced will remain inside their country and as internally displaced persons (IDPs) should be protected and assisted in accordance with the 1998 Guiding Principles on Internal Displacement. However, there are instances of people affected by such disasters crossing international borders, either because the only escape routes lead them there or because they hope to be better protected or assisted in another country.
2. Government-initiated planned evacuation of areas at high risk of disasters. This means that people may have to be (forcibly) evacuated and displaced from their lands and prohibited from returning to them, and relocated to safe areas. This is likely to lead to permanent internal displacement.
3. Environmental degradation and slow onset disasters, such as reduced water availability, desertification, recurrent flooding and increased salinity in costal zones. Kälin explains, that such deterioration may not necessarily cause forced displacement strictly defined, but instead incite people to move to regions with

⁶ T. Perez, op.cit.

⁷ S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor, H.L. Miller, 'Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (Climate Change 2007) 14.

⁸ W. Steffen, J. Hunter, L. Hughes, 'Counting the costs: climate change and coastal flooding' (Climate Council of Australia 2014) iv.

⁹ T. Perez, op. cit.

¹⁰ J. McAdam, 'Environmental migration governance', [in:] A. Betts (eds), 'Global Migration Governance' (Oxford 2010) 1.

¹¹ Convention relating to the status of refugees of 28.07.1951 (Dz.U. 1991 nr 119, poz. 515).

better income opportunities and living conditions before it becomes impossible to stay at home. However, if areas become uninhabitable because of complete desertification or sinking coastal zones, then population movements would amount to forced displacement and become permanent.

4. Small island States at risk of disappearing because of rising seas. At the point at which the territory is no longer habitable, permanent relocation to other States would be necessary.

5. A decrease in essential resources, which causes the risk of conflicts. Even though people displaced by conflict may be eligible for protection as refugees or assistance as IDPs, the resource scarcity, which cannot be resolved, will lead to conflict and the displacement of a protracted nature¹².

From this point of view we can discern three groups of migrants due to the intensification of the factors that cause migration. J. Bogardi distinguishes 1. environmentally motivated migrants - they are the ones who "predict the worst" - they can leave their exacerbating environment but it still can be rebuilt 2. environmentally forced migrants - these are people who want to "avoid the worst," so they are forced to leave their homes because of the loss of livelihoods caused by climate events. 3. environmental refugees - such people "flee the worst", unlike previous groups, who, due to difficult conditions, "could" leave their land¹³.

Nevertheless, the most common, and one of the first, was the definition of the environmental refugees given by Essam El-Hinnawi. He describes environmental refugees as: "people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life. By 'environmental disruption' in this definition is meant any physical, chemical and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life"¹⁴.

W. Kälin notices though, that with regard to slow-onset disasters and environmental degradation, there is a lack of criteria to distinguish clearly between voluntary population movements and forced displacement. In particular, in the context of gradual environmental degradation, some of the movement could be considered voluntary, for example, triggered by the prospect of finding a better life in areas not affected by extreme weather events, and thus be part of adaptation strategies. In other cases, however, a clearer element of coercion, including threats to life, health, property and livelihood, exists¹⁵.

2. The situation of climate refugees from small island states.

Although there are a plenitude of various environmental and climate triggers affecting human lives, not every of them causes equally serious consequences. From the perspective of possible governments' support, as well as applying existing international mechanisms, it must be admitted, that the situation of small island developing states is the worst. As Tuvalu's Prime Minister Enele Sosene Sopoaga said: „no leader (...) can say the total of his territory and all citizens will disappear if we allow temperature increase of 1.5 degrees"¹⁶. Developing countries in the Pacific, like Tuvalu or Kiribati, are first and foremost affected by global climate

¹² W. Kälin, 'The Climate Change-Displacement Nexus' (ECOSOC Panel on Disaster Risk Reduction and Preparedness: Addressing the Humanitarian Consequences of Natural Disasters 2008), http://www.brookings.edu/speeches/2008/0716_climate_change_kalin.aspx?p=1. J. McAdam, 'Environmental migration ...', op. cit. 7-8.

¹³ J. Bogardi, 'Environmental Refugees: the Forgotten Migrants. Environmental Migration: Flight or Choice?', Panel Discussion, UN Headquarters (New York, 2007, Bonn, Germany 2007) 12-14.

¹⁴ E. El-Hinnawi, 'Environmental Refugees', United Nations Environmental Programme (New York/Nairobi 1985) 4 [quoted by:] D.C. Bates, 'Environmental Refugees? Classifying Human Migration Caused by Environmental Change', [2002] *Population and Environment*, 466-467.

¹⁵ W. Kälin, 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons' (Geneva: Sixty fourth session of United Nations General Assembly, A/64/214, 3 August 2009) 7.

¹⁶ V. Craw, 'Population of Tuvalu, Kiribati and Nauru already migrating due to effects of climate change'. <http://www.news.com.au/technology/environment/climate-change/population-of-tuvalu-kiribati-and-nauru-already-migrating-due-to-effects-of-climate-change/news-story/f90541a7704f43318dd87c4193896846>.

change and due to the relatively low national income, weak human resources, exceptional economic vulnerability to external threats, belong to the Least Developed Countries¹⁷. Their islands are lying only a few meters above the sea level¹⁸, so they are particularly vulnerable to even the smallest climate change. The main threat to these countries is the increase in the sea level, which takes away another meters of land and entails a number of economic consequences. Significant sea level rise in the coming years, in countries such as Tuvalu and Kiribati, causes serious and real danger of lands in these countries becoming uninhabitable¹⁹. What is specific, it is impossible to move inland due to the narrowness of these islands, nor are there higher grounds to which people could escape from the rising seas²⁰. What is more these countries have undeveloped economies, limited resources, dependence on export markets and widespread poverty, so they are not prepared to meet the climate demands imposed by the climate²¹.

In its Fourth Assessment Report, the Intergovernmental Panel on Climate Change expressed a high or very high confidence, that the sea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities. This panel argues, that there is an evidence, that in most climate change scenarios the water resources of small islands can be seriously threatened. In addition, climate change can have a significant impact on coral reefs, fisheries and other marine resources, as well as on the maintenance of small farming on these islands. In general, sea level rise, floods, seawater intrusion into freshwater resources, salinization of soil and fall in water supply will have a very negative impact on coastal agriculture²².

What is important all these occurrences, caused by sea level rise will be eroding the viability of island communities, highly increasing the likelihood of migration or resettlement a long before the final inundation occurs. W. Steffen concludes, that a sea level rise of 0.5 to 2 m could displace 1.2 and 2.2 million people from the Caribbean region and the Indian and Pacific Ocean islands, assuming that no adaptation occurs²³.

N. Maclellan notices, that states like Tuvalu or Kiribati have very limited capacity for adaptation²⁴. Their plans provide a range of actions, such as enhancing productivity, improving information and communication, providing adequate infrastructure, integrating climate change into development processes, improving energy security and predicting and reacting to disasters²⁵.

The IPCC suggests that the overall vulnerability of small island states stems from four interrelated factors: (a) the degree of exposure to climate change. (b) a limited capacity to adapt to projected impacts. (c) the fact that adaptation is not a high priority, in light of other pressing problems. and (d) uncertainty surrounding global climate change projections and their local validity²⁶.

Citizens of small Pacific nations say they feel “trapped” by effects of climate change with many looking overseas for a way out²⁷. As Victoria Crow observes, nearly one quarter of people in Kiribati had already moved due to climate change and another 70 percent said would look to migrate if the impact on their homes and country got any worse. Eight percent of those in Tuvalu had already moved, while 70 percent said they would also consider moving, as did 35 percent of those in Nauru²⁸.

¹⁷ 'Tuvalu's National Adaptation Programme of Action', 13.

¹⁸ 'Tuvalu', CIA – The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html>.

¹⁹ N. Maclellan, 'The future is here: climate change in the Pacific, Oxfam briefing paper, Carlton' (Newton 2009) 13.

²⁰ President Aote Tong of Kiribati, 'Statement to the General Debate of the 63rd UN General Assembly', (Geneva 25 September 2008).

²¹ N. Maclellan, op. cit. 13. L. Briguglio, 'Small island developing states and their economic vulnerabilities' [1995] World Development Vol. 23, No. 9 1615-1632.

²² N. Maclellan, op. cit., 14.

²³ W. Steffen, J. Hunter, L. Hughes, op. cit. V.

²⁴ N. Maclellan, op. cit. 28.

²⁵ 'Review of mainstreaming of climate change into national plans and policies' (Tuvalu 2013) 4.

²⁶ J. McAdam, 'Environmental migration, op. cit. 7-8.

²⁷ V. Crow, op. cit.

²⁸ Ibidem.

3. Struggles with searching for a new home.

From the abovementioned reasons the mass planned relocation of the whole island nations to another state's territory becomes a realistic option. When all the adaptation measures will fail, there will be no other solution. Due to sea level change small flat island states will soon become uninhabitable and, in the end, inundated.

But such a mass cross border relocation have not been yet regulated. There are no regulations, which would allow to carry out the displacement in an organised and controlled manner. There is not only the lack of instruments to implement this kind of solutions, but also the lack of any terra nullius in contemporary world, that could serve as a destination point in these actions. Nor is there the general will from the neighboring states to accept all the inhabitants from the island states. That is why it can be said, that today a new war for the land has begun. The size of the world territories, especially islands, is shrinking and the existing territories are being exacerbated by the impacts of climate change. People feel the pression to find a new home and to secure the future for the next generations. Despite this fact the head of Europe Aid's Sustainable Energy and Climate Change Unit Peter Craig-McQuaide claims, for those living on the islands affected, migration should be a choice rather than a „last resort”²⁹. For that reason there are a lot of various paths leading to ensure citizens a new safer home.

When it comes to the current possibilities, there are generally two kinds of solutions. Small island states' citizens can make individual attempts to move to another country within its accessible means or there can be undertaken the actions on the state's level to ensure the new land, where the whole state can be relocated and re-created.

However, as B. Burson and R. Bedford state, that access to migration channels is restricted by money, international visa restrictions and practical arrangements³⁰. They claim that existing regional immigration frameworks typically do not have policies specifically aimed at facilitating cross-border movement in response to natural disasters or in anticipation of future disasters linked to climate change³¹.

What is more, in B. Burson and R. Bedford opinion, Pacific island states and territories, share a large degree of mutual privileging in terms of granting visa-free or visa-on-arrival entry as visitors in contrast to the countries of the Pacific Rim, which do not generally grant waiver or visa-on-arrival status to citizens of Pacific islands. They conclude, that this may mean, that individuals wishing to cross borders in response to natural disasters are more likely to be able to do so by travelling to another island country than to the Pacific Rim countries³².

For example, a migration to New Zealand – country that is the main target of migrations from small island states – is possible within two models, but only one of them can be taken into consideration as a possible solution. It is the Pacific Access Category (PAC) – a visa created in 2002, that was based on an existing Samoan plan and replaced former Tuvalu, Kiribati and Tonga work programs³³. This program allows to settle in New Zealand 75 people from Tuvalu, 75 from Kiribati and 250 from Tonga with their partners and their dependents every year³⁴. However, the entitlement is subject to many restrictions and is dedicated to persons aged 18 to 45, who have a job offer in New Zealand and speak English³⁵. This solution is therefore

²⁹ Ibidem.

³⁰ B. Burson, R. Bedford, 'Facilitating voluntary adaptive migration in the Pacific', [in:] *Disasters and displacement in a changing climate*, [May 2015] issue 49 *Forced Migration Review* 55.

³¹ Ibidem.

³² Ibidem.

³³ J. McAdam, Refusing 'refuge' in the Pacific: (de)constructing climate-induced displacement in international law' [in:] E. Piguet, A. Pécoud, P. de Guchteneire, [eds.], 'Migration, environment and climate change' (UNESCO, Paris, UNSW Law Research Paper No. 27, 2010) 18.

³⁴ Immigration New Zealand, 'Pacific Access Category', <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>.

³⁵ R. Cohen, M. Bradley, 'Disasters and Displacement: Gaps in Protection' [2010] vol. 1 *Journal of International Humanitarian Legal Studies* 13.

unsuited to provide protection to those, who are most vulnerable to change, that is to children, people with disabilities and older people³⁶. First of all, however, as D. Weir notes, this is a labor migration program and there is no link between PACs and climate change³⁷. V.O. Kolmannskog also notes that this visa is not different from the usual migration arrangements³⁸. It cannot therefore be considered, that PAC is a mean of ensuring the protection to climate refugees. Generally, as B. Burson and R. Beedford note, when granted, access to employment in Pacific countries is often highly regulated and controlled and many have binding post-employment repatriation requirements. This may affect the ability of these systems to respond to natural disasters by facilitating cross-border migration in a timely or economically sustained fashion³⁹.

As the above example shows, the existing framework of migration policies are insufficient to implement voluntary adaptive migration.

The abovementioned reasons could be the argument for creating the 'migration with dignity' policy by Kiribati. It is a long-term nation-wide relocation strategy, which assumes creating opportunities for those who wish to migrate abroad now and in the near future.

Karen E. McNamara states, that its goal is „to forge expatriate communities in various receiving countries, such as Australia and New Zealand, so that they may support other migrants in the longer term, and also to enhance the opportunity for remittances to be sent back. With costs largely subsidised by the government, the second part of this policy is to improve the levels of educational and vocational qualifications that can be obtained in Kiribati, so that they match those that are available in the places where residents may migrate to. It is hoped that this training and upskilling will provide opportunities to migrate abroad 'with dignity' and build on existing cross-border labour arrangements"⁴⁰.

What is more, as it was mentioned above, climate change refugees do not qualify as refugees under Convention relating to the status of refugees of 1951 to the environmental refugees, because they do not fulfil the criteria of this convention⁴¹

The conclusion is that people affected by climate change effects crossing international borders, do not qualify as refugees entitled to international protection, but neither are they economic migrants. In consequence the status of climate refugees remains indefinite and there is definitely a legal gap in this matter⁴². In this situation, W. Kälin claims, that host governments should allow such persons to stay temporarily for humanitarian reasons until they can safely return back to their homes. Second, governments and humanitarian agencies in both the country of origin and the receiving country should cooperate closely to develop immigration policies and other solutions, which would address the needs of the displaced⁴³.

³⁶ Ibidem.

³⁷ D. Weir, R. Dawes, I. Maxwell, 'Receding maritime zones, uninhabitable states and climate exiles. How international law must adapt to climate change', Foundation for International Environmental Law and Development (FIELD), s. 8-9. [see more] New Zealand's immigration relationship with Tuvalu, New Zealand Ministry of Foreign Affairs & Trade <http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php> [04.09.2011].

³⁸ V. O. Kolmannskog, Future floods of refugees. A comment on climate change, conflict and forced migration, Norwegian Refugee Council (Oslo 2008) 28.

³⁹ B. Burson, Richard Bedford, op. cit. 55.

⁴⁰ K. E. McNamara, 'Cross-border migration with dignity in Kiribati', [in:] Disasters and displacement in a changing climate, [May 2015] issue 49 Forced Migration Review 62.

⁴¹ Article 1 A (2) of the 1951 Refugee Convention states, that a refugee is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". Convention relating to the status of refugees of 28.07.1951 (Dz.U. 1991 nr 119, poz. 515). It was also confirmed by the case law. The Australian and New Zealand courts to which the residents of Tuvalu and Kiribati have addressed cases in which they tried to obtain refugee status in order to gain protection from the effects of climate change have settled all the cases brought against them. Generally speaking, they stated that these are not cases in which the applicants may not be considered to be in a threatening situation that rises to the level of persecution for any of the five reasons indicated in the Refugee Convention. see J. McAdam, Climate change..., op. cit., s. 3.

⁴² V. Türk, 'Temporary protection arrangements to fill a gap in the protection regime', [in:] Disasters and displacement in a changing climate, [May 2015] issue 49 Forced Migration Review 40.

⁴³ W. Kälin, 'The Climate Change-Displacement (...) op. cit.

In my opinion, this kind of measures will not be sufficient in the situation of state's inundation. When this moment begins, a practical actions and radical means have to be undertaken. The only way to ensure people from submerging island states the safe future is the mass relocation of the whole population of these states.

What is important the realignment, which involves shifting communities away from climate change-threatened areas and restricting development in these risk areas, is rather impossible in the case of inundation of small atoll states. The only solution is the resettlement of the whole inhabitants of the island from an area of high environmental risk to another of lower risk, in this case from one island state to another⁴⁴.

In the past there were only few examples of such a crossborder relocation. J. McAdam in this context indicates three historical cases from the Pacific. These were the relocation of the Banabans from present-day Kiribati to Fiji in 1945. the partial relocation of the Vaitupuan from present-day Tuvalu to Fiji, beginning in 1947 and the relocation of Gilbertese to Gizo and Wagina in the Solomon Islands between 1955 and 1964⁴⁵.

As M. Loughry and J. McAdam note, there has also been a movement of the population of Kiribati to the atoll of South Tarawa, resulting in over half of the total population of Kiribati residing on this one atoll. In reaction to the high population density there, in the 1990s the Kiribati government moved nearly 5,000 people to outlying atolls⁴⁶.

Nevertheless planned relocation of the whole inhabitants of island states is a complicated and multidimensional undertaking. It requires the creation of a legal basis and a whole government approach. Risk assessments and consultation with, and the active participation of, affected communities – those to be relocated, those left behind and host communities should also be involved⁴⁷. S. Leckie and E. Simperingham notice, that communities almost always want to stay but, if necessary, they want to move together and want safer land with adequate socio-economic support, including schools, hospitals and livelihoods⁴⁸. Therefore it requires engagement of actions among a variety of experts and institutions, including development, humanitarian assistance, human rights, disaster risk management, environment and climate change, urban and regional planning⁴⁹.

What is also very important, such a managed relocation process should not lead to increase in the vulnerabilities. B. Doberstein and A. Tadjell notice, that although climate change-related retreat might reduce physical vulnerability to hazard through reduced exposure, it could simultaneously increase social and economic vulnerability through reductions in social capital or livelihood opportunities⁵⁰. For that reason the process of planned relocation should ensure that if people move they will do so in safety and dignity⁵¹.

However, all the ideas of resettlement of the whole island nations will be of little importance, if there will be no place, where these nations could be relocated. In other words in lack of a safe and habitable land none of these plans can be realised, even if such necessity occurs.

So far there is no agreement on this matter in Pacific states. There is a low possibility, that other states would sell some vast fertile lands to the „sinking” island states, that could accomodate and maintain the whole nations, which sometimes consist of many thousands or hundred thousands inhabitants. The reasons for that

⁴⁴ B. Doberstein, A. Tadjell, 'Guidance for 'managed relocation', [in:] Disasters and displacement in a changing climate, [May 2015] issue 49 Forced Migration Review 27.

⁴⁵ J. McAdam, Lessons from planned relocation and resettlement in the past, [in:] Disasters and displacement in a changing climate [May 2015] issue 49 Forced Migration Review 30.

⁴⁶ M. Loughry, J. McAdam, 'Kiribati – relocation and adaptation' [in:] Climate Change And Displacement, [October 2008] issue 31 Forced Migration Review 52.

⁴⁷ B. Doberstein, A. Tadjell, op. cit. 30.

⁴⁸ S. Leckie, E. Simperingham, 'Focusing on climate-related internal displacement' [in:] Disasters and displacement in a changing climate [May 2015] issue 49 Forced Migration Review 35.

⁴⁹ B. Doberstein, A. Tadjell, op. cit. 30.

⁵⁰ Ibidem 27.

⁵¹ Victoria Crow, op. cit.

are various, from lack of enough suitable territories for sell, to the risk of the increase of illegal immigrants on the doorstep of their borders as well as the risk of appearance the further claims to another pieces of their territory.

Although in 2012 Kiribati has purchased for 8.77 million dollars a 20 sq km of land on Vanua Levu, a Fijian island, in order to give its people somewhere to grow food or to escape to⁵², this will not solve the problem of this state. As critics of this initiative have said, this piece of land is unsuitable for living and can produce food for only few hundreds more people⁵³.

Nevertheless, taking under consideration the fact, that the realisation of the abovementioned plans is subject to many restriction, conditions and often depends on political unstable decisions, there are being created new alternative solutions, that can be perceived as a way out from the complicated relations between the states. As Peter Thiel pointed out, „the mode for escape must involve some sort of new and hitherto untried process that leads us to some undiscovered country”⁵⁴.

„Seasteading” is this kind of solution. The notion of seasteading explicitly refers to „homesteading”, the nineteenth-century settler colonial practice of allocating „free” farms to those who would build and reside in unclaimed public lands⁵⁵. The „seasteading movement” aim is to establish permanent autonomous ocean communities⁵⁶.

The Seasteading Institute is a non-profit organization seeking to realize the idea of a floating community. Its mission is to experiment with a new society based on new ideas of government, namely by establishing something like a sovereign cruise ship with its own set of rules, regulations, and leaders⁵⁷. These floating city-states would at first exist on platforms inspired by cruise ships, aircraft carriers and oil platforms but finally the pentagon platforms with multi-level buildings will be constructed⁵⁸.

Some authors argue, that this idea presents the anarchist bohemianism and neoliberal corporate aggression, because the main reason for construing floating territories was to create self-sovereign communities, which could flee from the jurisdictions with for example unfavourable tax law or other policy⁵⁹.

But this idea can serve as a new territory for the inundating island states. There have been already the attempts to establish the series of man-made floating islands around the Maldives in the Indian Ocean. „The 5 Lagoons Project” is the joint project of the Maldivian government and Dutch Docklands, a Holland-based firm that specializes in building everything from floating prisons to floating conference and hotel complexes and homes. This project will consist of 80 million square feet area including villas, a floating 18-hole golf course with an undersea tunnel, a conference complex and hotel, 185 \$1-million waterfront homes connected along a flower-shaped quay as well as a separate floating island with homes for residents of Malé, the country’s capital⁶⁰.

⁵² ‘Pacific island Kiribati buys land in Fiji to escape climate change’, <http://blueandgreentomorrow.com/environment/pacific-island-kiribati-buys-land-in-fiji-to-escape-climate-change/>.

⁵³ C. Pala, ‘The Island Nation That Bought a Back-Up Property’ (2014) <https://www.theatlantic.com/technology/archive/2014/08/The-Island-Nation-That-Bought-a-Back-Up-Property/378617/>.

⁵⁴ P. Thiel, ‘The education of a libertarian. Cato Unbound: A Journal of Debate’ [quoted by:] L. Veracini, ‘Displacement as method. Seasteading, tiny houses and Freeman on the Land’, [in:] N. Cook, A. Davison, L. Crabtree [eds.], ‘Housing and Home Unbound: Intersections in Economics, Environment and politics in Australia’ (London and New York 2016) 135.

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⁵⁶ L. Veracini, ‘Displacement as method. Seasteading, tiny houses and Freeman on the Land’, [in:] N. Cook, A. Davison, L. Crabtree [eds.], ‘Housing and Home Unbound: Intersections in Economics, Environment and politics in Australia, London and New York 2016, p. 135.

⁵⁷ A. Mendenhall, ‘My “Country” Lies over the Ocean’ [2012] Vol 5 Seasteading and Polycentric Law, Studies In Emergent Order 137.

⁵⁸ I. Simpson, ‘„If I’m not a ship, I’m a boat that could be”: Seasteading and the post-social political imagination, A thesis’ (Montréal, Québec, Canada 2016) 1.

⁵⁹ L. Veracini, op. cit. 136.

⁶⁰ D. Black, ‘Floating islands to the rescue in the Maldives’ (18 August 2012) https://www.thestar.com/news/world/2012/08/23/floating_islands_to_the_rescue_in_the_maldives.html.

Conclusions

Climate change force a vast number of communities around the world to seek solutions for its impacts. The scarcity of available territories, restrictive migration policies and lack of international regulations referring to the problems of climate refugees makes that this group of people remains unprotected. As the climate change effects are increasing, the need to find a stable solution is urgent. Climate refugees from small island states feel, that time is running out. In case of inaction, the whole states will become uninhabitable and, finally, inundated. That is why many of these nations perceive the mass resettlement of these nations as the only durable solution. The idea of seasteading could avoid the complicated and politically unstable actions, although it is completely new and will definitely cause problems, that now can only be predicted. Nevertheless a new war for the land has started and will last until international community will cope with the complex problem of climate change induced displacement.

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HYBRID WAR, INFORMATION TECHNOLOGIES AND THE LEGAL VACUUM IN THE DIGITAL WORLD

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Abstract

The present article is devoted to the phenomenon of the so called hybrid war, the issues connected with the term definition, as well as its peculiarities and contemporary legal regulations with regard to information technologies. The issue of “hybrid war”, “hybrid warfare”, and “hybrid threat” terms usage has been raised. It has been proposed to define hybrid war in the light of such characteristics as hybrid tactics application, digital technologies usage and a special information accompaniment of events, uncertainty (or vaguely defined) of subjects and sides of the conflict, indefinite spatial–temporal boundaries of the conflict as well as the multi-lateral activity of the aggressor country with a definite shift towards non-military means. Specific features of the information component of hybrid war have been highlighted, such as an obvious bias in the information provision, ambiguity and uncertainty, fighting for trust, destruction of reality and construction of a “new” pseudo-reality, seeking use the country's vulnerabilities to kindle the conflict from within (inner grounds). The issues of specifics of UN Charter, international humanitarian law and human rights law in the hybrid war case have been raised.

Keywords: information technologies, hybrid war, hybrid threat, international security, legal regulation.

Introduction

A raised influence of information technologies upon state, society and people has become essential to the contemporary world development. National and international security systems have been challenged by the explosive growth of information technologies while every single individual's security and freedom has been put at risk.

It is due to a lack of research as yet into hybrid wars and their unpredictability that they have become a major threatening factor. At the same time, certain traditional threats are acquiring new forms. The international security system crisis and the fact that most countries are not yet ready to face the new challenges call for the revision of the current approaches and strategies, as well as amendments to the current legal regulation and changes of institutions, while the world digitization makes it necessary to make the changes: (1) fast, (2) well thought-out (3) bearing even the most unlikely variants in mind. On the world's entering the era of information technologies, hybrid threats and wars have highlighted, metaphorically speaking, a certain legal vacuum.

Many will erroneously think of “vacuum” as a synonym of “emptiness”, “void”, the absence of anything. Yet, it is known that, depending on the approach, “vacuum” could also be seen as a special condition of the field in which its energy is minimal, or a special condition of matter, or space with extra – low pressure. By any definition, vacuum will bear a set of physical characteristics thus not being able to be “absolutely empty”. What is going on, then, in this relative emptiness inside the digital world faced with the new, hybrid, threats?

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1. Hybrid war: the legal term definition and its meaning

“Hybrid war”, “hybrid warfare”, “unrestricted conflicts”, “gray zone conflict”, “gray war” are the main terms used to describe conflicts of a new type, or conflicts in which old methods of warfare are combined with some new technological advances. The terms are to stress the difference there is between the contemporary war conflicts and the conventional (“traditional”) ones. Yet, there is no single legal term with a stable definition. In addition, the following problems are currently being debated: are there, indeed, any essential differences between modern conflicts and the old ones, or, rather, the new ones are simply a novel combination of old methods? Has the contemporary warfare changed so dramatically as to require fundamental changes in legal regulation, including the introduction of new terms? What really stands behind the success of the contemporary hybrid attacks: an essentially new quality of means or, rather, the combination of known methods and new information technologies?

Another important problem consists in defining both parts of the term: what indeed does “hybrid” mean and whether the term “war” can be used speaking of the modern conflict – and if so, in which exact meaning of the word?

Hybrid war or hybrid warfare? Owing to the fact that hybrid conflicts, information technologies and cyber conflicts are a relatively new phenomenon, a narrower term “warfare” has been more widely spread, although over the past few years there have been a tendency to use a stronger term – war. In scientific research and some legal documents hybrid war, warfare and treats are used as synonyms.

As P. R. Mansoor noted, hybrid warfare is a “conflict involving a combination of conventional military forces and irregulars (guerrillas, insurgents, and terrorists), which could include both state and non-state actors, aimed at achieving a common political purpose”². According to F. G. Hoffman, hybrid wars (and hybrid wars) “incorporate a range of different modes of warfare, including conventional capabilities, irregular tactics and formations, terrorists acts including indiscriminate violence and coercion, and criminal disorder”³, and hybrid wars can be conducted by both states and a variety of non-state actors⁴. A. S. Doroshkevych defines hybrid war as “a military strategy that combines the regular war, the “small war” and the cyber war.” The information constituent here acquires such weight that it becomes a self-righteous element and turns out to be of no less importance than the military ones”⁵. Hybrid war is defined as “the military actions carried out by a combination of military, quasi-military, diplomatic, information, economic and other means to achieve the strategic political purposes. The specificity of this combination is that each of the military and non-military ways of hybrid conflict used for military purposes and as a weapon. literally non-military means apply as weapons that defeat different levels of enemy systems”⁶.

With regard to the gravity of consequences and the necessity of a firm-handed reaction to hybrid conflicts I personally believe that the stronger term, “hybrid war”, should be applied, at least in the cases when a military component of the conflict can be seen (like, for example, in the case of aggression of Russian Federation against Georgia (2008) and Ukraine (2014 – 2017).

² Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present’, ed. Williamson Murray and Peter R. Mansoor (Cambridge: Cambridge University Press, 2012), 2.

³ F. G. Hoffman, ‘Conflict in the 21st Century: The Rise of Hybrid War’ (Arlington: Potomac Institute for Policy Studies 2007), 8.

⁴ F. G. Hoffman, ‘Conflict in the 21st Century: The Rise of Hybrid War’ (Arlington: Potomac Institute for Policy Studies 2007), 14.

⁵ А. С. Дорошкевич, ‘Гібридна війна в інформаційному суспільстві’ [eng. Hybrid war in the information society]. [2015] Вісник Національного університету ‘Юридична академія України імені Ярослава Мудрого’ 2, 22.

⁶ ‘Світова гібридна війна: український фронт: монографія’ [eng. The World Hybrid War: Ukrainian Front: monograph]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 19.

The vagueness of the term – “hybrid war” – is not only aggravated by the ambiguity of its interpretation, but also by its popular usage, ranging from legal, political, military, analytical debates to publications in media to news coverages and popular blogs.

As J. K. Wither writes, hybrid warfare has become “the most common term used to try and capture the complexity of twenty-first-century warfare, which involves a multiplicity of actors and blurs the traditional distinctions between different types of armed conflict and even between war and peace. Hybrid warfare has ceased to be a topic only for military strategists, as it has now entered the broader public do-main and become a major security concern for Western governments”⁷. It is noted that the “hybrid” aspect of the term simply denotes a combination of previously defined types of warfare, whether conventional, irregular, political or information”⁸.

The vagueness of the term raises fears that it will not be useful and widespread. The report ‘Russia and Hybrid Warfare – Going beyond the Label’ involves a principal conclusion that the “hybrid warfare” concept is not suitable as an analytical tool for assessing Russian military capabilities or foreign policy intentions and should therefore not be used as the basis for strategic decision-making and defence planning. Russia’s successful use of non-military instruments, and of information in particular, in the annexation of Crimea was the reason why the “hybrid warfare” label has gained so much traction in its aftermath. However, the discussion of these concerns under the “hybrid warfare” umbrella is likely to obscure more than it can explain in terms of analysis and risks arriving at skewed conclusions that could even be playing into Russia’s hands”⁹.

On the other hand, the absence of the legal term “hybrid war” and a legal base intended to regulate hybrid conflicts in international law in particular, provokes an irresponsible usage of new war means and tactics and the de-humanization of wars, the underestimation of the effectiveness of “information weapons” which are in fact able to inflict immeasurable harm, including serious delayed consequences and undermined social stability.

Hence, the modern understanding of contemporary conflicts in the digital world ranges from a complete denial of the term “hybrid war” or its value to using the term “World Hybrid War” to denote the novel global international confrontation¹⁰ that replaced the Cold War. Since it appears easier to characterize hybrid war than to define the exact term, it would probably be reasonable to outline the term through an array of features pertaining to hybrid war.

Such features include: (1) the usage of hybrid tactics, combining overt and covert, military and non-military, regular and irregular means. (2) the usage of digital technologies and a special information accompaniment / a special way of highlighting the events, including a vast array of acts ranging from disinformation to the deconstruction of reality. (3) uncertainty and vagueness of the subjects and sides of the conflict resulting, in particular, from covert and remote participation in the conflict and a great proportion of non-state participants. (4) indefinite spatial–temporal boundaries of the conflict. (5) the multi-lateral nature of the aggressor’s acts with an accent on non-military means.

It is noted that there are “covert and overt tactics, enacted by military and/or non-military means, ranging from intelligence and cyber operations through economic pressure to the use of conventional forces. By employing hybrid tactics, the attacker seeks to undermine and destabilise an opponent by applying both coercive and subversive methods. The aggressor may work through or by empowering proxy insurgent

⁷ J. K. Wither, ‘Making Sense of Hybrid Warfare’ [2016] *The Quarterly Journal* 15 No. 2, 74.

⁸ M. Kofman, M. Rojansky, ‘A Closer Look at Russia’s ‘Hybrid War’ [2015] Kennan Cable 7 Kennan Institute, Wilson Center. Available at: <https://www.files.ethz.ch/isn/190090/5-KENNAN%20CABLE-ROJANSKY%20KOFMAN.pdf>.

⁹ B. Renz, H. Smith, ‘Russia and Hybrid Warfare - Going beyond the Label’ [2016] Aleksanteri Papers 1/2016 Available at: http://www.helsinki.fi/aleksanteri/english/publications/presentations/papers/ap_1_2016.pdf.

¹⁰ ‘Світова гібридна війна: український фронт: монографія’ [eng. *The World Hybrid War: Ukrainian Front: monograph*]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 493.

groups, or disguising state-to-state aggression behind the mantle of a “humanitarian intervention”¹¹. F. G. Hoffman argued that despite the traditional conflict will still pose the most dangerous form of human conflict, with increasing probability, however, “we will face adversaries who blur and blend the different methods or modes of warfare. The most distinctive change in the character of modern war is the blurred or blended nature of combat”¹². A hybrid conflict unfolds in more than one direction simultaneously, and, as stated by V. P. Gorbulin and D. V. Dubov, among these parallel yet interconnected directions there are: “the “proper” military one (characterized by more or less traditional combat of regular armed forces, yet also involving unconventional military groups such as private and (or) armed (paramilitary) groups), and the diplomatic, cultural, informational, economic up to energetic levers. The conflict will be of varying intensity in each particular direction. However, all of the directions are in this way or another controlled by a single coordinating centre”¹³. Besides, as it is often stated, “the onset of a hybrid war is connected with unconventional methods of military combat carried out by illegal armed groups”¹⁴.

A close attention must be paid to such an additional characteristic as the complexity of reckoning the hybrid war consequences. This feature may not be obvious at the beginning of the conflict, but in retrospect it might help to establish the hybrid nature of the confrontation, which is of special significance in dubious cases. Thus, it is justly noted that “the quantity and worth of damage inflicted to all actors is hard to calculate as a result of both the absence of relevant statistics and the impossibility of drawing a definitive line between direct and indirect losses. Among human losses, as different from conventional war, the civilians will constitute a weighty part, having suffered from both the military activity and a dramatic worsening of the overall social, economic, ecological, and epidemiological conditions. A hybrid war also leads to inner migration, the scale of which is disastrous”¹⁵. Of great importance is also the fact that the consequences of hybrid aggression may, first of all, manifest themselves much later (for instance, reflected in the mindset of the next generations), and secondly, include moral damages and an adverse psychological impact on people (for instance, the unprecedented support and justification of the aggressor side, the devaluation of the lives of those included among “enemies”, “non-humans” not worthy of living, and rocketing numbers of aggressive behavior instances among those who, while not directly participating in the conflict, feels “involved” in it.

2. The information component of contemporary threats

It is difficult to overestimate the significance of information component in contemporary conflicts. Its decisive role in the hybrid war or viewing hybrid war as primarily information war can be debated. It can be stressed that innovative information technologies are responsible for the success of non-military impacts and military operations – but in any case, undoubtedly, hybrid aggression is supported by centrally-managed information campaigns in mass media, accompanied by manipulation of thinking and backed by enormous quantities of fakes, which in turn have become possible due to the world digitization. As J. K. Wither noted, contemporary hybrid warfare has “the emphasis on non-military methods of conflict and, in particular, information warfare. The employment of coercive information operations is the most distinguishing feature of

¹¹ EEAS, Food-for-thought paper ‘Countering Hybrid Threats’ Working Document of the European External Action Service, (2015) 731, 2.

¹² F. G. Hoffman, ‘Hybrid Warfare and Challenges’ [2009] Joint Forces Quarterly No 52 1 st quarter, 37.

¹³ В. П. Горбулін, Д. В. Дубов, ‘Трансформаційний потенціал гібридного світу: виклики для України’ [eng. Transformational potential of the hybrid world: challenges for Ukraine]. [2016] Стратегічна панорама 2, 4.

¹⁴ М. П. Требін, ‘Гібридна’ війна як нова українська реальність’ [eng. ‘Hybrid’ war as a new Ukrainian reality]. [2014] Український соціум 3, 115.

¹⁵ ‘Світова гібридна війна: український фронт: монографія’ [eng. The World Hybrid War: Ukrainian Front: monograph]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 482.

the recent descriptions of hybrid warfare and allows some comparisons to be drawn between IS's campaigns in the Middle East and the very different war and theater of operations in Ukraine"¹⁶.

The specifics of the information component of contemporary threats manifests itself in the following:

1. *A shift of the "objectivity point" (bias) while providing information.* A compromise between two opposing points of view will never be reached in hybrid war since it is shifted along the axis too far from the truth, as the aggressor, in the first place, launches a powerful information campaign through traditional and non-traditional mass media, social networks and personal blogs. It is maintained that under the conditions of hybrid war the aggressor will try despite the obvious facts, to conceal the very fact of aggression and represent themselves in the quality of a peacemaker. An monitor, as long as they are supported by one of the sides, will try to adhere to the objective criteria of the situation evaluation – that is, they will not exclude the possibility of the aggressor's actions being justifiable. Therefore, the monitor's attempt to remain unbiased will be controversial by definition: in practice, the monitor will partly support the aggressor's position while at the same time taking consistent measures to deter their aggression¹⁷. The aggressor will use all the means available to promote a definite point of view in order to provoke such reaction of the international community that would be advantageous to the aggressor. As it is put by M. M. Neag, "a critically important aspect of hybrid warfare is to generate ambiguity both in the affected population under attack and in the larger international community. The aim is to mask what is actually happening on the ground in order to obscure the differentiation between war and peace. This ambiguity, the lack of full attribution, can paralyse the ability of an opponent to react effectively and mobilise defences as it becomes unclear who is behind an attack. Even more, ambiguity can divide the international community, limiting the speed and scope of a response to the aggression"¹⁸.

2. *Uncertainty and ambiguity, resulting in doubts as to the information provided, its interpretation, its essence, the real course of events.* "Each state (and ideally the entire international community) must embrace this uncertainty in its policy and doctrine. The current lack of legal and political means for addressing cyber operations leaves the international community vulnerable to these kinds of coordinated attacks. Because there are essentially no precedents with which to address cyber warfare, most states shy away from directly addressing a nation's misbehaviour in cyberspace. If there had been a response to aggressive behaviour within the Ukrainian network sphere, perhaps the West could have had a more expedient and cohesive response to the Russian physical invasion"¹⁹. The tactics of uncertainty will be especially efficient in such conflicts where the sides share information space to a certain extent. For example, in the case of Ukraine a lack of confidence in refuting information attacks resulted from both a lack of the state's preparedness to handling such conflicts, and a partial overlap between Russia and Ukraine's information space: in networks, but also in cultural sphere and other connections.

3. *Fighting for trust.* Given the abundance of information in the contemporary world, it is becoming increasingly difficult to filter and assess it while it is becoming more and more seductive to uncritically share somebody else's point of view. The side of the conflict that manages to win over the trust of information consumers will significantly change the balance of powers. Public trust (if only a partial one) can be won by various structures and groups while keeping their anonymity and sometimes not even existing anywhere apart from the virtual world. As it is noted, whether it is the spread of fake news, politically motivated leaks of

¹⁶ J. K. Wither, 'Making Sense of Hybrid Warfare' [2016] *The Quarterly Journal* 15 No. 2, 76.

¹⁷ 'Світова гібридна війна: український фронт: монографія' [eng. *The World Hybrid War: Ukrainian Front: monograph*]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 40.

¹⁸ EEAS, Food-for-thought paper 'Countering Hybrid Threats' Working Document of the European External Action Service, (2015) 731, 3.

¹⁹ E. Hunter, P. Pernik, 'The Challenges of Hybrid Warfare' [2015] *International Centre for Defence and Security, ICDS Analysis*, Tallinn, Estonia Available at: https://www.icds.ee/fileadmin/media/icds.ee/failid/Eve_Hunter__Piret_Pernik_-_Challenges_of_Hybrid_Warfare.pdf.

hacked information, the use of trolls, or automated social media bots: these instruments present a grave challenge to informed public debate. Several factors enhance their impact: today's media landscape holds many challenges for quality journalism and is, in many countries, increasingly fragmented, polarized, and politicized. Technological changes, most importantly the rise of social media as a major source of information, create filter bubbles and echo chambers in which only partial sets of information are shared and amplified²⁰. Social media is a technology that, on the one hand, can enhance democratic change, but on the other, deepen people's dependence on pseudo-reality. This is similar to a hammer that can be used for hammering in a nail or for murdering a human. With one important difference, though: no one is as bonded with their hammer emotionally as they are tied to their Facebook or Twitter.

4. *The de-construction of reality and construction of "new" pseudo-reality existing, primarily, in the information influence target's imagination.* In a hybrid conflict, the aggressor will seek to consistently destroy the existing picture of the world while replacing it with another one. Sometimes that starts happening months or years before the actual conflict breaks out. Hybrid war, it is stated, is planned based on information war, where alternative zombie-reality is being built, in which the opponent will be turned into the enemy (doomed to be physically destroyed), a beast not worthy of being called a human²¹. The forming of new, comprehensive social, informational and cultural background as a powerful mechanism of modeling the new reality takes place according to the rule: "real is what is given to you by and within this matrix, estimated and interpreted for you while rebutting or silencing the true facts or shifting them to the periphery of perception"²². Even though many "facts" of the modeled pseudo-reality will later be proven false, or can instantly be refuted by critical thinking, the aim of hybrid tactics will still be achieved by mere provoking an emotional reaction at the very beginning. The emotions will be additionally kindled to aggravate the effect.

5. *Seeking to use the country's vulnerabilities to kindle the conflict from within (inner grounds).* Any vulnerability: weakness of governance, ethnic controversies, inter-confessional debate – will be successfully used in a war of this kind. The hybrid warfare destabilizes the state and polarises the society²³. There is usually an emphasis on exploiting the vulnerabilities of the target and on generating ambiguity to hinder decision-making processes. Massive disinformation campaigns, using social media to control the political narrative or to radicalise, recruit and direct proxy actors can be vehicles for hybrid threats²⁴. Likewise, a "post-truth" culture makes foreign disinformation campaigns more likely and erodes the very foundation of enlightened debate on which liberal democracies depend²⁵. Polarization and destabilization are made to achieve their boiling point when news alone may trigger serious social turmoil. At the same time, particular persons and groups are labeled, using, among other means, hate speech. According to A. S. Doroshkevych, "identocide" – meaning the destruction of national – state – civil identity of the opponent country and demoting the opponent to be perceived as none other than a beast, an enemy – is an important component and objective of hybrid war. The essence of "identocide" is an attempt to persuade the majority of the aggressor country's population – and, ideally, part of the "enemy" country's population – about the evil intentions of the

²⁰ Munich Security Report 2017 'Post-Truth, Post-West, Post-Order?' Available at: <https://www.securityconference.de/en/discussion/munich-security-report/munich-security-report-2017/>, 42.

²¹ А. С. Дорошкевич, 'Гібридна війна в інформаційному суспільстві' [eng. Hybrid war in the information society]. [2015] Вісник Національного університету 'Юридична академія України імені Ярослава Мудрого' 2, 24.

²² 'Світова гібридна війна: український фронт: монографія' [eng. The World Hybrid War: Ukrainian Front: monograph]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 58.

²³ M. M. Neag, 'New typology of war-the hybrid war' [2016] Revista Academiei Fortelor Terestre N. 1 (81), 19.

²⁴ European Parliament and the Council, 'Joint Framework on countering hybrid threats - a European Union response', Joint communication to the European Parliament and the Council, JOIN (2016) 018 final.

²⁵ Munich Security Report 2017 'Post-Truth, Post-West, Post-Order?' Available at: <https://www.securityconference.de/en/discussion/munich-security-report/munich-security-report-2017/>, 8.

“enemy²⁶. As is shown by the Russian – Ukrainian conflict, even having free access to information people choose to be uncompromising and emotional. People are losing the fragile touch of civilization even faster in the conditions of a hybrid war than they did during the great wars of the past.

3. Legal responses to hybrid threats in the digital world

For conventional wars, there exist quite a broad range of legal regulations and norms, which, however, is not sufficient for indisputable conflicts resolution. In the case of hybrid warfare, there are no definitive *jus ad bellum*, *jus in bello* and *jus post bellum*.

The obvious crisis of the international security system and the vulnerability of most countries' national security systems stem from the increasing mutual dependence of countries, and globalization enhanced by the rapid development of information technologies, which, to make things worse, broaden the gap between different parts of the world (in terms of values, culture, outlook, economy etc). A lack of responsibility in the sphere of international relationships and the ineffective mechanisms of international law create ground for the emergence of new forms of aggression, often “disguised as democratic processes, like, for instance, most separatist movements. That said, artificial exaggeration of factors leading to separatism can be observed – with the aim of propaganda as well as in order to justify radical measures taken against the country in question. As a rule, the described processes take place under the influence of interested states, providing military, political and informational support to the separatist movements.”²⁷.

Even though the contemporary understanding of the term “aggression” is not directly linked to any particular type of war, it presupposes the usage of weapons, which is not always obvious in hybrid conflicts. A broader term of “armed conflict”, in its turn, means the presence of armed participants and a certain intensity of military actions (which, again, is difficult to define conclusively in the case of hybrid threat).

The specifics of hybrid war entails a certain difficulty establishing the very fact of aggression, especially when we are dealing with non-military influence, as well as informational, economic, energetic levers and threats. For instance, in the sphere of economy, as it is noted, “it is always rather easy to disguise hybrid aggression as defending the interests of the national economy, economic reasons or international competition. Besides, hybrid confrontation in the economic sphere serves to conceal and de-formalize the conflict between the states”²⁸. It is therefore not clear what retaliatory measures can be regarded as an adequate response to hybrid aggression, both military and non-military.

That said, we are faced with certain difficulty when trying to identify the participants of the conflict. First and foremost, the problem is caused by the discrepancy between the private and state sectors. What are the adequate response measures in the case of private individuals performing cyber attacks leading to international conflicts? What if private actors take part in an existing military conflict on one of the sides without that side's consent? Does the state bear any responsibility for its citizens' actions in its own and international information space? Another problem is remote participation. Particular individuals engaging in an information attack may have very little relation to the conflicting states. Joining “virtual forces” does not require a contract or citizenship. Indeed, it can be any person compassionate with one or the other side of the confrontation. One example is the pro-Ukrainian hackers living in different countries who sided with Ukraine in its confrontation with Russia. As W. Booth writes, “This notion of remoteness of the operator from the consequences of his or her activity is compounded by the difficulty that is likely to be encountered in

²⁶ А. С. Дорошкевич, ‘Гібридна війна в інформаційному суспільстві’ [eng. Hybrid war in the information society]. [2015] Вісник Національного університету ‘Юридична академія України імені Ярослава Мудрого’ 2, 24.

²⁷ ‘Світова гібридна війна: український фронт: монографія’ [eng. The World Hybrid War: Ukrainian Front: monograph]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 469.

²⁸ ‘Світова гібридна війна: український фронт: монографія’ [eng. The World Hybrid War: Ukrainian Front: monograph]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 99.

determining, and then being able to demonstrate, first, who undertook the cyber operation in question, second, on behalf of which state or organization, if any, the operation was undertaken, and, third, its purpose”²⁹.

The issues of legal regulation of hybrid wars raise controversy in both international and national law. It is most widespread to be based on the UN Charter, international humanitarian law and human rights law.

The application of the Charter is possible due to the fact that UN is focused on the maintaining international peace and security. UN can take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace (Article 1). The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken to maintain or restore international peace and security (Article 39)³⁰.

It could be possible to allow two cases of military response: its sanctioning by the Security Council according to Article 42 or, alternatively, as the achievement of the right of individual or collective self-defence if an armed attack occurs according to Article 51³¹. Yet, the application of the above articles is faced with a range of problems resulting from the absence in the Charter of such notions as, say, cyber threat regarded as unacceptable actions, which is not surprising as it was created long before the threats in question emerged. Also, there is problem at all with the definition of armed force and aggression, because the Charter itself contains vague and somewhat contradictory formulations.

Attempts to apply international humanitarian law to hybrid war are also connected with serious difficulties. First of all, it is problematic to qualify hybrid war as such that reaches the level of armed conflict. Secondly, it is difficult to classify the hybrid conflict as international and non-international. Thirdly, the line between civilians and military persons in such a conflict is fine or non-existent. Finally, it is problematic to estimate the damage inflicted on the civilians.

In hybrid war “one of fighting sides is not a subject of International law in majority of cases. So, the question arises as to what is its legal status, and what rules should be applied: just national law, just international, or both of them and to what extent. In international law, relevant norms are: common article 3 for Geneva Conventions, its Additional Protocol II, and a good portion of international human rights norms. Also, in some cases it is appropriate to apply international anti-terrorist conventions”³². T. G. Andriyevskyy suggests applying a novel approach to classifying and defining contemporary conflicts: (1) international armed conflicts (“normal” wars, peacemaking operations, including international sanctions of military nature sanctioned by the UN Security Council). (2) armed conflicts of non-international character (civil wars, inner rebellions). (3) armed conflict of the hybrid character³³. Some authors consider hybrid war just like non declared war, thus – non-recognized international armed conflict³⁴. Perhaps, a partial solution to the problem lies within the sphere of the Geneva Conventions and the supplementary protocols, in particular as to what regards undeclared war, indiscriminate weapons and causing excessive damage and suffering. But as in a

²⁹ W. Booth, ‘Some legal challenges posed by remote attack’ [2012] *International Review of the Red Cross. Humanitarian debate: Law, policy, action* 94 (886), 587.

³⁰ Charter of the United Nations (1945), 59 Stat. 1031, T.S. 993, 3 Bevens 1153, entered into force Oct. 24, 1945.

³¹ Charter of the United Nations (1945), 59 Stat. 1031, T.S. 993, 3 Bevens 1153, entered into force Oct. 24, 1945.

³² V. Vlasjuk, ‘Hybrid war, international law and Eastern Ukraine’ [2015] *European political and law discourse* Vol. 2 Issue 4, 26.

³³ Т. Г. Андрієвський, ‘Гібридна війна як специфічний тип гібридного конфлікту’ [eng. Hybrid war as a specific type of hybrid conflict]. [2016] *Сучасне суспільство* Випуск 2 (12), 11.

³⁴ V. Vlasjuk, ‘Hybrid war, international law and Eastern Ukraine’ [2015] *European political and law discourse* Vol. 2 Issue 4, 26.

case with the UN Charter, international humanitarian law does not manage to change as seriously and fast as the world in the era of information technology.

Some aspects of hybrid war can be regarded in the light of human rights. In terms of informational threats, the following three applications of such rights can be outlined. (1) The first application will promote the fundamental right to freedom of opinion and expression. (2) The second application will be based on a set of rights closely connected with information, and relying heavily on, information, such as, for instance, the right to privacy and the right to participate in the government. (3) The third application would address indirect human right infringement in the event of direct grave consequences (for instance, the right to life and health). However, all the three applications mentioned will require establishing clear causal connections between the activities undertaken during the hybrid war and their consequences.

The Universal Declaration of Human Rights highlights the outstanding nature of the right to freedom of opinion and expression. Apart from being directly stated in Article 19, it is mentioned in the preamble: “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”³⁵. The fundamental nature of this right means that it embraces the right to have own opinion and achieve it, the right to express and spread ideas or abstain from that (for example, the right to keep from spreading any known information or estimation). Information technologies are an invaluable asset for various self expression. However, in the event of hybrid war those same technologies may easily put the bases of the mentioned rights at risk by targeting the freedom of speech and press. The key problem for the right to freedom of opinion and expression is to define the boundaries of acceptable government’s intrusion in its achievement for safeguarding national security.

A complex of rights, closely connected to information, embraces both internationally recognized human rights, such as the right to privacy (it could, for instance, be applied if cyber operations undertaken as part of hybrid war lead to the disclosure or falsification of private data, or if the intrusion affected influential public persons, etc) and newer human rights, such as the right to Internet access, the right to remain anonymous in networks, and the right to be forgotten. The broadened scope of the traditional rights may also make an influence of the legal regulation of hybrid wars. First and foremost, that has a lot to do with the development of novel technologies for humans: implants, prosthetic organs and many other achievements change our understanding of personal inviolability, or the point of the start of life, or the concept of a fundamental right to bodily integrity.

Identifying actions and their consequences as well as participants’ responsibility can also be complicated in the event of hybrid war.

What main steps are to be taken in order to stop hybrid wars ultimately distorting today’s world?

First of all, the main documents and strategies of individual states and international organizations need to be revised and amended. For example, it was resolved by the NATO that a hybrid attack of its member states can be the reason for implementing Article 5 of the Washington Treaty. As stated, “this decision alone may have the effect of deterring the aggressor”³⁶. Yet, deterring is not always a sufficient measure, as we can see with the annexation of the Crimea, undertaken by the Russian Federation and breaching not only the fundamental international laws and national regulations (both Russian and Ukrainian), but the entire *status quo*, established after the Second World War.

Secondly, outdated international institutions need reforming. In the first place, the principal decision is to be taken as to the limitation of the right to veto in UN Security Council. The limitation of consensual principle of decision-taking is very likely to make a positive influence on the functioning of such organizations as OSCE.

³⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

³⁶ ‘Світова гібридна війна: український фронт: монографія’ [eng. The World Hybrid War: Ukrainian Front: monograph]. за заг. ред. В. П. Горбуліна (Київ: Національний інститут стратегічних досліджень 2017), 36.

A possibility of prompt reaction to hybrid threats is to be made provisions for, and rules of aggression evidence fixation are to be changed, while the procedures for immediate blocking aggressor states participation in a range of international organizations need to be foreseen. These steps are of primary importance today.

Thirdly, new security mechanisms and models have to be created at both national and international levels. The models ought to take into account the specifics of information technologies development, the flexibility and changeability of the world in the digital era, the growing inter-dependence of countries the emergence of horizontal links and informal institutions. As it is justly noted, it is essential to seriously reconsider the significance of the nongovernmental sector in solving national security problems. Even now, organizations of this sector are making a priceless contribution to the security of the state. The latter, in contrast, will never be able to become as flexible and mobile as NGOs, free of bureaucratic restrictions and prescriptions³⁷. Democratic institutions can also support media literacy, strengthen their communication efforts, and educate their citizens³⁸. Non-legal means, such as media literacy, critical thinking, active civil society, collective effort to support the side being attacked, economic levers of influence, alternative ways of collaboration and support on the regional level, etc), may all come in handy and ensure an adequate response to the hybrid threats.

All in all, “the most appropriate responses may involve the application of specific political, informational, economic, diplomatic or, in the case of a physical threat, military tools of statecraft. More complex threats require a whole of government or or comprehensive approach. Usually, the best strategies involve the coordination and direction of all of the effective instruments of state power, no matter how the threat is defined”³⁹. That is why searching for new methods of counteraction and implementing them will require a complex approach.

Conclusions

It has been shown that the modern hybrid threat raise the demand for the revision and reform of the current legal and non-legal models and mechanisms as well as the introduction of a number of changes into national and international law. Among the most urgent steps are the limitation of the right to veto in the UN Security Council, a limited application of the consensual principle of decision-making and an introduction of the simplified procedure by which the aggressor country could be blocked from participating in international organizations, the shortening of the terms of reacting to hybrid aggression and the changes to the rules of evidence fixation.

Regardless of which term is eventually selected to denote hybrid war, a range of questions remain unanswered as of today, since the specifics of such war includes uncertainty and unpredictability of actions, participants and consequences, as well as spatial-temporal boundaries, “reality shift” and extraordinary lies accumulation, manipulating thinking and adverse psychological impact.

It is worth admitting that hybrid war is the world’s new reality and such wars unfold on the battlefields of universal human values. The information component of contemporary conflicts and the uneven, yet irreversible, digitalization of the world leave us no choice but developing flexible and dynamic strategies, applying unconventional tactics, taking non-governmental actors into consideration, promoting non-military means of counteraction, and joining efforts around our fundamental principles and human rights protection.

³⁷ В. П. Горбулін, Д. В. Дубов, ‘Трансформаційний потенціал гібридного світу: виклики для України’ [eng. Transformational potential of the hybrid world: challenges for Ukraine]. [2016] Стратегічна панорама 2, 8.

³⁸ Munich Security Report 2017 ‘Post-Truth, Post-West, Post-Order?’ Available at: <https://www.securityconference.de/en/discussion/munich-security-report/munich-security-report-2017/>, 42.

³⁹ J. K. Wither, ‘Making Sense of Hybrid Warfare’ [2016] The Quarterly Journal 15 No. 2, 86.

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12. Т. Г. Андрієвський, 'Гібридна війна як специфічний тип гібридного конфлікту' [eng. Hybrid war as a specific type of hybrid conflict]. [2016] Сучасне суспільство Випуск 2 (12) 5-14.
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19. Munich Security Report 2017 'Post-Truth, Post-West, Post-Order?' Available at: <https://www.securityconference.de/en/discussion/munich-security-report/munich-security-report-2017/>.

20. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

CHALLENGES IN THE E-HEALTH REGULATORY POLICY

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Abstract

The concept of eHealth remains controversial among users, health care professionals and decisionmakers. The most significant issues of eHealth policy implementation at the national level are associated with the protection of individual privacy, and health care data, particularly with respect to the dissemination, quality and integrity. At the level of the European Union (EU), the eHealth Digital Service Infrastructure (eHDSI), financed by the Member States and the European Union Connecting Europe Facility programme (CEF programme) is charged with coordinating the deployment of the core services to enable the provision of cross-border eHealth Information Services.³ The core services are intended to support the EU Member States in the development of interoperability of health information systems. While the development of interoperable health information systems and their deployment transnationally at the level of the EU is a crucial element in the evolution of the EU health policy, it requires deep legal and regulatory competence. In fact, many of the limitations in the creation of a united eHealth and health care system across the EU may be attributed to legal and regulatory ambiguity. This ambiguity, together with the digital divide, inequality in eHealth literacy, technical differences in health information systems, and incompatibilities in essential regulatory frameworks impedes the free flow of data essential to the development of a Digital Single Market (DSM). The major challenges in the regulation of eHealth policy across the EU lie in the lack of uniformity and of binding agreements around the processing, protection and use of personal data, and, concomitantly, the lack of uniformity in public health regulatory legislation. Researchers are seeking solutions to improve eHealth in the EU by strengthening and rationalising the regulatory environment around digital health and eHealth policy.

Keywords eHealth, governance, policy, health economy, health system, digital divide, Digital Single Market, Europe.

Introduction

‘As long as the eHealth market is characterised by a lack of regulation and legal certainty, barriers to the progress of eHealth will persist’.⁴

The lack of adequate legislation and uniform strategy reflect the absence of the uniform health care policy across the EU, and constitute an unresolved challenge to the ability of Member States to contend fully with pressing social needs and evolve an optimized approach to the management of public policy. The quality of governance of eHealth is particularly weak. This is due in large measure to the lack of interoperability

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³ eHealth Network. Governance model for the eHealth Digital Service Infrastructure during the CEF funding. Available from: http://ec.europa.eu/health/sites/health/files/ehealth/docs/ev_20151123_co02_en.pdf. <https://ec.europa.eu/digital-single-market/connecting-europe-facility>.

⁴ Stated by Gérard Comyn, head of the Unit “ICT for Health”, DG INFSO, EC.

amongst health information systems of Member States. There is an urgent need to contend with this problem and develop robust, transnational policies supported by legislative ratification and adequate financial commitments.

eHealth Action Plan began prioritising the deployment of eHealth beginning in 2004. More specifically, it emphasised that eHealth needed to be a central element of public health across the EU.⁵ eHealth policy is intended to improve citizens' health by increasing access to accurate and pertinent medical information. by allowing cross-border access to medical and diagnostic records. by consolidating EU political, financial and technical strategies to foster the efficiency in health care sector. by emphasising evidence-based medicine. by providing access to telemedicine services and remote sensing devices including home health. and by empowering patients through the use of proven and effective technology⁶.

Indeed, in 2006, the Council articulated the principle that eHealth regulatory policy should be based on “the overarching values of universality, access to good quality care, equity, and solidarity” as well as “quality, safety, care based on evidence and ethics, patient involvement, redress, privacy and confidentiality”.⁷

Strengthening the fiscal governance of health policy may contribute to the development and improvement of eHealth policy capacity. However, the concept of eHealth has not been emphasised in primary sources of EU law. Article 14 of the Directive 2011/24/EU on the application of patients' rights in cross-border health care is the first official document of the European Union in which objectives of eHealth have been clearly provided. In 2011 eHealth policy was deemed to be one of the principal features of cross-border health care that would require precise regulation at the level of the EU in order to improve the potential for health care policy in the EU health policy and its economy as a whole.

The eHealth Network (a network of national authorities of each Member State responsible for e-health) is intended, among other objectives set up in the Article 14 of the Directive 2011/24/EU, to produce guidelines on cross-border access to electronic health data and eHealth services, and to create a sustainable legal basis for the further transferability of health data in cross-border health care. A key provision includes supporting “common identification and authentication measures”.⁸ Additionally, reimbursement for eHealth services should be available to patients seeking health care should they move from jurisdiction to another within the EU.

A literature review to determine the main legal barriers to the further deployment of eHealth Policy was conducted. In 2010, the Council concluded that the European Union should invest in the development of a Digital Single Market that could provide a better quality of life through improved health care delivered by means of the ultra-fast internet. interoperable efficient applications and easier access to eHealth services and knowledge, in particular across borders⁹. Insofar as there has been no legislation adopted specifically

⁵ European Commission. “eHealth – making healthcare better for European Citizens: an action plan for a European eHealth area”. (2004) Brussels, 30.4.2004 COM 356 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “*eHealth Action Plan 2012–2020 - Innovative healthcare for the 21st century*”. COM(2012) 736 final, {SWD(2012) 413 final}, {SWD(2012) 414 final} Brussels, 6.12.2012. European Commission.

⁶ https://ec.europa.eu/health/ehealth/policy_en.

⁷ Council of the European Union. Council Conclusions on Common values and principles in European Union Health Systems [2006] OJ, C 146/1.

⁸ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' right in cross-border healthcare [2011] OJ, L88/45, Art. 14, p. 1, p. 2. Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market [2014] OJ, L257/74, p. 10. eHealth Network. ‘Governance model for the eHealth Digital Service Infrastructure during the CEF funding’. Brussels, 23.22.2015.

⁹ Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility [2013] OJ, L348/132, p. 29.

with respect to eHealth, the full implementation of “e-Europe” might not be achievable until the idea of “European Union health policy” is included in the exclusive competence of the European Union. EU legislative acts prohibit the processing of sensitive data if a Member State lacks standards for security standard as required by the EU. The situation is analogous to the standards for processing data outside the EU, excepting certain conditions set out in the Article 26 of the Directive 95/46/EC. This can be allowed only if a country has complied with minimum requirements for data security – the adequacy of the level of protection.¹⁰

Concerns related to the privacy of special categories of personal data and its secure processing with particular attention to differences in the health care information exchange may become a significant impediment to the integration of health information systems across member states. An overview of the provision of cross-border eHealth services revealed that only 7 EU Member States (Austria, Denmark, Estonia, France, Hungary, Norway and Sweden) have implemented an opt-out approach in terms of sharing of electronic health records (EHRs).¹¹ Cross-border exchange of health information across the Union is also impaired by other significant barriers, such as the existence of a digital divide, the lack of awareness around and inequality of eHealth literacy among citizens, legal ambiguities requiring patient consent to create and share medical data across Member States, the absence of common encryption standards, and a number of controversial issues surrounding financial support for a cross-border health information system.¹²

Results from WHO survey revealed that 22 Member States found funding the most important barrier to the implementation of eHealth system.¹³ The creation of the Connecting Europe Facility (CEF) was intended “to accelerate investment in the field of trans-European networks and to leverage funding from both the public and the private sectors while increasing legal certainty and respecting the principle of technological neutrality”.¹⁴ Therefore, there is a need to enlarge the EU’s exclusive competence in regulating health policy with a particular attention to fostering the growth path of eHealth. eHealth services are essential for economic growth and for the Digital Single Market.¹⁵ Strengthening and clarifying the exclusive competences of the EU in this domain may lead to sustainable economic growth in the health care arena.

¹⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ, L281/45, Art. 25, p. 2.

¹¹ Overview of the national laws on electronic health records in the EU Member States and their interaction with the provision of cross-border eHealth services, 2014.

¹² Cruz-Jesus, et al [2012]; Currie et al [2014]; Moen et al [2012], Mur-Veeman et al [2008]; Stroetmann et al [2012].

¹³ WHO Regional Office for Europe. From innovation to implementation. e-Health in the WHO European Region. Copenhagen. Denmark; 2016. Available from: http://www.euro.who.int/__data/assets/pdf_file/0012/302331/From-Innovation-to-Implementation-eHealth-Report-EU.pdf.

¹⁴ Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility [2013] OJ, L348/129, p. 2.

¹⁵ Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility [2013] OJ, L348/129, p. 26.

The Role of Government

“At the global level, eHealth governance touches on the rights, rules, responsibilities and risks of stakeholders in areas such as the health Internet, health data use and information systems. Sound governance describes participatory, transparent, accountable, effective and equitable processes that promote the rule of law. Stakeholders comprise of the both the public and private sectors, as well as the civil society”.¹⁶

Policy proceeds implementation. The quality of the implementation of eHealth policy, however, depends on internal and external organisational barriers.¹⁷ Internal barriers refer to the adaptability in the use of ICT in the health care at the institution level, while external barriers “arise when market forces impact the way in which the healthcare organisation operate”.¹⁸ An important role of government is to overcome such problems by providing a national strategy for eHealth designed to ensure sufficient information supply in health care and thereby improve the quality, safety, and efficiency of health care through information and communication technology.

The creation of a united eHealth system is impaired by existing national legislative acts by Member States and within the EU. The progressive development of eHealth applications has engendered growing interest, but also concern among decision-makers, health service providers and the public with respect to the safety and protection of sensitive medical information during and after cross-border transfer. Issues of privacy and integrity are central in terms of personal health data usability and transferability. Despite the fact that 58% of Member States have an eHealth strategy and some Member States have already agreed upon legal provisions for cross-border interoperability of personal health data, the following questions remain largely unanswered:

- How should health care data be collected? What legal protections should be enacted around the processing of health care data?
- How can one assure that health care data are provided by recognised and licensed medical professionals meeting EU standards?

What international legal standards must be set in place for archiving, transmitting, receiving and protecting medical data? What kinds of software, if any, meet such standards?

In developing eHealth policy it is necessary to prioritise the development of acceptable international legal as well as technical standards. eHealth network has set up eHealth specific standard organisations to create standards for eHealth system content, interoperability and functionality of eHealth systems.¹⁹ However, the scope might be limited to specific kinds of standardisation, specific uses of information, specific terminologies etc.²⁰ Therefore, there is a need to implement a robust governance structure with strong supervision, oversight and enforcement authority to ensure secure transfer of special categories of data across borders and avoid potential misuse.

Legal uncertainty towards eHealth Policy

Any regulation has an impact on the quality of policy and governance performance. It might well increase effectiveness, given the steady improvement of technology and its applications in public health.

¹⁶ <http://www.who.int/ehealth/governance/en/>.

¹⁷ Gulick, P. G. [2002], p.74.

¹⁸ *Ibid.*

¹⁹ Proposal for initiating a platform consisting of the standards developing and profiling organizations relevant to eHealth in Europe and members of the eHealth Network Joint Action. Available form:

http://ec.europa.eu/health/sites/health/files/ehealth/docs/ev_20150512_co62_en.pdf

²⁰ *Ibid.*

Although the further amplification of eHealth policy amongst Member States is governed mainly by primary sources of EU law, the eHealth policy remains complex, and may not be amenable to a single, simple legal approach. Legal approaches must take technical considerations into account when deliberating about optimal legislative provisions. EU legislative acts should not impede potential implementation of technological innovation or deployment in the health care. The impact of legal approach towards the potential implementation of the eHealth policy shall be analysed by the group of experts from technology science, law, medicine and politics.

One possible approach to the processing of sensitive personal health data might be to utilize the stipulations in Regulation 2016/679 for purposes of preventive or occupational medicine, the assessment of the working capacity of the employee, medical diagnosis and the provision of health/ social care/ treatment or the management of health or social care systems.²¹ Forthcoming regulations are expected to enact measures protecting fundamental rights of natural persons with respect to privacy in general, and with respect to confidentiality around certain special categories of personal data in electronic communications. Despite the fact, that DSM strategies seek to strengthen the case for action at the Union level²², according to Regulation (EU) 2016/679 each Member State has the right to decide on its own authority to “*maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health*”.²³ Also, Directive 2011/24/EU stipulates that the interoperability of eHealth solutions should be achieved whilst respecting national regulations on the provision of health care services.²⁴ Consequently, the objective of eHealth Network might be impeded because no binding legislative framework has been created to guide and support the further development of an EU-wide eHealth system. At the present time, therefore, it remains to the discretion of every individual Member State to mitigate restrictions to the free flow of health data and information exchange.

There are other issues at work as well. *De facto*, transferability of health data supported by interoperable health information systems are considered a source of e-commerce between the EU Member States and for that reason, they are subject to evaluation in accordance with the principles of proportionality and subsidiarity as set out in the Article 5 of the European Union Treaty. The legal definition of electronic health records is missing in the legislative documents of around half of the Member States. so is a common medical terminology and clinical coding system.²⁵ In addition, few Member States have developed and implemented a central database with online access to health data, including patient consent for access to and further use of personal sensitive health data.²⁶ Article 32 of the Regulation 2016/679 stipulates the level of security of processing of personal data with regard to the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services.

Therefore, should a Member State of the Union lack competence in providing formal assurance around the processing of sensitive data, the processing of health care data from any eHealth data system is

²¹ Regulation 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) [2016] OJ L119/39, Art. 9, p. 2

²² Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications [2017], European Commission. Brussels COM 10 final, 2017/0003 (COD).

²³ Regulation 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) [2016] OJ L119/39, Art. 9, p. 4.

²⁴ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' right in cross-border healthcare [2011] OJ, L88/53, p 57

²⁵ Overview of the national laws on electronic health records in the EU Member States and their interaction with the provision of cross-border eHealth services, 2014.

²⁶ *Ibid.*

prohibited. Results from a survey conducted by WHO in 2015 indicate that only 22% of Member States have established legislations that address sharing of health data internationally.²⁷

In the absence of specific EU legislation, a variety of EU projects (*epSOS*, *NETC@RDS*, *ENED* and *eSENS*) have been piloted to foster health information exchange between the Member States.²⁸ As a result, only a few Member States have established legal provisions for cross-border interoperability of EHRs. Therefore, it is at least plausible that the only way in which health information exchange in the Union might be achieved efficiently is by establishing far-reaching eHealth policy at the Union level.

eHealth systems affect a number of rights established in new regulations surrounding the protection of natural persons with regard to the procession of personal data. Such rights are essential in terms of personal health data rectification, abolition and restriction of processing. However, shall these rights such as 'Right to be Forgotten', 'Right to restriction of processing', 'Right to data portability' and 'Right to object' and 'Automated individual decision-making' be adopted and established by the Member States to give and provide an opportunity for individuals to directly erase all their personal health data from eHealth system? In Austria, the right to eliminate these data exists and does not require the consent of health care professionals.²⁹ This dilemma might be solved if Member States could agree that after a certain stipulated timespan, some medical records including results of examinations and diagnostic tests might be considered superfluous despite the fact that medical and diagnostic records are considered official documents. *Aliunde vel aliter*, there is a real danger that expunging some records might lead to major risks for the population at large and for health care professionals whose personal security might be threatened if a history of mental illness were not available.

Thus, a new *lex specialis* is needed to command and control flexibility of right to erasure, considering that the extent and the implications of the interaction of law and of emerging technologies. Any deployment and further usability of shared health information system at the EU level must respect the principle of technological neutrality.

Conclusions

eHealth policy is a part of health policy and e-Governance and is intended to improve citizens' health and increase the quality of health care, including access to health care data. A variety of political, financial and technical strategies have been coordinated by EU countries to make eHealth services more effective, user-friendly, and available to both health care professionals and patients.³⁰ The development of a Digital Single Market faces a variety of problems in the implementation stage of eHealth policy. An overview of legal approaches and stage of implementation of eHealth system has been undertaken under the mandate of the European Commission in 2014.³¹ eHealth network has set up eHealth specific standard organisations to create standards for eHealth system content, interoperability and functionality of eHealth systems.³² In a supranational organisation as the EU, certain health administration aspects need to be regulated by treaties

²⁷ <http://apps.who.int/iris/bitstream/10665/252529/1/9789241511780-eng.pdf?ua=1#page=16>.

²⁸ <https://www.esens.eu/content/e-health>.

²⁹ Overview of the national laws on electronic health records in the EU Member States and their interaction with the provision of cross-border eHealth services, 2014.

³⁰ https://ec.europa.eu/health/ehealth/policy_en.

³¹ Overview of the national laws on electronic health records in the EU Member States and their interaction with the provision of cross-border eHealth services, 2014.

³² Proposal for initiating a platform consisting of the standards developing and profiling organizations relevant to eHealth in

Europe and members of the eHealth Network Joint Action. Available form: http://ec.europa.eu/health/sites/health/files/ehealth/docs/ev_20150512_co62_en.pdf.

and approved by all Member States prior to the implementation of any eHealth solution. A robust system of oversight and governance must be incorporated as a matter of law in the implementation process. eHealth policy cannot be safely, effectively and sustainably delivered in a complex, conflicting legal environment. Indeed, the title “Public Health” in the Consolidated Version of the Treaty of the Functioning of the European Union Art. 168 needs to be improved and re-captioned to reflect eHealth regulation. Lastly, further research is needed to investigate the effects of legal risk management on eHealth policy development.

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THE ARMS TRADE TREATY 2014: A FAINT STEP IN INTERNATIONAL ARMS TRADE REGULATION.

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Abstract

Adoption of The Arms Trade Treaty (ATT) has become a real benchmark in international law on arms transfers. For the first time States have reached out the consensus regarding assessing and preventing the authorization of exports, imports and other transfers of conventional arms. This article identifies and outlines the main stages aspects of the negotiation during drafting ATT. It also covers historical perspective of drafting and evaluates the outcomings of this process.

In addition, present article considers the scope of the Treaty defining the equipment or materiel covered (Article 2). There follows analysis of the provisions which contain the obligations on exporting States, ranging from absolute prohibitions (Article 6) to the provision concerning 'export assessments' (Article 7), which is expected to be the most frequently applicable in practice. There is also an attempt to assess existing weaknesses and omissions of the ATT and to propose possible solution to facilitate reduction of illegal arms trade.

Keywords: international arms trade, security, conventional arms, arms trade treaty.

Introduction

In a modern world global arms market is growing with an extremely stressful speed imposing its devastating effect not only in the regions affected by armed conflicts but on the world fragile peace and security. The volume of international transfers of major weapons has grown continuously since 2004 and increased by 8.4 per cent between 2007–11 and 2012–16, according to data on arms transfers published by the authoritative source on arms trade the Stockholm International Peace Research Institute (SIPRI).² Notably, transfers of major weapons in 2012–16 reached their highest volume for any five-year period since the end of the cold war. Since the Cold War had significantly diminished control of arms trade and led it to completely illicit process. Governmental control of arms trade has been a sensitive issue for a long time. So the path towards universal instrument with legal binding type of commitment was also long and thorny.

This phenomenon might be explained, first, by the fact that the sale of weapons is an advantageous and legitimate means of replenishing the state budget. Secondly, the states' security concern are growing. Thus, in the context of the growing intensity of armed violence, international terrorism and the emergence of terrorist entities (such as IS), whose activities violate human values, there is an urgent need for an effective international legal mechanism that will prevent illicit export and import of arms on the International level.

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² SIPRI Fact Sheet February, 2017. Available at: <https://www.sipri.org/sites/default/files/Trends-in-international-arms-transfers-2016.pdf>.

For the first time in history, a legally binding instrument establishes a common regulatory framework for international transfers of conventional arms, and therefore sets up an universal legal standard in one of the few areas which has escaped any control until now: the arms trade.

Finally it may be possible to predict and foresee challenges that ATT will meet in a near future.

The ATT contributed to the consolidation of an international regime for the control of arms transfers by supporting steps taken beforehand at both the global and regional levels to address this issue. While some countries have had national control systems in place for many years, for the majority this is not the case. In 2006 three years after the launch of the global campaign for a legally binding international instrument for the control of the arms trade, the resolution entitled “Towards an Arms Trade Treaty” was presented by the First Committee of the UN and the process

1. Background of the Arms Trade Treaty

Turning back the historical context of the signing process of the ATT, there are stages or levels, which should be outlined. The initial development of the modern arms trade treaty concept was because of efforts by civil society. In the London offices of Amnesty International in late 1993, four NGO arms control advocates conceived the original idea that led to the ATT. They drew up a draft legally binding Code of Conduct with common rules to restrict international arms transfers — for tactical reasons aimed initially at European Union (EU) member states.³ The NGOs decided to boost their campaigning efforts. Amnesty International, Oxfam and the International Action Network on Small Arms (IANSA - a network of hundreds of NGOs) launched the Control Arms Campaign in October 2003, spreading the ideas through events, publications and popular flash mobs and public meetings. Hundreds of thousands of people worldwide called on all political leaders to agree an ATT with robust rules and by 2005 support had grown from a handful to over 50 countries. Emboldened by the civil society advocacy and some champion governments, on 6 December 2006 in the UN General Assembly, 153 states voted in favour (with only the US against) of a resolution to begin a process of consultation for an ATT. A record number of Member States submitted their views to the UN Secretary General.⁴

The ATT entered into force on December 24, 2014, recognized the contribution made by already existing instruments initiated to combat with illicit arms trade, such as the United Nations Programme of Action⁵, The Wassenaar Agreement etc. but the instrument itself was deemed to become a legally binding. To date, 130 states have signed it. The number of State Parties that expressed their intention to assume obligations under the Treaty was achieved because of long and quite dramatic negotiation process. In addition, if at the very beginning of the process there was a common position of initiating states, then at the final text adoption meeting the consensus was practically lost.

In our opinion, the first official stage of the work on the contents of the document is the international campaign on the regulation of arms transfers, initiated in 2006 by a group of Nobel laureates, including the Dalai Lama, the Costa Rican President Oscar Arias and the President of Poland Lech Walensa, during which the first General Assembly resolution on the arms trade was adopted within the framework of the UN. It recognized that the absence of international standards in the field of regulating the export and import of weapons is a factor contributing to terrorism, an escalation of armed conflicts and threatening sustainable development and international security.⁶

³ The Birth And The Heart Of The Arms Trade Treaty p.16.

⁴ Ibid. p.17.

⁵ United Nations Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects.

⁶ UN GA 61/89, 6 December 2006.

Although significant progress has been made, a number of factors: lack of concrete benchmarks, numerical targets and insufficient acknowledgement of links between small arms and wider issues, transparency and greater responsibility in transfers of conventional arms, dual-use goods and technologies, thus preventing destabilizing accumulations at this stage were still not fully covered. Participating States seek, through their national policies, to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities, which undermine these goals, and are not diverted to support such capabilities.

The second stage from 2010 to 2012 is characterized by active discussions of the text of the treaty. During this period, a Group of Governmental Experts (GGE) was formed, which formed a bank of proposals, which, although in some cases contradictory, could form the basis for the formation of the document. Because of the work of the GGE, a new extensive document appeared, which a collection of even more contradictory proposals became. From July 2 to July 27, 2012, the UN Diplomatic Conference was held in New York. During the sessions, differences in the approaches of the states to the content and sequence of document production only increased, no consensus was reached, and the final text was not adopted.

The skepticism and apprehension expressed during the discussion by some arms exporting states (US, France, Germany, Great Britain) are grounded: any external constraints can lead to unpredictable risks and enormous commercial losses. Still the negotiating States' goals and concerns were very different from each other. Some of them included state sovereignty considerations, others economic concerns, still others parties and NGOs pushed on the strong humanitarian framework of the treaty provisions.⁷ However, this fact does not mean that the proposals were opposing to each other, we would like to point out that there existed a substantial division in the ATT concept. The main positive side of the negotiations, on which the states practically did not have contradictions, were the ATT provisions concerning the creation of national weapons control systems in those states where such systems do not exist emphasizing that the majority of states do not have systems of such character.

The final stage of the ATT adoption process was the Conference on the International Treaty on the Arms Trade, held on March 18-28, 2013, during which states succeeded in elaborating a text that would take into account to a certain extent the positions of all negotiating states. The project was supported by 154 out of 193 UN member states. Including the United States and the European Union and entire African continent. Only three States—Iran, North Korea, and Syria—opposed acceptance of the treaty ⁸while another 23 delegations abstained. Among the abstaining countries are China, Russia, the Arab Middle East, and Belarus.

Among the critics of the Treaty were many States that had either abstained from voting or voted against the adoption, but also disappointed NGO representatives. Egypt, for example, criticized 'the absence of definitions of important concepts essential to the implementation of the Treaty'.⁹ Belarus stated that the Treaty risks leaving 'a wide margin for subjective interpretations of the export criteria'.¹⁰ The criticism demonstrated by States was mainly and unanimously grounded on the "humanitarian" criteria for assessing the permissibility of arms transfers, whose fuzzy formulation can really become the basis for ambiguous and broad interpretation while applying it in practice.

Analyzing the results of the voting, it is also necessary to take into account the geopolitical context when negotiations were held. The armed conflict in Syria, the protracted and ambiguous nature of which

⁷ S. Parker, Analysis Of States' Views On An Arms Trade Treaty 1 (2007), Available At [Http://Unidir.Org/Publications](http://Unidir.Org/Publications).

⁸ The Same Three States Blocked The Adoption Of The Treaty By Consensus At The Final United Nations Conference On The Arms Trade Treaty Which Finished Its Deliberations The Previous Week.

⁹ United Nations General Assembly Official Records Of The 67th Session, 71st Plenary Meeting, P. 14.

¹⁰ Ibid. p. 15.

many states and experts attributed, in particular, to illegal arms supplies to the illegitimate regime of the Syrian leadership Bashar Assad, also substantially influenced the outcome of the ATT text discussion.

It is worth underlining the position of the Russian Federation as one of the largest arms exporters, which considered the agreement underdeveloped. Justifying its official position, Russia payed attention to the provisions of Article 7 of the Treaty, which prohibit the legal sale of weapons to problem regimes (for example, violating human rights), but does not limit the way of arming the opposition fighting against the governments of their countries.¹¹

Finally, due to the incredible efforts of political leaders, NGO and the UN since 2006 a legally binding instrument that would encompass the trade completely and that would establish the highest possible common international standards for the import, export and transfer of conventional arms was successfully brought into life. This was the process towards the Arms Trade Treaty that was ultimately adopted on 2 April 2013 by a massive majority in the United Nations General Assembly. The Treaty, which has so far been signed by 130 and signed as well as ratified by 89 States, accessed by 30 States.

2. Overview of obligations under the Arms Trade Treaty

In order to provide a better understanding of complex context of the environment of arms trade treaty we will make a short profile of the ATT provisions.

As it comes to the text of the ATT, the main obligation and aim of this treaty is to establish standards for regulating the trade in conventional arms, as well as to prevent illicit trade in and diversion of such weapons.¹² Article 2(1) ATT lists the types of arms the treaty applies to: tanks, armored vehicles, artillery systems, aircraft, helicopters, warships, missiles, missile launchers, and small arms and light weapons (SALW). In addition, Articles 3 and 4 ATT expand the scope of the treaty to include munitions and ammunition for these weapons, as well as parts and components thereof, when these are exported in a form that provides the capability to assemble them. Member States are obliged to establish a national control system to regulate the export of such items. In addition, they must regulate the import, transit, transshipment and brokering of the armaments listed in Article 2(1).

The ATT prohibits transfers of weapons, ammunition or components in contravention of UN Security Council resolutions or any other binding international obligations. States are furthermore banned from authorizing transfers if they have knowledge that the items in question will be used in the commission of

“[...] genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes [...]”.¹⁰

If none of these situations apply, member States are still obliged to assess the possible consequences of any export of convention weapons, ammunition or components in terms of its impact on peace and security, or it's potential to facilitate violations of humanitarian law, human rights law, acts of terrorism, or acts related to transnational organized crime.¹¹ ATT member States are furthermore obliged to take measures to prevent the diversion of arms, to keep records of transfers. they are encouraged to share these reports, as well as to cooperate to further the prevention of illicit trade in convention weapons. These latter provisions, however, only apply to arms covered in Article 2(1) ATT, not to ammunitions or components.

First of all, a huge and significant step forward in the sphere of comprehensive regulation of international arm trade represent Articles 6 and 7 of the ATT. Article 6 is one of the core articles of the ATT and is the key starting point for States on the way of assessing the legality of a potential transfer of conventional arms, ammunition/munitions or parts and components as defined by the treaty.¹³ Article 6

¹¹ These views are available at: www.un.org/disarmament/convarms/ArmsTradeTreaty/html/ATT-ViewsMS.shtml.

¹² Article 1, ATT.

¹³ 'The birth and the heart of the Arms Trade Treaty', Brian Wood & Rasha Abdul-Rahim, p. 4.

imposes an obligation on States Parties to prohibit any transfer of conventional arms or related items in certain circumstances. In addition, transfers must be prohibited when State have knowledge that arms which that the arms being considered would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or any other war crime as defined by international agreements to which the State is a party. Worth noticing, that crimes against humanity are distinguished from genocide in that they do not require the specific intent to destroy a target population group. 14 Special attention has to be given to the exact wording of the provision of authorization of transfer. Experts and scholars¹⁵ distinguish a meaning of high importance in the notion «knowledge», which suggests an interpretation of invoking individual criminal responsibility. It has a specific meaning in the context of authorization of transfer. In this regard it means, that State authority (usually represented by individuals) being aware of existing circumstances which contradict the conditions of legal transfer, nevertheless authorize the

To stimulate implementation and increase transparency, thus reinforcing the standards of Articles 6 and 7, the ATT obliges member States to establish national control systems, make available their national control lists, and designate national points of contact for the exchange of information. It furthermore contains articles on record-keeping, reporting and international cooperation. the Secretariat is tasked with stimulating transparency and cooperation between States.

Although the Treaty does not generally cover dual-use goods, the logic should apply to export that consists of purely military parts as well as dual-use parts. parts that have both military and civilian applications. For instance, a State may first acquire gun or missile systems from one

3. Evaluation of the Arms Trade Treaty

Arms transfers, unless they are illegal from the start - that is, either intended to supply arms to terrorist groups or criminal groups, or to violate arms embargoes imposed by the Security Council - should arrive only at their final destination and be used for the declared purposes registered on the transaction certificate. This is not always the case, however, as sometimes the arms, their parts, components and munitions are deviated during shipment and end up in the hands of unauthorized recipients, or the designated recipients are governments that commit acts of genocide, war crimes, torture or large scale human rights violations, but are not subject to embargoes.

One notable example is that of South Sudan - a country where arms transfers have caused humanitarian disasters and contributed to the incapacity to meet the population's sustainable development needs. Marked by low income, only 25% of the population in South Sudan has access to health services and the life expectancy is 55 years of age. The country has been in conflict since its foundation in 2011 and even earlier, during the decades of independence struggles, the country's territory suffered the devastation of various forms of war: tribal, cross-border, and civil war. This has resulted in 50,000 deaths, 1.5 million internally displaced persons and 500,000 refugees.¹⁶

It is in this context that international arms transfers take place, and end up being both a business and a means to intervene in the internal affairs of other countries, without attention always being paid to the humanitarian risks that they generate. In the absence of adequate controls, that is provided exactly by the

14 Geneva Academy of International Humanitarian Law and Human Rights, 'The Arms Trade Treaty,' Academic Briefing 3, June 2013, accessed October 3, 2015, http://www.snis.ch/system/files/academy_briefing_3_2013_arms_trade_treaty.pdf.

15 Brian Wood & Rasha Abdul-Rahim, p. 5.

16 ATT Monitor, Case study 2016, 'Dealing in double standards: how arms sales to Saudi Arabia are causing human suffering in Yemen', <http://armstreatymonitor.org/en/wp-content/uploads/2016/02/ATT-Monitor-Case-Study-2-Saudi-Arabia-.pdf> armstreatymonitor.org/en/dealing-double-standards-arms-sales-saudi-arabia-causing-human-suffering-yemen/.

ATT, arms transfers divert essential resources away from human development needs in arms receiving countries.

Several States Parties including the UK, Germany, France and signatory the US have so far failed to fully adhere to the Treaty, and are flouting international law in plain sight by selling billions of dollars worth of deadly weapons to Saudi Arabia, which are being used against Yemeni civilians.¹⁷

Evaluation of the treaty in understanding of this article means to answer the question whether stipulated rules address the challenging issues they were created to tackle and to what extent they are doing it if they do.

There was and still there is a certain amount of concerns¹⁸ outlined by the experts and scholars¹⁹ consisting either of inadequate provisions or of major gaps in the scope of the Treaty and the obligations it imposes. We would like to underline the most important to our view:

- Narrowness of scope of the ATT: the treaty does not cover the surveillance, equipment and military technology.

- The circumstances required before an outright ban is imposed are too narrow: a transfer that has reasonable potential for threatening international peace and security, or of being used to commit or facilitate serious human rights violations, should have been added to the three that are currently found in Article 6. The assessment process in those cases not covered by the outright ban—and these will be the great majority—is weak in several respects.

- The notion 'knowledge' that is required before a transfer authorization should be elaborated and explained.

- The Treaty gives excessive latitude to exporters to allow them to 'pick and choose' among potential recipients on grounds of economic self-interest or double standards based on political advantage. Purely as a technical legal matter this is very difficult to correct, for it is hard to reformulate the factors set out in Article 7.1 to ensure consistency. In terms of real politik the problem is even greater: creation of an international enforcement body with powers of authoritative interpretation was and is simply unacceptable to key States, and perhaps most States, as an incursion on their sovereignty.²⁰

And in addition to principle, so long as powerful States, the USA above all, see arms sales and gifts as a tool of foreign policy, this block will remain. This may be the most intractable problem of all that currently exist.

Conclusions

Arms transfers, unless they are illegal from the start - that is, intended either to supply arms to terrorist groups or criminal groups, or to violate arms embargoes imposed by the Security Council - should arrive only at their final destination and be used for the declared purposes registered on the transaction certificate. This is not always the case, however, as sometimes the arms, their parts, components and munitions are deviated during shipment and end up in the hands of unauthorized recipients, or the designated recipients are governments that commit acts of genocide, war crimes, torture or large-scale human rights violations, but are not subject to embargoes.

Accountability for arms transfer decisions will be decisive for the effective implementation of the ATT and will act as an important check for those who continue to suffer as a result of irresponsible arms transfers and the illicit trade. The suffering of those people must remain at the forefront of the decision-making process

¹⁷ http://controlarms.org/en/wp-content/uploads/sites/2/2016/08/Opening-presser_xx_180816-2.pdf.

¹⁸ L. Lustgarten, 'The Arm Trade Treaty: achievements, failures, goals' p.571.

¹⁹ Ibid. p. 599

²⁰ Ibid. 600.

regarding arms transfers. A lesson learned during the “birth” of the ATT is that only strong, ongoing global pressure from civil society will provide the context to improve the treaty, and key to the substantial improvement of the treaty will be to strengthen the provisions and implementation of Articles 6 and 7 - the “heart” of the treaty.

To tackle the illicit trade, we first need to control the legal and legitimate trade - most of the weapons that end up in the illegal trade start in the authorized trade. To reduce the risk of diversion for illegitimate and unauthorized uses, and to minimize the risk of weaknesses being exploited by arms dealers, we need a global treaty to be effectively implemented.

No one is saying the treaty is a panacea. But if it's effectively executed in good faith, it'll be a giant leap forward in making sure there's greater protection for the hundreds of millions of people whose lives and livelihoods are affected by this. Modern global system of arms control must (in ideal way) cover the development, production, stockpiling, proliferation and usage of small arms and conventional weapons.

No one is also stating that any arms trade itself is presumed to be illegal – without any doubts? For states. Primarily, it is a way of exercising their sovereign freedom of trade and consolidation of state security in order to guarantee safety to people within their territories.

During the period of 11th – 15th September 2017 third conference of the state parties of the ATT will be held in Geneva and will be dedicated to three crucial aspects of the ATT: Transparency and reporting, implementation and treaty universalization.²¹ The States as well as the international community will have to tackle these fragile and sensitive issues effectively and constructively.

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NOT SO NEUTRAL NET NEUTRALITY

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Abstract

In 2015 European Commission approved Digital Single Market (DSM) strategy in order to foster four fundamental freedoms of the EU in the digital economy. One of core segments of creating the DSM is access to open Internet. To reach this goal Telecom Single Market (TSM) Regulation was approved in November 2015, whereas BEREC guidelines were adopted in 2016 August. In this paper it is discussed the concept of "net neutrality", whether it is ensured in the Regulation and in what sense.

Net neutrality is a principle fostering that all data packets on the Internet have to be treated equally (without blocking, slowing down, altering, restricting, interfering with, degrading or discriminating). For a long time there was no threat to net neutrality. However, Internet service providers started to discuss about making deals with content providers (such as Youtube, Spotify etc.) to transfer their content faster. On the one hand there is economic sense to allow ISPs to extract money from CPs. After all, ISPs have to invest into infrastructure in order to transfer data from CPs which do not pay anything for their data to be transferred to end-users. On the other hand, such practice would affect end-users and other CPs and change the Internet as we know it.

Keywords: net neutrality, Regulation 2015/2120, traffic management measures.

Introduction

The Internet has developed over the past decades as an open platform for innovation with low access barriers for users, content and application providers (CPs) and Internet service providers (ISPs)². In 2015 European Commission adopted the Digital Single Market strategy. A Digital Single Market (DSM) is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. The European Commission has identified the completion of DSM as one of its 10 political priorities³. One of the pillars of the DSM is the principle of open Internet. Open Internet is such where net neutrality is ensured. The Internet became so widespread because data is transferred in the fastest possible manner despite sender, receiver or type of the data. Therefore, amusing but insignificant picture of a cat or a critical notification of forthcoming hurricane were sent applying the same rules⁴. It should be noted that CPs do not pay ISPs' for the delivery of their traffic to end-users. That is end-users who pay for the access to the Internet. However, few CPs are responsible for a major part of traffic during peak times.

Internet service providers (ISPs) wanted to abolish net neutrality thus allowing them to rate data packages according to sender, receiver or type.⁵ In that case ISPs could have made deals with major CPs

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² M. Civilka et al., 'Informacinių technologijų teisė' (Vilnius: NVO Teisės institutas 2004) 63.

³ European Commission, 'Open Internet' (available at <https://ec.europa.eu/digital-single-market/en/open-Internet-net-neutrality>).

⁴ M. Civilka et al., 'Informacinių technologijų teisė' (Vilnius: NVO Teisės institutas 2004) 23.

⁵ L. Lessig, 'The Internet under Siege, Foreign Policy' (available at <http://foreignpolicy.com/2009/11/16/the-Internet-under-siege/>).

such as Facebook, Netflix or Youtube in order to transfer their data faster than regular traffic. Therefore, a video from a “premium” CP would effortlessly buffer. This would mean that start-ups or less beneficial CPs would end up in the slower lane. Eventually end-users would stop using slower platforms. The Internet would lose major part of its identity and user-generated content. Also, ISP’s would promote their downstream services thus disrupting fair competition.

As a response⁶, in 2015 regulation 2015/2120 of the European Parliament and of the Council laying down measures concerning open Internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Telecom Single Market or TSM) was adopted. TSM regulation is a major achievement for the Digital Single Market. It creates the individual and enforceable right for end-users to access and distribute Internet content and services of their choice. The idea that some services are of such great importance to the society that the providers must not discriminate their customers is as old as ferries. If there were only one raft in the village, boatman could not charge more from a butcher than a carpenter.⁷ In the US, the Internet is considered as an utility and not a service.⁸

The first question to be addressed is what is “net neutrality”? In TSM Regulation’s travaux préparatoires there was a definition of the “net neutrality” which stated that this means that traffic should be treated equally, without discrimination, restriction or interference, independent of the sender, receiver, type, content, device, service or application⁹. This allows fair competition online between start-ups or large corporate CPs. It should be noted that the definition of “net neutrality” was removed from the final text of the TSM Regulation. The author believes it is so because the regulation allows quite a lot of deviations and exceptions from the principle of net neutrality. Therefore, a layman could question whether the regulation truly reaches its goal which is to ensure that ISPs would not become gatekeepers picking which content providers would reach end-users faster or slower. Later in this article it is argued that in this sense, the regulation is successful and ensures that the data would be transferred according to the principle of best effort.¹⁰

The general rule is that end-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their Internet access service (TSM Regulation article 3(1)). It should be noted that this article is constructed in a broad sense and is comprehensive, setting requirements for upload and download. Meanwhile “information and content” should be regarded as any data which is transferred electronically.

Providers of Internet access services shall treat all traffic equally, when providing Internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used. As mentioned before, this norm applies only to IAS. It should be also noted that this does not mean that every end-user will get the same quality of services. Data packages might be lost because of external factors or affected by capabilities of end-user’s device. Some authors believe that package differentiation

⁶ European Commission ‘Our commitment to Net Neutrality’.

⁷ The Economist, ‘Gordian net’ (available at <http://www.economist.com/news/leaders/21641201-why-network-neutrality-such-intractable-problemand-how-solve-it-gordian-net>).

⁸ *US Telecom Association, et. al. v FCC et. al.*, Case 15-1063 [2015] US Court of Appeals.

⁹ European Parliament (EP) Draft Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/22/EC, and Regulations (EC) No 1211/2009 and (EU) No 531/2012.

¹⁰ BEREC Report on IP interconnection in the context of Net Neutrality.

could be allowed.¹¹ For instance, Netflix is responsible for one third of traffic during peak times in the USA. In order to manage all the traffic from one CP, ISPs have to make additional investments to infrastructure. Therefore it might seem logical to tax particular CP.¹²

1. Limitations

First of all, the application of the TSM Regulation itself is limited. It is applicable only to Internet access service (IAS) (TSM Regulation recital 1) which is publicly available electronic communications service that provides access to the Internet, and thereby connectivity to virtually all end points of the Internet, irrespective of the network technology and terminal equipment used. It should be addressed what “publicly” stands for in this context (TSM Regulation article 2). In the Body of European Regulators for Electronic Communications (BEREC)¹³ Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (Guidelines) it is stated that if IAS is offered to generally unspecified group of end-users but rather any end-user, the services are to be considered as “publicly available” and vice versa. For instance, virtual private network “eduroam” which is used by institutions of higher education is not public. As well as access to Internet provided by restaurants or internal corporate networks.¹⁴ However how to assess ISP which operates in a limited location (i.e. one district) of a city? It should be held that such services would still be considered as “publicly available”, because anyone could settle in that district. But what if the services are provided in a territory where access is limited (i.e. students’ campus, military school or a prison)? In one sense, the service would not be truly publicly available. In other sense, ISP has no authority deciding who would be allowed to enter the territory. Author believes that such services would also fall under the TSM Regulation. Even though there is limited access to the territory, the ISP has no authority deciding who that person would be.

2. Zero-rating

There is a specific commercial practice called zero-rating (also called zero-pricing). An ISP applies a price of zero to the data traffic associated with a particular application or category of applications (and the data does not count towards any data cap). A zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s) would infringe the Regulation.¹⁵ ISP could also offer zero-rating to an entire category of applications (e.g. all video or all music streaming applications) or only to certain applications thereof (e.g. its own services, one specific social media application, the most popular video or music applications). In the latter case, an end-user is not prevented from using other music applications. However, the zero price applied to the data traffic of the zero-rated music application (and the fact that the data traffic of the zero-rated music application does not count towards any

¹¹ R.S. Lee, T. Wu ‘Subsidizing Creativity through Network Design: Zero-Pricing and Net Neutrality’ [2009] Journal of Economic Perspectives 23.

¹² The Economist, ‘What network neutrality is, and why it matters’ (available at <http://www.economist.com/blogs/economist-explains/2015/02/economist-explains-7>).

¹³ The Body of European Regulators for Electronic Communications (BEREC) was established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009, as part of the Telecom Reform package. BEREC contributes to the development and better functioning of the internal market for electronic communications networks and services. It does so, by aiming to ensure a consistent application of the EU regulatory framework and by aiming to promote an effective internal market in telecoms sector, in order to bring even greater benefits to consumers and businesses alike. Furthermore, BEREC assists the Commission and the national regulatory authorities (NRAs) in implementing the EU regulatory framework for electronic communications. It provides advice on request and on its own initiative to the European institutions and complements at European level the regulatory tasks performed at national level by the NRAs.

¹⁴ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 5.

¹⁵ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 11.

data cap in place on the IAS) creates an economic incentive to use that music application instead of competing ones. The effects of such practice applied to a specific application are more likely to “undermine the essence of the end-users’ rights” or lead to circumstances where “end-users’ choice is materially reduced in practice” (TSM Regulation recital 7) than when it is applied to an entire category of applications.¹⁶ It should be noted that end-users pay monthly fee (fixed access) or are being charged according to downloaded data (mobile access).¹⁷

Zero-rating practice was criticized as anti-competitive and against the principle of net neutrality especially if such offers involved mobile operators’ vertically integrated video or cloud services (which are data hungry). However, some economic incentives and justifications must be noted.¹⁸ First of all, infrastructure and content are economic complements: mobile Internet users derive utility only with a system consisting of both Internet connection, and content and services.¹⁹ In other words, CPs rely on the infrastructure of the telecoms operators. On the other hand, mobile operators establish higher value for their platforms by offering popular services.²⁰ Besides carrying the offerings of content providers, some operators also offer their own services such as music streaming and cloud storage. Zero-rating offers can be considered as zero pricing on the tied product of certain content when consumers choose the tying product of mobile Internet. However, this must be argued in the light of the practice of EUCJ (i.e. Microsoft case). That is ISPs must not block the traffic of non-zero-rated content. Secondly, it is argued that significant motivation of zero-rating schemes is no doubt to expand the use of certain CPs, and in turn to increase mobile wireless penetration. This may generate a variety of economic and social benefits particularly among low-income populations and in developing countries. In developed countries, zero rating is mostly a tool to push up demand for mobile Internet.²¹ Despite some economic justifications, zero-rating practice is generally forbidden and must be evaluated under case-by-case basis taking into account the aim of the Regulation to safeguard equal and non-discriminatory treatment of traffic (TSM Regulation article 1), data cap limit, market size of the ISP etc.²²

It should be noted that a mobile operator may offer free subscription to a music streaming application for a period of time to all new subscribers which is not similar to a zero-rating practice. Where the traffic associated with this application is not subject to any preferential traffic management practice, and is not priced differently than the transmission of the rest of the traffic, such commercial practices are deemed not to limit the exercise of the end-users’ rights granted under TSM Regulation article 3(1).²³

The debate on zero-rating practice gathered the biggest CPs. Concerned parties disagreed who should carry the costs of transferring data.²⁴ ISPs invest to infrastructure, cables, towers and satellites. Meanwhile CPs (such as Facebook, Spotify or Netflix) can easily and free of charge use this infrastructure to sell their content. The main argument was that ISPs must not be the only one who shall bear the costs of data transferring. However, author believes that this argument is weak. ISPs have decided to start their business based on a business model which was at that time. That model is based on providing access for end-users and getting paid by them. It would be hardly beneficial if ISPs would become influencers which

¹⁶ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 11.

¹⁷ BEREC A view of traffic management and other practices resulting in restrictions to the open Internet in Europe, 10.

¹⁸ R.S. Lee, T. Wu ‘Subsidizing Creativity through Network Design: Zero-Pricing and Net Neutrality’ [2009] *Journal of Economic Perspectives*.

¹⁹ L. Lessig, ‘Code v2’ (New York: Basic Books 2006) 292.

²⁰ A. Preta, P. Peng, ‘Openings for zero rating’ [2016] *InterMEDIA* 44.

²¹ Deloitte, ‘Value of connectivity: Economic and social benefits of expanding Internet access’.

²² BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 12.

²³ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 12.

²⁴ B.M. Frischmann ‘An Economic Theory of Infrastructure and Common Management’ [2005] *Minnesota Law Review* 89

app or social network end-users should use by offering the incentives of zero-rating. Other possibility to balance the interests of these stakeholders is to allow zero-pricing or other traffic management measures but to give the right to pick specific applications to end-users.²⁵

3. Reasonable traffic management

Sometimes the network can experience congestion.²⁶ During congestion traffic load generated by some users will affect the quality of service for the others.²⁷ Therefore ISPs are allowed to implement reasonable traffic management measures. The objective of reasonable traffic management is to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to the objectively different technical quality of service requirements of specific categories of traffic, and thus of the content, applications and services transmitted (TSM Regulation recital 9). In order to be deemed reasonable, such measures have to be (i.) transparent, (ii.) non-discriminatory (iii.) proportionate (iv.) shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic (v.) Such measures shall not monitor the specific content and shall not be maintained for longer than necessary (TSM Regulation article 3(3)).

The requirement for traffic management measures to be non-discriminatory does not preclude providers of Internet access services from implementing, in order to optimise the overall transmission quality, traffic management measures which differentiate between objectively different categories of traffic. Any such differentiation should, in order to optimise overall quality and user experience, be permitted only on the basis of objectively different technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth)²⁸ of the specific categories of traffic, and not on the basis of commercial considerations. Such differentiating measures should be proportionate in relation to the purpose of overall quality optimisation and should treat equivalent traffic equally. Such measures should not be maintained for longer than necessary (TSM Regulation recital 9). Speaking about non-discriminatory measures it should be noted that technical criteria for quality of service is latency, jitter, packet loss and bandwidth. Traffic is divided to categories based on these criteria. For instance, some apps require low latency and high bandwidth (i.e. high quality video streaming, online video games).²⁹ In contrast, sometimes latency is not important, i.e. e-mail service. It is important to note that objectively different categories of traffic can be treated differently. However, such differentiating measures should be proportionate in relation to the purpose of overall quality optimisation.³⁰ In all cases ISP must act consistently with its' previous practice.

The principle of proportionality meets general requirements set out in the practice of the EUCJ: (i.) there is a legitimate goal to effectively use available resources and ensure best possible quality to end-users. (ii.) these measures are suitable. (iii.) measures are necessary to reach the goal and there is no other less intervening measures. BEREC points out that encrypted traffic cannot be treated less favourable just because it is encrypted. It is also important to take into account whether traffic management measures are applied on a regular basis or only when congestion occurs. Measures which are applied only during peak times can be considered to be proportionate.³¹

²⁵ B. Van Schewick 'Network Neutrality and Quality of Service' [2015] Stanford law review.

²⁶ B.M. Frischmann, B. Van Schewick 'Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo' [2007] *Jurimetrics* 47 393.

²⁷ C.S. Yoo, 'Network Neutrality and the Economics of Congestion' [2006] . *Georgetown Law Journal* 94 1095.

²⁸ BEREC Report on differentiation practices and related competition issues in the scope of net neutrality.

²⁹ BEREC Guidelines for quality of service in the scope of net neutrality, 18.

³⁰ BEREC Report on differentiation practices and related competition issues in the scope of net neutrality, §40-56.

³¹ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 17.

BEREC states that in the event that traffic management measures are based on commercial grounds, such measures will not be reasonable.³² An obvious example of this could be when ISP charges for usage of different traffic categories or where the traffic management measure reflects the commercial interests of an ISP that offers certain applications or partners with a provider of certain applications. Author believes that “commercial grounds” should not be understood in a strict manner meaning that ISPs make commercial arrangements with CPs or promotes its’ own downstream content services. For instance, imagine there are two major³³ video platforms “High quality” and “180p” which both have significant market power. One offers high quality videos, another – same videos with lower quality. In order to provide appropriate quality of service for end-users watching videos in HD quality, ISP have to make additional investments in the infrastructure. To avoid such costs ISP might take actions to promote “180p”. Therefore, it should be held that “commercial grounds” means not only additional revenue but also avoidance of costs or other benefits in a broad sense.

Finally, it should not be forgotten that traffic management measures are exception from a general clause. Therefore ISP cannot constantly claim it experiences congestion and applies these measures. It must make additional investments into infrastructure to avoid congestion in the first place.

4. Exceptional traffic management

ISPs must not engage in traffic management measures going beyond mentioned before, and in particular shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary, in order to reach specific goals (TSM Regulation article 3(3)). These exceptions are to be understood in a strict manner. For instance, there is a prohibition to monitor specific content under reasonable traffic management measures. However, monitoring could be justified under traffic management going beyond reasonable traffic management measures. Such measures must comply with Data protection legal acts.^{34,35}

Above mentioned paragraph of TSM Regulation is important for two reasons. First of all, it forbids any other traffic management measures. Secondly, it specifies numerous clauses of available exceptions. BEREC points out that rules against altering content, applications or services refer to a modification of the content of the communication, but do not ban nondiscriminatory data compression techniques which reduce the size of a data file without any modification of the content. Such compression enables a more efficient use of scarce resources and serves the end-users’ interests by reducing data volumes, increasing speed and enhancing the experience of using the content, applications or services concerned.³⁶

First exception is regarding complying with Union legislative acts or complying with orders by courts or public authorities. Second exception is related to preserving the integrity and security of the network for example by preventing cyber-attacks that occur through the spread of malicious software or identity theft of end-users that occurs as a result of spyware (TSM Regulation recital 14). Typical attacks and threats that will trigger integrity and security measures include flooding network components, spoofing IP addresses in order to mimic network devices or allow for unauthorised communication, distribution of malicious software, viruses etc. Conducting traffic management measures in order to preserve integrity and security of the network could basically consist of restricting connectivity or blocking of traffic to and from specific endpoints.

³² BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 18

³³ I. Jarukaitis et al., ‘Elektroninių ryšių teisė’. (Vilnius: Eugrimas 2005).

³⁴ Council Directive 95/46/EC On the protection of individuals with regard to the processing of personal data and on the free movement of such data, 31.

³⁵ Council Directive 2002/58/EC Concerning the processing of personal data and the protection of privacy in the electronic communications sector, 37.

³⁶ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 19.

Examples of such traffic management measures include blocking of IP addresses, or ranges of them, because they are well-known sources of attacks, blocking of IP addresses from which an actual attack is originating, blocking of IP addresses/IAS showing suspicious behaviour (e.g. unauthorised communication with network components, address spoofing).³⁷ Because of security reasons ISPs may conduct regular monitoring of content inspecting not only headers but also applying „deep packet inspection“ techniques. BEREC points out that this exception could be used as a basis for circumvention of the Regulation because security is a broad concept³⁸. NRAs should therefore carefully assess whether the requirements of this exception are met and to request that ISPs provide adequate justifications when necessary.

Third exception is related to prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally. Temporary congestion should be understood as referring to specific situations of limited duration, where a sudden increase in the number of users in addition to the regular users, or a sudden increase in demand for specific content, applications or services, may overflow the transmission capacity of some elements of the network and make the rest of the network less reactive. Possible causes of those situations include a technical failure such as a service outage due to broken cables or other infrastructure elements, large increases in network traffic due to emergency or other situations beyond the control of providers of Internet access services. Such congestion problems are likely to be infrequent but may be severe, and are not necessarily of short duration (TSM Regulation recital 15).

5. Specialised services

There is demand on the part of providers of content, applications and services to be able to provide electronic communication services other than Internet access services, for which specific levels of quality, that are not assured by Internet access services, are necessary (TSM Regulation recital 16). Providers of electronic communications to the public, including providers of Internet access services, and providers of content, applications and services shall be free to offer services other than Internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality (TSM Regulation article 3(5)).

Providers of electronic communications to the public, including providers of Internet access services, may offer or facilitate such services only if (i.) the network capacity is sufficient to provide them in addition to any Internet access services provided. (ii.) Such services shall not be usable or offered as a replacement for Internet access services, and (iii.) shall not be to the detriment of the availability or general quality of Internet access services for end-users.³⁹ Author believes such criteria are clear but can be widely interpreted. The “specific level of quality” should be specified by the CP, and it should be demonstrated that this specific level of quality cannot be assured over the IAS and that the QoS requirements are objectively necessary to ensure one or more key features of the application. If assurance of a specific level of quality is objectively necessary, this cannot be provided by simply granting general priority over comparable content.⁴⁰

This provision is targeted to promote innovation and creation of new innovative apps or services. However ISP's efforts to grant exclusive bandwidth to a specific application calls for a discussion regarding remuneration to the ISP from CP. In other case it would make little sense for an ISP to make such an investment. Even more – what if this specialised service would not be successful and shortly fails? Could an

³⁷ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 21.

³⁸ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 22.

³⁹ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 25.

⁴⁰ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, 25.

ISP request for damages suffered for investing into infrastructure to provide specialised service in the first place? Probably not. Therefore, the application of this norm remains uncertain. Moreover, ISP would only grant exclusive traffic to a service if it attracts more end-users. This presumption limits the incentives to create innovative specialised services only in a highly profitable, mass applicable services.

It should be noted that the regulation remains silent what services might be regarded as specialised services and there is no exhaustive definition of optimised content, apps, or services. BEREC notes that the Internet and the nature of IAS will evolve over time. A service that is deemed to be a specialised service today may not necessarily qualify as a specialised service in the future due to the fact that the optimisation of the service may not be objectively necessary, as the general standard of IAS may have improved. On the other hand, additional services might emerge that need to be optimised, even as the standard of IAS improves. Given that we do not know what specialised services may emerge in the future. NRAs should assess whether a service qualifies as a specialised service on a case-by-case basis. For now, specialised services are considered to be VoLTE, IPTV, real-time health services (i.e. remote surgery).

Conclusions

Common EU rules on net neutrality through regulation (as opposed to directive) should ensure that the provisions applied across Europe are the same. However, the Regulation and the BEREC guidelines give broad discretion for NRAs' because a number of cases are evaluated on case-by-case proceedings. Inconsistent NRAs' decisions can potentially lead to diverse practice in separate EU countries thus circumventing the creation of Digital Single Market.

Despite the fact that the regulation promotes "open Internet" it does not ensure absolute openness or neutrality. The regulation provides a number of exceptions and allows invasive traffic management measures during exceptional (but not rare) situations (congestions etc.). Therefore, it might be said that "open Internet" is ensured partially but not in full. However, this should not be regarded as a disadvantage of the regulation. Traffic management practices should be appreciated not from individualistic point of view, but rather from utilitarian perspective. From this perspective the regulation properly ensures that access to open and fast Internet connection is available to a highest number of people. Absolute net neutrality should not be pursued.

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THE IMPACT OF ETHIOPIA'S ANTI-TERRORISM LAW ON FREEDOM OF EXPRESSION

Husen Ahmed Tura¹

Abstract

This article analyses the impact of the Ethiopia's anti-terrorism law on the enjoyment of the right to freedom of expression and information. Ethiopia recognized the right to freedom of expression and information by ratifying the International Covenant on Civil and Political Rights (ICCPR) in 1993. It also recognizes the right to freedom of expression and other scores of civil and political rights under its constitution of 1995. However, the anti-terrorism law of 2009 contains overly broad and vague definition of terrorism that is susceptible to misinterpretation and misapplication, which adversely affect the legitimate exercise of the right to freedom of expression and political opposition. In practice, the government of Ethiopia has used and abused the anti-terrorism law to stifle dissent and crackdown on members of legal opposition parties, human rights activists, journalists, bloggers and members of the civil society who criticized the ruling party and some of its policies and practices. Although a proper application of anti-terrorism law is necessary to counter threats of 'terrorism', the Ethiopian case demonstrates that the law can be misused as a tool of political repression. Ethiopia should revise the existing anti-terrorism law and stop using it to stifle dissent and should respect the legitimate exercise of the right to freedom of expression and information.

Keywords: anti-terrorism law, freedom of expression, stifling dissent, Ethiopia

1. Introduction

The acts of 'terrorism' pose serious threats to the enjoyment of human rights and undermine peace and national security.² Following the terrorist attacks of September 11, 2001 in the United States, the UN Security Council passed Resolutions, which urge the states around the world to adopt legislative measures to counter terrorism.³ Anti-terrorism laws and practices, as a principle, are compatible with the goals of human rights protection. To this end, the UN states that '... effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing'.⁴ While anti-terrorism measures are crucial in a democratic society to ensure the safety and security of citizens, many repressive governments use and abuse their anti-terrorism laws to restrict and punish the legitimate exercise of human rights including the right to freedom of expression and information.

Ethiopia adopted the anti-terrorism proclamation⁵ in 2009 to counter threats of terrorism, which may not be addressed by ordinary criminal law.⁶ However, this law is criticized for its negative impact on several civil and political rights including the right to presumption of innocence, the right to fair and public trial, the right to speech and expression, the right to due processes of law, and the right not to be subjected to cruel treatment of accused

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² UN, 'Human Rights, Terrorism and Counter-terrorism' (Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 32) <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> accessed 19 April 2017.

³ United Nations (UN) Security Council Resolutions 1368, 1373 and 1377 of 2001, 1390 of 2002, 1455 and 1456 of 2003 and 1526 of 2004.

⁴ 'United Nations Global Counter-Terrorism Strategy' (8 September 2006) UN Doc A/RES/60/288. <https://unispal.un.org/DPA/DPR/unispal.nsf/0/1EF6E139F9F1786F852571FE0069FF46>.

⁵ FDRE, Anti-Terrorism Proclamation No. 652/2009.

⁶ *ibid*, preamble. WD Kassa, 'Examining some of the Raisons D'être for the Ethiopian Anti-Terrorism Law', (2013) 7(1) Mizan Law Review, 49.

persons.⁷ In particular, it has been criticized as overly repressive of the right to freedom of expression and information, which is guaranteed under the Federal Democratic Republic of Ethiopia (FDRE) Constitution of 1995 and the ICCPR, to which Ethiopia has been a state party to since June 1993. Studies show that the government of Ethiopia is using the anti-terrorism law to crackdown on legitimate opposition and criticisms against the ruling party under the guise of countering terrorism.⁸ The Oakland Institute (OI) finds that ‘the government of Ethiopia routinely uses its vague and overly broad anti-terrorism law to stifle freedom of expression and political opposition.’⁹ So far, the government has charged with and convicted several members of legal opposition parties, civil society leaders, journalists and bloggers under the anti-terrorism law.¹⁰

This article critically examines the impact of the Ethiopia’s anti-terrorism law on freedom of expression and the right to information. It analyzes definitions of ‘terrorist acts’ and ‘encouragement of terrorism’ contained in the anti-terrorism law and assesses their misapplication to prosecute journalists, leaders and members of legal opposition parties and bloggers who allegedly criticized the government and its policies.

2. Freedom of Expression and its limits under the Ethiopian Constitution

The Ethiopian Constitution of 1995 enshrines the right to opinion, expression and information under article 29 as follows.

1. Everyone has the right to hold opinions without interference.
2. Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.
3. Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:
 - a. Prohibition of any form of censorship.
 - b. Access to information of public interest.

The FDRE Constitution prohibits censorship and guarantees access to information of public interest.¹¹ It states that ‘the press shall, as an institution enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.’¹² It gives emphasis to the significance of media ‘financed by or under the control of the State ... to entertain diversity in the expression of opinions.’¹³

Furthermore, the Constitution stipulates that ‘these rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed.’¹⁴ Nevertheless, ‘any propaganda for war’ and ‘the public expression of opinion intended

⁷ Dawit Endeshaw, ‘Anti- Terrorism Legislation and Its Impact on Basic Human Rights: The Case of Ethiopia’ (LL.B Thesis, Addis Ababa University, 2014) v.

⁸ Mesenbet A. Tadege, ‘Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges’ (2016) 5 UB Journal of Media Law & Ethics, 69. Amnesty International, ‘Dismantling Dissent Intensified Crackdown On Free Speech In Ethiopia’, (16 December 2011) <http://www.amnestyusa.org/research/reports/ethiopia-dismantling-dissent-intensified-crackdown-on-free-speech-in-ethiopia> assessed 15 May 2017. Committee to Protect Journalists, ‘Anti-terrorism legislation further restricts Ethiopian press’ (23 July 2009) <<https://cpj.org/2009/07/anti-terrorism-legislation-further-restricts-ethio.php>> assessed 15 May 2017. Human Rights Watch, ‘An Analysis of Ethiopia’s Draft Anti-Terrorism Law’, (30 June 2009) <<https://www.hrw.org/news/2009/06/30/analysis-ethiopias-draft-anti-terrorism-law>> assessed 15 May 2017.

⁹ The Oakland Institute (OI) ‘Ethiopia’s Anti-Terrorism Law: A Tool to Stifle Dissent’ (The Oakland Institute and Environmental Defender Law Center 2015) 5. <<https://www.oaklandinstitute.org/ethiopias-anti-terrorism-law-tool-stifle-dissent/>>

¹⁰ Human Rights Watch, ‘Journalism Not a Crime: Violations of Media Freedoms in Ethiopia’ (21 January 2015) <https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia> assessed 15 May 2017.

¹¹ *The Constitution of the Federal Democratic Republic of Ethiopia*, Proclamation No 1/1995. *Fed.Neg.Gaz* Year 1. No 1 (1995) (hereafter FDRE Constitution), art 29(3) (‘a’ and ‘b’).

¹² *ibid.* art. 29(4).

¹³ *ibid.* art. 29 (5).

¹⁴ *ibid.* art. 29 (6).

to injure human dignity' are prohibited under the Constitution.¹⁵ Besides, 'legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals.'¹⁶

Some rights such as the right to privacy and reputation are classified as the fundamental human rights while the right to freedom of expression is considered as a democratic right under the FDRE Constitution.¹⁷ To this end, article 10 of the Constitution stipulates that 'human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable' while 'democratic rights of citizens shall be respected'. This seems to imply that 'human rights and freedoms are given greater protection than democratic rights, which are not 'inviolable and inalienable' but must be 'respected' by the government.¹⁸ Accordingly, where a conflict arises between a fundamental human right and a democratic right, the former prevails over the latter. In other words, where 'unfettered expression of ideas threatens one of the fundamental human rights and freedoms, the constitutional design lends credence to the conclusion that the latter should be preferred.'¹⁹ Nevertheless, there is no a legal indication that 'the reputation of politicians and government' could be accorded a better protection than the right to freedom of expression and information. Freedom of expression must prevail over protection of politicians as 'political criticism has greater value than the reputation of political figures.'²⁰ In fact, article 29 of the Constitution does not specify as to whether the honor and reputation of politicians should prevail over the right to freedom of expression.

The scope of the right to freedom of expression and its legal limitations in Ethiopia must also conform to the international treaties ratified by the country.²¹ Ethiopia is a state party to the ICCPR²², which under article 19 imposes legal obligations on states to respect and protect freedom of expression and the right to information.²³ Governments may impose some restrictions or limitations on the right to freedom of expression as per article 19(3) of the ICCPR 'if such restrictions are provided by law and are necessary: (a) for respect of the rights or reputations of others. or (b) for the protection of national security, public order, public health, or morals.' The UN Human Rights Committee, in its General Comment No. 34 on the right to freedom of expression, argued that the limitations provided under article 19(3) 'should be interpreted narrowly and that the restrictions may not put in jeopardy the right itself.'²⁴

3. The Broad and Vague Definition of Terrorism Violates Freedom of Expression

Despite the constitutional recognition of the right to freedom expression in Ethiopia, the anti-terrorism law of 2009 contains provisions that may adversely affect the enjoyment of this right.²⁵ The Oakland Institute finds that 'Ethiopia's anti-terrorism law is premised on a very broad and vague definition of terrorist activity, which permits the government to repress internationally protected freedoms and to crack down on political dissent, including peaceful political demonstrations and public criticisms of government policy'.²⁶ The law also authorizes the government to

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid* art 10(1), (2)).

¹⁸ G Timothewos, 'Freedom of Expression in Ethiopia: The Jurisprudential Dearth' (2010) 4(2) *Mizan Law Review*, 208.

¹⁹ *ibid* 109, 210.

²⁰ R Gezahegn, 'Political Criticism and Defamatory Speech: Ethiopian Law in Comparative Context' https://www.academia.edu/14336768/Political_Criticism_and_Defamatory_Speech_Ethiopian_Law_in_Comparative_Context. accessed 20 April 2017.

²¹ FDRE Constitution, 1995, art 9 (4).

²² International Covenant on Civil and Political Rights (ICCPR) adopted December 16, entered into force March 23, 1976. Ethiopia ratified the ICCPR in 1993.

²³ ICCPR, article 19 stipulates, 'Everyone shall have the right to hold opinions without interference. ... Everyone shall have the right to freedom of expression. this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

²⁴ UN Human Rights Committee, General Comment No. 34, 'Article 19, Freedoms of Opinion and Expression', CCPR/C/GC/34 (2011).

²⁵ W D Kassa, 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments' (2014) 8(2) *Mizan Law Review*, 371.

²⁶ The Oakland Institute (n 9).

impose 'long-term imprisonment and even the death penalty for crimes that bear no resemblance, under any credible definition, to terrorism.'²⁷

Article 3 of Ethiopia's anti-terrorism law defines 'terrorist acts' as follows:

Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional, economic, or social institutions of the country:

1. causes a person's death or serious bodily injury.
2. creates serious risk to the safety or health of the public or section of the public.
3. commits kidnapping or hostage taking.
4. causes serious damage to property.
5. causes damage to natural resource, environment historical or cultural heritages.
6. endangers, seizes or puts under control, cause serious interference or disruption of any public service.
or
7. threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article.

is punishable with rigorous imprisonment from 15 years to life or with death.

The definition as is vague and very broad, which can be misinterpreted and misapplied by the government to punish a legitimate exercise of the right to freedom of expression and acts of peaceful political dissent.

A non-violent march that blocked traffic could qualify as a terrorist act. [...] An individual need only "threaten to commit" any of the relevant acts, including property crimes and "disruption of public service," to be prosecuted as a terrorist. The definition of terrorist acts thus potentially encompasses many legitimate acts of protest and political dissent, or minor crimes at most. [...] the anti-terrorism law may therefore stifle legitimate political debate about issues of great concern and importance to Ethiopian citizens. [...] the definition of "acts of terrorism" could include acts of political dissent. Therefore, a group of two or more individuals who engage in peaceful political protest could be deemed a "terrorist organization," and membership in the group deemed a crime.²⁸

Another provision of the Ethiopia's anti-terrorism law that has attracted the attention of many human rights groups including the Article 19, the Human Rights Watch, the Amnesty International and some researchers is the definition of 'encouragement of terrorism'.²⁹ Article 6 of the Ethiopia's anti-terrorism law is 'likely to result in the criminalization of perfectly lawful statements and chilling of much political speech and debate.'³⁰

Article 6 of the law defines 'encouragement of terrorism' as follows:

Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.³¹

This provision employs broad and vague terminologies to define the 'encouragement of terrorism'. It suffers from subjectivity as any publication could be regarded as 'encouragement of terrorism' depending on the perception of 'some or all members of the public to whom it is published'. For instance, an author or a publisher of an information without having an intention to encourage 'terrorist acts' or was not negligent enough as to the possible effects of the message on the perceptions of the public could still be found guilty of the crime if some portions of the public misinterpret the message be encouragement of terrorism.³² Worst of all, this definition does not make a distinction

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ Kassa (n 25) 372.

³⁰ Gezahegn (n 20).

³¹ FDRE Anti-Terrorism Proclamation, 2009, art 6.

³² Gezahegn (n 20).

between acts of peaceful criticism and incitement to violence and/or violent opposition.³³ Thus, government might use Article 6 of the anti-terrorism law to prosecute journalists, bloggers, researchers, members of legal opposition parties for publishing critical articles regarding opposition groups or rebels who are proscribed as ‘terrorists organizations’ such as the Ginbot 7, the Oromo Liberation Front (OLF) or the Ogaden National Liberation Front (ONLF) or for reporting grassroots resistances against the government such as the #OromoProtests³⁴ or the #Amhararesistance but without having an intention to encourage their political motives.

For example, 24 defendants in the *Federal Prosecutor v. Andualem Arage et al.* faced criminal prosecution under article 6 of the Anti-Terrorism law for encouraging terrorism.³⁵ Yonatan Tesfaye Regassa, the former spokesperson of the Blue Party, detained since December 2015 for criticizing the government on his Facebook page and charged with ‘incitement of terrorism’ in May 2016.³⁶

Other terms of the definition of the crime of ‘encouragement of terrorism’, which may have possibility of imposing ‘a chilling effect through silencing even legitimate criticism of government’³⁷ are ‘direct or indirect encouragement or other inducement’. This phrase is too much susceptible to abuse of interpretation because of its vagueness. It does not define what ‘direct’ or ‘indirect’ ‘encouragement of terrorism’ means. These imprecise legal terminologies may affect a journalist or any other writer who may be interested in analyzing activities of political organizations proscribed by the government of Ethiopia as ‘terrorist groups’. Any minor political resistance but a legitimate exercise of the right to freedom of expression can be interpreted as ‘encouragement of terrorism’. This in turn ‘undercuts free political debate and criticism of government.’³⁸ Nevertheless, the international human rights law requires that the law may put restrictions on the freedom of expression only when it is necessary to protect certain legitimate aims, and those restrictions must be provided by the law and proportionate.³⁹

Regarding the impacts of the flawed definition of terrorism in Ethiopia’s Anti-terrorism law Bekele concludes that:

With its broad definition of terrorism and a questionable mechanism of proscribing terrorist organizations, the anti-terrorism law of Ethiopia goes beyond the immediate effect of violating human rights as it also closed down the political space that for a short while existed in the country before the 2005 elections.⁴⁰

4. The Misuse of the Ethiopia’s Anti-Terrorism Law to Stifle Dissent

The Government of Ethiopia uses and abuses the Anti-terrorism law to stifle political dissent in several cases, which affect journalists, human rights activists, members of civil society, members and leaders of legal opposition political parties as well as bloggers.⁴¹

³³ Amnesty International ‘Dismantling Dissent’ (n 7).

³⁴ The Oromo people protested the farmland grabbing and their political and economic discrimination and marginalization since November 2015. The government declared state of emergency for six months on 2 October 2016 that is currently renewed for another four months. Reports show that the government’s security forces have killed hundreds of peaceful protesters, mainly high school and university students. and detained and prosecuted tens of thousands of protesters under the Anti-terrorism law of 2009. See Husen Ahmed Tura, ‘Linking Land Rights and the Right to Adequate food in Ethiopia: Normative and Implementation Gaps’ (2017) 35(2) Nordic Journal of Human Rights 85-105.

³⁵ Ibid.

³⁶ Amnesty International, ‘Ethiopia: Release opposition politician held for Facebook posts’ (Amnesty International, 6 May 2016) <https://www.amnesty.org/en/latest/news/2016/05/ethiopia-release-opposition-politician-held-for-facebook-posts/>

³⁷ Gezahegn (n 20).

³⁸ Ibid.

³⁹ Jo M. Pasqualucci, ‘Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights’ (2006) 39 Vanderbilt Journal of Transnational Law 379. T Mendell, ‘Background Paper for Meetings by the UN Special Rapporteur on Freedom of Opinion and Expression’, (2010) Center for Law and Democracy, 9-20.

⁴⁰ Melhik Abebe Bekele, ‘Counter-terrorism and the suppression of political pluralism: An examination of the Anti-Terrorism Proclamation of Ethiopia’ (LLM Thesis, University of Pretoria, 29 October 2010).

⁴¹ The Oakland Institute (n 9).

Journalism and Media Freedom



The government of Ethiopia has increased its repression of independent media, mainly through the criminal prosecution of journalists under the anti-terrorism law.⁴² Reports show that, as of 21 January 2015 not less than 19 journalists were arrested while other 60 were forced into exile to other countries since 2010 due to a fear of the criminal prosecution and persecution in relation to their publications, which the government may consider as political criticism.⁴³ In addition to 'politically motivated' criminal prosecutions, 'journalists suffer from threats, intimidation and physical abuses.'⁴⁴ Courts usually convict journalists prosecuted under the anti-terrorism law,⁴⁵ which adversely affects not only the constitutional right to freedom of expression but also journalism and journalists' access to justice. The government also recently prosecuted independent Medias run by the Ethiopian diaspora such as the Oromia Media Network (OMN) and the Ethiopian Satellite Television (ESAT) with the crime of terrorism for covering the #OromoProtests and the #AmharaResistance of 2016 in Ethiopia.⁴⁶

The Oromo People



The repressive strategies of the government of Ethiopia including the use of law as an instrument of oppression and persecution excessively target the Oromo people, who have been facing political and economic

⁴² Human Rights Watch, 'Journalism Not a Crime: Violations of Media Freedoms in Ethiopia' (2015) <<https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia>> assessed 19 April 2017.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Mahlet Fasil, 'Ethiopia prosecutors bring multiple criminal charges against opposition leader Dr. Merera Gudina, two others' Addis Standard (Addis Ababa, 23 February 2017).

exclusion for more than a century since the formation of the modern Ethiopia in the second half of the 19th century.⁴⁷ The report of Amnesty International published in 2014 titled 'Because I Am Oromo' unveils the plight of the Oromo people and documents recent systematic and gross violations of human rights committed against the Oromo people by the current regime of Ethiopia.⁴⁸

The Amnesty International finds that:

Between 2011 and 2014, at least 5000 Oromos have been arrested based on their actual or suspected peaceful opposition to the government. These include thousands of peaceful protestors and hundreds of opposition political party members. The government anticipates a high level of opposition in Oromia, and signs of dissent are sought out and regularly, sometimes pre-emptively, suppressed. In numerous cases, actual or suspected dissenters have been detained without charge or trial, killed by security services during protests, arrests and in detention.⁴⁹

The government has utilized the Anti-terrorism law to prosecute the Oromo students, farmers, civil servants, scholars, journalists and members of legal opposition parties since it came into power in 1991 in general and in relation to the recent Oromo protests in particular.⁵⁰ The Human Rights Watch summarizes the excessive use of force against the Oromo protesters, who resisted the farmland grabs in Oromia Regional State in 2016, as follows.

State security forces in Ethiopia have used excessive and lethal force against largely peaceful protests that have swept through Oromia, the country's largest region, since November 2015. Over 400 people are estimated to have been killed, thousands injured, tens of thousands arrested, and hundreds, likely more, have been victims of enforced disappearances.⁵¹

⁴⁷ The Oromo people are the largest ethnic group in Ethiopia and the Horn of Africa currently estimated to more than 40 million. See Mohammed Hassen, 'Conquest, Tyranny, and Ethnocide against the Oromo: A Historical Assessment of Human Rights Conditions in Ethiopia, ca. 1880s–2002' (2007) 9(3) *Northeast African Studies*, 15.

⁴⁸ 'Ethiopia: 'Because I Am Oromo': Sweeping Repression in the Oromia Region of Ethiopia' (Amnesty International, 28 October 2014) <https://www.amnesty.org/en/documents/afr25/006/2014/en/>

⁴⁹ *ibid.*

⁵⁰ Farmland grabbing and the longstanding political and economic marginalization of the Oromo people triggered the Oromo protests since November 2015. The government security agents are accused for using excessive force against largely peaceful protesters. Allegedly more than 1000 (the governments figure is 669) protesters have been killed. See Human Rights Watch, 'Such a Brutal Crackdown' Killings and Arrests in Response to Ethiopia's Oromo Protests' (*Human Rights Watch*, 16 June 2016). <https://www.hrw.org/report/2016/06/16/such-brutal-crackdown/killings-and-arrests-response-ethiopias-oromo-protests>, Selam Solomon, 'Ethiopia's Anti-terrorism Law: Security or Silencing Dissent?' (Voice of America 31 May 2016) <http://www.voanews.com/a/ethiopia-anti-terrorism-law-security-silencing-dissent/3356633.html>.

⁵¹ Human Rights Watch, 'Such a Brutal Crackdown' Killings and Arrests in Response to Ethiopia's Oromo Protests' (*Human Rights Watch*, 16 June 2016). <https://www.hrw.org/report/2016/06/16/such-brutal-crackdown/killings-and-arrests-response-ethiopias-oromo-protests>.

Prominent political leaders of the Oromo Federalist Congress, a legal opposition party representing the Oromo people in Ethiopia, including Mr. Bekele Gerba, Dr. Merera Gudina, Gurmessa Ayano, and other thousands of peaceful protesters have been arrested and faced terrorism charges since December 2015.⁵²



Bekele Gerba is a former English professor at Addis Ababa University and a prominent figure in the Oromo legal opposition parties. He was the deputy chairperson of the Oromo Federalist Democratic Movement when he was sentenced to 8 years in prison with Olbana Lelisa of the Oromo People's Congress party who was sentenced to 13 years on December 11, 2012. Mr. Gerba's sentence was reduced to three years upon appeal.⁵³ The Government arrested him again when he was working as deputy chairperson of the Oromo Federalist Congress (OFC) on December 23, 2015 following his statements against the proposed government's plan for farmland grab in Oromia, which led to deadly protests throughout Oromia in 2016. Mr. Gerba was charged under the Anti-Terrorist Proclamation as he was accused of belonging to 'the proscribed Oromo Liberation Front (OLF), a charge that is regularly used to silence ethnic Oromos who are critical of the government. 'While he was originally taken to the notorious Maekalawi prison, in April 2016 he was transferred to Qilinto prison. As a human rights activist, Bekele has been subject to repeated threats, intimidation, periods of incommunicado detention as well as torture and ill treatment by government-backed military forces'.⁵⁴

Twenty (20) Oromo students of the Addis Ababa University criminally charged for peacefully demonstrating in front of the US Embassy in Addis Ababa on 8 March 2016 and exercising their right to freedom of expression by saying:

"Schools are Knowledge Camps, not Military Camps", "Stop the Genocide Against the Oromo People", "The Government should take Responsibility for those Killed", "Stop the Killings and Evictions", "The Government Should Withdraw its Military from Oromia Region", "The Ethiopian Defense Force is terrorizing the Oromo People", "Stop giving Lands to Investors while Citizens are Starved", "The Government of America Should be aware of Ethiopia's Pseudo Democracy".⁵⁵

The criminal prosecution of the peaceful student protestors clearly violates article 29 and 31 of the Ethiopian constitution, which explicitly stipulates the right to freedom of expression and the right to peaceful demonstrations respectively.

⁵² Tura (n 35).

⁵³ Bekele Gerba and Olbana Lelisa were arrested after meeting with Amnesty International delegates. see Amnesty International, 'Ethiopian opposition leaders detained after meeting with Amnesty International' (Press Release, 31 August 2011). <https://www.amnesty.org/en/press-releases/2011/08/ethiopian-opposition-leaders-detained-after-meeting-amnesty-international-2/>

⁵⁴ 'Bekele Gerba' Tom Lantos Human Rights Commission US Congress <<https://humanrightscommission.house.gov/defending-freedom-project/prisoners-by-country/Ethiopia/Bekele%20Gerba>>

⁵⁵ Federal Public Prosecutor v. Soressa Deme Tolera *et al.* Federal First Instance Court, Menagesha Criminal Bench Addis Ababa G/J/B/P/P//F/No. 01716/08 (16 March 2016). <http://ehrp.org/full-charge-on-aau-students-charged-for-protest-infront-of-us-embassy-addis/>

Bloggers

The Ethiopia also applied the anti-terrorism law to charge bloggers who wrote papers criticizing the government for restricting the constitutional right to freedom of expression and information. The Zone 9 bloggers⁵⁶ criminally prosecuted under the anti-terrorism law in 2014.⁵⁷ Although the main reason for their arrest and prosecution was their critical articles appeared on their blog (Zone 9), the government accused them of working with the 'terrorist groups' and foreign organizations such as the Tactical Technology Collective, which provided them with digital security training to help them protect their online privacy.⁵⁸

The arrest and prosecutions of the Zone 9 bloggers has had a wider chilling effect on freedom of expression in the country, elevating the level of fear among bloggers and online activists who increasingly fear posting critical commentary on Facebook or other social media platforms.⁵⁹

Reports show that the right to freedom of expression itself becomes the main evidence of the government to convict journalists, human rights activists and bloggers.⁶⁰ For example, journalists were criminally prosecuted in relation to their 'diverse political opinions' which 'criticized the government', while acting 'peacefully and legitimately as journalists or members of legal opposition parties.'⁶¹

Newspapers and website articles, communication with news outlets known to be critical of the government, writing poems calling for political change, writing articles about the uprisings in the Middle East and their implication for the Ethiopian politics were presented as evidence against accused journalists and human rights activists.⁶²

Twenty-one articles from website 'Ethiopian Review' were adduced as evidence in the cases against journalists Reyot Alemu, Woubshet Taye, Zerihun Gebre-Egziabher, Hirut Kifle and Elias Kifle.⁶³ Similarly, the government produced tracts, poems and some of the papers written by defendants entitled 'Oromo's struggle against slavery' and 'What can we learn from the Egyptian civil disobedience?' against 69 members of the Oromo Federalist Democratic Movement (OFDM) and the Oromo People's Congress (OPC) as evidence to prove its criminal charges.⁶⁴ The government's prosecutors brought the clips of interviews and public speech (including presentation of Mr. Bekele Gerba at the Oromo Studies Association's annual conference of 2015 as keynote speaker), as an evidence of crime of terrorism.⁶⁵ All of the above instances show that the Ethiopian government uses and abuses its anti-terrorism law to criminalize political criticism and nonviolent opposition.

Felix Horne observes that:

The Ethiopian government is sending a clear message when it charges peaceful protesters and opposition politicians like Bekele Gerba with terrorism. The message is that no dissent is tolerated, whether through social media, the electoral system, or peaceful assembly.⁶⁶

⁵⁶ A group of six young activists who wrote critical articles on the violation of human rights including the freedom of expression in Ethiopia. see 'Zone 9 Bloggers: Ethiopia' (Freedom Now) <<http://www.freedom-now.org/campaign/zone-9-bloggers/>> assessed 19 April 2017.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ Human Rights Watch (n 42).

⁶⁰ Amnesty International (n 7).

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ 'News:Prosecutors Present Clips of Interview and a Public Speech as Evidence of Terrorism Charges against Bekele Gerba' Addis Standard (Addis Ababa, Addis Ababa, 17 February 2017) <http://addisstandard.com/news-prosecutors-present-clips-interview-public-speech-evidence-terrorism-charges-bekele-gerba/>

⁶⁶ Felix Horne, 'Dispatches: Using Courts to Crush Dissent in Ethiopia' (Human Rights Watch, 9 May 2016) <https://www.hrw.org/news/2016/05/09/dispatches-using-courts-crush-dissent-ethiopia>

5. Balancing Human Rights and Counter-terrorism Measures

Counter terrorism measures have posed serious threats to the human rights and the need to balance liberty and security draw the attention of many actors. The UN Security Council, in its Resolution 1456 of 2003, stipulates that 'states must ensure that any measures taken to combat terrorism must comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law.'⁶⁷

Hoffman contends that:

A "war on terrorism" waged without respect for the rule of law undermines the very values that it presumes to protect. We must restore the balance between liberty and security by reasserting the human rights framework, which provides for legitimate and effective efforts to respond to terrorist attacks.⁶⁸

As discussed in preceding sections, Ethiopia has committed itself to respect and protect the right to freedom of expression and information by ratifying the ICCPR and other relevant international human rights treaties. It has also expressly recognized the right to freedom of opinion and expression under article 29 of the FDRE Constitution. Therefore, it must balance its counter-terrorism measures with its obligations to respect and protect human rights.

6. Conclusions

Despite the constitutional recognition of human rights in general and the right to freedom of expression and information in particular in Ethiopia, the design and misapplication of the anti-terrorism law have posed serious threat to the legitimate exercise of those rights. The anti-terrorism law is designed in vague and overly broad terms, which paves the way for the government to stifle dissent and political opposition under the guise of protecting the national security.

The Ethiopia's mass arrests and prosecution of journalists, bloggers, civil society leaders as well as leaders and members of the legal opposition parties under the crime of 'encouraging terrorism' for their critical statements against the ruling party violates the right to freedom of expression and information. The law and practice also undermine the possibility of creating a vibrant, tolerant and democratic society in the country. Moreover, the abuse of this law to prosecute innocent persons adversely affects the purpose and process of countering actual 'terrorist acts'. Such practice can also erode the legitimacy of the government to protect the citizens' rights and its mandate to ensure the national security. Thus, besides its negative impacts on the media, academia and civil society, the misapplication of the Ethiopia's anti-terrorism law could be resulted in government's loss of political legitimacy and it undermines the future of the country's development.

Therefore, the government of Ethiopia should amend the anti-terrorism law in the light of its obligations to respect, protect and fulfil human rights in general and the right to freedom of expression in particular. Moreover, it must stop using the law to stifle a peaceful political dissent.

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JUDICIAL DISAGREEMENT ON TRIGGERING BREXIT: AN ANALYSIS OF THE MILLER CASE

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Abstract

The United Kingdom European Union membership referendum undoubtedly was the watershed moment of European politics of 2016 and Brexit will remain a defining event further on until its unclear conclusion. Since the beginning Brexit faced legal issues as the giving of notice to withdraw from the EU was challenged in the courts.

This paper examines the main legal argumentation behind the United Kingdom Supreme Court's judgment of 24 January 2017, popularly known as the *Miller* case. The Supreme Court with an eight judge majority decided that the notice of withdrawal from the European Union cannot be given by the executive government alone without the direction to do so made by legislation. However, three judges dissented from this judgment and produced their own dissenting opinions with arguments in favour of the Government. The purpose of this paper is to present the main arguments from both the majority and the dissenters to determine essential point of judicial disagreement in the *Miller* case.

Keywords: Brexit, Triggering Article 50, Miller Case, Royal Prerogative, Parliamentary Sovereignty, Dissenting Opinion.

Introduction

*"Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements"*²

- Article 50(1) of the Treaty on European Union

On the 23rd of June 2016 citizens of the United Kingdom voted in favour of leaving the European Union. United Kingdom's Government ministers announced that they would bring four decade long UK membership of the European Union to an end. However, the issue of constitutional requirements to initiate the process of leaving the European Union was raised by Gina Miller and Deir dos Santos against the Secretary of State for Exiting the European Union (hereinafter referred to as "the Secretary of State") in the Divisional Court of England and Wales. The particular issue was whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen. The Divisional Court, comprised of a three judge panel, unanimously ruled against the Secretary of State in a judgment given on the 3rd of November 2016³. Subjected to an appeal by the Secretary of State, the *Miller* case came before the Supreme Court of the United Kingdom, which laid down its final judgement on the 24th of January 2017⁴.

As it often goes with questions of high political and constitutional complexity, unanimity in collegiate courts is hard to achieve. The decision of the Supreme Court was no exception. It was reached by a divided court. Three judges: lords Reed, Carnwath and Hughes, opposed the majority of eight with three individual dissenting opinions (which in volume amounted to almost a second whole judgment). This testifies that the reasoning behind the Supreme Court's decision was not considered to be without flaw and controversy even by a group of its own

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² Consolidated version of the Treaty on European Union, 26 October 2012, 2012/C 326/01.

³ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

⁴ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

esteemed members. The sheer gravity and novelty of the questions raised in the *Miller* case require an analysis of the judgment. And the circumstance of the divided court enables an additional mode of research. This paper aims to provide the readership with a reconstruction of the essential argumentation of the judgment of 24 January 2017. The majority's reasoning will be set out against the opposing arguments provided by the dissenting judges. The analysis of legal argumentation will reveal the extent and the main points of the disagreement in the judge's panel.

1. Constitutional background and the main issue in *Miller*

"*The bedrock of the British constitution is ... the supremacy of the Crown in Parliament*"⁵

- Lord Thomas Bingham

In the *Miller* case the court was called upon to apply the constitutional law of the United Kingdom to determine whether the Crown has prerogative powers to give notice under Article 50 to trigger the process for withdrawal from the European Union. This issue touches upon the intricate balance between the constitutional principle of Parliamentary sovereignty and the scope of the Royal prerogative powers (also referred to as the Crown's prerogative).

Originally, sovereignty was concentrated in the Crown, subject to limitations which weren't clearly defined and which changed with practical exigencies. Accordingly, the Crown largely exercised all the powers of the state. However, over the centuries, those prerogative powers were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th century, the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the state, the legislature (the two Houses of Parliament), the executive (Ministers and the Government more generally) and the judiciary (the judges).

Thus these days the Royal prerogative encompasses the residue of powers left in the hands of the Crown and, which are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation. Lord Reid has described the Royal prerogative as a "*relic of a past age, not lost by disuse, but only available for a case not covered by statute*."⁶ Professor HWR Wade summarized the aspects of the Royal prerogative as follows: "[T]he residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot affect the rights of subjects), and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war."⁷

Nevertheless, as it is mentioned, prerogative powers are limited by the Parliament. An important aspect of the fundamental principle of Parliamentary sovereignty is that primary legislation is not subject to displacement by the Crown through the exercise of its prerogative powers⁸. The Crown has only those prerogative powers recognised by the common law and their exercise only produces legal effects within boundaries so recognized⁹. Outside those boundaries the Crown has no power to alter the law of the land, whether it is common law or contained in legislation.

⁵ *R (Jackson) v Attorney General* [2005] UKHL 56. [2006] 1 AC 262, at Para 9.

⁶ *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, at Para. 101.

⁷ Wade, W., Forsyth, C. *Administrative Law*, Oxford University Press, p. 13.

⁸ As Lord Parmoor explained in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, at p 575: "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject."

⁹ A classic statement of the position was given by Lord Parker of Waddington in *The Case of The Zamora* [1916] 2 AC 77, at Para 90: "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity."

This subordination of the Crown (i.e. the executive government) to law is the foundation of the rule of law in the United Kingdom. It has its roots well before the war between the Crown and Parliament in the seventeenth century. In the foundational *Case of Proclamations* (1610) Sir Edward Coke reported the considered view of himself and the senior judges of the time that: "*the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm <...> The King hath no prerogative, but that which the law of the land allows him*"¹⁰. This view, although controversial at the time, became decisively confirmed with the conclusion of the Glorious Revolution in 1688 and was entrenched in the first two parts of section 1 of the Bill of Rights¹¹.

Since the end of the 17th century the principle of Parliamentary sovereignty is well-established in the UK constitutional law. It means that the legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation. The leading authority of constitutional law Professor A.V. Dicey summarized that the Parliament has "*the right to make or unmake any law whatever. and further, that no person or body is recognised by the law ... as having a right to override or set aside the legislation of Parliament*".¹²

The only exception which allows for law other than that enacted by the Parliament to take precedence is when the Parliament has itself made provision to allow that to happen. The sole example of this is the European Communities Act 1972, which was enacted to ratify United Kingdom's membership in the European Economic Community. It authorizes a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. Nevertheless, the Parliament still remains sovereign and supreme, and has continuing power to remove the authority given to other law by earlier primary legislation. Thus the Parliament retains the power to repeal the European Communities Act 1972 if it wishes.

The question of balance between the constitutional principles of Parliamentary sovereignty and the Royal prerogative was the main issue in the *Miller* case. As Lord Hughes accurately summarized in his brief dissenting opinion, the issue centres on two very well understood constitutional rules, which point in completely opposite directions. The first rule derived from the principle of Parliamentary sovereignty and advocated by Mrs Miller, states that the executive government cannot change law made by Act of Parliament, nor the common law. Mrs Miller's case was that because there was an Act of Parliament (the European Communities Act 1972) to give effect to the United Kingdom's joining the (then) European Economic Community and to make European rules part of UK law, there has to be another Act of Parliament to authorize service of notice to leave. The second rule, derived from the Royal prerogative and adhered to by the government, states that the making and unmaking of treaties is a matter of foreign relations within the competence of the government. Thus prerogative power is said to include the right to withdraw from treaties which govern UK membership of the European Union (hereinafter also referred to as "the EU Treaties"). The government's case was that the European Communities Act 1972, which did indeed make European rules into laws of the United Kingdom, will simply cease to operate if the UK leaves. It agrees that a government cannot alter the law of the UK which statute has made. However, according to the government, the giving of a notice to leave the EU (and in due course leaving it) would not be altering the statute. The statute would simply cease to apply because there would no longer be rules under treaties to which the UK was a party. We can see that neither of the sides is contesting the opposing rule. Which side's argument is correct depends in the end on the true reading of the European Communities Act 1972.

¹⁰ *The Case of Proclamations* [1610] EWHC KB J22.

¹¹ Section 1, parts 1 and 2 of the Bill of Rights 1688 c.2 (1 Will and Mar Sess 2): „<...> the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall <...> the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of Sate is illegall”.

¹² Dicey, A. V. *An Introduction to the Law of the Constitution*, p. 38 of the 8th edition, 1915, the last edition by Dicey himself. and see chapter 1 generally.

2. The effect of European Communities Act and the triggering of Article 50

*"It may be there has never been a statute having such profound effects on so many of our daily lives"*¹³

- *John Laws LJ*

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From about 1960, the United Kingdom's government was in negotiations with the then member states of the European Economic Community (hereinafter also referred to as "EEC") with a view to joining the EEC and associated European organizations. These negotiations, following intense debates in both Houses of the Parliament, concluded on the 22nd of January 1972 with the signing of the Treaty of Accession which provided that the United Kingdom would become a member of the European Economic Community on the 1st of January 1973. As with most international treaties, the 1972 Accession Treaty was not binding unless and until it was formally ratified by the United Kingdom. And it was ratified by the enactment of the European Communities Act 1972 (hereinafter also referred to as "European Communities Act" and "1972 Act").

The long title of the 1972 Act described its purpose as "to make provision in connection with the enlargement of the European Communities to include the United Kingdom ...". As we shall see ahead, the interpretation European Communities Act was of central importance in the *Miller* case proceedings. That can be especially said about Section 2 of the 1972 Act which was headed "General Implementation of Treaties". Section 2(1) of the 1972 Act was in set in these terms: "*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly <...>*"¹⁴

Even though many statutes give effect to treaties by prescribing the content of domestic law in areas covered by them, the European Communities Act does it considerably more. It authorizes a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes.

Under the terms of European Communities Act, EU law takes effect as a part of the law of the United Kingdom in one of three ways. First, the EU Treaties themselves are directly applicable by virtue of section 2(1). Some provisions of those Treaties create rights (and duties) which are directly applicable in the sense that they are enforceable in UK courts. Secondly, where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the United Kingdom without the need for further domestic legislation (applied to Regulations). Thirdly, section 2(2) authorizes the implementation of EU law by delegated legislation (applied to Directives)¹⁵. Thus, EU law in EU Treaties and EU legislation will pass into UK law, granting certain rights to UK's residents, through the medium of 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties.

The Treaty of Lisbon introduced into the EU Treaties for the first time an express provision entitling a member state to withdraw from the European Union. It did this by inserting a new article 50 into the Treaty on European Union (further - "TEU"), which provides as follows:

"1. Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.

¹³ *Thoburn v. Sunderland City Council* [2003] QB 151 (DC) at 62.

¹⁴ European Communities Act 1972 (c. 68).

¹⁵ Section 2(2) of the 1972 Act provides that "Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision" (a) "for the purpose of implementing any Community [now EU] obligation of the United Kingdom" (which is defined as any obligation "created or arising by or under the Treaties") or "enabling any rights ... enjoyed ... by the United Kingdom under or by virtue of the Treaties to be exercised", and (b) for ancillary purposes, including "the operation from time to time of subsection (1)".

2. *A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal <...>*
3. *The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period. <...>*¹⁶

Taking into account the provisions set out in article 50, the *Miller* case proceeded under the assumption that the notice under article 50(2) (hereinafter also referred to as “Notice”) cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn. It follows from this that once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the European Union and a party to the EU Treaties.

Lord Pannick, representing Mrs Miller, described the giving of Notice by drawing the analogy of a trigger being pulled: “<...> it is the giving of the notice which triggers the legal effects under article 50(3). Those effects are that once notification is given, [t]he Treaties shall cease to apply to the state in question’, from the date of a withdrawal agreement, or – if no such agreement is reached – at least within two years from notification, unless an extension of time is unanimously agreed by the European Council and the member states concerned. Notification is ... the pulling of a trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply”. In particular meaning that some of the legal rights which the applicants enjoy under EU law, such as, for instance, the rights of UK citizens to the benefit of employment protection, to equal treatment, and to the protection of EU competition law, and the right of non-residents to the benefit of the “four freedoms” (free movement of people, goods and capital, and freedom to provide services), would come to an end irrespectively of the withdrawal negotiations. That would mean that the giving of Notice would pre-empt the decision of Parliament on whatever legislation it would be planning or willing to enact to address the consequences of the withdrawal¹⁷. It would conclude to an alteration of law by ministerial action, without prior legislation, which is not in accordance with constitutional requirements of the United Kingdom.

3. The majority’s judgment: executive action cannot alter sources of law

*“We cannot accept that a major change in UK constitutional arrangements can be achieved by ministers alone”*¹⁸

The majority in its judgment accepted the proposition that the scope of the rights which are incorporated into domestic law through section 2 of the 1972 Act varies with the United Kingdom’s obligations from time to time under the EU Treaties. However, the majority noted that this proposition is also limited in nature. Thus, the provisions of new EU Treaties are not automatically brought into domestic law through section 2: only once they have been statutorily added to “the Treaties” and “the EU Treaties” in section 1(2) can section 2 give effect to new EU Treaties. And section 2 can only apply to those rights and remedies which are capable of being “given legal effect or used” or “enjoyed” in the United Kingdom.

It was also accepted that Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law after the United Kingdom had ceased to be bound by the EU Treaties.

¹⁶ Consolidated version of the Treaty on European Union, 26 October 2012, 2012/C 326/01.

¹⁷ Such is the purpose of the Great Repeal Bill. For more: K M Hayne, ‘The “Great Repeal Bill”’, U.K. Const. L. Blog (12th Apr 2017) (available at <https://ukconstitutionallaw.org/>).

¹⁸ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at Para 82.

However, while acknowledging the force of Lord Reed's powerful judgment, the majority did not accept that it follows from this that the 1972 Act either contemplates or accommodates the abrogation of EU law upon the United Kingdom's withdrawal from the EU Treaties by prerogative act without prior Parliamentary authorization. On the contrary, by the 1972 Act, Parliament endorsed and gave effect to the United Kingdom's membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties.

In short, the fact that EU law will no longer be part of UK domestic law if the United Kingdom withdraws from the EU Treaties does not mean that Parliament contemplated or intended that ministers could cause the United Kingdom to withdraw from the EU Treaties without prior Parliamentary approval. There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union. The former involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional body which effects a fundamental change in the constitutional arrangements of the United Kingdom.

One of the most fundamental functions of the constitution of any state is to identify the sources of its law. And the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning. Upon the United Kingdom's withdrawal from the European Union, EU law will cease to be a source of domestic law for the future (even if the Great Repeal Bill provides that some legal rules derived from it should remain in force or continue to apply to accrued rights and liabilities), decisions of the Court of Justice will (again depending on the precise terms of the Great Repeal Bill) be of no more than persuasive authority, and there will be no further references to that court from UK courts. Even those legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.

Accordingly, the main difficulty with the Secretary of State's argument is that it does not answer the objection based on the constitutional implications of withdrawal from the EU. Withdrawal is fundamentally different from variations in the content of EU law arising from further EU Treaties or legislation. A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, if Notice is given, this change will occur irrespective of whether Parliament repeals the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.

The Secretary of State (and the dissenting judges) sought to counter these points with the argument that the 1972 Act (as amended from time to time) effectively incorporates the EU Treaties, and that the applicants cannot point to any provision in the Act which states that the prerogative powers in relation to those treaties are to be abrogated. Given that there is nothing in the 1972 Act which expressly or by necessary implication abrogated ministers' prerogative powers to withdraw from the Treaties to which it applied, it followed that the prerogative to withdraw from the EU Treaties was not precluded by the 1972 Act. This conclusion was based on an excerpt from *De Keyser's Royal Hotel* case¹⁹ which suggested that prerogative powers should not be treated as abrogated unless a statute expressly, or by necessary implication, provided for their abrogation. It was also relied upon the *Rees-Mogg* case²⁰, in which the Court of Appeal held that ministers could ratify a protocol to the TEU without Parliamentary

¹⁹ "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject." In *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

²⁰ *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Rees-Mogg* [1994] QB 552.

approval. In the course of his reasons for rejecting an argument based on the proposition that prerogative powers could not be used to alter the law, Lloyd LJ appears to have concluded that ministers' prerogative powers exist generally in relation to the EU Treaties, apparently on the basis that a prerogative power can be fettered by statute only in express terms.

However, as explained above, the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form. It follows that, rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, unless that Act positively created such a power in relation to those Treaties, it does not exist. And, once one rejects the contention that section 2 accommodates a ministerial power to withdraw from the EU Treaties, it is plain that the 1972 Act did not create such a power of withdrawal, as the Secretary of State properly accepts.

The majority agreed that it would have been possible to Parliament to provide expressly that the constitutional arrangements and the EU rights introduced by the 1972 Act should themselves only prevail from time to time and for so long as the UK government did not decide otherwise, and in particular did not decide to withdraw from the EU Treaties. But there is no basis to accept that the 1972 Act did so provide. As Lord Hoffmann explained in *Simms*, "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost", and so "[f]undamental rights cannot be overridden by general ... words" in a statute, "because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process"²¹. Had the 1972 Act expressly spelled out that ministers would be free to withdraw the United Kingdom from the EU Treaties, the implications of what Parliament was being asked to endorse would have been clear, and the courts would have so decided. But taking the legislation as it is posited, it is unacceptable that, in Part I of the 1972 Act, Parliament consciously provided the ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.

4. Lord Reed's dissent and the conditional nature of the European Communities Act

*"The 1972 Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU"*²²

Lord Reed

Out of the three dissenters Lord Reed produced the most extensive argument against the majority's judgment. While acknowledging the importance of the constitutional principle of Parliamentary sovereignty and its supremacy over domestic law, Lord Reed asserted that the principle does not require that Parliament must enact an Act of Parliament before UK can leave the EU. That is because the effect which Parliament has given to EU law in UK domestic law, under the European Communities Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU. The 1972 Act does not limit the Government's actions in respect of the UK's membership of the EU neither expressly, nor by implication. It does not, therefore, affect the Crown's exercise of prerogative powers in respect of the UK membership. Further, since the effect of EU law in the UK is entirely dependent on the 1972 Act, no alteration in fundamental rule governing the recognition of sources of law has resulted from membership of the EU, or will result from notification under article 50. It follows that Ministers are entitled to give notification under article 50, in the exercise of prerogative powers, without requiring authorization by a further Act of Parliament.

²¹ *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131.

²² *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at Para 177.

The key to Lord Reed's argument lies in the detailed textualist interpretation of the Section 2(1) of the European Communities Act, and in the exposition of its essential structure: "*All such [members of a specified category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement].*"

Lord Reed noted two features of such rules as stated above. First, the rule is conditional in nature: the application of the requirement which it imposes depends on there being members of the specified category that satisfy the relevant condition. Secondly, although a rule in that form contemplates the possibility that the condition may be satisfied, the form of the rule does not convey any intention that the condition will be satisfied. The intention of the rule-maker, so far as it can be derived from the rule, would not therefore be thwarted or frustrated if, either immediately, or at some point in the future, there were no members of the relevant category which satisfied the relevant condition.

In Section 2(1), the relevant category is: "*rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and ... remedies and procedures from time to time provided for by or under the Treaties.*" The words "from time to time", which appear twice, mean that section 2(1) is concerned not only with the Treaties, and the regulations and other legal instruments made under them, as they stood at the time of accession, but also with the Treaties and instruments made under them as they may change over time in the future. This recognizes the fact that the "rights, powers, liabilities, obligations and restrictions ... created or arising by or under the Treaties", and the "remedies and procedures ... provided for by or under the Treaties", alter from time to time, as a result of changes to the Treaties or to the laws made under the procedures laid down in the Treaties. This is relevant in the *Miller* context, since it demonstrates that Parliament has recognised that rights given effect under the 1972 Act may be added to, altered or revoked without the necessity of a further Act of Parliament.

The requirement imposed by Section 2(1) is: "*shall be recognised and available in law, and be enforced, allowed and followed accordingly.*" This phrase gives effect in domestic law to all such rights, powers and so forth as satisfy the relevant condition.

The condition which must be satisfied, in order for that requirement to apply, is: "*All such ... as in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom.*" This phrase was of particular importance to the resolution of the *Miller* appeal. It follows from this phrase that rights, powers and so forth created or arising by or under the Treaties are not automatically given effect in domestic law. Legal effect is given only to such rights, powers and so forth arising by or under the Treaties as "in accordance with the Treaties" are without further enactment to be given legal effect "in the United Kingdom". In this respect, the 1972 Act creates a scheme under which the effect given to EU law in domestic law exactly matches the UK's international obligations, whatever they may be.

Therefore, the effect given to EU law in our domestic law is conditional on the Treaties' application to the UK. That condition was not satisfied when the Act came into force, because the Treaties were not yet ratified and thus did not then apply to the UK. The content of the specified category was therefore zero. The satisfaction of the condition, some months later, depended on the decision of a UK entity: it depended on the Crown's exercise of prerogative powers. The content would return to zero if the condition ceased to be satisfied as the result of the UK's invoking article 50. That would be so whether the decision to invoke article 50 had, or had not, been authorized by an Act of Parliament. It is, indeed, accepted by the majority that the condition would cease to be satisfied if the Crown invoked article 50 after being authorized to do so by statute. The only issue in dispute is whether the action by the Crown, as a result of which the contingency of section 2(1) will cease to be satisfied, must be authorized by an Act of Parliament. On that issue, section 2(1) is silent. Neither expressly nor by implication does it require such action to be authorized by Parliament. The fact that section 2(1) is itself a fixed rule of domestic law enacted by Parliament does not affect that conclusion, since a fixed rule which is conditional will necessarily operate only for as long as the condition is satisfied. Nor does it support a conclusion that Parliament has, by necessary implication, deprived the Crown of its prerogative powers. In addition Lord Carnwath argued that it is illogical to search in the European Communities Act for a presumed Parliamentary intention in respect of withdrawal, at a time when the treaty contained no express power to withdraw, and there was no reason for Parliament to consider it. Thus the 1972 Act did not remove the Crown's treaty-making prerogative in respect of European matters, whether expressly

or by implication. Neither did subsequent legislation such as the European Union (Amendment) Act 2008 which was enacted after the signing of the Lisbon Treaty.

5. Lord Carnwath on judicial self-restraint and Parliamentary accountability of the Government

*"[F]or it is the task of the Parliament and the executive in tandem, not of the courts, to govern the country..."*²³

- Lord Mustill

In his dissenting judgment Lord Carnwath noted the lack of precedent for the issue of prerogative powers to withdraw from a treaty previously given effect in domestic law, let alone one which has played such a vital part in the development of United Kingdom's legal system over more than 40 years. Therefore, in dissent he stressed the importance of judicial self-restraint in adjudicating such matters, and deference to the actions of the Parliament, emphasizing accountability of the executive government to the Parliament.²⁴

Lord Carnwath argued that it was wrong to view the *Miller* case as a simple binary choice between Parliamentary sovereignty, exercised through the legislation, and the uninhibited exercise of the prerogative by the Executive. The majority should have taken into mind the constitutional principle of Parliamentary accountability, which means that the executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. This relationship is implemented through ordinary Parliamentary procedures, and is a matter for Parliament alone. Therefore, the courts should not inquire into the methods by which Parliament exercises control over the Executive, nor their adequacy. Lord Carnwath supported these statements with the minority judgment in the *Fire Brigades Union* case, in which Lord Mustill said that "*Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses. for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country*"²⁵. Professor Gavin Phillipson also considered the *Fire Brigades Union* case's relevance to the *Miller* case and concluded that "*the British constitution works most effectively when parliamentary and judicial forms of control and accountability, rather than being framed as antagonistic alternatives, or mutually exclusive directions of travel, work together, but clearly defined, differentiated and mutually complementary roles*"²⁶.

In this spirit Lord Carnwath concluded that the court in the *Miller* case should have deferred to the actions of the Parliament with respect to the Executive's further actions, in particular to the debate which took place at the same time as the hearings in the Supreme Court, and led to the motion that was passed by a large majority of the House of Commons. This motion recognized that it is "Parliament's responsibility to properly scrutinize the Government while respecting the decision of the British people to leave the European Union", and ended by "call(ing) on the Government to invoke article 50 by 31 March 2017"²⁷. Thus, even though the House of Commons is not the same as the "Queen in Parliament", whose will is represented exclusively by primary legislation, the motion lends support to the view that, at least at this initial stage of service of a notice under article 50(2), formality of a Bill is unnecessary to enable Parliament to fulfil its ordinary responsibility for scrutinizing the government's conduct of the process of withdrawal.

Taking into account these arguments, Lord Carnwath concluded that the majority took too narrow a view of the constitutional principles at stake in the *Miller* case. There is no doubt that withdrawal from the European Union must involve a partnership between Parliament and the Executive, but that does not mean that the legislation is required simply to initiate it. That would be pure legal formalism. Legislation will undoubtedly be required to implement withdrawal, but the process, including the form and timing of any legislation, can and should be

²³ *R v Secretary of State for the Home Department Ex p Fire Brigades Union* [1995] 2 AC 513 at p. 567D-F.

²⁴ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at Para 243-274.

²⁵ *R v Secretary of State for the Home Department Ex p Fire Brigades Union* [1995] 2 AC 513 at p. 567D-F.

²⁶ Gavin Phillipson, *A dive into deep constitutional waters: article 50, the Prerogative and Parliament* (2016), 79(6) *Modern Law Review*, pp. 1064-1089, p 1089.

²⁷ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at Para 255.

determined by Parliament not by the courts. This outcome would not be breaching the constitutional principles which have been entrenched in the UK's law since the 17th century, and would not be a threat to the fundamental principle of Parliamentary sovereignty.

Conclusions

The main reasoning behind the Supreme Court's judgment in *Miller* can be summarized as follows. Firstly, UK constitutional law dictates that only the Parliament is sovereign, and has the power to legislate, through which it can confer rights to individuals. Thus, secondly, the use of Royal prerogative powers cannot change the law, unless the Parliament itself authorized it in a statute by express statements or by necessary implication. Thirdly, European Communities Act of 1972 enacted by the Parliament confers various rights to individuals on the condition of the membership in the European Union. Fourthly, the giving of notice under Article 50 to withdraw from the European Union, because of its irrevocability, would in effect change the domestic law, because individuals would eventually lose rights conferred to them by the 1972 Act. It would also effectively eliminate EU law from the accepted sources of law in the UK. Fifthly, the Parliament neither by express wording, nor necessary implication in the 1972 Act or subsequent legislation did authorize the Government to give Notice and thus change the domestic law (especially its sources of law). Therefore, conclusively, the executive government does not have power under the Crown's prerogative to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union.

The main point of the dissenters was that the giving of a Notice would not alter domestic law in an unacceptable way, because the possible changes in law were already addressed in the conditional nature of the European Communities Act. Being no unaccounted change of law, the Royal prerogative powers in the field of foreign relations (especially in the making or withdrawing from international Treaties, such as the one on the membership in the EU) are not generally limited, unless such abrogation of powers is stated expressly or by necessary implication in the concerned Act itself. No such limitations are prescribed in the European Communities Act of 1972. Therefore, conclusively, the executive government under the Royal prerogative powers is able to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union. The dissenters also argued that the majority should not have, in breach of judicial self-restraint, interfered in the accountability-based relations between the Parliament and the Government. The precise procedure to start the withdrawal procedure should have been determined by the Parliament, not by the courts.

In conclusion it can be stated, that main point of judicial disagreement in the *Miller* case was one of statutory interpretation. The balance between Parliamentary sovereignty and the Royal prerogative boiled down to the interpretation of the European Communities Act. The majority took a broader approach, emphasizing the general importance of the 1972 Act to the UK domestic law system and its sources of law. While the dissenters took a restrained position, focusing on the textualist interpretation of the 1972 Act, emphasizing its conditional nature, but disregarding the effect the giving of a notice to withdraw would to the whole legal system.

In the end, on the 16th of March European Union (Notification of Withdrawal) Act 2017 (c. 9) was passed and assented by the Queen. Accordingly, on 29th March United Kingdom's Prime Minister Theresa May triggered the withdrawal procedure from the European Union according to the constitutional requirements of the United Kingdom. Even though Mrs May managed to keep her promise to trigger withdrawal until the end of March 2017, the fate of Brexit still remains unclear and will depend on further negotiations and resolve.

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BREXIT AND ARBITRATION: WHAT HAPPENS NEXT?

Tadas Varapnickas¹

Abstract

The purpose of this paper is to examine if Brexit may affect international commercial arbitration in the United Kingdom as well as in the European Union. In order to reveal this issue, firstly, it is analysed if Brexit has any effect on London as favourable seat of arbitration. Second, the author determines how Brexit may affect the recognition and enforcement of the foreign arbitral awards in both the United Kingdom and the European Union. Third, the paper deals with the anti-suit injunctions and their application in the United Kingdom after Brexit.

When analysing the abovementioned issues, the author argues that Brexit will not affect international commercial arbitration in the United Kingdom and in the European Union but on the contrary – it may have very positive effects on this method of alternative dispute resolution.

To reveal the subject-matter of the conference paper, the author analyses laws of the United Kingdom and the European Union as well as the relevant sources of international law. The author also bases his conclusions on the case-law and the opinions of legal doctrine.

Keywords: Brexit, arbitration, anti-suit injunctions, recognition and enforcement of arbitral awards.

Introduction

“Brexit means Brexit” said the Prime Minister of the United Kingdom (hereinafter, the UK) Ms. Theresa May and a declaration of only three words became one of the most popular and most debatable phrases of the whole world in 2016. But what does it really mean? Almost a year passed after the Great Britain’s voters decided to leave the European Union (hereinafter, the EU) on 23 June 2016 and still there is no or almost no certainty about the consequences of the leaving either to the EU or to the UK itself.

Arbitration in the UK is often used as an alternative to litigation². London as a seat of arbitration is also one of the most popular places to arbitrate. For example, London Court of International Arbitration (LCIA) was founded in 1892 and by many accounts is the second most popular European institution in the field of international commercial arbitration (ICC in Paris being the only one outrunning London)³. Finally, UK’s Arbitration Act 1996⁴ is considered to be one of the most modern arbitration laws in the world. Hence, arbitration found its place in the legal system of the UK. Will it all change after the UK leaves the EU? This is the main question this paper aims to reveal.

The paper deals with main issues regarding the relationship between Brexit and arbitration. The author, firstly, examines Brexit’s impact to arbitration seat in London. Second, the author analyses how Brexit affects recognition and enforcement of foreign arbitral awards. Later, application of anti-suit injunctions is examined. These topics were chosen because they are the most important for commercial arbitration and it is interesting to examine what effect could Brexit have on them.

When writing this paper, the main research methods were systematic, comparative and analytical. The author discussed the most important positions of legal doctrine and case-law.

1. Impact of Brexit on London as a favourable seat of arbitration

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² A. Dahlberg, A. Welsh, ‘Arbitration Guide: England and Wales’ [2012] www.ibanet.org [last viewed 20-03-2017] 3.

³ A. Ahmedov, ‘Born’s Finest: 19 Leading Arbitral Institutions of the World’ [2015] <https://www.linkedin.com/pulse/borns-finest-19-leading-arbitral-institutions-world-aibek-ahmedov> [last viewed 20-03-2017].

⁴ Arbitration Act of the United Kingdom 1996.

Arbitration practitioners McIlwrath and Savage state that “the most important variable in an international arbitration clause is the place (or “seat”) of arbitration. It is the city to which the arbitration is legally attached”⁵. Indeed, “the identity of the arbitral seat has significant legal effects. This is because a number of issues relating to judicial supervision of an arbitration will be subject to the law and courts of the arbitral seat, often regardless of the parties’ choice of applicable substantive law”⁶.

“London is not just a global financial centre – it is a global legal centre too. <...> Among the gleaming offices serving the financial and associated services industry, more than half the world’s leading law firms have chosen the capital as their headquarters, which means that London has the largest concentration of judicial expertise anywhere in the world”⁷. Being twenty-second largest city in the world by population and second largest in Europe (after Moscow)⁸ London is an attractive place for arbitration as well. In 2010 corporations were asked to indicate their preferred seat of arbitration and the reason for their preference. London was most commonly preferred. Even 30 % chose London which was followed by Geneva (9 %), Paris, Tokyo and Singapore (each 7 %)⁹. “Some of the main reasons parties used London were its reputation as a neutral and impartial jurisdiction, the law governing the substance of the dispute and established contacts with specialist lawyers. language and cultural familiarity were also mentioned”¹⁰. Will it change after Brexit? Will London’s importance to international arbitration decrease? The answer is no. Despite what happens with Brexit, London will remain an important hub for arbitration.

First, for many reasons businesses worldwide choose English law as the law governing their contracts¹¹. English and New York law dominate international business transactions but New York is far from being a serious competitor to English law¹². Although substantive law and arbitral seat are not related, when parties choose English law as the applicable law it “often results in the choice of London as the seat of arbitration for any disputes arising under that agreement”¹³.

Party autonomy to choose applicable substantive law is a generally recognised principle of international law¹⁴. Redfern and Hunter emphasize that “Rome I, which is applicable to contractual obligations within the [EU], accepts as a basic principle the right of parties to a contract to choose, expressly or by implication, the law that is to govern their contractual relationship”¹⁵. The Court of Justice of the EU strongly supports this principle in its case-law¹⁶.

Until Brexit, both EU nationals and internationals have often chosen English law as law governing their contract. It probably will not change after Brexit. As Abdel Wahab claims “if English law was agreed by the parties to be the applicable law, it remains a valid choice following the Referendum and Brexit. <...> If the parties choose

⁵ M. McIlwrath, J. Savage, ‘International Arbitration and Mediation: A Practical Guide’ (Alphen aan den Rijn: Kluwer Law International 2010) 21.

⁶ G. B. Born, ‘International Arbitration and Forum Selection Agreements: Drafting and Enforcing’ (Alphen aan den Rijn: Kluwer Law International 2016) 56.

⁷ L. Scott-Moncrieff, ‘Arbitration: What Makes London So Special?’ [2012] <https://www.lawsociety.org.uk/news/speeches/arbitration-what-makes-london-so-special/> [last viewed on 20-03-2017].

⁸ List of cities proper by population [2017] https://en.wikipedia.org/wiki/List_of_cities_proper_by_population [last viewed on 20-03-2017].

⁹ L. A. Mistelis, ‘Arbitral Seats: Choices and Competition’ [2010] <http://kluwerarbitrationblog.com/2010/11/26/arbitral-seats-choices-and-competition/> [last viewed on 21-03-2017].

¹⁰ *Ibid.*

¹¹ ‘Why English Law Governs Most International Commercial Contracts’ [2016] <http://www.qits.com/blog/english-law/why-english-law-governs-most-international-commercial-contracts> [last viewed on 19-03-2017].

¹² G. Cuniberti, ‘The International Market for Contracts: The Most Attractive Contract Laws’ [2014] 34 *Nw. J. Int’l. L. & Bus.* 516

¹³ M. S. McNeill *et al.*, ‘Brexit: Potential Implications for International Arbitration in London’ [2016] <http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/10/Brexit-Potential-Implications-for-International-Arbitration-in-London-IA-10182016.pdf> [last viewed on 24-03-2017] 2.

¹⁴ G. B. Born, *International Commercial Arbitration. Volume II: International Arbitral Procedures* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2014) 2672.

¹⁵ N. Blackaby *et al.*, ‘Redfern and Hunter on International Arbitration: Student Version’ (Oxford: Oxford University Press 2015) 187.

¹⁶ *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Case C-184/12 [2013] CJEU published in the electronic Reports of Cases, para. 49.

English law, in a contractual context, the principles of freedom of contract and protection of commercial certainty will always prevail and they will not be impacted by the departure from the EU¹⁷.

It must be noted in that regard that the UK became part of the EU only in 1973. Nevertheless, before and after this event arbitration was strong in Britain. Therefore, the fact that there will be changes in the English law should not affect parties' intentions to choose London as their seat of arbitration. Consequently, parties should continue choosing English law as the governing law and simultaneously London as the seat of arbitration.

Second, there are many factors that parties consider when choosing their seat of arbitration. Redfern and Hunter are of opinion that "an understanding of the interplay between the private arbitral process and the different national systems of law that may impinge upon that process is fundamental to a proper understanding of international arbitration"¹⁸. As the same authors state, role of national arbitration law is important in almost every stage of arbitral proceedings, beginning with the enforcement of the agreement to arbitrate, continuing with the court assistance to arbitration during the proceedings and concluding with the annulment or recognition of the award. The UK's Arbitration Act 1996 is considered to be one of the most pro-arbitration laws. Indeed, "the 1996 United Kingdom Arbitration Act is an outstanding, indeed masterful, legislative framework on arbitration. <...> The Act rehabilitates the English tradition of substantive review by integrating it into a statutory setting that unequivocally supports arbitration and understands the gravamen of the process and its need for autonomy. The 1996 Arbitration Act is a truly excellent law of arbitration, worthy of international emulation"¹⁹. Arbitration Act 1996 is not based on the EU law. Thus, it will not be affected by Brexit and should motivate parties to arbitration to choose London as the seat of arbitration.

Furthermore, according to Born there are many factors that influence or should influence selection of arbitral seat. These factors are: 1) if a country is a contracting party to Convention on the Recognition and Enforcement of Foreign Arbitral Awards²⁰ (hereinafter, the New York Convention). 2) standards for annulment of arbitral awards. 3) supportive national arbitration regime. 4) effect on selection of arbitrators. 5) effects on procedural and substantive laws and 6) convenience and cost²¹. He concludes that parties ordinarily select arbitral seats with a legal regime and track record that ensures a reasonably predictable and efficient arbitration and a sizeable community of international arbitration practitioners²².

UK and in particular London match all these criteria. As it was already mentioned, UK's Arbitration Act 1996 creates "greenhouse conditions" for arbitration. Practitioners of one of the largest law firms in the world Shearman & Sterling note that "the Arbitration Act 1996 is another key factor in London's pre-eminence as a seat for international arbitration. The Arbitration Act provides a robust legal framework for the conduct of arbitration in England, Wales, and Northern Ireland. English courts not have significant experience interpreting its terms, and have done so in a largely pro-arbitration fashion. London also offers a large pool of international arbitration specialists, not just from the EU but also from across the world"²³.

Third, there are some pessimistic scenarios as regards London as a preference of arbitral seat as well. McIlwrath believes that "the potential formal legal framework that will arise is only one factor determining whether parties are less or more likely to choose a seat. In fact, it may not even be the most important factor. As much as parties may wish to believe they rely on objective assessments of a forum, place of dispute resolution is usually decided by agreement among various preferences, rather than being unilaterally chosen from a menu of static options"²⁴. He continues that "today, parties have the ability to select from many countries with legal systems and

¹⁷ M. S. Abdel Wahab, 'Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation' [2016] 33 Journal of International Arbitration 465.

¹⁸ *Cit. op.* 15, 58.

¹⁹ T. E. Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' [1998] 22 Tul. Mar. L.J. 154.

²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

²¹ G. B. Born, 'International Arbitration: Law and Practice' (Alphen aan den Rijn: Kluwer Law International 2012) 117-119.

²² *Ibid.*, 119.

²³ *Cit. op.* 13, 2.

²⁴ M. McIlwrath, 'An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe' [2016] 33 Journal of International Arbitration 451-452.

courts that provide an adequate form of commercial dispute resolution, especially within Europe. Unsurprisingly, predictability is an important factor in their selection”²⁵. McIlwrath concluded that “while London is likely to remain an important hub for international dispute for the foreseeable future, Brexit will diminish city’s relative stature further. Some cases will be lost because of the UK’s diminished goodwill among European parties, others because so much uncertainty persists over the UK’s future relationship with the EU, and others because other centres will step up efforts to attract the lucrative dispute resolution business”²⁶.

Although McIlwrath’s doubts about London’s future seem to be well reasoned, author of this paper does not believe that the future is that dark for London. There are many advantages that allow London to prevail in the race between arbitral seats. “The English judiciary is internationally recognised for its impartiality, experience and skill <...> English law upholds the principle of confidentiality of arbitral proceedings <...> The popularity of London-seated arbitrations can also be attributed in part to the prevalence of English law, given that the choice of English governing law often goes hand in hand with the choice of London as the seat <...>. None of these features are likely to change following the UK’s withdrawal from the EU”²⁷. Besides, as it will be shown below, Brexit may even give some advantages to arbitration in the UK which it lacks now. Also, McIlwrath’s statements might be overridden by the simple fact that before 1973 and after arbitration in London was popular and remained popular. Hence, why it could change after Brexit?

Finally, the author is of opinion that Brexit may even increase the number of arbitration agreements. 2016 was indeed a year of surprises. Brexit was followed by the US Presidential elections, The Netherlands, France, Germany and even the UK itself have survived or will survive their own unpredictable elections. Even before 2016 politics of the world started to change dramatically. What one can be certain of is that we live in an age of uncertainty. Uncertainty, primarily, is related to the policy of governments of various countries. Arbitration is a private mechanism to solve disputes. Parties to arbitration themselves determine who and how should solve their misunderstandings. This is not the same with national court proceedings. Thus, it may lead that more and more persons would sign arbitration agreements in order to protect themselves from the unpredictable state policies influencing court proceedings too. Of course, this should not be the intention of arbitration to profit from these uncertainties, but if it happens, arbitration may win both in London and elsewhere.

To conclude, today London is one of the prevailing arbitral seats. It is influenced by many factors. Those factors such as the pro-arbitration case-law, modern Arbitration Act 1996, popular among the parties English law should not be affected by Brexit. In the short period, however, there might be some declines, in particular if negotiations between the UK’s Government and the EU are hard and unpredictable. However, it should not affect London that much that it loses its importance to international arbitration.

2. Recognition and enforcement of arbitral awards in the UK and the EU after Brexit

Since arbitrators are private persons, national courts are necessarily involved in the recognition and enforcement of arbitral awards. In 1958 the most important international instrument in the field of recognition and enforcement of foreign arbitral awards – the New York Convention – was adopted. Since then, the Convention has had a significant impact on arbitration practice, as well as on the court practice in connexion with arbitration. This is best witnessed by the fact that, to date 156 countries have become party to the Convention. Thus it can be said that the New York Convention successfully fulfils its purpose of facilitating the recognition and enforcement of foreign awards²⁸. The question arises what will happen with the recognition and enforcement of arbitral awards after Brexit?

²⁵ *Ibid.*, 453.

²⁶ *Ibid.*, 461.

²⁷ J. Rogers, Simon Goodall, Charles Golsong, ‘How will Brexit impact arbitration in England and Wales? Its business as usual’ [2016] 7 International arbitration report of Norton Rose Fulbright 16.

²⁸ ‘United Nations Conference on Trade and Development: Dispute Settlement: International Commercial Arbitration: 5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention’ [2003] http://unctad.org/en/Docs/edmmisc232add37_en.pdf [last viewed on 20-03-2017] 1.

Will it become more difficult to recognize arbitral awards adopted in the EU in the UK and *vice versa*? Due to the following reasons the answer is no. Recognition and enforcement will not be affected either in the UK or the EU.

First, New York Convention is an instrument of international law and not the EU law (although all EU member states are parties to the New York Convention). In Recital 12 of the Brussels I recast regulation²⁹ it is explicitly stated that the New York Convention takes precedence over the Regulation as regards the recognition and enforcement of foreign arbitral awards. According to Šekštelo, when adopting the new Brussels I regulation European Commission went the way of compromise and did not improve the recognition of arbitral awards within the EU because these issues are regulated by the New York Convention³⁰. Historically, when drafting Brussels Convention 1968³¹, arbitration was left outside because “there were many international agreements on arbitration to which the Contracting States were parties. At that time, it had been hoped that there might be a separate European agreement for a uniform law of arbitration, which has never come to fruition”³².

Hence, because the recognition and enforcement of the foreign arbitral awards is not part of the EU law, it should not be affected by Brexit. Indeed, arbitral award adopted in any EU member state has to be recognised by competent court of the UK even now when the Great Britain still is a member state of the EU. The same with arbitral award adopted in the UK. All the proceedings are governed by the New York Convention and relevant domestic law and not the law of the EU.

Second, some issues may arise as regards the concept of public policy. Article V(2)(b) of the New York Convention foresees that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition and enforcement of the award would be contrary to the public policy of that country. This ground is “one of the most frequently-invoked bases for refusing to recognize an award”³³. The concept of public policy means national public policy. “The overwhelming weight of authority applies the public policies of the judicial enforcement forum in recognition proceedings”³⁴.

Yet in 1977 Junker wrote that “the public policy defense to enforcement of foreign arbitral awards has been considered the greatest single threat to the use of arbitration in international commercial disputes. Courts and commentators alike have expressed misgivings over this potential “loophole” in binding international commercial arbitration. These misgivings are based on the ease with which a court might disregard a foreign arbitral award for virtually any reason, however, persuasive, simply by finding that enforcement of the award would conflict with the public policy of the forum”³⁵. 40 years later the problem of what the public policy is and how it should be understood are still unsolved³⁶.

Redfern and Hunter note that “the national courts of England are reluctant to excuse an award from enforcement on grounds of public policy. At one time it was said that “there is no case in which this exception has been applied by an English court”³⁷. Sir Donaldson stated in one of the cases that “considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution”³⁸.

Although it seems that public policy is not an issue as regards the UK arbitration, it may create some misunderstandings after Brexit. It must be emphasized that the concept of public policy is enshrined in the EU laws and the Court of Justice of the EU interprets the meaning of public policy giving it a regional character³⁹. Abdel

²⁹ 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 judgements in civil and commercial matters (recast).

³⁰ A. Šekštelo, ‘Arbitražas ir reglamentas Briuselis I bis: *status quo* išlaikytas?’ [2015] 1 Arbitražas: teorija ir praktika 63.

³¹ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels, 1968).

³² U. Magnus, P. Mankowski *et al*, ‘Brussels I Regulation’ (Munich: Sellier. European Law Publishers 2007) 63.

³³ *Cit. op.* 21, 401.

³⁴ *Cit. op.* 21, 402.

³⁵ J. R. Junker, ‘The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards’ [1977] 7 Cal. W. Int’l L.J. 228.

³⁶ G. Dominas, ‘Viešosios tvarkos samprata arbitražo teisėje’ [2016] 2 Arbitražas: teorija ir praktika 35. *Cit. op.* 6, 134-135.

³⁷ *Cit. op.* 15, 641.

³⁸ *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.h. v. Ras Al Khaimah National Oil Co.*, Case 2196 [1987] Court of Appeal of England and Wales.

³⁹ *Cit. op.* 17, 477.

Wahab is cautious that, though, not every provision of the EU law constitutes a fundamental principle of public policy, “EU principles of public policy could cause serious problems of enforcement/recognition, if a court of a non-Member State is called upon to enforce awards incompatible with EU public policy principles, as the said court will not be bound except by its own conception of public policy, which would not include EU regional public policy principles. That said, post-Brexit, the UK would lose the integrated EU regional dimension of its public policy principles and English courts would not be bound by fundamental principles of EU law from which the UK has exited”⁴⁰.

However, despite the fact that fundamental principles of EU law affected understanding of public policy, courts of many European countries (including France, Switzerland, Germany or Lithuania⁴¹) recognise that in applying the public policy it should be given international and not a domestic dimension⁴². Furthermore, the ground of public policy, although invoked many times, is successfully used only in rare situations. Therefore, it should not happen after Brexit that most of arbitral awards are declined recognition in the UK and in EU because of violations of public policy. For instance, Switzerland is not a member state of the EU. Nevertheless, arbitral awards adopted in Switzerland are successfully recognised in EU and *vice versa*. It should be the same with the UK after Brexit.

To summarize, because recognition and enforcement of foreign arbitral awards is regulated by the New York Convention, Brexit should not affect the recognition of arbitral awards either in the UK or the EU. Public policy as a ground to refuse recognition might be the only issue that could create some difficulties whereas the fundamental EU principles will not be a part of the UK law after Brexit. However, both the EU and UK are rules of law and respect human rights. Therefore, the dimension of international public policy which should apply in these cases will remain unchanged.

3. Anti-suit injunctions: Is the *West Tankers* doctrine ended in the UK?

“The anti-suit injunction is the remedial device available in common law systems to restrain a party from instituting or continuing with proceedings in a foreign court”⁴³. The anti-suit injunction is a common law concept and is not known to civil law countries. It is most highly developed in England, where such injunctions have been granted for some 170 years⁴⁴. Gaillard emphasizes that “it has become increasingly frequent in international arbitration for a recalcitrant party to attempt to disrupt the arbitral process by bringing the dispute covered by the arbitration agreement before national courts (ordinarily those of that party’s own State) and seeking an “anti-suit injunction” from those courts”⁴⁵. Similarly, the same might happen when a party which initiated arbitration seeks anti-suit injunction to restrain the other party’s right to initiate parallel court proceedings. As it will be shown below, Court of Justice has had a negative approach towards anti-suit injunctions. What will happen after the UK leaves the EU?

First, “historically the English courts had demonstrated a willingness to act in support of arbitration and to protect their own jurisdiction by issuing anti-suit injunctions to restrain parties who brought court proceedings in breach of an arbitration agreement or an exclusive jurisdiction clause. However, EU law severely curtailed the English courts’ power to do so where the offending court proceedings have been brought in an EU member state”⁴⁶.

It all started with the *Turner* case where the Court of Justice forbid anti-suit injunctions with regard to parallel court proceedings⁴⁷. Yet even before that, in one action in 1996 “German court declared that an English antisuit injunction, aimed at restraining proceedings brought in Germany in violation of an arbitration clause, was a violation

⁴⁰ *Cit. op.* 17, 478.

⁴¹ *Akcinė bendrovė “ORLEN Lietuva” v akcinė bendrovė “Lietuvos geležinkeliai”*, Case 2A-360/2012 [2012] Court of Appeal of Lithuania.

⁴² *Cit. op.* 15, 644.

⁴³ G. Fisher, ‘Anti-suit injunctions to restrain foreign proceedings in breach of an arbitration agreement’ [2010] 22.1 *Bond Law Review* 1.

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⁴⁵ E. Gaillard, ‘Anti-suit Injunctions Issued by Arbitrators’ (The Hague: International Council for Commercial Arbitration 2006) 235.

⁴⁶ *Cit. op.* 27, 17.

⁴⁷ *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changeport SA*, Case C-159/02 [2004] CJEU I-03565

of German public policy”⁴⁸ because “the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration courts)”⁴⁹.

In famous *West Tankers* case, House of Lords referred for a preliminary ruling of the Court of Justice regarding anti-suit injunctions. Insurers Allianz and Generali brought proceedings against West Tankers before the Italian court. However, West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement. In parallel, West Tankers brought proceedings before England courts seeking a declaration that the dispute between the parties was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Italian courts. Finally, the case went before the Court of Justice to rule on legitimacy of anti-suit injunctions within the EU. The Court of Justice explicitly ruled that “it is incompatible with [Brussels I regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement”. The Court argued that such anti-suit injunctions are contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it⁵⁰.

In *Gazprom* case the Court of Justice elaborated more on the issue bringing in some confusion. In this case the Republic of Lithuania initiated civil proceedings in Lithuanian courts although the arbitration agreement was concluded between Lithuania and Gazprom. Gazprom initiated arbitration proceedings in order to restrain Lithuania from pursuing the abovementioned proceedings. The arbitral tribunal ruled that some of the reliefs sought by Lithuania should be dropped. Gazprom asked Lithuanian courts to recognize the arbitral award in Lithuania and the Supreme Court of Lithuania asked the Court of Justice if an anti-suit injunction ordered by that award is compatible with the Brussels I regulation. The Court of Justice ruled that Brussels I regulation “must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State”⁵¹.

Although judgement in *Gazprom* case brought some questions as regards the legality of anti-suit injunctions within the EU⁵², it remains clear that “anti-suit injunctions are incompatible with the [Brussels I Recast] Regulation, as they deprive Member State courts of the power to assess their own jurisdiction under the Regulation. Hence, the rationale of *West Tankers* continues to be applicable”⁵³. This position is also supported by the commentators of the Brussels I Recast regulation who claim that anti-suit injunctions are incompatible with the principle of mutual trust⁵⁴.

It follows, that as long as the UK remains a member state of the EU, its courts do not have a right to issue anti-suit injunctions that would affect the jurisdiction of courts of member states of the EU. Still, the UK courts may issue an injunction as regards the courts of any other country (with a condition that there is no agreement or other legal basis that would preclude issuing anti-suit injunctions).

⁴⁸ G. B. Born, ‘International Arbitration: Cases and Materials’ (New York: Wolters Kluwer 2015) 331.

⁴⁹ *Ibid.*

⁵⁰ *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, Case C-185/07 [2009] CJEU I-00663.

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⁵² S. Lacey, ‘Are Anti-Suit Injunctions Back on the Menu? Part 2: The CJEU’s Decision in *Gazprom*’ [2015] <http://kluwerarbitrationblog.com/2015/05/14/are-anti-suit-injunctions-back-on-the-menu-part-2-the-cjeus-decision-in-gazprom/> [last viewed on 28-03-2017].

⁵³ P. Ortolani, ‘Anti-suit Injunctions in Support of Arbitration Under the Recast Brussels I Regulation’ [2015] 6 MPILux Working Paper 17.

⁵⁴ A. Dickinson, E. Lein *et al*, ‘The Brussels I Regulation Recast’ (Oxford: Oxford University Press 2015) 25

Second, as already mentioned Brexit might be the fracture after which anti-suit injunctions come back to life as regards their application to the EU countries. This could be an advantage for arbitration in the UK. “English courts’ ability to preserve the integrity of arbitration proceedings through anti-suit injunctions provides a further advantage for London as a seat of arbitration”⁵⁵. As Davies and Kirsey note “assuming Brexit involves a full withdrawal from the EU, including all its laws (which is not certain at all), the English courts would no longer be required to follow the [Court of Justice] authority limiting their ability issue anti-suit injunctions in respect of court proceedings in an EU Member State court. They would no longer be bound by *West Tankers* and would therefore be able to issue anti-suit injunctions in the same manner as they currently do in respect of court proceedings in non-EU courts”⁵⁶. Indeed, English courts are considered to be pro-arbitral and the case-law they form proves it. Hence, if parties agreed to solve their misunderstandings through arbitration and one of the parties commence parallel procedures in an EU court, English courts would be allowed to issue an injunction ordering to drop those proceedings for integrity of arbitration. Of course this would rely on the post-Brexit framework negotiated between the UK and EU⁵⁷. But if this is the case, London might gain a competitive advantage as a seat of arbitration⁵⁸.

Third, an opposite effect of anti-suit injunctions to arbitration must also be considered. It is possible that English courts will issue injunction for person who commenced arbitration proceedings in EU member state and not the litigation in English courts. For instance, Gaillard states “the use of anti-suit injunctions is particularly frequent in disputes involving States. It is, indeed, tempting for a State, or a State-owned entity to renege on an arbitration agreement to which it freely consented by resorting to its own courts to have the other contracting party enjoined from initiating an arbitration against it, or, if arbitral proceedings have already been initiated, from pursuing them”⁵⁹. However, these situations are rare. Gaillard himself lists only three cases were it happened and none of these cases concerned the UK. Therefore, the risk that Gaillard envisages are small and should not affect arbitration in the UK.

To sum up, possibility to protect arbitration agreement by getting an injunction from the UK courts may be a way to increase international arbitration’s popularity in the UK and a motivator for EU’s businesses to choose London as the seat of arbitration even more frequently after Brexit. While other EU courts do not apply anti-suit injunctions, English courts would have this opportunity if, of course, the negotiations between the EU and UK does not end up in protecting the Brussels regime.

Conclusions

Although it is not yet known how the negotiations between the UK and EU go, it may be concluded that Brexit might have positive impact to international arbitration in the UK. Being a member state of the EU, the UK had to refuse to apply instruments such as anti-suit injunctions towards other EU member states. It might end with Brexit. The UK may recover its right to decide on all issues related to arbitration, including anti-suit injunctions, interpretation of public policy etc.

The UK is already an attractive place for arbitration. With modern Arbitration Act 1996, plenty of well-known arbitration scholars and practitioners, frequently chosen English law, the UK attracts many to choose the UK as their seat of arbitration. That will not change after Brexit. On the contrary, arbitration’s popularity may grow up and parties to arbitration might choose London even more frequently.

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⁵⁵ *Cit. op.* 13, 2.

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⁵⁷ “Unless the UK chooses to remain bound by the Brussels regime, Brexit may create a legal vacuum which means that the UK will need to agree an alternative regime with the EU Member States if it wishes to continue benefitting from mutual recognition and enforcement of judgments. There is no certainty as to the regime that will apply post-Brexit as this regime will largely depend on the outcome of the exit negotiations between the UK and other EU Member States” (*Ibid.*, 508).

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38. *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, Case C-185/07 [2009] CJEU I-00663.
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40. *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.h. v. Ras Al Khaimah National Oil Co.*, Case 2196 [1987] Court of Appeal of England and Wales.
41. *United Antwerp Maritime Agenies (Unamar) NV v Navigation Maritime Bulgare*, Case C-184/12 [2013] CJEU published in the electronic Reports of Cases.
42. *Akcinė bendrovė "ORLEN Lietuva" v akcinė bendrovė "Lietuvos geležinkeliai"*, Case 2A-360/2012 [2012] Court of Appeal of Lithuania.

REGULATORY FRAMEWORK FOR LIBERAL PROFESSIONS IN EU: THREATS AND CHALLENGES THAT WILL BE POSED BY *BREXIT*

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Abstract

Brexit should have significant effect to liberal professionals (attorneys, architects, auditors, medicals, engineers, etc.) acting and moving within the EU. Currently the EU involvement in regulating liberal professions ranges from general directives (e.g. Service Directive, Professional Qualifications Directive) to particular profession related directives (e.g. Lawyers' Services and Establishment Directives) and even regulations (e.g. Regulation on Public-interest Entities which implements reform of audit market). Case law of the CJEU, as a source clarifying a number of legal aspect of professional activities, and soft law instruments adopted by the EC should be also mentioned. Aim of the paper is to verify if it is possible to identify at least main vectors on how *Brexit* may alter regulatory framework applicable for liberal professions. To attain this aim it is sought to (1) analyse the professional regulatory framework at the EU level. (2) discuss main options for implementing *Brexit*. (3) assess if possible impact of *Brexit* may be already seen. Paper is supported by official documents related to *Brexit* implementation published by officials and professional regulatory authorities of the UK. Conclusions are drawn that although possible model on *Brexit* implementation is currently acquiring certain shape, the agreement on the 'form' of the *Brexit* agreement, does not provide for more definition on the content thereof. Currently it is feasible only to foresee some stages on how the EU derived regulation on liberal professions should develop and transform in the UK law.

Keywords: liberal professions. professional regulation. *Brexit*.

Introduction

Representatives of liberal professions (attorneys, architects, auditors, medicals, engineers, etc.) render high standard intellectual services. It is widely renowned that activities of the representatives of liberal professions are very important to the European Union ('EU') – they create up to 9% of gross domestic product of the entire EU and their activities constitute 1/3 of all services market². Although much of the activities of liberal professionals are regulated at national level by state authorities and self-regulatory authorities, regulation at the EU level is also quite broad. Firstly, the EU legislation (directive and regulations) should be mentioned. Secondly, case law of the Court of Justice of the European Union ('CJEU') also forms a significant part of the EU regulatory framework for professionals as it contributes to interpreting regulatory provisions. Finally, the European Commission ('EC') constantly adopt soft law instruments aimed at encouraging to improve national regulation related to professional activities.

As the EU has created a significant regulatory framework for the activities of professionals, *Brexit* should have significant effect to liberal professionals acting and moving between the United Kingdom ('UK') and the other EU countries. Aim of the paper is to verify if it is possible to identify at least main vectors on how *Brexit* may alter regulatory framework applicable for liberal professions. To attain this aim it is sought to (1) analyse the professional

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² European Commission, 'Communication from the Commission. Report on Competition in Professional Services' [2004] COM(2004) 83 final. P. 3. European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Evaluating National Regulations on Access to Professions' [2013] COM(2013) 676 final. P. 2.

regulatory framework at the EU level. (2) discuss main options for implementing *Brexit*. (3) assess if possible impact of *Brexit* may be already seen.

European scholars have analysed many regulatory aspects of liberal professionals, e.g., principles for regulating market of professional services, reasons of regulating specific professions, competition matters of professional regulation³, etc. However, these researches have not taken into consideration possible impacts of secession of any of the member states. Due to this, the Article is mostly supported by official documents related to *Brexit* implementation published by the UK officials and professional regulatory authorities, which have already expressed their reactions to the *Brexit* phenomenon.

In writing this article, main research methods were employed. The analytical method was used in assessing institutional positions and experts' papers and presentations related to the possible impact of *Brexit* to professionals. The comparative method was used in analysing regulatory methods used by the EU in regulating professional services. The logical, systemic and critical methods were used to determine the possible implication of *Brexit* to liberal professionals. The teleological research method was used in analysing *travaux préparatoire* material drafts, resolutions, reports of working groups of institutions.

1. Regulation of liberal professions at the EU level

Certain occupations, such as attorneys, auditors, architects, doctors are widely known as liberal professions. However, there is no common definition or extensive list of liberal professions – understanding of liberal professions differs around the countries. The EU concept of liberal professions is based on CJEU case law and documents issued by the EC⁴. Under these sources, liberal professions have features which differentiate them from any other regulated professions: liberal professionals personally and independently provide services of intellectual nature that require specific education and high professional expertise, their activities are regulated and they are bound by high ethical standards. Also, services of liberal professionals have possible impact not only to their clients but also to third persons and public goods, such as justice system, health and safety, environmental protection.

It is commonly specified in the literature⁵, that activities of liberal professionals are not (or not entirely) trade or pure business in the legal sense. In certain cases, liberal professionals may be regarded as highly qualified employees, however, usually they act professionally independently and tend to be self-employed. Due to such specifics, free movement of liberal professionals within the EU is based on several provisions of the Treaty of Functioning of the European Union ('TFEU')⁶ – free movement of workers (Article 45), right of establishment (Article 49) and right to provide services (Article 56). All the EU regulation of professional activities firstly aims at removing barriers for professionals to move and practice in other member states and has 2 main vectors⁷: (1) negative

³ E.g.: I. Paterson. M. Fink, A. Ogus et al. 'Economic impact of regulation in the field of liberal professions in different Member States: Regulation of Professional Services, Part 1' [2003] http://ec.europa.eu/competition/sectors/professional_services/studies/prof_services_ihs_part_1.pdf. J. Grady. R. Paserman. 'Professional services: scope for more reform' [2005] *Competition Policy Newsletter*, No. 3, p. 65-67. D. de Noronha Goyos JR, 'The Legal Profession and the Liberalisation of Services in the World Trade Organisation (WTO)' [2007] <http://www.professor-noronha.adv.br/en/the-legal-profession-and-the-liberalisation-of-services-in-the-world-trade-organisation-wto/>. G. Shaw, 'Notaries – a profession between state and market' [2007] http://www.notaries.org.uk/articles/articles/profession_between_state_and_market_files/page4_1.pdf. L. S. Terry. S. Mark. T. Gordon, 'Adopting Regulatory Objectives for the Legal Profession' [2012] *Fordham Law Review*, Vol. 80, Iss. 6, p. 2685-2760. N. J. Philipsen, 'Regulation of Pharmacists: A Comparative Law and Economics Analysis' [2013] *European Journal of Comparative Economics*, Vol. 10, No. 2, p. 225-241. I. E. Wendt, 'EU Competition Law and Liberal Professions: an Uneasy Relationship?' (Leiden: Martinus Nijhoff Publishers 2012).

⁴ European Commission [2004]. P. 3. *Adam*, Case C- R/99 [2001] ECR I-7467. Par. 39.

⁵ I. E. Wendt [2012]. P. 1. G. Shaw [2007]. P. 4.

⁶ Treaty on the Functioning of the European Union [2012] OJ C/326.

⁷ F. Kainer, presentation 'The consequences of Brexit on services and establishment. Different scenarios for exit and future cooperation' at the *Workshop: Consequences of Brexit*, which took place at Committee on the Internal Market and Consumer Protection of the European Parliament on 28 February [2017] https://polcms.secure.europarl.europa.eu/cmsdata/114820/2_3_%20Prof%20Dr%20Kainer%20EP%20Presentation%20rev_V2.pdf. P. 4.

integration, which includes removal of national regulation hindering access to market. (2) positive integration, which include approximation of standards and introduction of mutual recognition provisions.

Regulation of professional activities was initiated in the year 1960⁸ and has developed through several stages. As from this time more than 40 different sectoral directives were adopted to harmonize the requirements of professional qualification for different professionals such as doctors, pharmacists and architects etc. Later, regulation was substantially codified and developed. Currently effective regulatory framework for liberal professions consists of European Parliament and Council Directive (EC) 2005/36 on the recognition of professional qualifications⁹ (**Professional Qualifications Directive**), European Parliament and Council Directive (EC) 2006/123 on services in the internal market¹⁰ (**Service Directive**) and special legal acts regulating provisions applicable to lawyers¹¹ and auditors¹².

The Professional Qualifications Directive facilitates free movement of qualified professionals by the means of mutual recognition of their qualification. The directive establishes 3 different systems: (1) automatic recognition based on harmonised minimum training requirements (applicable to doctors, dentists, pharmacists, nurses, midwives, veterinary surgeons and architects), (2) automatic recognition based on professional experience (applicable to professions of craft, trade and industry) and (3) general recognition when case by case assessment is performed (applicable to professions for which training requirements have not be harmonized). The directive also regulates requirements for professionals intending to temporarily provide services without establishing and creates administrative cooperation system among national authorities¹³. Latest amendments introduced voluntary European Professional Card¹⁴, which is electronic record within the Internal Market Information System (**IMI**) confirming that professional qualification of person has been recognised in the member state where such person pursues the activities. Therefore, the directive also solves practical issues and provides framework for administrative cooperation and electronic communication between the member states.

The Service Directive establishes that national rules restricting the right of establishment and the freedom to provide services must be non-discriminatory, proportionate and justified by public interest objectives, such as protection of the urban environment, social policy or public health, etc. The directive is applicable for a wide range of services, including those provided by liberal professional, such as legal and tax advisers, architects, engineers, etc. The directive requires the member states to take legislative and non-legislative (organisational or practical) measures. It affects a significant number of national laws and regulations, even those that are adopted by professional self-regulatory bodies¹⁵. The Services Directive also regulates certain material aspects of services,

⁸ European Commission, 'Commission Staff Working Document on the transposition and implementation of the Professional Qualifications Directive (Directive 2005/36/EC)' [2010] SEC(2010) 1292, <http://ec.europa.eu/DocsRoom/documents/15132/attachments/1/translations>. P. 4.

⁹ European Parliament and Council Directive (EC) 2005/36 on the recognition of professional qualifications [2005] OJ L255/22

¹⁰ European Parliament and Council Directive (EC) 2006/123 on services in the internal market [2006] OJ L376/36.

¹¹ Council Directive (EEC) 77/249 to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L78/17. European Parliament and Council Directive (EC) 98/5 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1985] OJ L77/36.

¹² European Parliament and Council Directive (EC) 2006/43 on statutory audits of annual accounts and consolidated accounts [2006] OJ L157/ 87. European Parliament and Council Regulation (EU) No 537/2014 on specific requirements regarding statutory audit of public-interest entities [2014] OJ L158/77.

¹³ European Commission, 'Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC)' [2011] <http://ec.europa.eu/DocsRoom/documents/15384/attachments/1/translations/en/renditions/pdf>. P. 6, 11. K. M. Kyrieri, 'The Modernised Directive on Professional Qualifications and its Impact on National Legislations' [2014] http://www.eipa.eu/files/repository/eipascope/20141120090725_EIPASCOPE_2014_KKY.pdf. P. 3.

¹⁴ European Parliament and Council Directive (EU) 2013/55 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2013] OJ L354/132. Commission Implementing Regulation (EU) 2015/983 on the procedure for issuance of the European Professional Card and the application of the alert mechanism pursuant to Directive 2005/36/EC of the European Parliament and of the Council [2015] OJ L159/27.

¹⁵ European Commission, 'Quick Guide to Services Directive' [n.d.] http://ec.europa.eu/growth/single-market/services/services-directive/in-practice/quick-guide/index_en.htm. P. 10, 12. Services Directive. Art. 2 and 9. European Commission, 'Handbook on Implementation of the Services Directive' [2007] <http://bookshop.europa.eu/en/handbook-on-implementation-of-the-services-directive-pbKM7807096/>. P. 8, 14.

such as information that should be made available on service providers, requirements for personal liability insurance, application of codes of conduct, etc. The directive introduces wide network for administrative cooperation: mutual assistance rules in case of cross border service provision, exchange of information obligations. technical support by the IMI. setting up points of single contact where service providers may get information and complete administrative formalities online in all member states. The Services Directive does not replace or conflict the Professional Qualifications Directive¹⁶, but even enhances the effect thereof as it further facilitates free movement of professionals and harmonises certain material aspects of professional activities.

The directives for lawyers regulate rules when and under what conditions lawyers with specially defined professional names (mostly – attorneys) may provide services temporarily and upon the establishment in another member state. Some specific rules, e.g. related to the possibilities to represent in courts, application of local rules of professional self-regulatory bodies, are determined. The directive for auditors regulates material aspects of audit activities, such as mutual recognition, constant training, registration, professional ethics, independency, objectivity, confidentiality and professional secrecy, audit standards, preparation of audit opinion, audit quality, sanctions, appointment and resolution of auditors. The regulation for auditor of public-interest entities, applicable from June 2016¹⁷, enhances transparency on financial reporting and provide auditors with a mandate to be independent. The regulation also establishes the Committee of European Auditing Oversight Bodies aimed at improving cooperation between European national audit authorities and proper application of the EU audit legislation.

Important role of developing the professional regulation at the EU level should be attributed the CJEU. The case law of CJEU has been very important source for drafting the Professional Qualifications Directive and the Services Directive¹⁸. Even upon the adoption of the directives, CJEU is still very important contributor to the EU regulation. Considering the case law of past 10 year, CJEU has issued many ruling related to the interpretation of the different provisions of professional directives¹⁹. Such case law is highly important in transposing provisions of directives into national laws or defending rights of professionals in national courts. The CJEU also has case law which goes beyond the scope of interpreting the said EU legal acts and contribute to a wider EU legal context of liberal professionals. Such example are the decisions²⁰ of the CJEU regarding the possibility to apply competition rules for self-regulatory bodies of liberal professions, prohibition to apply citizenship requirement for notaries or application of consumer protection rules for the consumers of legal services.

Initiatives of the EC also have important impact on enhancing regulation of liberal professionals. As the major example, could be mentioned the proposals of the EC to review the national rules regulating liberal professionals and consider if those rules are necessary for the public interest and if they are proportionate and justified. The EC pointed out that in some cases more pro-competitive mechanisms could and should be used instead of certain

¹⁶ Services Directive. Art. 3(1) and 6. Ch. V and VI.

¹⁷ European Commission, 'Reform of the EU Statutory Audit Market' [2016] http://europa.eu/rapid/press-release_MEMO-16-2244_en.htm.

¹⁸ Services Directive. Rec. 23, 34, 37, 40, 41, 56, 69, 70, 77, 79, 82, 89 of the preamble.

¹⁹ E.g.: *Konstantinides*, Case C-475/11 [2013]. *Conseil national de l'ordre des médecins*, Case C-492/12 [2013]. *Ordre des architects*, Case C-365/13 [2014]. *Angerer*, Case C-477/13 [2015]. *Société fiduciaire nationale d'expertise comptable*, Case C-119/09 [2011] ECR I-2551. *Femarbel*, Case C-57/12 [2013]. *OSA*, Case C-351/12 [2014]. *Rina Services and others*, Case C-593/13 [2015]. *Pešla*, Case C-345/08 [2009] ECR I-11677. *Koller*, Case C-118/09 [2010] ECR I-13627. *Ebert*, Case C-359/09 [2011] ECR I-269. *Torresi*, Cases C-58/13 and C-59/13 [2014]. *Akzo Nobel Chemicals and Akcros Chemicals / Commission*, Case C-550/07P [2010] ECR I-8301.

²⁰ *Wouters and others*, Case C-309/99 [2002] ECR I-1577. *Commission / Belgium*, Case C-47/08 [2011] ECR I-4105. *Commission / France*, Case C-50/08 [2011] ECR I-4195. *Commission / Luxembourg*, Case C-51/08 [2011] ECR I-4231. *Commission / Portugal*, Case C-52/08 [2011] ECR I-4275. *Commission / Austria*, Case C-53/08 [2011] ECR I-4309. *Commission / Germany*, Case C-54/08 [2011] I-4355. *Commission / Greece*, Case C-61/08 [2011] ECR I-4399. *Šiba*, Case C-537/13 [2015].

traditional restrictive rules²¹. These initiatives have caused wide discussions on deregulation of liberal professions in member states²².

2. Initial debates on *Brexit* implementation model

The described regulatory system on how the free movement of liberal professionals is ensured within the EU, will be inevitably affected by *Brexit*. It may be presumed that the severity of this impact would depend on how *Brexit* would be implemented in practice. As from very beginning of the talks on *Brexit*, experts, researchers and consultancy firms have focused on the following 5 mostly likable *Brexit* implementation models²³:

1) *European Economic Area ('EEA')*. This model is clearly defined – under it, a non-member state is treated regarding the single market exactly as if it was a member state. The UK would be required to implement all single market legislation, including any new legislation, also to follow the CJEU. Participation in the EU legislation process would be only formal²⁴. This model has been regarded as not entirely acceptable for the UK as it would not allow to control immigration and to withdraw from the jurisdiction of the CJEU.

2) *Bilateral agreements as concluded with Switzerland*. Like Switzerland, the UK could seek to agree sector-by-sector treaties with the EU. Access to the internal market would not be full but it would be given on a case by case basis. The UK would not be bound to transpose the internal market legislation and would have freedom to conclude trade agreements with third countries. This model may be not acceptable as too burdensome, in Swiss case such cooperation has developed through decades and now comprises of 120 agreements²⁵.

3) *Custom Union as used by Turkey*. As in case of the so-call Ankara Agreement, the UK could agree to implement customs union under which goods may be traded without customs restriction. The Customs Union does not cover important economic areas such as agriculture, services or public procurement²⁶. This model does not include free movement of people and services.

4) *Free trade agreement*. The UK could follow the practice of the EU to conclude free trade agreements with other countries, such as Canada or Ukraine²⁷. It is a solution to pursue negotiations on each important matter and include the results in one legal instrument. Main difference from the membership in the EU and free trade agreement is that such agreement would come with less sectoral coverage and do not give automatic access to the single

²¹ European Commission [2004]. P. 3-4. European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions – Professional Services – Scope for more reform – Follow-up to the Report on Competition in Professional Services' [2005] COM(2005) 405 final. P. 4. European Commission [2013]. P. 10.

²² E.g.: G. Brosio, 'The regulation of professions in Italy' [1997] <http://www.feem.it/userfiles/attach/Publication/NDL1997/NDL1997-036.pdf>. The Chancellery of the Prime Minister of the Republic of Poland, 'Deregulation: opening access to over 230 professions' [n.d.] <https://www.premier.gov.pl/en/news/news/deregulation-opening-access-to-over-230-professions.html>. E. Kavoliūnaitė-Ragauskienė, 'Notarų veiklos liberalizavimo galimybė europos sąjungos lotyniškojo notariato tradicijos valstybėse' (Vilnius: Lietuvos teisės institutas 2014).

²³ E.g.: House of Commons, 'Leaving the EU. Research paper 13/42' [2013] <http://researchbriefings.files.parliament.uk/documents/RP13-42/RP13-42.pdf>. P. 29. Law Society of England and Wales, 'The EU and the legal sector' [2015] <http://www.lawsociety.org.uk/news/documents/the-uk-legal-services-sector-and-the-eu/>. P. 7. Linklaters LLP, 'In or out? Ready or not? The United Kingdom EU Referendum' [2015] http://www.linklaters.com/pdfs/mkt/london/Linklaters_UK_EU_Referendum_In_Out.pdf. P. 2. M. Emerson, 'Which model for Brexit? CEPS Special Report No. 147' [2016] <https://www.ceps.eu/system/files/SR147%20ME%20Which%20model%20for%20Brexit.pdf>. P. 3. PricewaterhouseCoopers LLP, 'Leaving the EU: Implications for the UK economy' [2016] <http://www.pwc.co.uk/economic-services/assets/leaving-the-eu-implications-for-the-uk-economy.pdf>. P. 14-16. S. Dhingra, T. Sampson, 'Life after Brexit: what are the UK's options outside the European Union?' [2016] <http://cep.lse.ac.uk/pubs/download/brexit01.pdf>. P. 1.

²⁴ Agreement on the European Economic Area [1994] OJ L1/3.

²⁵ Federal Department of Foreign Affairs of Swiss Confederation, 'Bilateral Agreements: Switzerland – EU' [2009] http://www.europarl.europa.eu/meetdocs/2009_2014/documents/deea/dv/2203_07/2203_07en.pdf. P. 3-4.

²⁶ EEC-Turkey Association Agreement [1963] OJ 217.

²⁷ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23. Association agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3.

market. Such agreements typically come with no obligations on free movement of people or mandatory application of the CJEU case law.

5) *World Trade Organisation ('WTO') regime*. This option is likable in case the UK and the EU would not reach an agreement. It would mean that the EU would treat the UK as any third country. The UK trade in services with the EU would be governed by the General Agreement on Trade in Services. Under this agreement, parties to the agreement chose which sectors they are prepared to liberalise, and the time scale over which they wish to do so. As with trade in goods, trade in services also is based on the principle of most favoured nation, however parties may introduce certain exemptions to this rule²⁸. Possibilities for liberal professionals to move and provide services in other member states would depend on GATS negotiations.

On 2 February 2017 the UK Government adopted the White Paper on *Brexit*²⁹. This document was followed by the Draft guidelines of the Council of the EU on 31 March 2017³⁰ and the Resolution of the European Parliament on 5 April 2017³¹, which reflect the first official position of the EU. These documents clarify certain issues on the anticipated *Brexit* process. The White Paper on *Brexit* shows³² that the UK has rejected EEA or Customs Union models and will be seeking new strategic partnership with the EU, including a 'wide reaching, bold and ambitious free trade agreement'. Although the UK Government has been confident³³ that the UK can reach a positive agreement about our future relationship with the EU in the time available under Article 50, the EU made it clear³⁴ that any negotiations on future relationship may be started only after the substantial progress will be made on the withdrawal agreement and that agreement on future cooperation may be concluded only after the UK leaves the EU. This means that actual framework of the free trade agreement will not appear until it is agreed on major withdrawal arrangements. Comparing with other models, free trade agreement should provide for certain flexibility for both parties. However, this option it is also very unclear and will highly depend of the political arrangements between the parties.

3. Possible impact of *Brexit* to professional regulation

Upon the very beginning when intentions to organise *Brexit* referendum were announced, the representatives of liberal professions³⁵ in the UK have expressed their anxiety related to the possible impact of *Brexit*. It was

²⁸ World Trade Organisation, 'The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines' [n.d.] https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

²⁹ Her Majesty's Government, 'The United Kingdom's exit from and new partnership with the European Union' [2017] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.

³⁰ Council of European Union, 'Draft guidelines following the United Kingdom's notification under Article 50 TEU' [2017] XT 21001/17, <http://www.politico.eu/wp-content/uploads/2017/03/FullText.pdf>.

³¹ European Parliament, 'Joint motion for a resolution on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union' [2017] 2017/2593(RSP), https://www.scribd.com/document/343381933/Draft-Resolution#download&from_embed.

³² Her Majesty's Government [2017]. P. 7.

³³ Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union' [2017] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604514/Great_repeal_bill_white_paper_print.pdf. P. 11.

³⁴ Council of European Union [2017]. Cl 4. European Parliament [2017]. Cl. 14, 15.

³⁵ British Veterinary Association, 'The EU referendum and the UK veterinary profession' [2016] https://www.bva.co.uk/uploadedFiles/Content/News_campaigns_and_policies/Campaigns/eu-referendum-uk-veterinary-profession.pdf. P. 3. E. Sinclair, S. Stagnell, S. Shah, 'Brexit and dentistry' [2016] *British Dental Journal*, Vol. 220, No. 10, p. 509-512, <http://www.nature.com/bdj/journal/v220/n10/pdf/sj.bdj.2016.371.pdf>. P. 509, 510 and 511. G. Lord, 'The impact of Brexit on EU audit reform' [2016] *Accountancy Age*, <https://www.accountancyage.com/2016/07/08/the-impact-of-brexit-on-eu-audit-reform/>. N. Rose, 'Brexit would damage lawyers' access to single market, Treasury predicts' [2016] *Legal Futures*, <http://www.legalfutures.co.uk/latest-news/brexit-damage-lawyers-access-single-market-treasury-predicts>. PricewaterhouseCoopers Luxembourg, 'Brexit – impact on audit reform?' [2016] <http://www.pwc.lu/en/press-articles/2016/brexit-impact-on-audit-reform.html>. R. Stott, 'Martha Thorne Urges UK to Preserve International Recognition of Qualifications in Wake of Brexit' [2016] *ArchDaily*, <http://www.archdaily.com/792720/martha-thorne-urges-uk-to-preserve-international-recognition-of-qualifications-in-wake-of-brexit>. Law Society of England and Wales, 'Brexit and the law' [2017] <http://www.lawsociety.org.uk/support-services/research-trends/documents/brexit-and-the-law>. P. 6, 14 and 15.

emphasised that the activities of liberal professionals are widely affected by the EU legislation – it ensures that the UK professionals may freely work and provide services around the EU with minimal difficulties and that professionals from the other EU countries may come to the UK. As main question was raised the faith of the Professional Qualification Directive and the Services Directive, as well as special rules for lawyers and auditors. There is likelihood that if some form of freedom of movement remains for workers and service providers after *Brexit*, then some form of mutual recognition would have to stay also, but in any case, it would be more restrictive. It was also noted that the UK will not have any influence of the development of new legislation of the EU or to the EU agencies and bodies, which are important for maximising consistency and effectiveness of the EU professional regulation.

Main challenge is that currently it is not possible to identify what would be the EU and the UK arrangements related to the trade of professional services and to what extent and scope the EU professional regulation could remain in the UK law after *Brexit*. The UK Government has expressed the importance of free movement of services and recognition of professional qualifications. However, no clear vision on how these important guarantees could be maintained after *Brexit* was provided³⁶. If the UK intends that free movement of liberal professionals would remain between the UK and the EU, it would be necessary to agree on (at least to certain extent) on the free movement of services and establishment and on the principles of mutual recognition³⁷. However, such arrangements seem incompatible with the already expressed position of the UK³⁸ that they will not be members of the single market because accepting all four freedoms is against with the democratically expressed will of the British people. The EU also emphasises³⁹ that after the withdrawal the UK will be treated as third country and the UK should not have preferential access to the internal market. Therefore, all provisions from the field of free movement of workers and services, also including professions related regulations, still is the most unclear part of the anticipated trade agreement to be negotiated between the EU and the UK.

Nevertheless, currently it is already possible to identify vectors and stages how the EU regulatory framework should develop in the UK law during the *Brexit* process and right after it:

1) *EU derived professional regulation will remain unchanged (and even may be further developed) in the UK until the withdrawal*. Both negotiating sides – the UK and the EU⁴⁰ – have confirmed that the UK will remain a full member of the EU and all the rights and obligations of the EU membership remain in force until exit. Moreover, the UK Government will continue to negotiate, implement and apply EU law during this period. In case the EU directives or regulations will be adopted or amended, the UK will be obliged to continue to implement and apply these new provisions until the final withdrawal from the EU. Also, there is a high possibility that application of EU professional regulation will also remain for certain period after the UK leaves the EU. This is since it is planned⁴¹ to establish the transitional period during which the EU law provisions could still be applicable in the UK.

2) *All EU professional regulation 'as it is' will be transposed in to the UK law on the moment of Brexit*. The UK plans to adopt the Great Repeal Bill, which will convert the EU 'acquis' into domestic law before *Brexit*. It is expected that this would allow businesses to continue operating knowing the rules have not changed significantly overnight, and would provide fairness to individuals, whose rights and obligations will not be subject to sudden change⁴². Different methods will apply for converting the EU law into the domestic UK law. Directives should be already transposed into the UK law, therefore, there will be not specific actions related them. As regarding regulations, it is planned that the Great Repeal Bill will make clear that EU regulations will be converted into domestic

³⁶ Her Majesty's Government [2017]. P. 41-42.

³⁷ F. Kainer [2017]. P. 9-10, 13.

³⁸ T. May, 'Prime Minister's Commons statement on triggering Article 50' [2017] <https://www.gov.uk/government/speeches/prime-ministers-commons-statement-on-triggering-article-50>.

³⁹ European Parliament [2017]. Cl. 22, 25.

⁴⁰ House of Commons [2013]. P. 11. Department for Exiting the European Union [2017]. P. 10. D. Tusk, 'Remarks on the next steps following the UK notification' [2017] <http://www.consilium.europa.eu/en/press/press-releases/2017/03/31-tusk-remarks-meeting-muscat-malta/>.

⁴¹ Council of European Union [2017]. Cl. 5.

⁴² Her Majesty's Government [2017]. P. 9. Department for Exiting the European Union [2017]. P. 12.

law and will continue to apply. As well, the UK has confirmed⁴³ that they will follow the historic case law of the CJEU when interpreting the UK law arising out of the EU law.

3) *Professionals related provisions of the UK law transposed from the EU law regulation will drift apart from the EU regulatory framework.* Even if the similar provisions would be transposed and maintained in the UK law, it is highly possible that they will start differ from the provisions deriving out the EU law. It is clearly said⁴⁴ that once the UK leaves the EU, the UK Parliament will be able to decide which elements of that law to keep, amend or repeal, also, all domestic legislation will reflect the content of the agreement the UK and the EU will agree upon. Therefore, it may be the case that many professional regulations will be withdrawn by the UK Parliament. Even if certain provisions are maintained, they may a tendency to 'drift apart'⁴⁵ due to future amendments in the EU or UK law and due to different interpretations, as the UK courts will not be bound any future jurisprudence of the CJEU.

Conclusions

1. EU legal framework for liberal professionals has developed more than 50 years and currently is a well-defined system of rules regulating mutual recognition of professional qualifications and common conditions for providing professional services. This regulatory framework is based on the free movement of workers, services and freedom of establishment, therefore, it is highly unclear how these freedoms will be ensured between the UK and the rest of the EU after *Brexit*.

2. Possible model on *Brexit* implementation is currently acquiring certain shape. The recently published positions of the UK Government and the EU rejected previously anticipated models of EEA and Customs Union and expressed the intention to agree on free trade agreement. Nevertheless, the agreement on the 'form' of the *Brexit* agreement, does not provide for more definition on the content thereof, especially in the field of free movement of liberal professionals.

3. Currently it is feasible only foresee some stages on how the EU derived regulation on liberal professions should develop and transform in the UK law. During the process, it will be possible to see certain transitional period during the *status quo* of regulatory framework should remain, later this regulation should transformed to purely domestic law and finally it should drift away from the EU framework due expected national amendments and absence of the unification at the EU level.

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⁴³ Department for Exiting the European Union [2017]. P. 13-16.

⁴⁴ Her Majesty's Government [2017]. P. 9. Department for Exiting the European Union [2017]. P. 10-12.

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THE EMERGENCE AND DEVELOPMENT OF CONTENT ID IN LIGHT OF USER GENERATED LAW

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Abstract

In our current knowledge based society YouTube, as the most prominent internet content provider, facilitates the exchange of information for internet users. YouTube employs a copyright management tool named Content ID enabling copyright holders to monetize the unauthorized use of their content by YouTube users. In this paper I will argue that Content ID is a legal innovation and can be considered user-generated law by performing the three step test - emergence, diffusion, adoption.

Keywords: Content ID, User-Generated Law, Copyright, Enforcement, Monetization.

Introduction

YouTube as the most prominent internet service providers (ISPs)², facilitates the exchange of information for internet users. According to Google an estimated 400 hours of new video content was uploaded per minute in 2016.³ As required by the Digital Millennium Copyright Act (DMCA) and many other national statutory laws⁴, YouTube must offer a notice and take down procedure (N&TD) in order to prevent itself from liability against copyright infringing content uploaded by its users. However, as Google reports, in 2016 only 2% of copyright issues were resolved by the legally required N&D on YouTube. 98% of copyright issues were managed by YouTube's voluntarily offered proprietary copyright management system named 'Content ID'. Rather than depending on the N&TD, the ex post remedy stipulated by statutory law, YouTube allows copyright holders to employ *a priori* control of what can appear on the site.⁵

Content ID scans videos being uploaded onto YouTube against a database of files that have been submitted by copyright holders. When a match of content has been identified, Content ID autonomously executes the copyright holders previously selected action. Not only may copyright holders select to block the uploaded content, they may choose to mute, monetize or track the identified video.⁶ Monetization especially is interesting for copyright holders as it generates immediate compensation for unauthorized third party use of their copyright protected work.⁷ So far Content ID has generated roughly 50% of the music industry's revenue from YouTube amounting to more than 2

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² According to 17 U.S. Code § 512 (k)(1)(B) a service provider is defined "a provider of online services or network access, or operator of facilities therefor," and includes "an entity offering the transmission, routing, or providing of connections for online digital communications." In the same vein, cf. Art. 2 (a)(b) Directive 2000/31/EC on electronic commerce ('E-Commerce Directive') and Art. 1 (2) Directive 98/34/EC.

³ Google Inc., How Google Fights Piracy 2016, 21, <https://drive.google.com/file/d/0BwxyRPFduTN2cI91LXJ0YjYYSjA/view?pref=2&pli=1>. All URLs are valid as of June 5th 2017.

⁴ Et al.: 17 U.S. Code § 512 [USA]. Art. 12-15 'E-Commerce Directive' and Art. 17 of Directive 2004/48/EC on the enforcement of intellectual property law ('Enforcement Directive')[EU]. § 8-10 Telemediengesetz 2007 [Germany]. Copyright Act, 1968, §§ 116AE, 116AH(1) [Australia]. Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique [France]. Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, § 19 [United Kingdom].

⁵ D. L. Zimmerman, 'Copyright and Social Media: A Tale of Legislative Abdication' [2014-2015] 35 Pace L. Rev. 260

⁶ Google, 'How Content ID works', <https://support.google.com/youtube/answer/2797370?hl=en>.

⁷ A. Simon, 'Contracting in the Dark: Casting Light on the Shadows of second level Agreements' [2014] 5 Wm. & Mary L. Rev. 306.

billion USD.⁸

Already this concise comparison of N&TD and Content ID reveals that enforcement of copyrights is not primarily determined by statutory law on YouTube. Instead, for a vast majority of cases legal relationships concerning copyrights are redefined by private agreements introduced and enforced by YouTube.

A reconstruction of Content ID's emergence and development may indicate reasons for its success and uncover significant problems. For this purpose I will apply the model of 'user generated law' to Content ID. It is specifically tailored to assist in reconstructing and analysing the emergence and development of private legal innovations for intellectual property law in a knowledge based society.⁹ User generated law is understood as: 'Users' who are any persons affected by the legal innovation.¹⁰ 'Law' which is the legal innovation established as a private form of legal regulation usually by contractual means.¹¹ 'Generated' which is the initiation or organisation of the process leading to a legal innovation.¹²

Applied to Content ID, the persons affected by the law are: YouTube itself, copyright holders using Content ID, active YouTube users, who upload predominantly user-generated content¹³ as well as passive YouTube users watching content on YouTube and advertisers financing the whole endeavour. The 'law' in question are non-public agreements between YouTube and copyright holders regarding Content ID¹⁴ as well as YouTube's terms of service¹⁵. While Content ID is undergoing continuous adjustments due to technical developments and pressure of its users, it was initially 'generated' by YouTube and launched in 2007. This leads us to the first of the three phases - emergence, diffusion, adoption - of user generated law.

1. Emergence

The first phase is 'Emergence', which "refers to a situation where a regulatory model is created and used by the parties effected by it."¹⁶ The emergence of Content ID is related to two crucial factors: in general, the practical difficulties of enforcing copyright law on the internet, in particular, the compensation of works being made publicly available on platforms without prior consent of the copyright holder.

For the detailed analysis of the emergence of legal innovation user generated law suggests that there are five determinants¹⁷: Firstly, state law must enable private actors to regulate themselves in a particular area of law by leaving 'autonomy spaces'. Secondly, 'heterogeneous demands' of users are the pressing force behind legal innovation. Thirdly, users will only develop legal innovations when they entertain 'expectations of benefits', particularly profits. Moreover, 'asymmetric information', namely the fact that users know best which regulation they prefer, facilitates legal innovation. Finally, the existence of 'lead users' understanding ordinary user needs are crucial for legal innovation.

1.1. Autonomy Spaces

⁸ See Google Inc., supra note 3, 26.

⁹ T. Riis (ed.), 'User Generated Law' (Cheltenham, Northampton: Edward Elgar 2016). 'User Generated Law' is inspired by von Hippel's theory on 'User Innovation', cf. E. von Hippel 'The Sources of Innovation' (Oxford: Oxford University Press 2005). Riis offers the model of user generated law in order to investigate if it is in fact useful for all private legal innovations.

¹⁰ T. Riis, 'User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society' in T. Riis (ed.), 'User Generated Law' (Cheltenham, Northampton: Edward Elgar 2016), 5.

¹¹ Id.

¹² Id., 5-6.

¹³ For further analysis of user-generated content, see N. Elkin-Koren, 'User-Generated Platforms' in R. Dreyfuss, D.L. Zimmerman, H. First (eds.), 'Working within the Boundries of Intellectual Property' (Oxford: Oxford University Press 2010), 128. also D. Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights' [2008-2009] 11 Vand. J. Ent.&Tech. L 921.

¹⁴ While the agreements are de facto non-public, YouTube offers detailed information on Content ID under YouTube Help – Manage your rights, cf. https://support.google.com/youtube/topic/6186113?hl=en&ref_topic=2676320.

¹⁵ Terms of Service for the US, <https://www.youtube.com/t/terms?gl=US>, including references to several further guidelines provided by YouTube.

¹⁶ T. Riis, See T. Riis, supra note 10, 10.

¹⁷ Id. 10-22.

The first determinants are 'autonomy spaces'. Statutory laws define the boundaries for autonomous regulation by private actors. As Content ID is a copyright management tool of an ISP, the boundaries of the *de jure* autonomy space are drawn by copyright law and statutory regulations on online intermediary liability. YouTube conducts business worldwide and offers localized versions of its services in 89 countries,¹⁸ hence it must also adhere to the specific standards in each jurisdiction. The following analysis will however focus on US law with references to European and German law.

In US copyright law a clear distinction is made between direct infringements – one's own unauthorized exercise of one of the exclusive rights of the copyright holder¹⁹ - and secondary liability²⁰ – one's vicarious action or contribution to an unauthorized exercise by a third party.²¹ Under these principles ISPs can be held liable for monetary relief for many of their activities as they commonly provide the means of distribution for potentially copyright infringing content.²²

In order to be exempted from liability YouTube must comply with safe harbour provisions. Since expectations in regard to the internet and its new intermediaries were high, legislators decided to ease the burden of ISPs from secondary liability, thus creating a space of autonomy. Pursuant to the relevant section for YouTube,²³ service providers are exempted from liability in case of "infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network [...]." Comparably, Art. 14 (1) E-Commerce Directive states: "[...] Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service[...]"²⁴ The liability exemptions in both jurisdictions further require that the ISP has neither obtained 'actual knowledge' of the infringing activity or upon obtaining knowledge of copyright infringing content, has expeditiously removed or disabled access to the material in question. 17 U.S.C. §512(c)(3)(A) lays down detailed requirements for N&TD. The E-Commerce Directive does not define specific N&TD procedures, instead explicitly encourages self-regulation, leaving the ISPs with additional autonomous space.

In both cases, the safe harbour provisions provide an autonomy space, or as Google's senior copyright policy counsel stated, "a playing field."²⁵ Yet, compliance with these safe harbour provisions is impeded by legal uncertainty. YouTube, when evaluating its activities, has to consider the following issues.

1.1.1 Actual knowledge

In the landmark case *Viacom v. YouTube*²⁶ the court clarified that the ISP does not lose its safe harbour if it is generally aware of widespread or common copyright infringements on its platform. 'Actual knowledge' is to be understood as knowledge of specific and identifiable infringements of individual items.²⁷

1.1.2 Control and Benefit

¹⁸ See YouTube localisation list at the bottom of <https://www.youtube.com/>.

¹⁹ Cf.: 17 U.S.C. §501, §106. Likewise in German Law §97 UrhG.

²⁰ Secondary liability in copyright law has been developed by case law. For 'vicarious copyright infringement' see *Shapiro, Bernstein and Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963). For 'contributory copyright infringement' see *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* 443 F.2d 1159 (2d Cir. 1971), 1162.

²¹ For an overview of cases on copyright infringement on the internet see: J. Cohen, L. P. Loren, R.L. Okediji, M. A. O'Rourke, 'Copyright in a Global Information Society' (New York: Wolters Kluwer 2015) 483-562.

²² Liability cases before 17 U.S.C. §512 came into force e.g.: In *Playboy v. Ferna* 839 F.Supp. 1552 (M.D. Fla. 1993) direct infringement was assumed. In *Sega v. Maphia I*, 857 F.Supp. 679 (N.D. Cal. 1994) contributory liability was affirmed. For an overview also see: T. Cloak, 'The Digital Titanic: The Sinking of YouTube.com in the DMCA Safe Harbor', [2007] 60 Vand. L. Rev. 1565.

²³ 17 U.S.C. §512 (c)(1).

²⁴ This provision does not affect the ability of member states to allow injunctions of different kinds against intermediaries, cf. recital 45 of the E-Commerce Directive.

²⁵ Hearing on § 512 of Title 17 before the Subcommittee on Courts, Intellectual Property and the Internet of the Committee on the Judiciary House of Representatives, March 13, 2017, <https://judiciary.house.gov/wp-content/uploads/2016/02/113-86-87151.pdf>, (Testimony of K. Oyama Google's senior copyright policy counsel) 98.

²⁶ 718 F.Supp.2nd 514 (S.D. N.Y. 2010), *Viacom v YouTube*, 2012 WL 1130851, 11(C.A.2 (N.Y.)).

²⁷ Similarly, Higher Regional Court of Justice Hamburg, Judgement of 01 July 2015, 5 U 87/12, 159, 230.

17 U.S.C. §512 (c)(1)(B) requires that the ISP “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” In *Perfect 10 v. Cybernet*²⁸ the court held, that if ISPs received financial benefits directly attributable to the infringing activity when generating revenues from advertisements placed along-side infringing content, the ISP could lose its safe harbour. This is certainly the case when ISPs exercise high levels of control by providing ‘extensive advice’ and ‘detailed instructions’ on content for its users, pre-screening submissions and refusing access to users.

Despite the lack of a statutory equivalent to 17 U.S.C. §512 (c)(1)(B) the European Court of Justice (ECJ) was faced with similar issues. In this regard the ECJ created a new requirement of a ‘neutral provider’ by stipulating: “that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.”²⁹ Further, the ECJ held that, “[w]here, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position [...]” [Emphasis added].³⁰

This assessment could be critical for YouTube, as it offers a YouTube Partner Program³¹ for users to monetize their own generated content in return for approximately 50% of the advertisement revenue. For that reason specific instructions are provided which may amount to ‘extensive advice’ and ‘detailed instructions’ as assessed in *Perfect 10 v. Cybernet*.

1.1.3 Storage and Software Functions

A related issue is, if an ISP loses its ‘neutral provider’ status when using software functions such as transcoding, ‘related videos’, video recommendations, creating playlists or categorization of uploaded videos. 17 U.S.C. §512 (c)(1) states that safe harbour is only available when the infringement occurs “by reason of storage at the direction of a user of material that resides on a system or network[...]” [Emphasis added].” In *UMG I* it was clarified that automated functions “providing access to materials stored at the direction of users is closely related to, and follows from, the storage itself.”³² Likewise, a German court held that ISPs offering these supporting services to all its users indiscriminately by automated processes are covered by the liability exemptions.³³

1.2. Heterogeneous Demands

The second determinants for the emergence of User Generated Law are ‘heterogeneous demands’ among actors. There are five different actors affected by Content ID and as such can be considered users of the regulatory model: YouTube, copyright holders, users uploading content and users viewing content as well as advertisers.

1.2.1 YouTube’s demand for Content ID

Without the risk of facing liability for third party content YouTube most likely would not have developed

²⁸ *Perfect 10 v. Cybernet*, 213 F.Supp.2d 1146, 1181 (C.D.Cal. 2002).

²⁹ ECJ Judgement of 23 March 2010, *Google France v Google*, C-236/08 to C-238/08, ECLI:EU:C:2010:159, 113.

³⁰ ECJ Judgement of 11 July 2011, *L’Oreal v eBay*, C-324/09, ECLI:EU:C:2011:474, 116.

³¹ Cf.: Introduction to the YouTube Partner Program, https://support.google.com/youtube/topic/14965?hl=en&ref_topic=2676320.

³² *UMG I*, 620 F.Supp.2d, 1092.

³³ Higher Regional Court of Justice Hamburg, Judgement of 01 July 2015, 5 U 87/12, 171 in reference to German Federal Court of Justice, Judgement of 05 February 2015, I ZR 240/12, 37 – *Kinderhochstühle III*. German Law does not differentiate between neutral or non-neutral providers. Yet, § 7 *Telemediengesetz* speaks of ‘eigene Informationen’ i.e. ‘one’s own information’. Based on this terminology the German Federal Court speaks of ‘appropriated information’ in cases of a non-neutral provider. Cf. D. Holznagel, ‘Notice and Take-Down-Verfahren als Teil der Providerhaftung’ (Tübingen: Mohr Siebeck 2013) 123.

Content ID. It is believed that Content ID was necessary in the attempt to implement a robust infrastructure to handle the notices in regard to the N&TD procedure laid out in 17 U.S.C. §512 (c), (g).³⁴ In consideration of automated notifications, this becomes even more urgent. In order to handle the constant resurgence of infringing material, copyright holders employ algorithms to crawl the internet for indications of potentially infringing content.³⁵ Once found, an automated takedown request can be sent to the ISP. As a result voluminous notices can be issued.³⁶ YouTube on the receiving side would need to process these automated notifications 'expeditiously' in order to be exempted from liability.³⁷ Expeditious and automated processing of allegedly infringing content is exactly what Content ID does.³⁸ However, as automated notifications were not yet prominent at the time of the development Content ID,³⁹ a different circumstance might have been more pushing.

Instead, it is believed that the legal proceedings Viacom brought forward against YouTube in 2007⁴⁰ pressured YouTube to develop a system for monitoring to provide for all contingencies.⁴¹ In essence, Viacom was seeking one billion US dollars in damages while raising the question of who was responsible for monitoring videos on YouTube for copyright infringing content, YouTube or copyright holders. However, even before proceedings commenced, as early as September 2006, Warner Music Group and YouTube announced a landmark video distribution and revenue partnership.⁴² In fact, Google applied for a patent titled 'Blocking of unlicensed audio content in video files on a video hosting website' in February 2007.⁴³ In any case, the uncertain scope of the liability exemptions must have created great pressure for legal and technological innovation.⁴⁴ This alone, however, does not suffice under the model of user generated law as it is rooted in statutory provisions, rather than a demand for legal innovation.⁴⁵

Adding the means for monetization of unauthorized use of copyright protected content made a virtue out of the necessity. As the Warner Music Group and YouTube news release emphasises, a crucial aspect of the development of Content ID is a revenue partnership. the purpose of making YouTube a better source for profit, for copyright holders as well as Google.⁴⁶ Thus, the monetization function of Content ID also entails the novelty of legal and technical means for automated licencing on the internet.⁴⁷ Especially, due to this additional aspect Content ID can be considered a legal innovation.

³⁴ N. T. DeLisla, 'You(Tube), Me, And Content ID – Paving the Way for Compulsory Synchronized Licensing on User-Generated Content Platforms' [2016] 81 Brook. L. Rev. 1285.

³⁵ Z. Carpou, 'Robots, Pirates, and the Rise of Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users' [20015-2016] 39 Colum. J. L. Arts 559.

³⁶ J. Urban, J. Karaganis, B. Schofield, Brianna, ' Notice and Takedown in Everyday Practice' (2017) UC Berkeley Public Law Research Paper No. 2755628.

³⁷ Although Google offers Transparency Reports on its takedown activities, these do not provide sufficient data on the volume of requests targeting YouTube, they are only representative of notices submitted pursuant to §512(d).

³⁸ The voluntary filtering executed through Content ID does not constitute sufficient knowledge or control of infringing activity to place YouTube outside the liability exemptions due to its automated nature, cf. UMG v Veah, 665 F. Supp.2d 1099, 113 (C.D. Cal. 2009) affirmed by UMG v Shelter, 718 F.3d 1006 (9th Cir. 2013).

³⁹ Content ID was launched 2007, the rise of automated takedown requests occurred between 2009 and 2014. An indication is the data on requested takedown notices Google Search received in this time period. 2009 there were less than 100 notices, 2014 approximately 345 million, cf. J. Karaganis, J. Urban, 'The Rise of the Robo Notice' [2015] 9 Comm. of the AMC 29

⁴⁰ See Viacom v YouTube, supra note 25. , see also above 1.1.1.

⁴¹ See A. Simon, supra note 7, 310. Also read the critique of the ruling emphasizing legal uncertainty: L. Katz, 'Viacom v YouTube: An Erroneous Ruling Based on the Outmoded DMCA' [2010-2011] 31 Loy. L.A. Ent. L. Rev. 101-142.

⁴² Press Release, Warner Music Inc., Warner Music Group, Warner Music Group and YouTube Announce Landmark Video Distribution and Revenue Partnership (Sept. 18, 2006), <http://investors.wmg.com/phoenix.zhtml?c=182480&p=irol-newsArticle&ID=906153>.

⁴³ US patent publication number US 7707224 B2.

⁴⁴ See above examples of legal uncertainty 1.1.

⁴⁵ Cf. For assessment of N&TD in general: C. Petersen, T. Riis, 'Private Enforcement of IP law by internet Service Providers: Notice and Action Procedures' in T. Riis (ed.), 'User Generated Law' (Cheltenham, Northampton: Edward Elgar 2016), 251

⁴⁶ Y. Lev-Aretz, 'Second Level Agreements' [2012] 45 Akron L. Rev. 155-156.

⁴⁷ See N. T. DeLisla, supra note 40, 1295.

1.2.2 Copyright holder's demand for Content ID

For eligible copyright holders Content ID can be seen as a win-win situation. Since copyright holders were faced with the 'digital dilemma', they sought to recover control over their copyrighted works.⁴⁸ In particular, copyright holders are interested in obtaining compensation for digital distribution of their content on the internet to secure their investments. New promising business models for copyright holders e.g. Spotify⁴⁹ or Netflix arose, creating additional streams of revenue for copyright holders.⁵⁰ However, these business models unlike YouTube, do not consider user-generated content created as derivative works of copyright protected material. As compensation for the unauthorized distribution of copyright protected content by means of levy or tax or voluntary collective licencing is non-existent,⁵¹ without Content ID, copyright holders would only possess the ability to takedown unauthorized content.

Content ID meets the demand of those copyright holders seeking means of utilizing unauthorized content on YouTube. While N&TD regimes, in theory, are also capable of facilitating communication between diffuse users and distant copyright holders,⁵² they were doomed to fail as the transaction costs remain high. Not only would each N&TD lead to a costly negotiation between both parties over the licensing terms, in the predominant amount of cases it is to be expected, that users of unauthorized content would not be willing or able to pay the licensing fee. YouTube resolved this issue by introducing a means of payment in form of advertising revenue. In addition, YouTube provides the means for compulsory synchronized licensing rendering negotiations between the parties obsolete.⁵³

Rather than responding to constant resurgence of infringing material, copyright holders may now decide to allow unauthorized content on YouTube and generate revenue by monetizing it.⁵⁴

1.2.3 User's Demand for Content ID

The notion of users demanding Content ID is not a very felicitous one. For YouTube users copyright enforcement tools are rather an obstacle than a necessity.⁵⁵ Even so, Content ID may seem to be the lesser of two evils. Instead of having content removed or being obliged to seek and enter into licencing agreements with numerous copyright holders,⁵⁶ users may come to prefer the possibility of copyright holders monetizing their videos in return for allowing these to remain publically available. While this trade-off is to the detriment of the users creating remixes, mashups and alike as they do not receive any remuneration for their derivative works when monetization is employed through Content ID,⁵⁷ it is currently the price a user is bound to pay, if it's content is to remain publically accessible.

⁴⁸ See Committee on Intellectual Property Rights and the Emerging Information Infrastructure, 'The digital Dilemma' (Washington D.C.: National Academy Press 2000), 30.

⁴⁹ See N. Wlömert, D. Papiés, 'On-Demand Streaming Services and Music Industry Revenues – Insights from Spotify's market entry' [2016] 33 Int. Jour. of. Res. In Mark. 314.

⁵⁰ K. Borja, S. Dieringer, 'Streaming or Stealing? The complementary features between music streaming and music piracy' [2016] 32 Jour. Of Retail. & Cons. Serv. 86-95.

⁵¹ While these options have been discussed in regard to peer-to-peer file sharing, they do not seem achievable as they require revision of international treaties. See A. Peukert, 'A Bipolar Copyright System for the Digital Network Environment' in A. Strowel, 'Peer-to-Peer File Sharing and Secondary Liability in Copyright Law' (Cheltenham, Northampton: Edward Elgar 2009), 149-195.

⁵² P. Heald, 'How Notice-And-Takedown Regimes Create Markets for Music on YouTube: An Empirical Study' [2014-2015] 83 UMCK L. Rev. 313-314.

⁵³ See N. T. DeLisa, *supra* note 40, 1307.

⁵⁴ B. Arsham, 'Monetizing Infringement: A New Legal Regime for Hosts of User-Generated Content' [2013] 101 Geo. L.J. 775

⁵⁵ L. Lessig, 'Free Culture: How Big Media Uses Technology and the Law to' (New York: The Penguin Press 2004) 184-188.

⁵⁶ See N. Elkin-Koren, *supra* note 13. To reduce transaction costs collective management organizations are established. Yet, models for cross-border online licensing are at an infancy stage. See S. Schwemer, 'Emerging models for cross-border online licensing' in T. Riis (ed.), 'User Generated Law' (Cheltenham, Northampton: Edward Elgar 2016), 77.

⁵⁷ This approach may conflict with national laws. For instance, German Copyright Law ensures appropriate remuneration for the use of one's work, original or derivative. See: § 11 Urheberrechtsgesetz. Also cf. below '3. Adoption'.

Viewers, nonetheless, are the greatest beneficiary. Without payment they have access to great amounts of copyright protected works.⁵⁸

1.2.3 Advertiser's Demand for Content ID

Advertisers are the final actors within the regulatory model of Content ID, as they finance the whole endeavour. Similarly to YouTube, in order to avoid conflicts with copyright holders, advertisers have great interest in ensuring that their advertisements are shown alongside non-infringing content. Through monetization on Content ID advertisers gain the certainty, that potentially copyrighted material was identified and approved to be monetized by the copyright holder himself.

1.3 Expectation of Benefits

'Expectations of benefits' are considered to be the third determinant for the emergence of user generated law. Basically, mainstream economic theory regards beneficial expectations to be either based on expected revenue and/or reduction of commercial risks in certain transactions due to the legal innovation.⁵⁹ The detailed depiction of the demands of all actors above already indicates that Content ID was created to establish a mutually beneficial environment for all actors. Thus, to avoid cumbersome repetitions, I will forgo an additional detailed analysis. Generally speaking, the automated system lowers transaction costs for all actors involved and generates revenue by monetization for YouTube and copyright holders alike. If the amount of investment into the development of Content ID is an indicator, the expectations of benefits must have been extraordinary. Google invested 60 million USD, more than 50.000 engineering hours into building the Content ID.⁶⁰

Moreover, usually, regulatory models are not sold as products.⁶¹ Yet, due to the hybrid nature of Content ID - being a technical innovation, while simultaneously regulating legal relationships among the affected actors - the technology can also be licenced to third parties for profit.

1.4 Asymmetric Information

'Asymmetric information', as the forth determinant for the emergence of user generated law, describes the issue of legislators having "inadequate information on users' legal needs that emerge within autonomy spaces [...]"⁶² As the initial point of this analysis were the liability exemptions, it is important to stress these regulations were drafted with unauthorized peer-to-peer file sharing of copyrighted content in mind.⁶³ Only when new platforms such as Facebook, YouTube, MySpace entered the Web 2.0 it became possible for layman to share their videos to a large audience following YouTube's slogan 'Broadcast Yourself',⁶⁴ and the issues around user-generated content⁶⁵ arose.

⁵⁸ The free use and great quantity of available music on YouTube explains its number one position among music streaming services, cf. J. Geddes, 'YouTube - Not Spotify, Pandora Or Apple Music - Is The Number One Music Streaming Service Worldwide: Here's Why' [8th July 2015] Tech Times, <http://www.techtimes.com/articles/66603/20150708/youtube-not-spotify-pandora-or-apple-music-is-the-number-one-music-streaming-service-worldwide-here-s-why.htm>.

⁵⁹ See T. Riis, *supra* note 10, 16.

⁶⁰ Hearing on § 512 of Title 17 before the Subcommittee on Courts, Intellectual Property and the Internet of the Committee on the Judiciary House of Representatives, March 13, 2017, <https://judiciary.house.gov/wp-content/uploads/2016/02/113-86-87151.pdf>, (Testimony of K. Oyama Google's senior copyright policy counsel) 98. Google has claimed to have paid out approx. 2 billion USD to the copyright holders due to Content ID. Since 45% of the ad revenue is retained by Google its investments have greatly exceeded amortization.

⁶¹ See T. Riis, *supra* note 10, 15.

⁶² *Id.*, 18.

⁶³ See e.g. the first peer-to-peer file sharing case *A&M Records v Napster*, 239 F.3d 1004 (9th Cir. 2001).

⁶⁴ These companies were founded between 2003 and 2005. Broad recognition of user-generated platforms became apparent in 2006 due to the Time Magazine choosing 'You' as the person of the year in 2006, see L. Grossman, 'You — Yes, You — Are Time's Person of the Year', Times [December 25, 2006], <http://content.time.com/time/magazine/article/0,9171,1570810,00.html>.

⁶⁵ User-generated videos can be understood as derivative works pursuant to 17 U.S.C. §101. also in German law § 3 UrhG.

This development created, at least for some actors, a need for effective means of monetizing the unauthorized use of copyright protected content in derivative works.

The information asymmetry between legislators and YouTube at this point is significant, in particular regarding the extraordinary technological component of Content ID. Furthermore, Google's unique position in the online advertising market vested YouTube with additional information which allowed establishing third party financing for monetization.⁶⁶

1. 5. Lead User

Finally, the fifth determinant for the emergence of user generated law are 'lead users' whose present strong needs will become common among its field of activity in the future.⁶⁷ For the emergence of user generated law the existence of multiple lead users is possible. In context of Content ID, YouTube is the first hosting site to employ a tool which provides copyright holders with the technological means of monetizing unauthorized use. Digital fingerprinting technology and content recognition existed before YouTube introduced its Content ID. In fact, in its first years YouTube itself used this technology from Audible Magic, a major provider of automated content recognition software.⁶⁸ Yet, the means for monetization can only be ascribed to YouTube.

Also Warner Music Group as a major entertainment company has a leading role among copyright holders. It is the first to commercially distribute its music video catalogue on a user-generated platform and to embrace the power and creativity of user-generated content. The agreement underlying Content ID was developed over a period of several months between these two lead users, hence suggesting that the legal innovation was a collaborative achievement.⁶⁹

2. Diffusion

Proceeding with the second phase 'diffusion', which "simply means that the legal innovation is copied and used by other parties [...]."⁷⁰ Ever since Warner Music Group has signed the first agreement with YouTube to employ Content ID many other copyright holders joined. As of July 2015, Google reports, that there are more than 8,000 partners using Content ID, including many major network broadcasters, movie studios and record labels.⁷¹ This development exemplifies the diffusion of Content ID among copyright holders.

A diffusion of Content ID among hosting platforms cannot be easily assumed. Hosting platform such as MySpace, SoundCloud, and Facebook are now maintaining copyright filters to block the upload of content registered by right holders.⁷² Thus, the practice of offering copyright holders a priori control of what may be posted on the platform has spread, yet, the possibility of monetization remains unique to YouTube's Content ID.

In sum, Content IDs underlining legal innovation of monetization shapes and regulates legal relations between YouTube, copyright holders, YouTube users and advertisers. 2 billion USD were generated on the basis of this legal framework. On this basis phase two has been completed.

⁶⁶ Google is able to ensure its dominant role in online advertising, see S. Nakajima, 'State of Online Advertising Worldwide' [2016] 104 Digiworld Eco. J. 89.

⁶⁷ See T. Riis, *supra* note 10, 21. 'Lead Users' are to be distinguished from 'lead actors', which represent actors that create legal innovations without being affected by them.

⁶⁸ See, About Audible Magic, <http://www.audiblemagic.com/about/>.

⁶⁹ Press Release, Warner Music Inc., Warner Music Group, Warner Music Group and YouTube Announce Landmark Video Distribution and Revenue Partnership (Sept. 18, 2006), <http://investors.wmg.com/phoenix.zhtml?c=182480&p=irol-newsArticle&ID=906153>.

⁷⁰ T. Riis, See T. Riis, *supra* note 10, 10.

⁷¹ See Google Inc., *supra* note 3, 19.

⁷² For MySpace, see <https://help.myspace.com/hc/en-us/articles/202085854-How-do-I-remove-a-copyright-block->. For SoundCloud, see <https://blog.soundcloud.com/2011/01/05/q-and-a-content-identification-system/>. Facebook reports using Audible Magic, see <https://www.facebook.com/help/400287850027717/>.

3. Adoption

The final phase to establish user generated law is 'adoption'. It "implies that the legal innovation is acknowledged by the legislator or other producers of state-enacted law as a regulatory model that works well."⁷³

The EU Art. 13 of the Proposal for a Directive on copyright in the Digital Single Market,⁷⁴ emphasises the need to ensure access to copyrighted works by means of functioning agreements between copyright holders and platforms. It states: "Information society service providers [...] shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers [Emphasis added]."⁷⁵ Hence, one could understand the legislator hinting to monetization through Content ID as it facilitates the access to copyright protected works on the internet based on agreements between YouTube and copyright holders.⁷⁶ In addition, YouTube has faced several court cases discussing Content ID to varying extents whereas Content ID has been acknowledged to be a legitimate model of regulating contractual relationships between the parties involved.

In any case, legislators need to also consider the flaws of this highly automated procedure. In sum, three harms of Content ID can be identified.⁷⁷ Firstly, false positives, also known as 'overblocking', harm public access to and use of information. Death of fair use has been proclaimed.⁷⁸ The automated functions of Content ID eliminate fair use analysis and are ineffectively dealt with Content ID appeal process. The overzealous matching of far reaching or even abusively used reference files can also impede other copyright owners of their revenue. Secondly, Content ID monetization unjustly enriches copyright holders. Irrespective of the length of the use of a copyright protected work, when a match is detected by Content ID the copyright holder can monetize the whole video and collect all ad revenue. Sharing revenue with the user who created the content is only explicitly foreseen for cover song videos.⁷⁹ Finally, Content ID creates legal uncertainty for YouTube users making user generated videos with 'authorized' content. It is difficult to retrace which content will be monetized and therefore can remain publically available. Even when some copyright holders explicitly approve the use of their content, audio or video clips can contain several distinctive copyright protected works allowing different copyright holders to choose different actions.⁸⁰

Conclusions

The analysis of the emergence and development of Content ID demonstrated the underlining contractual relations of the monetization option can be considered user generated law. Content ID is a multi-faceted innovation.

⁷³ T. Riis, See T. Riis, *supra* note 10, 10.

⁷⁴ COM(2016) 593 final, The proposal is expected to be discussed by the EU parliament and Council near-term.

⁷⁵ *Id.*

⁷⁶ In the current case, the line between the phases of 'diffusion' and 'adoption' may be blurred. Art. 13 of the proposed directive can also be read as promoting the diffusion of Content ID.

⁷⁷ For a list of proposed improvements, see L. Shinn, 'YouTube's Content ID as a Case Study of Private Copyright Enforcement Systems' [2015] 43 AIPLA Q. J. 385.

⁷⁸ B. Taylor, 'The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID' [2014-2015] 13 Duke L. Tech. Rev. 66-88.

⁷⁹ If the user uploading the video is a creator participating in the YouTube Partner Program. He will be paid revenue on a pro rata bases for an eligible cover song video once the video is claimed by the copyright holder. See YouTubeHelp, 'Monetizing Eligible Cover Videos', https://support.google.com/youtube/answer/3301938?visit_id=1-636274986580903105-3062100605&rd=1.

⁸⁰ Even when the gaming developers encourage walkthroughs of their game, the music playing in the background of said game can be ground for the video being blocked by the copyright owner of the music. See P. Tassi, 'Blizzard, Capcom, Ubisoft And More Rally Behind Copyright-Afflicted YouTubers' [2013] Forbes, <https://www.forbes.com/sites/insertcoin/2013/12/12/blizzard-capcom-ubisoft-and-more-rally-behind-copyright-afflicted-youtubers/#1cc406ad40e3>.

It is a technology employing algorithms to find content matches. It also regulates copyrights by either allowing blocking of videos or monetization. Therefore, Content ID is a product and service as well as a new means of regulating relationships between YouTube, copyright holders and YouTube users. Hence at times the particularities of the models of product innovation and user generated law are intertwined. This can be traced back to the fact that in the digital real, algorithms are twofold, a product and a means of regulating activities.

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REGISTRATION OF HASHTAGS AS TRADE MARKS IN EUROPEAN UNION LAW

Maciej Zejda¹

Abstract

The main object of the paper is to assess whether word signs combined with hashtag symbol afford trade mark protection under Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 (Directive 2015/2436). For this reason, article describes the phenomena of hashtags and the way they are used on the Internet. Consideration will be given to how the strategy of marketing campaigns has changed and why it is relevant to the understanding of the marketing power of hashtags. Paper concentrates on whether existing rules on trade mark protection are adequate to assess word marks acting as hashtags to have functions of traditional trade marks. The requirement of distinctiveness of a trade mark in the light of the nature of various types of hashtags will be thoroughly examined. In this case, attention must be paid to various types of word signs that act as hashtags and contexts associated with such use. Paper brings into focus whether hashtag may acquire secondary distinctiveness due to extensive *hashtaging* of a particular word or slogan. Finally, consideration must be given to the functional role of hashtags on social media websites in comparison to the role played by domain names. The study focuses on whether word signs, which are preceded by hashtag symbol, are perceived solely as a data tag used for searching online social media, or also as a trade mark for goods or services and thus fulfil the essential role of every trade mark which is acting as an indicator of origin of the goods and services to which it attaches. Article refers to concepts related to the use of hashtags in American case law and tries to apply them in the context of Union legislation.

Keywords: hashtags, trade marks, social media, distinctiveness, source identifier.

Introduction

Hashtags are simple octothorpes which became recently a very common marketing tool in social media campaigns. The idea of the use of the hashtag sign is not new as it dates to the late 1980's when the users of the Internet Relay Chat ("IRC") used hashtags to categorize the content of the chats into groups. Technically speaking a hashtag is a metadata consisting of a word or whole phrase with a # prefix². Nowadays, it allows social media users to facilitate their search through the content displayed on various social media sites. Twitter is a platform where the hashtag-mania begun. Users of Twitter are *tweeting* – i.e. posting messages on their profiles, that are accessible by other users. It is possible to use Twitter as a blog and keep all the Tweets public, meaning anyone could read them on personal profile page. It is also possible to keep tweets only accessible to certain people. Once a twitter account is created, the user can begin building its network of contacts. As a result, an individual can invite other users to receive Tweets, and can follow other members' posts³.

People type the hashtag sign before a relevant keyword or phrase in their Tweet to categorize subjects of conversations and thus facilitate a Twitter search. For example, one of the most popular hashtags in the history of Tweeter is "#JeSuisCharlie", which is designed to be attached to tweets expressing solidarity for the victims of the

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² B. Butswin, '#Trade markLaw: Protecting and Maximizing the Value of Trade marks in an Evolving Social Media Marketplace' [2016], 7(1) *Cybaris* 111.

³ For more information see: J. Strickland, N. Chandler, 'How Twitter Works' [online] Available at: <http://computer.howstuffworks.com/internet/social-networking/networks/twitter1.htm> [Accessed 9th April 2017].

terrorist attack, which took place in Paris, at the Charlie Hebdo headquarters⁴. Clicking on a *hashtagged* word in any message shows other Tweets that include that hashtag⁵. Consequently, a Tweeter user can quickly find and engage in relevant conversation by clicking on certain hashtags. Another social platform which uses hashtags to great effect is Instagram, which is a photographic equivalent of Twitter. This basically means that instead of short messages users post photographs or videos and mark them with hashtags to enable other users to quickly search through them by categories.

In other words, hashtags enable people who use social media platforms to follow each other's content posted on their profiles. This feature allows users to take part in conversation with other users, even with people they did not previously know, since everyone can follow the same set of tweets or other content. It also allows social media platforms to be tied to other forms of media, so that television shows, for example, can receive live tweets about the content of the programming⁶. Most importantly, hashtags can link users of various social media platforms. They are currently used on a number of social networking sites, including Facebook, Instagram, Pinterest, Vine, Flickr, Google+, YouTube, Kickstarter, Delicious, and Tumblr⁷. Apart from social media, hashtag symbol is also deployed by the whole blogosphere. As a result, hashtags allow users of various social media platforms and followers of blogs to exchange their thoughts, ideas, photographs or experiences regarding random subjects. Some of those subjects may be dedicated to trade mark proprietors, which is why the hashtag is such an important tool in contemporary marketing. It allows marketers to interact more efficiently with the audience comparing to traditional media, as they are able to monitor interaction between members of audience by following posts related to hashtags which represent trade marks in live time⁸. Hashtags are thus one of the key methods of increasing interactions of the potential consumers since they enable audience to quickly navigate between content posted on several social media platforms. At the same time marketers are using social media campaigns to advertise and engage with consumers directly. This new marketing instruments allow also trade mark holders to react quickly in case the goodwill of the mark is at risk. The main difference between marketing in social media and traditional media is the fact that the first one is based on interaction between the marketers and audience as well as interaction between audience itself while the latter consist merely of a communication stemming from the marketer towards recipients⁹. As a result, marketing in social media is dependent on the activities of the web users – it even encourages consumers to get involved in the marketing campaigns, while traditional marketing treats consumers only as passive recipients of the message prepared by marketers.

I. Do hashtags act as source identifiers?

To answer the question whether word signs preceded by a hashtag are worthy of trade mark protection it is firstly essential to analyse whether such marks have the ability to fulfil the essential function of the trade mark embodied in art. 3 of the Directive 2015/2436, i.e. to act as a source identifier in general. According to art. 3 (a) of the Directive 2015/2436, a trade mark must be capable of distinguishing the goods or services of one undertaking from those of other undertakings. This provision corresponds with art. 4.1 (a) of the Directive 2015/2436 which states that registration shall be refused to marks that cannot constitute a trade mark. The settled case-law of the Court of Justice of the European Union (CJEU) simply states that the essential function of a trade mark is to guarantee the identity of the origin of the marked product to a consumer or end user by enabling him, without any possibility of

⁴ For more information see: T. Whitehead, Paris Charlie Hebdo attack: Je Suis Charlie hashtag one of most popular in Twitter history' [online] Available at: <http://www.telegraph.co.uk/news/worldnews/europe/france/11336879/Paris-Charlie-Hebdo-attack-Je-Suis-Charlie-hashtag-one-of-most-popular-in-Twitter-history.html> [Accessed 10th April 2017].

⁵ Twitter, 'FAQ' [online] Available at: <https://support.twitter.com/articles/49309> [Accessed 9th April 2017].

⁶ S. Coughlan, R. J. Currie, 'Social Media: The Law Simply Stated' [2013], 11 Can. J. L. & Tech. 229.

⁷ For more information about the use of hashtags on various social media platforms see: M. Patterson [2014] 'How to Use Hashtags on Every Social Media Network' [online] Available at: <http://sproutsocial.com/insights/how-to-use-hashtags/> [Accessed 10th April 2017].

⁸ B. Butswin, op. cit., p. 112.

⁹ R. T. Scherwin, '#HaveWeREallyThoughtThisThrough?: Why granting trade mark protection to hashtags is unnecessary, duplicative, and downright dangerous' [2016] 29(2) Harvard Journal of Law & Technology 459.

confusion, to distinguish the product or service from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition, it must be able to guarantee that all the goods or services bearing it have originated under the control of a single undertaking which is responsible for their quality¹⁰.

Hashtags' ability to become a trade mark depends among other things upon their creation, use, meaning and most importantly - the context of their use¹¹. Consequently, the way hashtags are used by consumers and the fact, that web users are fully aware that a hashtag containing a trade mark does not have to originate from the trade mark holder is the most essential aspect when it comes to assessing hashtags ability to act as a source identifier *in abstracto*. As a result, it would possibly be difficult to assess that a hashtag use of the registered trade mark by the trade mark holder represents use for the purpose of distinguishing the goods or services in question as originating from a particular undertaking. The way social media platforms operate through use of hashtags makes it practically impossible for the users of social media platforms to perceive hashtags as source identifiers since anyone can hashtag any word it wishes. More importantly – trade mark proprietors encourage third parties to use their trade marks in hashtags since generating online traffic is the main purpose of hashtag campaigns in social media. Such use of hashtags conflicts with the idea of acting as a source identifier. The requirement that a mark is used as a source identifier is however essential to establish protection under trade mark law¹².

This is where the main problem with registration of hashtags is rooted - even if it is assumed that some hashtags are sufficiently distinctive or they basically contain protected trade marks, they act as functional tools which enable to categorize and search through available topics on multiple social media platforms. Limiting the right to use hashtags only to trade mark holders would undermine functionality and purpose of social media. Functionality of hashtags is similar to domain names, both fulfil technological functions, that is enable web users to navigate through Internet content. However, it is much easier for domain names to act as source identifiers rather than simply functional tools since they can be easily used as trade marks and be viewed as a badge of origin by consumers. As it is described in scholarship writing, a domain name is *passive and static - a web user can only visit it and complete transactions once there, but cannot change it or become its co-author*¹³. This helps domain names to be perceived as source identifiers since web users are expecting websites containing trade marks in the domain names to be linked with the proprietor of the trade mark. A hashtag, on the other hand, is collaborative and dynamic. It serves expressive and communicative functions as well as technological. More importantly, hashtags meaning may be developed or modified by users depending on the context of its use and the subject of the tweets¹⁴. The web user who clicks on a hashtag containing trade mark does not have any reasonable grounds to believe that the hashtag originates from the trade mark holder. This position is reflected in American case law which treats hashtags differently from domain names and does not equip hashtags in the ability to act as a source identifier since recipients do not perceive them in such a way¹⁵. Consequently, there is a considerable difference between domain names and hashtags although it apparently seems those two instruments are designed to perform roughly the same functions. In case of hashtags it is difficult to find instances when they are used online as badges of origin, rather than merely as tools organising the use of social media platforms, or at least are not perceived as such by consumers. Protection of hashtags as trade marks would thus be questionable since they are not recognized by consumers as source identifiers and thus cannot constitute a trade mark in the light of art. 3 of the Directive 2015/2436.

II. Are hashtags of distinctive character?

28. ¹⁰ *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc., formerly Pathe Communications Corporation*, Case C-39/97 [1998], para.

¹¹ A. J. Roberts, op. cit., 57.

¹² *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik*, Case C-63/97 [1999] para. 38. *Arsenal Football Club plc v Matthew Reed*, Case C-206/01 [2002] para. 53.

¹³ A.J. Roberts, op. cit., 34.

¹⁴ *Ibid*, 35.

¹⁵ *Example: Eksouzian v. Albanese*, Case No. CV 13-00728-PSG-MAN [2015] U.S. C.D. Cal. Aug. 7, 2015, for opposite view see: *Fraternity Collection, LLC v. Fargnoli*, Case No. 3:13-CV-664-CWR-FKB 2015 WL 1486375 [2015] S.D. Miss. Mar. 31, 2015 (which suggests that under certain circumstances hashtags are able to act as indicators of origin of goods and services which are capable of being distinctive).

Even if we assume that word signs combined with hashtag symbol may act as source identifiers it is essential to consider whether such signs may possess or acquire distinctive character. Pursuant to art. 4.1 (b) of the Directive 2015/2436 trade marks which are devoid of any distinctive character cannot be registered. For a mark to possess distinctive character it must identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from products of other undertakings¹⁶. Consequently, existence of the distinctive character may be established only in relation to particular type of goods or services attached to the mark. According to case law of CJEU it has been expressed that in deciding whether a mark is distinctive attention must be paid to both, the ordinary use of trade mark as a badge of origin in sectors concerned and the perception of the mark by the relevant public¹⁷. If a mark is not inherently distinctive it is incapable of becoming a valid trade mark and its registration is forbidden under art. 4.1 (b) of the Directive 2015/2436.

A descriptive mark may though acquire secondary meaning through intensive use, e.g. in advertising. Consequently, a descriptive trade mark may transform into a registrable trade mark once the relevant part of public associates it with certain class of goods. This basically means, that the public identifies the goods described by certain mark as originating from specific undertaking¹⁸. It must be stressed out that also an inverse route is possible: meaning that a distinctive trade mark might transform into a generic term. Such names may at first be distinctive marks of a particular proprietor but due to an intensive use by the public and recklessness of the trade mark holder when it comes to trade mark policy, they may become at some point merely descriptive of a category of goods or services.

The nearly unanimous view presented in doctrine states that the addition of the hashtag symbol to a mark will not transform a descriptive mark into a distinctive one¹⁹. The reasoning behind this view is that the hashtag symbol itself is used merely as a tool which facilitates categorization and searching within online social media and as such does not have any impact on the character of the mark it precedes²⁰. Anyone is free to add the hashtag symbol before any word, consequently there are no valid reasons why addition of such a symbol shall render a descriptive mark registrable as a trade mark. It is believed, that addition of the hashtag symbol shall not change the distinctiveness of a descriptive word, however it must be stressed, that in certain circumstances a descriptive word with a hashtag sign in front may gain secondary meaning through use in commerce. This must be the case especially when business owners use a *hashtagged* word sign also in real life (e.g. a name of a news magazine), as in such case the word sign may be associated with certain type of goods or services more easily comparing to the use of a hashtag solely in social media. It is difficult to imagine consumers associating hashtag, which contains non-distinctive word with certain type of products or services only because of its use in social media, as in such circumstances the hashtag is not attached to any product or service.

For the purpose of this section hashtags will be divided between the ones which are created by trade mark holders or marketers and the ones which are the result of consumers', or more broadly speaking, citizen's invention. There are generally no discrepancies in the doctrine of trade mark law regarding the registration of the existing trade marks prefixed with the hashtag symbol separately as new trade marks²¹. The addition of the hashtag sign will not have any impact on the protection of the existing word signs. The proprietor of the existing trade mark is of course entitled to protect its trade mark combined with the hashtag symbol. However, from practical point of view registration of a hashtag which contains an already trademarked word sign as a separate trade mark does not make any business sense. In such circumstances the protection of the *hashtagged* trade mark would be covered by the protection afforded to the trade mark used after the hashtag symbol as it has already been assumed to be worthy of protection.

Apart from the use of hashtags consisting merely of the existing trade marks, the marketers also use hashtags containing slogans. This category shall be divided into two. The first one includes hashtags selected by producers

¹⁶ *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd.*, Case C-299/99 [2002], para. 35.

¹⁷ *Linde AG's Trade Mark Application*, Joined Cases C-53/01 to C-55/01 [2003].

¹⁸ J. Davis, 'Intellectual Property Law' (Oxford: Oxford University Press 2012) 213.

¹⁹ B. Butswin, op. cit., 121.

²⁰ *Ibid*, 121.

²¹ A. J. Roberts, op. cit., 12.

or marketers that contain existing trade marks²². In this case there shall be generally no obstacles when it comes to registration of such a hashtag as a trade mark, however this time it may be more complex to show that the slogan acts as a source identifier. Although, as in case of hashtags consisting merely of existing trade marks, there is no reasonable point in registering such a slogan as a trade mark from business perspective. Again, slogan of this type shall be treated as already protected by employing the registered trade mark. However, even in case the applicant would apply for such registration it would possibly be granted as the distinctiveness of the already protected trade mark would probably cover the rest of the slogan. Some doubts may be raised if slogan modifies existing trade mark to such an extent that a new word is created (e.g. #cokecanpics).

In the second instance, hashtags contain slogans which do not refer explicitly to a registered trade mark. This type of hashtags does not exploit existing brands but instead function more like traditional slogans or delineate discrete campaigns or collaborations²³. Advertising slogans are thus objectionable under art. 4. 1 (b) of the Directive 2015/2436 since the relevant public perceives them only as a mere promotional formula. However, such hashtag would perhaps afford registration if the applicant would be able to prove that the phrase acquired secondary meaning through use. Successful registration of this type of slogans is usually difficult since they are designed to advertise rather than act as badges of origin and thus are descriptive. Nevertheless, CJEU gave guidance on the criteria that should be used in assessing the distinctive character of a slogan. Such registration would require proving *inter alia* that a slogan has number of meanings, constitutes a play on words, introduces elements of conceptual intrigue or surprise, so that it may be perceived as imaginative, surprising or unexpected, has some originality, and most importantly triggers in the minds of the relevant public a cognitive process or requires an interpretative effort²⁴.

Beside discussion regarding registration of hashtags invented by trade mark holders or marketers, it is of essence to discuss registration of hashtags that are developed by web users. The experience of American authors shows us that in most cases hashtags fail to function as distinctive marks if they were generated by users of social media platforms²⁵. In such event the words located after hashtag symbols do not generally refer to any existing goods, services or brands. Even if the applicant would designate some sort of goods or services there would be high likelihood of false association of the hashtag with products or services for which their registration is sought. Considering European law, it must be noted that most of the citizen generated hashtags would fall under art. 4.1 (d) of the Directive 2015/2436 and be classified as created exclusively of signs or indications which have become customary in the current language. Additionally, it is extremely difficult to prove that such a hashtag is of distinctive character under art. 4. 1 (b) of the Directive 2015/2436 as they are not usually attached to any kind of goods or services. Nevertheless, there is several attempts to register such citizen-generated hashtags as trade marks. Most commonly such attempts are made in the US²⁶, however there was a number of applications made within several national patent offices of Member States related to the hashtag containing the slogan *Je suis Charlie*. In this case, the European Union Intellectual Property Office (EUIPO) issued a following statement regarding the registration of such a mark:

*"an application which consisted of or which contained the phrase "Je suis Charlie" would probably be subject to an objection under Article 7 (1) (f) of the Community Trade Mark Regulation, due to the fact that the registration of such a trade mark could be considered "contrary to public policy or to accepted principles of morality" and also on the basis of Article 7(1)(b) as being devoid of distinctive character."*²⁷

²² For more information see: V. Torelli, 'Trade marks in social networks: the case of Coke's hashtag trade mark applications' (2015) [Blog] IPKat, Available at: <http://ipkitten.blogspot.com/2015/04/trade-marks-in-social-networks-case-of.html> [Accessed 8th April 2017].

²³ A. J. Roberts, *op. cit.*, 14.

²⁴ *Audi AG v OHIM*, Case C-398/08 P [2010] para. 47.

²⁵ A. J. Roberts, *op. cit.*, 57.

²⁶ *Example*: U.S. Trade mark Application Serial No. 86/485,865 [2014] regarding application to register #ICantBreathe for shirts, a reference to the last words of Eric Garner, who was choked to death.

²⁷ EUIPO, 'Je suis Charlie – acceptability by OHIM of any potential applications' [online] Available at: https://euipo.europa.eu/ohimportal/en/news?p_p_id=csnews_WAR_csnewsportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_pos=1&p_p_col_count=3&journalId=1787585&journalRelatedId>manual/ [Accessed 9th April 2017]

The position of the EUIPO in this case was met with considerable enthusiasm by trade mark scholars. Some concerns were although raised whether objection to registration shall be rather based primarily on the identity of the applicant and the type of goods or services protection is sought after rather than the character of the word sign and its impact on morality. Consequently, it shall be noted that in case of citizen generated hashtags the identity of the applicant is essential. If there is no link between the applicant and the hashtag, application should be refused since the trade mark could be qualified as deceitful to the public under art. 4.1 (g) of the Directive 2015/2436. Use of such a trade mark by an entity which is unrelated to the meaning behind the hashtag could wrongfully suggest existence of such a link. This means that the application could possibly not be refused if the applicant was Charlie Hebdo itself as the use of the slogan *Je suis Charlie* by Charlie Hebdo would possibly not be classified as deceitful²⁸. Secondly, only after it is possible to establish that the trade mark is not deceitful to the public, it would be necessary to prove that the trade mark distinguishes goods or services of one undertaking from those of other undertakings. Questions have been asked, whether the registration shall not be dependent on the character of goods or services since hashtags may in some circumstances acquire distinctive character through use. EUIPO stated that such a slogan would be devoid of distinctive character without mentioning the class of goods or services to which it attaches. Consequently, it could be argued that *Je suis Charlie* hashtag should be registered only by Charlie Hebdo and only in the newspapers' class. This would be possible only if Charlie Hebdo proved that consumers associate *Je suis Charlie* slogan with the Charlie Hebdo magazine. On the other hand, significant doubts can be raised over registration of this slogan, since it is mostly associated with a terrorist attack rather than the magazine itself. One may however argue that the terrorist attack took place at the headquarters of the Charlie Hebdo and the victims of the attack were mainly employees of the magazine so there exists some link between the phrase and Charlie Hebdo. Nevertheless, there is still valid point that registration of such a trade mark would be contrary to public policy or to accepted principles of morality, since business entity would try to take financial advantage of terrorist attacks. This is however inherent to the *Je suis Charlie* slogan, as not all citizen generated hashtags are connected to such tragic events. Additionally, it can be also argued that the phrase *Je suis Charlie* is classified as created exclusively of signs or indications which have become customary in the current language and thus falls under absolute ground for refusal established in art. 4.1 (d) of the Directive 2015/2436. It must be thus concluded that registration of a hashtag invented by citizens as trade mark would be highly problematic and in most cases unsuccessful.

Additionally, it is important to consider that hashtag may be useful as an instrument which builds brand recognition. It can be argued that sensible use of hashtags may help acquiring distinctiveness by the words contained in the hashtag. This would be specifically helpful for applicants who seek registration of hashtags containing advertising slogans as well as phrases generated by users of social media. It is emphasized by B. Butwin that extensive *hashtaging* of a particular word or slogan may lead to mass awareness of such word sign as a source identifier for the relevant goods or services²⁹. It may however also lead to trade marks becoming generic terms, since the overuse of a trademarked hashtags by users of social media may in certain circumstances result in the loss of any distinctiveness by a once valid trade mark. Consideration must be specifically given to the phenomena of *verbal hashtaging*, which is basically a habit of adding the word hashtag before whatever one person has planned to say in order to convey secondary meaning of the spoken words³⁰. Consequently, only very cautious and thought-out hashtag campaigns may help the *hashtaged* word acquire distinctive character and become source identifier for the goods or services originating from certain undertaking³¹. The same can be said about the distinctiveness of existing trade marks which are used as hashtags – there is a possibility that through excessive use of those marks as hashtags one day they would transform from distinctive trade marks to merely descriptive hashtags.

²⁸J. Phillips, 'JE SUIS CHARLIE: Alicante acts on speculative trade mark applications' (2015) [Blog] IPKat, Available at: <http://ipkitten.blogspot.com/2015/01/je-suis-charlie-alicante-acts-on.html> [Accessed 9th April 2017].

²⁹ B. Butwin, op. cit., 127.

³⁰ R. T. Scherwin, op. cit., 463.

³¹ B. Butwin, op. cit., 127.

Conclusions

It must be emphasised that use of hashtags have become omnipresent in social media, but their status as intellectual property—particularly as trade marks—is still developing and more complex than expected. The response given by EUIPO regarding registration of the *Je suis Charlie* hashtag as a trade mark did not exhaust the topic of registrations of hashtags in general, especially due to the brief reasoning presented by the Office.

Primarily, it is more natural to treat hashtag merely as a functional tool used only to enable quick and efficient use of social media platforms by consumers. This position, treats hashtags differently from domain names and does not equip hashtags with the ability to act as a source identifier since recipients do not perceive them in such a way. The reasoning behind such a conclusion stems from the fact that contrary to methods employed by traditional marketing, hashtags encourage origination from as many sources as it is possible. The idea of social media marketing is based on the interaction between users and their ability to play active role in the campaign. Thus, the main feature of the hashtags, which are responsible for success of social media campaigns, prevents them from acting as source identifiers, as otherwise the role of a hashtag would be intrinsically conflicting. A tool that is designated to be used by as many people as possible cannot act as a badge of origin at the same time.

However, even if we assume that word signs combined with hashtag symbols are used and perceived by consumers as indicators of origin, doctrine of trade mark law recognises valid grounds to oppose registration of citizen originated hashtags as trade marks. Most commonly such applications would render ineffective due to likelihood of deceiving public as to the relation between applicant and hashtag. The other reasons for refusing registration of such slogans is lack of distinctive character and the fact that they consist exclusively of signs or indications which have become customary in the current language. Registration of existing trade marks combined with hashtag or slogans which employ existing trade marks shall be assessed as of no business reasoning, because the protection of the existing trade mark covers the hashtag symbol or the rest of the slogan. When it comes to slogans which do not contain existing trade marks, registration would possibly be valid only in case of proving that the slogan acquired distinctiveness through use in commerce.

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ANNEX 1. CONFERENCE PROGRAMME

Day One: 27th of April, 2017

9.30 - 10.00	Registration (Room JR4, 1 st Floor)
10.00 - 10.10	Opening of the Conference by Prof. Dr. Tomas Davulis , Dean of the Vilnius University Faculty of Law
10.10 - 11.00	Brexit: A Real Challenge for Europe – Guest Lecture – Prof. Dr. Joakim Nergelius , Örebro University, Sweden

SESSION I

Section A (Room 302, 3 rd Floor)		Section B (Room 710, 7 th Floor)		Section C (Room JR4, 1 st Floor)	
Moderator: Prof. Dr. h. c. Helmut Siekmann / Frankfurt am Main J. W. Goethe University		Moderator: Dr. Ilona Petraitytė / Vilnius University		Moderator: Dr. Nika Bruskina / Vilnius University	
11.15 - 11.30	Brexit Is Not a Surprise. Explaining a 'Leave' Vote through the Concept of (EU) Public Policy Values Rita Grigulaitė / University of Sussex	11.15 - 11.30	The Emergence and Development of Content ID in Light of User Generated Law Karolina Zawada / Frankfurt am Main J. W. Goethe University	11.15 - 11.30	Communication Strategies for Supreme Courts in Today's Digital World Lauranne Claus / University of Antwerp
11.30 - 11.45	Judicial Disagreement on Triggering Brexit: An Analysis of the Miller Case Andrius Valuta / Vilnius University	11.30 - 11.45	Personal Data as an Economic Good – Misleading Commercial Practices and Social Networks Dr. Ricardo Pazos / University of Santiago de Compostela	11.30 - 11.45	Criminal Liability for Terrorism in European Union in The Context of the <i>Ultima Ratio</i> Principle Aušra Dambrauskienė / Vilnius University
11.45 - 12.00	When, Why and Whom Do We Trust – How to Achieve Trust Building Relations Between EU Judiciary Systems Simona Bronušienė / Vilnius University	11.45 - 12.00	Challenges in the eHealth Regulatory Policy Melita Sogomonjan / Tallinn University of Technology	11.45 - 12.00	Terrorism and Protection of Cultural Heritage Jakub Janczyk / University of Silesia
12.00 - 12.15	Brexit and Kosovo as EUs Biggest Foreign Affairs Challenges Attila Nagy / Independent researcher	12.00 - 12.15	Health Data, Big Data and Innovations. Where's The Law? EU Approach Justina Januševičienė / Vilnius University	12.00 - 12.15	Non-refoulement in Light of Shifting Responsibility on Refugees Natallia Karkanitsa / Belarusian State University
12.15 - 12.45	Discussion and Conclusions	12.15 - 12.45	Discussion and Conclusions	12.15 - 12.45	Discussion and Conclusions

LUNCH BREAK

SESSION II

Section A (Room 302, 3 rd Floor)		Section B (Room 710, 7 th Floor)		Section C (Room JR4, 1 st Floor)	
Moderator: Assoc. Prof. Dr. Vigitā Vėbraitė / Vilnius University		Moderator: Dr. Izabela Skomerska-Muchowska / Lodz University		Moderator: Assoc. Prof. Dr. Indrė Isokaitė-Valužė / Vilnius University	
14.00 - 14.15	Brexit = The Beginning for British People and the End for Polish Entrepreneurs? The Effects of Brexit on Economic and Law Positions of Polish Entrepreneurs Justyna Kopalka – Siwińska / University of Lodz	14.00 - 14.15	Not So Neutral Net Neutrality Laurynas Totoraitis / Vilnius University	14.00 - 14.15	A New War for the Land? Climate Refugees' Struggles with Searching for a New Home Anna Reterska-Trzaskowska / University of Lodz
14.15 - 14.30	Implications of Brexit for EU Private International Law Aleksandrs Fillers / University of Antwerp	14.15 - 14.30	Divided by an Algorithm: Competition Law and the Public Interest in the Post-Truth Digital Society Dr. Claudio Lombardi / University College London	14.15 - 14.30	Europe's Struggle with the Accommodation of the Religious Diversity of Immigrant Groups Georgia du Plessis / University of Antwerp
14.30 - 14.45	What Does the Brexit Mean for Insolvency? Lina Dzindzelėlaitė-Šaltė / Vilnius University	14.30 - 14.45	Using Technology to Trace Electoral Fraud: a Tool for International Courts? Dmitry Kurnosov / University of Copenhagen, Centre of Excellence for International Courts (iCourts)	14.30 - 14.45	Lost in Translation – the Best Interest of the Child Principle in the Light of Refugee Children in Crisis Karolina Mendecka / University of Lodz
14.45 - 15.00	Brexit and Arbitration: What Happens Next? Tadas Varapnickas / Vilnius University	14.45 - 15.00	Registration of Hashtags as Trademarks under European Union Law Maciej Zejda / University of Gdańsk		
15.00 - 15.30	Discussion and Conclusions	15.00 - 15.30	Discussion and Conclusions	15.00 - 15.30	Discussion and Conclusions

Day Two: 28th of April, 2017

9.30 - 10.00 Registration (Room JR4, 1st Floor)

10.00 - 10.30 The Old New Role of Law in Contemporary World – Guest Lecture – **Marius Vaščega**, European Commission's Economic Governance Officer in Vilnius, Lithuania

SESSION III

Section A (Room 302, 3rd Floor)		Section B (Room 710, 7th Floor)		Section C (Room JR4, 1st Floor)	
Moderator: Prof. Dr. Joakim Nergelius / Örebro University		Moderator: Assoc. prof. Dr. Lina Mikalonienė / Vilnius University		Moderator: Dr. Donatas Murauskas / Vilnius University	
10.45 - 11.00	Fighting Against Smugglers Without the Neighbours: What Legal Framework for Post-Brexit UK? Juliette Bouloy / Paris West University Nanterre La Défense	10.45 - 11.00	Commercial Data Protection for an Information Technology Based Business Afforded by the Prohibition of Unfair Competition Vaidas Kontrimas / Vilnius University	10.45 - 11.00	Terrorism vs. International Law - Case of Attacks in Brussels Mateusz Osiecki / University of Lodz
11.00 - 11.15	Regulatory Framework for Liberal Professions in EU: Threats and Challenges that Will Be Posed by Brexit Evelina Agota Vitkutė / Vilnius University	11.00 - 11.15	Legal Regulation of Multimodal Carriage of Goods in Light of Modern Technologies: Time to Change Vilius Mitkevičius / Vilnius University	11.00 - 11.15	How Hybrid Are Modern Wars? Alaa Al Aridi / Vilnius University
11.15 - 11.30	Are Crowdworkers Workers? Reflections on Employment Relations in Gig Economy Nastazja Potocka-Sionek / University of Lodz	11.15 - 11.30	Does Application of Physicians' Liability Ensure or Deter Use of Innovation? Monika Morkūnaitė / Vilnius University	11.15 - 11.30	Hybrid War, Information Technologies and the Legal Vacuum in the Digital World Dr. Yulia Razmetaeva / Yaroslav Mudryi National Law University
11.30 - 11.45	Brexit Effect on UK Public Procurement Law: Straight Way Back to the Procurement Middle Ages or the Opportunity to Impose a Better Regulation via Rediscovering UK Courts Developed Solutions? Vilius Kuzminskas / Vilnius University	11.30 - 11.45	Are We Waiting for a Landmark Judgement? Judgment Possibilities and Their Consequences in Case C-434/15 'Association Professional Elite Taxi vs. Uber Systems Spain, S.L.' Kacper Baran / Jagiellonian University in Kraków	11.30 - 11.45	Autonomous Weapons Systems in International Humanitarian Law Dominika Iwan / University of Silesia
11.45 - 12.15	Discussion and Conclusions	11.45 - 12.15	Discussion and Conclusions	11.45 - 12.00	Fully Autonomous Weapons Systems and the Principles of International Humanitarian Law Mateusz Piątkowski / University of Lodz
12.15 - 13.15				12.00 - 12.15	Discussion and Conclusions

LUNCH BREAK

SESSION IV

Section A (Room 302, 3rd Floor)		Section B (Room 710, 7th Floor)		Section C (Room JR4, 1st Floor)	
Moderator: Prof. Dr. Hab. Monika Namysłowska / University of Lodz		Moderator: Assoc. Prof. Dr. Priscilla Harris / Appalachian School of Law and Vilnius University		Moderator: Prof. Dr. Eric Millard / Paris West University Nanterre La Défense	
13.15 - 13.30	Law on State Liability: Latvian and Estonian Perspective Janis Priekulis / University of Latvia	13.15 - 13.30	E-Waste: Legal challenges of a Deteriorating Global Problem Dr. Kleoniki Pouikli / Trier University	13.15 - 13.30	Arm Trade Treaty 2014 – a Faint Step in International Arm Trade Regulation? Hanna Taliaronak / Belarusian State University
13.30 - 13.45	The Impact of Brexit on the New, Post - Brexit English Contract Law. An Attempt to Define English Contract Law De Lege Ferenda Adrian Cop / University of Gdańsk	13.30 - 13.45	Smart Regulation for Low-carbon Future Yuliya Milto / University of Bologna	13.30 - 13.45	Reparations for Conflict Displacement: The Approaches of International Adjudicative Bodies in Light of the Emerging 'Right Not to Be Displaced' Deborah Casalin / University of Antwerp
13.45 - 14.00	Dieselgate in the US and in the EU. One Scandal, Double Standard in Consumers' Treatment Hanna Misiak / University of Gdańsk	13.45 - 14.00	The Future of EU Emissions Trading Scheme Karolis Jonuška / Vilnius University	13.45 - 14.00	Law and Politics at the International Criminal Court – the Rome Statute System in the Aftermath of the African States Withdrawals Dr. Tomasz Lachowski / Lodz University
14.00 - 14.15	Brexit and the Institute of Administrative Sanctions Milda Markevičiūtė / Vilnius University			14.00 - 14.15	The Impact of Ethiopia's Counterterrorism Law on Freedom of Expression Husen Ahmed Tura / University of Eastern Finland
14.15 - 14.45	Discussion and Conclusions	14.00 - 14.45	Discussion and Conclusions	14.15 - 14.45	Discussion and Conclusions

END OF CONFERENCE