

INTERNATIONAL
NETWORK
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STUDIES IN LAW

8th International Conference of PhD Students
and Young Researchers

THE FUTURE DECADE OF THE EU LAW

CONFERENCE PAPERS





VILNIAUS UNIVERSITETO BIBLIOTEKA

FOREWORD BY THE ORGANISERS

We are delighted to present you already the eight edition of international conference papers of the PhD students and young researchers. This year the international conference has been devoted to the topic “The Future Decade of the EU Law”.

The shift in the landscape of the EU is evident during the past decade. The spread of technology has unlocked opportunities for future development, milestones were reached in the sphere of data protection and the free flow of the digital single market. However, many of the achievements were followed by challenges some of which were tackled, yet others remain. For example, among the priorities of the European Commission there are the aims of building a more integrated energy union, developing a balanced and progressive trade policy to harness globalisation, and strengthening the EU’s position as a global actor. The EU and its Member States made significant achievements and faced challenges, in the context of which one may find it difficult to resist the question as to whether the EU is at a crossroads and what lies ahead. Participants of the International Conference of PhD Students and Young Researchers discussed both the developments of EU law during the past decade and the prospects of the Union in the future.

Year 2020 will go into history as the year, during which Covid-19 virus pandemic spread throughout the world and many events and meetings had to be cancelled or had to be moved to online version. We are happy that our members managed to organize international conference virtually and made it possible for the doctoral students or young researchers to participate in the event and present their ideas in such a way.

Diversity of topics and number of papers 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.

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Virtual Conference

Date: 8-9 MAY, 2020

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PROTECTION OF MINORITY SHAREHOLDERS' RIGHTS IN GROUP OF COMPANIES: LITHUANIA AND EU COMPANY LAW PERSPECTIVES

Edvinas Bakanauskas¹

Abstract. Just as in the entire European Union, in Lithuania company groups are an integral part of the modern business world. It is the companies that are part of company groups are leading both in Lithuania and in the European Union in terms of a number of economic indicators: revenues, number of employees, amounts of taxes paid and other contributions. Despite being an integral part of modern business, regulation of company groups has not yet attracted sufficient attention both at the European Union or the national level. Such absence of a consistent regulation may lead to or cause, *inter alia*, infringements of rights of minority shareholders. Accordingly, the purpose of the present article is to assess whether the effective Lithuanian or European Union regulation is sufficient to protect minority shareholders' rights in group of companies.

Keywords: protection of minority shareholders' rights, group of companies.

INTRODUCTION

In Lithuania, as in other European Union (hereinafter – EU) countries, groups of companies are an integral part of the modern economy. It is the companies belonging to the groups of companies that are leading ones in Lithuania in terms of various economic indicators: revenue², number of employees³, amount of taxes and other contributions paid⁴. Meanwhile in Europe, the largest companies also belong to groups of companies⁵. It may then seem, that much attention should be paid at both EU and national level to the proper regulation of groups of companies, including the protection of the rights of minority shareholders in groups of companies. Nevertheless, despite the fact that groups of companies are an integral part of the modern economy, to date there is no special regulation of groups

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2 For example, in 2018, in Lithuania, AB ORLEN Lietuva, which belongs to the PKN ORLEN SA group of companies, was in the first place in terms of revenue and UAB Maxima LT was in the second place and UAB Girteka logistics - in the third place (Verslo žinios, 2019).

3 For example, in 2018, UAB Maxima LT, AB Lietuvos geležinkeliai, UAB Palink were the leaders in Lithuania in terms of the number of employees (Verslo žinios, 2018).

4 As can be seen from the STI report for 2017, the major share of taxes and other contributions are paid to the state by companies belonging to groups of companies, for example, AB ORLEN Lietuva, which belongs to the PKN ORLEN SA group of companies, is in the first place. It should be noted that the above-mentioned STI report sums up all the taxes and contributions paid by undertakings, including indirect taxes (VAT, excise duties) and personal income tax on benefits classified as personal class A income, which must be calculated, deducted and paid to the budget by those paying out that income (State Tax Inspectorate, 2018).

5 For example, in the first place Volkswagen company group (Business Chief, 2018).

of companies in Lithuanian or EU company law (EMCA, 2017, p. 371)⁶. Naturally, one may wonder why is there no such regulation? Have there been any attempts to regulate groups of companies? Is such regulation needed at both the EU and national level? In the absence of regulation of groups of companies, are the rights of minority shareholders in a group of companies sufficiently protected? Finally, what are the prospects for regulating groups of companies and, more specifically, for protecting the rights of minority shareholders in groups of companies (both at EU and at national level)? Accordingly, the purpose of this article is to assess whether the current Lithuanian or EU legal regulation is sufficient to protect the rights of minority shareholders in a group of companies. In order to achieve the above objective, the first part of the article focuses on the analysis of the overall situation with regard to the regulation of groups of companies, including the protection of the rights of minority shareholders in groups of companies at EU level, in order to see if there is any need of change to the regulation of groups of companies. The second part of the article analyses whether the lack of regulation of groups of companies exists at EU level only or at the national level of the EU Member States as well. The third part of the article provides answers to the question of whether the protection of the rights of minority shareholders in groups of companies should be regulated at EU level. The fourth part of the article examine the path to be taken by the protection of the rights of minority shareholders in groups of companies in Lithuania and present the path proposed by the author of the article, i.e. transposing the provisions of the European Model Company Act (hereinafter – EMCA), intended to protect the rights of minority shareholders in a group of companies, into the Lithuanian company law. It should also be noted that due to the limited scope of this article, this article is not intended to provide a detailed analysis of the above-mentioned EMCA provisions and rather seeks to clarify the shortcomings of the current Lithuanian legal framework related to the protection of minority shareholders rights in groups of companies and specify, why the transposing into national law of provisions of EMCA should be considered as a possible tool to remedy these shortcomings.

1. GROUP LAW IN THE EUROPEAN UNION

The subject of company groups regulation has been on the agenda of the European Commission for more than 40 years (ECLC, 2016, p. 2). Unfortunately, currently there is no specific legislation regulating groups of companies at EU level. It is true that there was an attempt to regulate groups of companies at EU level when a Draft Ninth Company Law (Draft Ninth Council Directive..., 1984) was drawn up for that purpose (regulate group of companies). One of the goals of the drafters of Ninth Company Law Directive was to protect minority shareholders in groups of companies: “*The*

⁶ It should be noted that at both national and EU levels, the operation of groups of companies is not regulated in company law in particular, while operation of groups of companies is regulated in certain other areas of law. For example, in the area of financial reporting, the beginning of regulation of groups of companies at EU level dates back to 1983, from the adoption of the Seventh Council Directive. Accordingly, the Lithuanian national law even has a special law dedicated for groups of companies. For more information, see: Law of the Republic of Lithuania on Consolidated Financial Reporting by Groups of Undertakings (Law of the Republic of Lithuania on Consolidated Financial Reporting by Groups of Undertakings, 2015). Accordingly, when this article states that there is no specific regulation of groups of companies at both EU and national level, this implies a lack of regulation in company law in particular.

shareholders, creditors and employees of public limited liability companies dependent on a group must, moreover, be suitably protected". In order to protect the interests of minority shareholders in a group of companies, the drafters of the Ninth Company Law Directive enshrined in the draft Ninth Company Law Directive the possibility of a subsidiary's minority shareholders to leave the subsidiary, i.e. by selling out their shares of the subsidiary when the parent company has acquired, directly or indirectly, 90% or more of the capital of the subsidiary. In the event that the shareholders of the subsidiary decide not to sell their shares, the draft directive provided, that: *"the guarantees granted to them must be independent of the financial results of their company"*. Articles 7 to 12 of the Ninth Company Law Directive also provided for the protection of the rights of minority shareholders in a subsidiary. For example, Articles 7 and 8 of the draft Ninth Company Law Directive refer to the right of minority shareholders of a subsidiary to appoint special auditors for the dependence report. The exercise of that right was intended to ensure that the minority shareholders of the subsidiary would be able to access the information on the actual structure of the group of companies: *"The special report shall give an overall picture which makes it possible to assess the extent and intensity of the relationship which existed, directly or indirectly, between the subsidiary company and the parent undertaking during the preceding financial year"*. Thus, part of the provisions of the draft Ninth Company Law Directive was intended to protect the rights of minority shareholders in a group of companies. Meanwhile, other provisions of the draft Ninth Company Law Directive were intended, for instance, to define the possible types of groups of companies; second, the rules on the disclosure of shareholdings, third, detailed rules applicable when the parent undertaking had entered into a "control contract" with a group, fourth, rules when it had made a "unilateral declaration instituting a vertical group" (European Commission, 2003, p. 18). Thus, the drafters of the Ninth Company Law Directive provided a comprehensive framework on group law. However, the consultation on the draft of Ninth Directive showed that there was very little support for such a comprehensive framework on group law: *"such an approach was largely unfamiliar to most Member States, and the business sector viewed it as too cumbersome and too inflexible. As a consequence, the decision was made not to issue an official proposal"* (European Commission, 2003, p. 19).

Nevertheless, it should be noted that the mere failure to adopt the Ninth Directive at EU level does not mean that regulation of groups of companies has become redundant: its need remained and merely the idea, that it should be comprehensive, was abandoned. Accordingly, in September 2001, the European Commission set up a Group of High Level Company Law Experts, which drew up a report where it identified and highlighted the main problems with the lack of regulation of groups of companies at EU level. The first one is transparency of the group relations (the shareholders of the parent may need additional information on the risks arising from the subsidiary for the parent since these risks may affect the parent (reputational risk; temptation to rescue the subsidiary with corresponding risks to the parent). The second one is the lack of a sell-out right of the group's minority shareholders. The third is the tensions between the interests of the group and its parts. The fact that in reality the interests of the subsidiary are often sacrificed to the interest of the parent or group as a whole, amounts to a wide-spread disregard of corporate law which has elements of hypocrisy and may

weaken the authority and credibility of corporate law more generally (Group of High Level Company Law Experts, 2001, p. 27 - 37). Accordingly, in 2003, the European Commission, based on the insights provided by the Group of High Level Company Law Experts, published a Report on “Modernizing Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward”, in which the Commission stated that there is no need to revive the draft Ninth Directive on group relations (European Commission, 2003, p. 18), instead the EU should consider provisions within the existing range of corporate law to address particular problems, such as the management of a group (rule allowing group policy, squeeze-out), transparency of groups, protection of creditors (wrongful trading) and minority shareholders’ protection (High Level Group of Company Law Experts, 2002 *In Reflection group on the Future of Company Law*, 2011, 59). It should be noted that some of the problems identified in the European Commission’s report “Modernizing Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward” concerning the regulation of group companies, have been resolved, such as transparency of group relations was resolved in part by the adoption of the Transparency Directive (Transparency Directive 2013/50/EU, 2013), the Takeover Directive (Takeover Directive 2004/25/EC... 2004). On the other hand, the insights into the protection of minority shareholders in groups of companies set out in the European Commission’s report “Modernizing Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward” have not been implemented.

In 2010, the European Commission set up another working group, namely the Reflection Group on the future of EU company law, to assess the situation with EU company law and to identify what changes are needed in EU company law. Accordingly, the Reflection Group on the future of the EU company report was prepared in 2011, part 4 of which contains proposals related to the regulation of groups of companies, such as the need to recognize the interest of groups of companies, etc. However, no specific proposals regarding protection of the interests of the minority shareholders in group companies were mentioned. On the other hand, on the basis of the said report, the European Commission conducted a public survey that revealed that the majority of the EU businesses surveyed are in favour of regulating the activity of the groups of companies at EU level, in particular by ensuring improved intra-group communication and recognition of interest of a group of companies; strengthening the protection of the interests of minority shareholders was also met with support (Reflection group on the Future of Company Law, 2011, 59).

Finally, in 2016, European Company Law Experts drafted a proposal for reforming group law in the European Union, where it was stated that as the law stands and is being developed in most jurisdictions, there is no need to develop a comprehensive European regime for the protection of the creditors and minority shareholders of the group company interests. However some doubts as to whether the applicable legal regimes in the different jurisdictions offers comparable levels of protection: one could argue that harmonisation should intervene in order to offer if not the same, at least a minimum level of protection all over the Union, thereby contributing to the level playing field in terms of cross border establishment and contributing to investment in other Member states (ECLE, 2016, p. 35).

Thus, summing up all the above, two things can be said: first, an analysis of the various initiatives and proposals for the regulation of groups of companies at EU level shows that no comprehensive law on groups of companies is planned at EU level. On the other hand, it is planned to regulate certain aspects of the activities of groups of companies in the future, such as the recognition of the interest of a group of companies. Secondly, it is the EU Member States that are free to choose how they want to regulate the aspects of company group management, creditors and minority shareholder protection. Naturally, the question arises as to whether the regulation of groups of companies, including the protection granted to minority shareholders, should in fact be left to the EU Member States, while having only a small share of the operation of groups of companies regulated at EU level. In order to answer the previous question, it is important to find out how the operation of groups of companies, including protection of the rights of minority shareholders in groups of companies, are regulated in the EU Member States.

2. COMPANY GROUPS REGULATION APPROACHES AT THE MEMBER STATES LEVEL

It has been mentioned that there is no common regulation of groups of companies at EU level. Meanwhile, the situation is slightly different at national level of Member States. Based on the way in which the EU Member States regulate operation of groups of companies, four approaches can be distinguished: comprehensive regulation, partial regulation, case law recognition, and lack of treatment.

The first approach aims at regulating the operation of groups of companies in detail. The emergence of such an approach is linked to Germany, which was the first in Europe to codify the regulation of groups of companies. This approach was subsequently adopted by some other countries, such as Brazil and Portugal. It should be noted that the Czech Republic also had a German-type legal system for quite a while, but in 2012 a new Law on Commercial Companies and Cooperatives was passed in 2012, which allowed for a more flexible regulation of groups of companies (EMCA, 2017, p. 371). Following the second approach, only certain matters related to groups of companies are regulated, but there is no comprehensive regulation of groups of companies. This is the regulation being applied in Italy, where the liability relationships among the members of a group of companies were regulated by the adoption of the reform of the Civil Code. As Kousedgi rightly points out, the purpose of the said reform was to regulate only certain aspects of company group law, rather than to codify the company group law in general, as it was done in Germany, for example (Kousedgi, 2007, p. 225). The third approach is linked to the French case law, according to which the management bodies of a subsidiary may take decisions in the interests of the group as a whole and not merely in the interests of the subsidiary. This approach is followed in other European countries: Belgium, Luxembourg, the Scandinavian countries and the Netherlands (EMCA, 2017, p. 371). The fourth approach includes countries where the operation of groups of companies is not regulated or are regulated only as required by the EU directives. Lithuania is one of the EU countries having adopted this approach (EMCA, 2017, p. 371).

Thus, the answer to the question of whether, in fact, the regulation of groups of companies, including the protection of minority shareholders, should in principle be left to EU Member States and

only a small part of group activities should be regulated at EU level, is positive, meaning be that it is the EU Member States which should be free to regulate operation of groups of companies, including the matters of protection of minority shareholders, since, firstly, as history, i.e. the attempt to adopt the Ninth Directive, has shown, the EU Member States maintain overly divergent positions regarding group company regulation, and secondly, the EU Member States have regulated the operation of groups of companies based on the specificities of their country's economy, traditions, differences in groups of companies (e.g. in some countries there are many more listed companies that belong to groups of companies, so this type of group of companies needs more attention), therefore unreasonable (artificial) regulation of groups of companies, including the protection of minority shareholders, at EU level would not facilitate the operation of groups of companies but, on the contrary, would only complicate it. In addition, as mentioned above, the various initiatives and proposals of the working groups also advocate only minimal regulation of the activities of groups of companies at EU level. Therefore, obviously, two questions arise: firstly, if Member States should be allowed to regulate operation of groups of companies, should the protection of the rights of minority shareholders in groups of companies be regulated at EU level? Secondly, as mentioned above, some EU countries, including Lithuania, have not regulated groups of companies, including the protection of the rights of minority shareholders in groups of companies, it is obvious that we need to answer the question of how the rights of minority shareholders of groups of companies in Lithuania should be protected: comprehensive regulation, partial regulation, case law recognition?

3. SHOULD THE PROTECTION OF THE RIGHTS OF MINORITY SHAREHOLDERS IN GROUPS OF COMPANIES BE REGULATED AT EU LEVEL?

It was stated in the previous part of the article that the regulation of groups of companies should be left to the discretion of the EU Member States and that certain matters of operation of groups of companies should be regulated at EU level, so the question naturally arose as to whether the protection of minority shareholders in groups of companies should be regulated at EU level. In the author's opinion, the aspects of protection of minority shareholders has to be regulated at EU level in cases where the companies forming the group of companies are from different countries, e.g. the parent company is registered and operates in Lithuania and controls two subsidiaries, one of which is registered and operating in Lithuania and the other – in Germany. In Lithuania, operation of groups of companies is not regulated, there are no special legal provisions dealing with protection the rights of minority shareholders in a group of companies, whereas in Germany there are provisions aimed at protection of the rights of minority shareholders in a group of companies, so it is clear that the rights of the minority shareholders in the subsidiary operating in Germany will be secured better than of the minority shareholders in the Lithuanian subsidiary.

Furthermore, in the absence of regulation of groups of companies at EU level, a parent company cannot be subject to civil liability for unlawful acts of a subsidiary established in another Member State (e.g. if a foreign subsidiary would infringe the rights of minority shareholders of its subsidiary

by unlawful acts). It was stated in the case *Impacto Azul Lda* by the Court of Justice of the European Union (CJEU, 2013), that Member States may adopt national regulations providing for the civil liability of a parent company for unlawful acts of a subsidiary established in another Member State and such a provision does not constitute a restriction of the freedom of establishment within the meaning of Article 49 TFEU. Thus, a parent company could incur civil liability for the unlawful acts of a foreign subsidiary only if it would be provided for in the national law of the parent company. The current Lithuanian legal regulation does not provide for the liability of a parent company for unlawful acts of a foreign subsidiary, therefore civil liability would not apply to a parent company registered and operating in Lithuania, even if the foreign subsidiary would have violated the interests of its minority shareholders. The question naturally arises, whether Lithuania and other EU Member States, whose laws do not provide for the civil liability of a parent company for the unlawful acts of a foreign subsidiary, would choose to include such provisions in their national laws. It is reasonable to assume that this is not the case, as it is clear that the introduction of such provisions would encourage parent companies not to establish themselves in that particular Member State choosing instead other Member States whose laws provide for more attractive regulation of groups of companies. Thus, it can be seen that ensuring the protection of the interests of minority shareholders in groups of companies made up of companies of different EU countries could prove to be rather challenging in practice, because the protection of the rights of minority shareholders in group companies would depend on the countries of the companies constituting the group. Consequently, in the view of the article's author, in order to ensure equal protection of minority shareholders' rights it is at EU level that certain standards for the protection of the rights of minority shareholders in a group of companies should be set when groups of companies are made up of companies from different EU Member States.

4. PROTECTION OF MINORITY SHAREHOLDERS' RIGHTS IN GROUP OF COMPANIES: WHICH APPROACH WILL LITHUANIA CHOOSE?

As mentioned above, a number of the EU Member States, including Lithuania, have not regulated the operation of groups of companies at all, including the protection of minority shareholders of groups of companies, so it is obvious that the question should be answered as to which path should be taken by the Lithuanian regulation of groups of companies? German (comprehensive regulation), Italian (partial regulation), French (case law recognition), or maybe some other path?

In the opinion of the author of the article, aspects of operation of groups of companies in Lithuania, including the protection of minority shareholders of companies, should be regulated in accordance with the provisions of the European Model Company Act⁷ (hereinafter - the EMCA). First of all, Chapter 15 of the EMCA, unlike the ICLEG and ECLE initiatives mentioned above, not only analyses the key

⁷ The EMCA is designed as a free-standing general company statute that can be enacted by Member States either substantially in its entirety or by the adoption of selected provisions. This approach differs from previous European company law initiatives, as it is a general settlement of the debate on which of the two regulatory approaches is superior – regulatory competition or harmonization. The EMCA offers the Member States a harmonized company law, but leaves it to each Member State to decide whether it will offer its businesses the advantages given by harmonization (EMCA, 2017, p. 1).

issues of company regulation, but also provides a specific model for the law on companies, including provisions concerning groups of companies. Second, the provisions of Chapter 15 of the EMCA were developed following an analysis of the regulation of groups of companies in the EU Member States and an assessment of the positives and negatives of the regulation of groups of companies in the EU Member States. In other words, when drafting the provisions of Chapter 15 of the EMCA, the drafters of the EMCA have assessed the existing models of regulation of groups of companies in the EU countries, such as Germany, France, Italy, etc., and the EMCA presented what the EMCA's authors considered to be the most appropriate regulation of groups of companies. Third, the novelty of the EMCA, the EMCA being drafted in 2017, fourth, the provisions of Chapter 15 of the EMCA aim to ensure a more flexible governance of the group of companies while protecting the interests of minority shareholders and creditors, sixth, the provisions of the EMCA apply to both open-end and closed-end companies.

4.1. Protection of shareholders of the parent company

First, certain significant operations of the parent company are transferred to a subsidiary whose shareholders are not the minority shareholders of the parent company. In this case, the position of these shareholders is weakened as the subsidiary may be able to take decisions that would not normally have been accepted by the parent company's minority shareholders. Unfortunately, the EMCA does not provide a solution to this problem. However, in the opinion of the author, this problem must also be solved, therefore, if the Lithuanian legislator decides to regulate the issues of protection of minority shareholders of groups of companies on the example of the EMCA, a solution for the above problem should be found as well.

Second, the structure of the group of companies makes it possible to restrict the availability of information to the minority shareholders of the parent company. For example, according to the current regulation of the Law on Companies of the Republic of Lithuania, both the right to ask questions to the company in advance and the right to receive information can be exercised only by the person who is a shareholder of that company. This means that a shareholder of the parent company may not be provided with certain information about the operations of the subsidiary, indicating that the subsidiary is a separate, independent company and the shareholder requesting the information is not a shareholder of the subsidiary. Meanwhile, Section 12 of Chapter 15 of the EMCA provides that relations between a group of undertakings, including relations with undertakings which previously belonged to the group, are subject to the right of access to information and the right to request a special investigation. Given that the EMCA confers the same rights on shareholders of both the parent company and the subsidiary, the right referred to in Section 12 of Chapter 15 of the EMCA will be discussed in the analysis of the provisions of Section 14 of Chapter 15 of the EMCA.

4.2. Protection of shareholders of the subsidiary

Chapter 15 of the EMCA contains 3 articles relating to the protection of minority shareholders in a subsidiary, i.e. EMCA Section 15.13 *“Corporate Opportunity within a Group”*, EMCA Section 15.14 *“Right of Shareholders to Request a Special Investigation”*, EMCA Section 15.15 *“Right to Sell-out”*.

Traditionally, the corporate opportunity doctrine has been designed to protect the interests of a company from cases where members of a management body or a member take advantage of a particular business opportunity that the company itself could have taken advantage of (Jackson, 1988, p. 394). Meanwhile, Section 13 of Chapter 15 of the EMCA discusses the specific application of the opportunity doctrine. The provisions of this section are intended for groups of companies in which the subsidiary is not wholly dependent on the parent company, the subsidiary has minority shareholders. In such a case, the parent company is prohibited from taking advantage of the business opportunity of the subsidiary in question, either directly or through other subsidiaries, with the exception of the cases where the consent of the independent directors or, in the absence thereof, the approval of the non-controlling shareholders of the subsidiary concerned has been obtained. For example, a subsidiary has the option of entering into a profitable agreement, but the parent company decides that another subsidiary will enter into the agreement instead. It is clear that the loss of the possibility of concluding a profitable agreement will primarily affect the interests of the subsidiary, but also (indirectly) the interests of the minority shareholders of the subsidiary, as the non-conclusion of the agreement would be detrimental to the subsidiary’s revenue. Thus, the application of the provision in Section 13 of Chapter 15 of the EMCA should protect the interests of both the subsidiary itself and its minority shareholders.

It has been mentioned that Section 12 of Chapter 15 of the EMCA establishes the right of shareholders of a parent company to request an investigation of the company’s activities, while Section 14 of Chapter 15 of the EMCA establishes the right of shareholders of a subsidiary to request an investigation of a company’s activities. Thus, both provisions of the EMCA establish the same right, but in one case this right is reserved for the shareholders of the parent company and in another case - for the shareholders of the subsidiary. It should be noted that the right to request an investigation of a company’s operations under Section 12 of Chapter 15 of the EMCA is detailed in Section 32 of Chapter 11 of the EMCA, which provides that a shareholder or shareholders may propose to the general meeting a special auditor to assess particular operation of the company and draft a report on its consequences for the company and its shareholders and its compliance with legislation and good business practice. The key advantage of the right to request an operational investigation under Sections 12 and 14 of Chapter 15 of the EMCA is that, unlike a normal operational investigation, the operational investigation is group-wide, meaning that the shareholders of the subsidiary (or the shareholders of the parent company, respectively), initiating the investigation, are able to access the financial situation not only of the subsidiary of which they are shareholders, but of the group of companies as a whole.

Finally, Article 15 of Chapter 15 of the EMCA provides for the right of subsidiary's minority shareholders to sell-out. The right to sell-out is enshrined in Section 15 of Chapter 15 of the EMCA, which provides for two cases in which minority shareholders in a subsidiary may exercise the right in question. First, Section 15 (1) of Chapter 15 of the EMCA states that when a parent company owns directly or indirectly more than 90 % of the shares and of the voting rights of a subsidiary, any other shareholder(s) may request that their shares be purchased by the parent company. Second, Section 15 (2) of Chapter 15 of the EMCA states that the shareholders of a subsidiary can request in court that the parent company or another person designated by it purchase their shares. Thus, the provisions of Section 15 of Chapter 15 of the EMCA allow minority shareholders in a parent company to leave the company.

Summarizing all the above, it can be stated that the provisions, proposed by the EMCA, on safeguarding the interests of minority shareholders of both the parent company and a subsidiary have advantages and at the same time enable identification of issues persistent in the Lithuanian company law, which concern the protection of minority shareholders in groups of companies. Firstly, the Lithuanian company law does not provide for regulation aimed at protecting a business opportunity of a subsidiary, and secondly, under the current regulation, shareholders of both the parent company and a subsidiary may exercise their rights only in respect to a specific company (e.g. exercise the right to information, request operational investigation of a legal person only of the company of which they are shareholders), and minority shareholders have rather limited options to leave a company of the group of companies in question. For example, according to the Lithuanian regulations currently in place, the right to sell-out can be exercised only in such public limited companies' securities are admitted to trading on a regulated market. This means that neither public limited companies whose shares are not traded on a regulated market nor private limited companies are covered by the said institute.

CONCLUSIONS

There is no specific regulation on groups of companies under EU company law. Regulation of groups of companies, including the protection of minority shareholders' rights, is left to EU Member states. The author agrees there is no need to develop a comprehensive EU law on groups of companies. However, certain issues, including the protection of the minority shareholders' rights in multinational groups of companies, must be regulated at EU level.

The lack of regulation of company groups in Lithuania leads to the fact that the rights of the minority shareholders of the company group are not fully ensured. Minority shareholders are forced to exercise their rights under legal norms, which are adapted to the classical concept of a legal entity, but only partly comply with the specifics of company groups. The author suggests evaluating the possibility of implementing certain provisions of EMCA into the national legislation.

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LEGISLATIVE PRINCIPLES OF INFORMATION SECURITY PROVISION IN THE EUROPEAN UNION MEMBER STATES

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Abstract. The article is dedicated to the study of the information security provision in the EU Member States in the context of analyzing their state programs, national programs as well as regulatory legal acts. This study identifies priorities and gaps in the information security provision in the EU Member States, analyzes special features of the institutional and legal mechanism of information security in the EU Member States in the context of the multi-vector international security system. The expediency of developing an integral coordinated information policy of the EU Member States, aimed at unification of the approaches to information security, is substantiated, as well as the experience of the EU Member States in this field aimed at improving the domestic regulatory framework of information security provision is studied.

Keywords: EU Member States, information security, cyber security, information space, rule of law.

INTRODUCTION

Currently, many EU Member States have established general national information security networks capable of rapid accumulation of the forces and means of public authorities aimed at countering a wide range of threats. And their operation is clearly regulated by the legal regulatory framework. The experience of the EU Member States (in particular, Germany, France, and Finland) shows that provision of a high level of information security is possible on condition that a thorough and effective system of legal acts in this area is adopted and the bodies that will ensure this security in a certain country function effectively.

The events of recent years clearly point to the availability of a crisis in the field of information security at both international and regional levels. Therefore, solving of the issues of proper legislative information security provision comes to the fore. At present, there are legal regulatory frameworks in this area in the EU Member States, but the problem lies in a certain inconsistency of the laws of the EU Member States in the approaches to addressing certain issues of information security provision, this significantly reducing the effectiveness of legal regulation in this area.

Thus, establishment of an effective and reliable system of information security provision in this country in the conditions of transformation of international security and foreign policy of our country before joining the European Union seems to be highly relevant. And at the forefront is the study of

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the experience of the EU Member States in this area, for the sake of adapting the standards available in the EU Member States in the context of information security provision.

RESULTS OF RESEARCH AND SCIENTIFIC PUBLICATION ANALYSIS

A number of authors in domestic and foreign literature, in particular D.Vasylenko, T.Tkachuk, O.Zozulya, B.Kormych, M.Gorka, V.Pillitelli, M Niles, T. Olavsrud, R. Lucas, and others have dedicated their researches to the issue of information security provision. However, no sufficient comprehensive study aimed at researching and comparing the experience of the EU Member States in the field of information security in order to borrow their experience in domestic law has been conducted.

GOAL OF THE ARTICLE

To study and develop holistic views of the functioning of the information security provision system in the EU Member States and their impact on the regional security system.

STATEMENT OF BASIC MATERIALS

The study of the practice of the EU countries in the field of information security provision and cyber threats combatting gives grounds to draw a conclusion about the lack of a unified system in this area, since each of them has its own legal mechanisms for regulating this range of issues. Analyzing the national law of the EU countries, we come to the conclusion that each of them has its own unique information protection system (Vasylenko, Maslak, 2010, p. 129).

Diego Acosta Arcarazo and Cian C Murphy point out that enactment of the Treaty of Lisbon has given the EU new powers in the field of international security law, while the Stockholm Programme is the latest EU framework action program in the field of justice and home affairs, in particular, in the issues of cooperation between the national criminal justice systems. And the combination of the new Treaty and the Programme has made security and justice the key areas of legislative development in the EU (Arcarazo, Murphy, 2014, p. 17). Raphael Bossong also emphasizes this, noting that an important element of cooperation in the field of security between the European Union (EU) Member States is intensive exchange of information between security agencies. No special steps towards integration can, although, be expected in this particularly sensitive area. However, existing approaches to intelligence support of the EU security policy need to be deepened and better monitored (Bossong, 2018, p. 6).

Prof. Dr. Udo Helmbrecht notes that legislative support of the European Union's network and information systems is important with a view to supporting the Internet economy through new initiatives aimed at further improvement of cyber resilience and response to cyber protection. (Helmbrecht, 2018) In this context, Marek Gorka states that a cyber security strategy is a basic document developed at the governmental level, that reflects the interests and rules of work security in cyber space. Besides that, it lays down the foundation for future legislation, policies / standards, guidelines and other security and cyber security recommendations (Gorka, 2018, p. 76).

Information security is one of the components of sustainable development of the whole state, and scientists normally apply the same approaches to the interpretation of the meaning of the term 'information security'. So, in particular, N.R. Nyzhnyk, B.T. Bilous mean by this term 'the status of legal norms and respective security institutions which guarantee constant availability of data for strategic decision-making and protection of information resources of the country' (Lipkan et. al., 2006, p. 280). In essence, a similar opinion is supported by B.A. Kormych who notes that information security should be understood as 'protection of the rules established by law, according to which information processes in the state take place, providing for constitutionally guaranteed conditions of existence and development of individuals, society as a whole and the state' (Kormych, 2004, p.384). In its turn, the opinion according to which 'information security' stands for a legislative and policy framework regulating the use of information and communication technologies by institutions and agencies of the European Union from the point of view of their information security and data confidentiality is noteworthy (Robinson, Gaspers, 2014, p.1-2). This view is supported by K. Dempsey who notes that information security stands for a legal and policy framework that regulates both the legal field and, at the same time, the use of information and communication technologies with an appropriate degree of responsibility for data confidentiality (Nieles et. al., 2017, p.2-3). Finally, Michał Mazur aptly states that 'information security, both real and legal, is a primary factor for the functioning of individuals and institutions, and especially for political bodies that are independent states and based on legal regulation that can authorize effective security of identified data' (Mazur, 2011, p. 64).

In our turn, researching the legal framework for information security, we focused primarily on countries such as Germany, France and Finland, because in our opinion, of all EU member states at the highest level, high legal standards of information security are ensured. Thus, studying legal provision of information security in Germany, we consider it necessary to note that back in 1997 Germany adopted the *Act of Information Protection in Telecommunications* (TDPA). In accordance with its general principles, collection, processing and use of information is allowed only in cases where it is permitted by law or with the user's consent. And since 2005 the so-called *Freedom of Information Act* has been in force in Germany, it regulates the right to access and receive information, in particular, everyone has the right to receive official information from the federal government agencies in accordance with the provisions of the Act. This Act expands on other federal bodies and institutions to the extent that they perform administrative tasks in accordance with public law. But the right of access to information does not apply if information disclosure may have a detrimental effect on international relations; military and other security interests of the Federal Armed Forces; internal or external security interests; external financial control matters (Tkachuk T., 2017a, p.106). The Federal Government must report to the German Bundestag on the application of this Act, while the German Bundestag must evaluate the Act scientifically.

In addition, analyzing the legal platform for information security in Germany, we tried to structure, in our opinion in terms of priority, the system of protection of the information space, in particular: The main coordinating governmental body which aims to promote information technology security, and which ensures security of information flows, systems, channel databases is the Federal Infor-

mation Security Service (BSI) of Germany. BSI is a part of the Federal Ministry of the Interior which, among other functions, ensures internal security and protection of Germany's constitutional order and fights terrorism, extremism, espionage, and sabotage.

In accordance with the Law *On the Federal Office for Information Security*, BSI collects and evaluates information on the threats posed to the state cyber security, detects new types of cyber attacks, as well as analyzes appropriate counter-measures (Klymchuk O., Tkachuk N., 2015, p.78). In our opinion, BSI is actually responsible for performing the following functions in cooperation with NATO and the EU: risk assessment of the information technology introduction; development of the criteria, methods and test tools for assessing the degree of national communication systems security; checking the degree of information systems security and issuing respective certificates; issuing permits for information systems introduction at important government facilities; taking special security measures related to information exchange in the state bodies, police, etc.; checking the reliability of existing information and technical facilities used in the field of federal authorities' activity; creating, verifying, testing and putting into operation cryptographic material for information exchange (for example, encryption of classified documents) at the federal level, etc.) (Tkachuk T., 2017a, p. 106).

In the process of conducting the study, we come to the conclusion that in order to optimize operational cooperation between all government agencies, as well as to improve the coordination of measures aimed at cyber attacks combating, Germany has established the National Cyber Security Center (NCAZ) within the Federal Office for Information Security, which interacts directly with other cyber security actors from the EU, NATO, and international organizations. In this context, I.O. Chernukhin quite aptly points out that this center operates within the Federal Office for Information Protection (BSI) (develops requirements for information protection in the state information systems) with direct involvement of the Federal Office for the Protection of the Constitution (BfV) staff (carries out law enforcement intelligence operations to identify cyber criminals) and the Federal Office for Civil Protection and Disaster Relief (BBK) (takes measures to eliminate socially dangerous consequences of cyber attacks) (Chernukhin, 2014, p. 32).

Within the framework of the proposed structural scheme for the protection of Germany's information space, we would like to note that the Federal Office for the Protection of the Constitution (BfV) and the Office of Information Operations which includes the Information and Computer Network Operations Division (WICMO) (Abteilung der Information und Computer Netzwerkoperationen – AICNW) also take care of the Germany's information security. WICMO was established at the end of 2010 as a specialized unit in the Bundeswehr's command structure (since April 2017 it has been operating as the 'German Cyber Space and Information Space Forces'). In his paper *Legal Provision of Information Security in the Context of Ukraine's Integration* Tkachuk T.Y. notes that it is WICMO that is assigned the following tasks in the implementation of the concept of information security in Germany, in particular in the field of cyber defense, that stimulate the effectiveness of measures aimed at cyber crime combating. The tasks of this division include, in particular: development of new methods of cyber attacks; penetration into computer networks of foreign states and organizations

with a view to intelligence data obtaining; carrying out of operations with destructive influence on networks and automated systems or blocking their operation (Tkachuk T., 2018, p. 249).

Analysis of Germany's information security policy allows us to conclude that among the priorities in countering cyber threats Germany has chosen the tactics of the so-called 'active defense'. In our opinion, identification of the offensive component of information confrontation and development of a separate structure constitutes an adequate response to the current threats posed to Germany's information security.

Besides this we would like to note that, on May 25, 2018, a new Federal Law *On Data Protection* (BDSG) came into force in the country, and it is adapted at the national level to EU Regulation 2016/679 of April 27, 2016 on the protection of individuals with regard to the processing of personal data and free movement of such data / Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 /. In addition, this Federal Law *On Data Protection* (Part I, Chapter 4) establishes the status and forms of activity of the Federal Commissioner for Information Data Protection. The Federal Commissioner, in general, acts as an ombudsman. Anyone who considers that their right of access to information under the German Federal *Freedom of Information Act* has been violated may apply to the Federal Commissioner for freedom of information. Accordingly, the Federal Commissioner may request federal authorities subject to the *Information Act* (IFG) to apply in the relevant issues and, where appropriate, may act as a mediator and work to ensure due process. However, he cannot give instructions to the authorities. If the Federal Commissioner considers that the German Federal *Freedom of Information Act* has been violated, he may express a formal objection and notify a higher authority and, if necessary, the German Bundestag thereof (Bundesdatenschutzgesetz (BDSG)).

Analyzing the legal platform for information security in France, we come to the conclusion that similar tactics in Germany for information security work successfully in France. In this format, we would like to note that since July 17, 2014, at the level of the legislative act, the program *Politique de sécurité des systèmes d'information de l'état* (State Information Systems Security Policy) has been in effect, it determines the global information systems security policy. We consider that this program establishes the rules for the protection of state information systems and priority mechanisms for combating cyber threats at the state level. These rules were developed by the National Systems Security Agency (ANSSI), in collaboration with the ministries. And on March 27, 2015 *Décret n° 2015-351 du 27 mars 2015 relatif à la sécurité des systèmes d'information des opérateurs d'importance vitale et pris pour l'application de la section 2 du chapitre II du titre III du livre III de la première partie de la partie législative du code de la défense* was issued, in which the French government has formulated new provisions for the security of information systems of operators in the sectors the role of which is critical to the life of the nation. In particular, this Decree sets the terms for: determining security rules necessary for the protection of information systems of operators that are of vital importance; introducing the systems for detecting events that affect the security of these information systems; informing about incidents affecting security or information systems operation, exercising control over information systems. In addition, it sets criteria that allow operators to identify information systems,

as well as IT security rules (Publication du décret n° 2015-351 du 27 mars 2015 relatif à la sécurité des systèmes d'information des opérateurs d'importance vitale).

In the process of conducting the study, it should be noted that the basic legal act that defines the strategic directions of French public policy in the field of security is the *White Paper on Defense and National Security* as of 2008. It names large-scale attacks on information systems among the most likely threats to France and the European community as a whole. The main ways to counter these threats mentioned in the document are cooperation in countering attacks on information systems, primarily within the EU; conducting both overt and covert active measures to counter the manifestations of aggression in information networks; training cyber troops on a professional basis (Défense et Sécurité nationale. Le Livre blanc). In 2013 the fourth White Paper was published under the supervision of Francois Hollande. In our opinion, a special feature of this document is recognition of military operations as 'the most important element of security'. The fifth document, under a slightly different title ('Strategic Defense Review and National Security'), was published in the late 2017 under the supervision of Emmanuel Macron. As noted by Shemchuk V.V. in his article 'Foreign Experience of Information Security of the State', this document pays a great attention to information threats and countermeasures, and it is also noted that some attacks in cyber space, due to their scale and severity, can be classified as armed aggression (Shemchuk, 2019, p. 189).

In order to implement the general security provision directions which are identified in the White Paper on security and defense in the information field, there has been elaborated a program regulatory act – *French Strategy on the Security and Defense of Information Systems*. Accordingly, on February 15, 2011, the National Agency for Information Systems Security published French strategy in the field of defense and security of information systems. The strategy set out in this document for the defense and security of national information systems is based on four goals, viz.: to have world-class cyber protection, to guarantee freedom of decisions in France through confidential and secret information protection, to strengthen cyber security of the critical national infrastructure, and to ensure security in civilian cyber space (La stratégie de la France en matière de cybersécurité et cybersécurité).

Also, as it is absolutely aptly noted in this context by Shemchuk V.V. in his article 'Foreign Experience of Information Security of the State', armies must fully plan and conduct operations in the digital space up to the tactical level in the chain of planning and conducting kinetic operations. In addition, to ensure information security the Defense Review allows to conduct combat operations in cyber space, which means a defensive or offensive struggle throughout the digital environment against government or non-government opponents (Shemchuk, 2019, p. 189-190).

Accordingly, based on the research, we want to express the opinion that in order to achieve these goals, the following areas should be identified for effective information security, in particular: to protect the information systems of the state and critical infrastructure operators to improve national resilience; to adapt the legal framework with due account of the latest technological developments and new types of information systems usage; to develop international cooperation in the field of information systems security, fight against cyber crime and cyber protection for better protection of the national information systems, etc.

In addition, we would like to note that despite the general lack of organizational integrity, a single coordinating body for information security, the national system of France contains both active (development of the information sphere, obtaining of the necessary information) and passive (protection of own information resources, systems, national identity) components for the protection of national interests in the information field. Beside that, executive authorities provide for the development of their own information space and information infrastructure, while special services take measures to protect them.

It is also worth noting that in order to counter information security threats, as well as to build a single nationwide system for protecting critical infrastructure against cyber threats, the National Agency for Information Systems Security (ANSSI) was established in 2009 as part of SGDSN. In order to support the activities of governmental agencies in critical conditions, SGDSN is responsible for the reliability, confidentiality, functionality of government communication means. Taking care of state secrets, SGDSN regulates the activities aimed at the protection of national defense secrets, determines interdepartmental priorities in this area. In addition, SGDSN coordinates economic intelligence activities. Shemchuk V.V. in his article 'Foreign Experience of Information Security of the State' notes that the respective function is to obtain, process and disseminate joint strategic information, the success of which depends on clear interagency coordination that should be accompanied by concerted action of economic entities and public administration (Shemchuk, 2019, p. 190).

The above legislative steps taken by Germany and France clearly confirm that special attention is paid to information security issues in these countries. However, according to Politansky, Finland has some particularly useful experience in the field of information security, as it is a successful example of implementing the optimal model of information society, establishing a developed information technology infrastructure and ensuring a high level of public access to them (Politansky, 2017, p. 35). Here again, it is important to note that participation in the EU imposes on these countries the obligations to comply with the standards of this organization related to the information society development and information security provision.

According to our research, the structural scheme of information security in Finland is as follows: the key state institutions responsible for the development and implementation of Finland's information security policy are the Ministry of Transport and Communications of Finland, the Data Protection Ombudsman. The Ministry of Transport and Communications is responsible for the development of legislation on communication networks, data security, ensuring access to communication services, as well as for the development and implementation of the national policy in the field of information security. A structural subdivision of the Ministry of Transport and Communications is the Finnish Communications Regulatory Authority (FICORA), the mandate of which includes control and state regulation in the field of information and communication technologies, as Tkachuk T.Y. notes in his article 'Ensuring Information Security in Non-Aligned Countries' (Tkachuk T., 2017, p. 62). The author notes that FICORA structure includes CERT-FI (Computer Emergency Response Team of Finland) – a Finnish rapid response computer team the main task of which is to prevent, detect and respond to cyber incidents, as well as to disseminate information about information security threats. In 2013

the Government of Finland approved the National Information Security Strategy which outlined the following priorities for improving the management of threats and the effectiveness of strategically important information systems maintenance, in particular: raising the basic knowledge of the population and business in the field of information security through provision of confidential and secure network services; developing and implementing professional training at all levels in order to strengthen information security; investing into international cooperation and participation in international research activities focused on information security (Finland Cyber Security Strategy (2013)).

In this context, we share the view expressed by Zozulya O.S., that it is the Finnish model of information society that has a strong social orientation, with combination of dynamic interaction between business and society with an active mediatory role of the state. The state retains two functions: development management and deregulation. Its main goals include establishment of the national information infrastructure to help raise public awareness among the country residents. Because of that, as the author notes, since 2003 the Government of Finland has been implementing measures to inform the citizens of the country about the methods and ways of protection against the negative information impact within the framework of the Information Security Strategy (Zozulya, 2016, p. 35).

It should also be noted that in 2013 the Government of Finland approved the National Information Security Strategy, which identifies the following priorities: establishment of the national information security center for comprehensive data collection and analysis, general situational awareness as well as national and international cooperation; excellence of threat management and service efficiency for strategically important information systems; raising of the basic knowledge of the population and business in the field of information security through provision of confidential and secure network services; development and implementation of professional training at all levels in order to strengthen information security; investing into international cooperation and participation in the international research activities focused on information security (Finland Cyber Security Strategy (2013)). In our opinion the Finnish National Security Strategy presupposes thus minimizing of the risks involved, which is an important task in ensuring global information security, since cyber attacks can be used as a tool of political and economic pressure, including in combination with traditional military means.

During the research a special attention was focused on the features of legal information security of the EU Germany, France and Finland in the context of studying their national cyber strategies as an inherent component of national security, in particular in terms of diversification of external relations in a multi-vector system of international security. The peculiarities of the functioning of the institutional and legal mechanism of cyber defense in the context of the legislative regulation of international cooperation between state institutions and national security structures were analyzed. The need to develop a coherent cyber defense policy of the European Union in the context of EU information policy in order to unify approaches to information protection and improve the regulatory framework for information security was also justified.

In general, having studied the specifics and features of information security in the EU, Germany, France and Finland, we concluded that in general the issue of information security in these EU countries is heterogeneous and contains a number of differences depending on the country. Thus,

Germany has a comprehensive cybersecurity strategy, complemented by a strong legal framework in the field of cybersecurity. In particular, the existence of the Federal Office for Information Security (BSI), which is responsible for managing the computer and communication security of the German government, is a clear demonstration that information security is at a high level. In this turn, France has a national cybersecurity strategy that focuses heavily on defense and national security. In particular, the National Agency for Information Systems Security (ANSSI) is a well-established information security body integrated with the country's CERT-FR computer emergency response team. And the implementation of specific sectoral security measures makes France one of the few EU countries that has taken such a focused approach to governance, including information security.

At the same time, based on our research, we would like to note that the approaches to information security adopted in the European Union are currently not unified. Therefore, research, evaluation and implementation of the positive experience of each EU country in this area are important in building the information security system of the European Union.

In addition, our analysis of the regulatory framework of the cyber security system of the EU countries Germany, France and Finland allows us to demonstrate the dominant role of intelligence services in ensuring cyber security. In this regard, in our opinion, international cooperation on unified approaches to combating cyber threats in the information space is somewhat limited.

Finally, we would like to note that the practical experience of the EU countries Germany, France and Finland is especially important in the formation of the domestic legal framework in the field of information security. Thus, the adaptation of legal standards that take place in these EU countries in this area is a priority of our country in the context of development and development of the national information security system.

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FREE MOVEMENT OF DATA IN THE EUROPEAN UNION: OPPORTUNITY OR BIG CHALLENGE IN A USE OF ARTIFICIAL INTELLIGENCE?

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Abstract. This article analyses the current situation in the European Union related to the free movement of data, relationship between personal data, non – personal data and their use in artificial intelligence technology. Despite the European Union's efforts to facilitate the free movement of data, some relevant obstacles are currently being observed. Artificial intelligence technology faces difficulties in using data. Despite the fact that large amounts of data are now increasingly accessible to such technology, its ability to de-anonymize data poses risks of turning simple data into personal data and making its use a challenge for artificial intelligence developers. The issues raised are sensitive and some regulatory changes should be made in the near future in order for the European Union to remain a leader in emerging technologies.

Keywords: Artificial intelligence, personal data, non - personal data, single market, free movement.

INTRODUCTION

Artificial intelligence² is one of the most important emerging technologies which is being considered to be strategically and economically significant for the European Union future plans. Artificial intelligence and data are essentially correlated. Without data there is no possibility to develop and compete with artificial intelligence applications in the market. Free movement of data becomes an essential requirement for a successful development of artificial intelligence in the European Union. However, it would not be easy for the European Union to become a leading region in artificial intelligence technology due to a strict legal framework regulation to protect personal data and privacy, which also contains specific sectoral regulation. The existing provisions of the European Union law will be applied to artificial intelligence technology regardless its specifics. One of the major obstacles for artificial intelligence to use data freely is the ability of artificial intelligence to

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² There is no legal term for artificial intelligence which would be set in legal acts. The European Economic and Social Committee (Opinion of the European Economic..., 2017) provides a fairly comprehensive and comprehensible concept of artificial intelligence by emphasizing that it is a very general concept. It states that artificial intelligence is a catch-all term for a large number of sub(fields) such as: cognitive computing (algorithms that reason and understand at a higher (more human) level), machine learning (algorithms that can teach themselves tasks), augmented intelligence (cooperation between human and machine) and artificial intelligence robotics (artificial intelligence imbedded in robots) and the central aim of artificial intelligence research and development is, however, to automate intelligent behaviour such as reasoning, the gathering of information, planning, learning, communicating, manipulating, detecting and even creating, dreaming and perceiving (Opinion of the European Economic..., 2017, p. 3). This article considers artificial intelligence as independent algorithms which can learn from provided data and teach themselves without needing to be programmed.

analyse data and identify individuals, even if such information is collected in separate databases or is anonymous. The purpose of this work is to analyse and reveal the problematic aspects arising from the regulation of data and its use in the field of artificial intelligence technology in accordance with the legal doctrine, legislation and case law and to discuss what should be done in the future legislation. The subject of this study is focused on the challenges posed by artificial intelligence and its correlation with data protection.

This article further analyses the regulation of the free movement of data in the European Union, the problematic concept of personal data which is identified 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/EC (General Data Protection Regulation, 2016) (hereinafter referred to as GDPR), artificial intelligence confrontation with some principles set in GDPR. The paper finds out that the aim to create a single European data sphere and to make the data easily and comfortably accessible and usable for a new technology such as artificial intelligence is possible but limited by strict requirements for the use of personal data and privacy. For the future development of a competitive European artificial intelligence technology the existing regulations should be reviewed, supporting legal acts or guidelines should be provided.

1. FREE MOVEMENT OF DATA IN THE EUROPEAN UNION

Even though currently the European Union has officially established four freedoms (of free movement of people, goods, services and capital), the free movement of data has been called the fifth freedom which complements the existing ones. Recently some important moves have been made towards the single data market and hopefully a better future regulation for the use of data. This year the European Commission has published a European strategy for data (A European strategy for data, 2020) (hereinafter referred to as A European strategy for data). The strategy states that the main aim is to create a single European data space – a genuine single market for data, open to data from across the world – where personal as well as non-personal data, including sensitive business data, are secure and businesses also have easy access to an almost infinite amount of high-quality industrial data (A European strategy for data, 2020, p. 4-5). This strategy is not the first attempt to make a clear vision of a common European Union single data market. A Digital Single Market Strategy for Europe which was published back in 2015, also stated that member States are therefore not able to inhibit the free movement of personal data on grounds of privacy and personal data protection and any unnecessary restrictions regarding the location of data within the European Union should both be removed and prevented (A Digital Single Market Strategy for Europe, 2015, p. 15). The main question is what has been done till now that the free movement of data can be broadly called a freedom without unnecessary restrictions?

Data can be divided into personal data, non-personal data and mixed data. Personal data is an exceptional value in the European Union, and it falls within the scope of the GDPR. Too broad definition

of personal data is a problematic issue regarding the implementation and usage of artificial intelligence which will be discussed further. Non – personal data is regulated by Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union (Regulation on the free flow..., 2018) (hereinafter referred to as Regulation on the free flow of non-personal data), which is aimed at opening up a better access to electronic data that will contribute to technological progress, including artificial intelligence. This Regulation on the free flow of non-personal data defines the data as other than a personal set in the GDPR. In other words, non – personal data is such data which was previously considered as personal data, but latter was depersonalized and became anonymous, or it may be such data which does not have any interface to an identified or identifiable natural person. Regulation on the free flow of non-personal data complements the existing legislation in data field³ and tries to create integral and solid legal framework for the free movement of data in the single market.

In mixed data sets it is also very important to identify which data can be used for artificial intelligence without additional requirements. The Guidance on the Regulation on a framework for the free flow of non-personal data in the European Union (Guidance on the Regulation on..., 2019) explains the rules of data use. It says that in the case of a dataset composed of both personal and non-personal data the Regulation on the Free Flow of Non-Personal Data applies to the non-personal data part of the dataset and the GDPR applies to the personal data part of the dataset, but then the non-personal and personal data parts are “inextricably linked”⁴, the data protection rights and obligations rising from the GDPR fully apply to the whole mixed dataset, also when personal data represent only a small part of the dataset (Guidance on the Regulation on..., 2019). Normally in practice it is technically difficult or very expensive to divide data sets to personal and non – personal data. It seems that basically when using mixed data in artificial intelligence, almost at all times it will be necessary to apply the GDPR requirements.

The European Union’s position is very active in creating a single data market. Beside the mentioned Regulations other legal acts concerning data issues have also been adopted⁵, making a part of the policy on digital single market. Nevertheless, even though it seems that the European Union has made the main decisions which facilitate the data movement and are very important for the

3 Regulation on the free flow of non-personal data supplements GDPR, Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (Police Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

4 The term “inextricably linked” first used in the Regulation on the Free Flow of Non-Personal Data is not defined in the same Regulation, nor it is possible to find the meaning in GDPR as well. However Guidance on the Regulation on a framework for the free flow of non-personal data in the European Union the term “inextricably linked” explains as a situation whereby a dataset contains personal data as well as non-personal data and separating the two would either be impossible or considered by the controller to be economically inefficient or not technically feasible (Guidance on the Regulation on..., 2019).

5 For more detailed information see A European strategy for data, 2020, p.4.

artificial intelligence development, going deeper, the use of data in this technology is not so smooth. Does these Regulations⁶ really make the data movement easier in a use of artificial intelligence tools and guaranty an easy flow of data? Or does they create obstacles for improvement and it is time to rethink some issues related to artificial intelligence?

2. PERSONAL DATA OR JUST DATA? A THIN LINE OF ASSESSMENT

The availability of large-scale data sets is crucial for the development of artificial intelligence. It is the basis for this technology to learn and achieve results. But what data can be used for artificial intelligence without major constraints? The European Union seeking to become a world leader in smart technologies field announced Regulation on the free flow of non-personal data which is aimed at opening up better access to data that will contribute to technological progress, including artificial intelligence. As it was mentioned before this legislation ensures the free movement of electronic, non-personal data that is not personalized and does not identify specific individuals or groups of individuals as well prohibits data localisation requirements. However, even if such data is anonymised but combinations of artificial intelligence with data make it possible to trace personal data or where personal and non-personal data are inextricably linked, the provisions of the Regulation on the free flow of non-personal data do not apply and the rules applicable to personal data shall apply. Thus, it is necessary to analyse which data are subject to the provisions of GDPR, which also affect the ability of artificial intelligence to use it in the performance of tasks.

GDPR consolidates a very broad definition of personal data. It means any information relating to an identified or identifiable natural person (GDPR, Art. 4 (1)). An identifiable natural person is one who can be identified, directly or indirectly. This takes into account a lot of situations. This extremely broad concept of personal data creates a situation that all data can potentially become personal data in the interaction with artificial intelligence. The European Court of Justice in the case *Patric Breyer* (The European Court of Justice case C582/14 Patrick Breyer v Bundesrepublik Deutschland) explains that the word “indirectly” in the context of personal data indicates that in order for the information to be considered personal it is not necessary that it itself enabled to identify the corresponding person’s identity and it is not required that all information would be held by a single person. Accordingly, GDPR recital 26 which also provides an expanded interpretation of the term personal data, stating that the data protection principles should apply to any information about an identified or identifiable natural person. The Article 29 Data Protection Working Party (WP29) has also specified that if the controller intends to keep the data for 10 years it should also assess the possibility to identify and disclose personal data from available data in the ninth year of data retention, in which case all the necessary legal requirements apply for the protection of personal data (Opinion 4/2007 on the concept..., 2007, p. 15). In terms of technological progress, it is clear that data controllers should pay a particular attention to the data provided for artificial intelligence activities.

6 GDPR and Regulation on the Free Flow of Non-Personal Data.

It is possible to distinguish four elements in the concept of personal data, which are closely related and interdependent: the concept of information, the relationship of information with the person, the concept of a natural person and the possibility of identification (Zaleskis, 2019, p. 92-95). Together, as it was mentioned before, these elements presuppose a very broad concept of personal data. In the case under consideration non-personal data may indirectly, in the interaction with other information, identify a natural person and thus become personal data (Bakhoum, *et al.*, 2018, p. 199). Data that are not considered personal data, such as metadata, have the potential to fall within the scope of personal data regulation at any time, according to the interactions discussed. When there is a possibility that the identity of a natural person may be revealed in the process of the data and artificial intelligence interaction, GDPR provisions should apply *ex ante* and it also should comply with all requirements (for example, obtaining the data subjects' consent). However, without the disclosure of the natural person's identity by artificial intelligence in the process, this would become a completely unnecessary procedure, becoming only a bureaucratic burden, because it is difficult to predict whether any data may become personal data in the future.

Should the definition of personal data be reviewed in the future? Some authors suggests to keep personal data definition as a threshold of protection, but with a sharper concept, namely, one based on the risk of identification from "0" (zero risk of identification) to "identified", and to treat information with varying degrees of identifiability differently (Schwartz and Solove, 2011, quoted in Purtova, 2018, p. 42). Other author (Purtova, 2018, p. 78-80) claim that there are several options: to narrow the meaning of personal data, or to preserve the broad interpretation of personal data, but reduce the intensity of compliance obligations, for instance by matching the intensity to risks, or to treat all data with the same requirements as for personal data. It is questionable which of these considerations would be the most optimal. Some of these proposals are unlikely to be implemented in accordance with formed case law. Besides the definition of personal data remained the same after GDPR adoption which recently have changed Directive 95/46/EC showing that legislator did not take additional measures to legitimize a different concept or change an extent.

Another issue related with a broad personal data concept is a prohibition of data localisation requirement. The Regulation on the free flow of non-personal data Art. 4 (1) prohibits data localisation requirements unless they are justified on grounds of public security in compliance with the principle of proportionality. The aim is to remove obstacles to non-personal data flow in Member States. The problem is that GDPR does not contain the same broad prohibition on Member States data localisation laws as the Regulation on the free flow of non-personal data, despite the free movement of personal data within the European Union being a central tenant of the GDPR (A new era for EU..., 2019). Art 1 (3) of the GDPR sets that the free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data. This means that any other restrictions for personal data related with data localisation is possible until it is related with requirements other than personal data protection. This creates legal uncertainty where data in interaction with artificial intelligence may become personal data and after this Member States could still impose data localisation requirements

on personal data for other reasons than those connected with personal data protection (Debussche *et al.*, 2019). This situation may interfere free movement of data because Member States still have a possibility to set data localisation requirements and to disturb cross-border data flows.

According to a recent study ordered by the European Parliament (The impact of the General Data..., 2020, p. 1) numerous artificial intelligence and data protection issues are not answered in the GDPR and data controllers with data subjects should be provided with guidance on how artificial intelligence can be applied to personal data in conformity with GDPR. Future regulation related with artificial intelligence and data should be measured and arising from practice. Any regulatory regime that is designed to govern artificial intelligence needs to take into consideration the GDPR as well as its practical implementation by organisations, to avoid unnecessary duplication of existing and potentially conflicting obligations, ambiguity and legal uncertainty (particularly in heavily regulated sectors) (Artificial Intelligence and Data Protection..., 2020, p.19). It is obvious that the current legal framework is unclear, causing uncertainty and additional legal instruments will be needed in the future. What measures will apply depends on how detailed this problem will be debated and broadcast to decision – making bodies.

3. ARTIFICIAL INTELLIGENCE COMPATIBILITY WITH SOME GDPR PRINCIPLES

Rapid technological development, free movement of data, the exchange of large amounts of data and the unrevealed potential of technology have led to a rather abstract application of GDPR regulation. Only in the use of such technology practical problems and necessary changes become clear. At this stage in the development of artificial intelligence there are several additional challenges. One of the ideas presented in the European strategy for data was the smooth move of data and its use for technologies, but current regulation, especially of the main principles set in GDPR have some gray areas which have to be clarified in the future. Principles are key value indicators which should be followed in applying the provisions of the GDPR. At present, however, these principles pose many uncertainties about their application and compatibility with artificial intelligence technology, their impact on the free movement of data. In this context several principles from GDPR with a significant decisive impact on the use, movement and generation of data in a use of artificial intelligence will be discussed.

Artificial intelligence systems are not well compatible with the storage limitation principle set out in GDPR Article 5 (1) (e), which requires data to be kept in a form that permits the identification of data subjects for no longer than necessary and only for the purposes for which the personal data are processed (General Data Protection Regulation, 2016). GDPR does not provide for specific storage periods. The obligation for the controller to collect, use or store certain data may arise from various legal acts which apply to controllers activities. These time limits arising from legal acts should be considered in line with the principle of storage limitation. Thus, the storage period must be optimal and based on regulatory legislation. For artificial intelligence, which creates a certain end product, it is especially important and relevant to preserve the original information in order to be able to trace, compare and discover what mistakes were made in the development or implementation process

if negative or different results were expected. This is particularly important due to the situation when currently it is difficult to understand the full potential of the artificial intelligence interaction with data. Even with the data controllers' utmost care while dealing with data and by employing all technical and organizational means, the provisions of this principle would still prevail and the data would have to be destroyed.

Another challenge for artificial intelligence systems is compliance with the principle of data minimization set out in paragraph (c) of GDPR Art. 5 (1), which means that personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (General Data Protection Regulation, 2016). The data controller should use only the information that is necessary to achieve the purpose and should not be able to collect any additional information that is not provided (even if it arises in the process of learning algorithms). As discussed earlier, artificial intelligence requires large amounts of data to learn, analyse, and make decisions. The variety and amount of data reduces the likelihood of algorithms to act bias and is a guarantee of making more transparent decisions. The requirement for data minimisation hinders free flow of data because by minimizing data to minimum the end product of artificial intelligence technology may be incomplete and not of the best potential it may be. Therefore, already at this stage, the data controller should know very specifically what result should appear and from which data it is intended to be extracted. Due to the specifics of artificial intelligence, it is difficult for the data controller to foresee and predict what artificial intelligence can learn and what results will present as final. In the course of such a process, it is quite likely that not only the purpose may change, but also artificial intelligence may generate, as a result, completely unexpected conclusions and presentations, and in the course of the process, additional data related to the task of artificial intelligence.

Another closely related principle is the purpose limitation principle set in GDPR Art. 5 (1) b which means that personal data must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes (General Data Protection Regulation, 2016). The purpose of this principle is to limit the data controllers' ability to use the data subjects' personal data in unlimited quantities. As data are collected for certain purposes (defining the purpose of data processing) so firstly, the controller can only collect the data for pre-defined and legitimate purposes, and secondly, the collected data cannot be further processed for those primary purposes in an incompatible way (Zaleskis, 2019, p. 118). In the case of artificial intelligence systems, the data collected from the data subject must be clearly defined and specified, and the necessary information must be explained and provided to the data subject if he or she has to give his or her consent accordingly. However, the process of deploying artificial intelligence systems often requires a variety of personal data that has previously been collected for completely different purposes. For example, the data collected from a Facebook account about a person's activities there is transferred to an artificial intelligence algorithm that determines whether the same person can be mortgaged to secure his obligations (Artificial intelligence and privacy, 2018, p.17). The controller should set sufficiently precise, clear and specific purposes for the processing; very broad purposes for the processing should not be considered appropriate. Therefore, in a situation where previously collected

data could be re-used only in another context, it is necessary to carefully assess whether the purpose is the same. In the case of Facebook such personal data could no longer be used because the purposes of the data are completely different and may have completely different legal consequences for the person; that is why the data subject's consent must be obtained again. The European Parliament underlines that the artificial intelligence developer should always have a clear, unambiguous and informed consent and that artificial intelligence designers have a responsibility to develop and follow procedures for a valid consent, confidentiality, anonymity, fair treatment and due process (A comprehensive European industrial policy..., 2019). Taking into account the specific nature of artificial intelligence and its ability to make its own decisions, in some cases it will be difficult to determine at which stage a particular goal has ended and a new one has begun. The consent given by the data subject may only be given for the purposes for which the data subject was informed (General Data Protection Regulation, 2016, Art 4 (11)). In the event of a change of that purpose in the process of artificial intelligence and in the absence of the data subject's consent to another purpose, such consent must be obtained separately.

It should be noted that some of these principles (the principle of purpose limitation and storage limitation) discussed above have several exceptions. In these areas personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes (GDPR Art. 5, (b), (e)). The question then arises as to whether the creation and development of artificial intelligence applications using the data could be regarded as one of the exceptions? It is quite likely that the development of artificial intelligence programs in the field of medicine to detect and diagnose different forms of cancer and their prevalence (Newman, 2019) or existing advance in artificial intelligence in radiology (Loria, 2019) suggests that artificial intelligence activities with personal data could indeed be considered as scientific or statistical. Moreover, GDPR recital 159 provides that the processing of personal data for research purposes should be interpreted broadly, including, for example, technological developments, and paragraph 162 provides that any operation of collecting and processing personal data essential for statistical analyses or preparation of statistical results is to be considered as data processed for statistical purposes. The situation could be different with artificial intelligence being used exclusively in the field of commerce; but who could deny the fact that progress or discovery in such an area cannot be applied to the use of artificial intelligence in medicine or any other human welfare activity.

It is already clear that interpreting the principles set in GDPR may take some time. It should be noted that such institution as European Data Protection Board could be more active by providing necessary guidelines.

CONCLUSIONS

1. The European Union tries to create integral and solid legal framework for the free movement of data in the single market. Recently several important regulations were adopted: GDPR and the Regulation on the Free Flow of Non-Personal Data. However, the application of these regulations

in the field of artificial intelligence raises some uncertainties. Legal uncertainty is observed in data protection requirements application for data used in artificial intelligence tools, data localisation requirements, compatibility of the principles set in GDPR with the activities of artificial intelligence. Current legal framework in artificial intelligence and data interaction is not sufficient, causing uncertainty and additional legal instruments will be needed in the future.

2. Artificial intelligence technology is not new in the world, but the rapid growth of data in recent decades has revealed the potential of this technology. Artificial intelligence can use data to create products that can be applied in a variety of areas of life and provide tangible benefits: for example, they are used in health care to detect early stages of cancer. However, one of the most important aspects is related to the fact what data artificial intelligence uses to achieve the goal. The concept of personal data introduced by GDPR Regulation leads to the conclusion that the scope of the Regulation is very wide and can be broadly extended to cover different categories of data: both directly and indirectly related to natural persons. With regard to artificial intelligence, in assessing the ability of this technology to make independent decisions and its unpredictability, it is highly likely that artificial intelligence may link the data provided to it to other available information and thus identify individuals. Therefore, only if there is a possibility that the identity of a natural person may be disclosed, the controller should apply the provisions of the GDPR *ex ante* to the data processed by artificial intelligence and comply with all the requirements.
3. Personal data used by artificial intelligence, or even data that could potentially become personal data, must be subject to the principle of storage limitation, principle of data minimization and the purpose limitation principle. It is difficult to reconcile these principles with the need for artificial intelligence to obtain a variety of data in large quantities. Such a constraint may not only have a significant impact on the development and learning opportunities of artificial intelligence, but also on the overall competitiveness of the European Union in the context of other regions of the world. It should be noted that the GDPR provides a number of exceptions where processing data for longer periods or in the case of purpose limitation, further processing would be allowed if this could be justified in the public interest for archiving, scientific or historical research or statistical purposes. However whether the development of artificial intelligence and its discoveries in various fields (especially science) could not be justified for these purposes remains an open question, as there is still no precedent to justify these objectives.

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NATIONAL IDENTITY AS A PATH TOWARDS THE COMPATIBILITY OF THE OPPOSITE STANDPOINTS

Paulius Griciūnas¹

Abstract. Both the unconditional primacy of the EU law (even over all the national constitutional norms), and the supremacy of any national constitutional rule over EU law, couldn't be considered as a solution to the accommodation of the constructive interaction between two autonomous legal systems. The pluralistic models come up with a solid explanation on how legal systems interact. However, they fail to provide a solution when it comes to the potential collision of the EU and national constitutional norms. In the last decade, discourse on the notion of national identity has been developing. This concept could be a viable approach in resolving situations (as researched in this article²) bordering on conflict in the pluralistic models.

Keywords: national identity, primacy, judicial dialogue.

INTRODUCTION

The dispute over the primacy of EU law, over any national law, is a long-standing issue that has sparked debate. The primacy of EU law was introduced as the core principle of EU law by the ECJ in C-6/64 *Costa* (Judgment of the Court of 15 July 1964), which sought to prevent the deprivation of the character of EU law by the national law “however framed”. The primacy of EU law over national legislation was reinforced in the C-11/70 *Internationale Handelsgesellschaft* (Judgment of the Court of 17 December 1970). The ECJ stated that EU law cannot be affected by the national constitution, nor the principles of a national constitutional structure. Despite the existence of the primacy of EU law in early decisions, the ECJ maintains its' position: the “rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law” (Judgment of the Court (Grand Chamber) of 8 September 2010). This position that the ECJ maintains meets the general idea of the EU, as described by L.F.M. Besselink, as the supranational construct that prevails over the Member States. Besselink's opinion was given in response to the existence of sovereignty as a cause of conflict (Besselink, 2010, p. 39). We can therefore conclude, that according to the ECJ, EU law has unconditional primacy over any national law, including the national constitutions. Otherwise, the Member States could introduce amendments to their national constitutions to circumvent the requirements of EU law, which would substantially affect the unity of EU law. Or could give way to a situation, in which the non-compliance with EU law based on the existing constitutional provisions would be justifiable.

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It is now generally accepted in the Member States that EU law takes precedence over national law. Although this principle is acceptable only in relation to ordinary law. This relationship is controversial and inconsistent in regard to constitutional law (Grabenwarter, 2009, p. 84-85). The primacy of EU law over the constitutions of the Member States remains a subject of debate (Perez, 2013, p. 146-147). The reasons for such a debate seem to be evident: EU law limits the absolute expression of these powers – national sovereignty (Chalmers et al., 2014, p. 202). According to the jurisprudence of the ECJ, albeit within the limited fields, the Member States “have limited their sovereign rights” (Judgment of the Court of 5 February 1963). Hence, if the primacy of EU law is unconditionally accepted by the Member States in these limited fields, the Member States limit their sovereign rights to an extent determined not by the national constitution, but by external legal system, namely the EU’s. In that case, the scope of constitutional norms becomes interdependent on the EU law – the more EU competence “creeps”, the more such national constitution shrinks. If such a model were to be unconditionally accepted, this would mean no more than the federal statehood, and could be described as the prostration of national law (Mayer, 2009, p. 423). But the EU is not a federation, the EU remains the Union of States (Bofill, 2013, p. 242; Opinion of AG Cruz Villalon in Case C-612/13). If it is so, couldn’t it be argued that the primacy of the EU law over national constitutional norms could be limited under certain conditions, and in case the results are favourable, under which conditions?

A STARTING POINT FOR DISCUSSION

In his book “Legal Monism”, P. Cragl examines the relationship between EU law and national law extensively from the perspective of the positivism paradigm, arguing that the four main models of the relationship between the EU and the national system can be categorised as: pluralistic, dualistic and monistic (Cragl, 2018, p. 214). The latter having two sub-types, either based on the primacy of the law of the Member States or based on the primacy of EU law. P. Cragl thus reaches a conclusion: the interaction between national law and EU law is a monistic model of a legal system based on the primacy of EU law (Cragl, 2018, p. 230, 236). However, such primacy of EU law over national constitutions would have features of the federal structure. The EU is more than a confederation because of the intensity of the commitments made by the union. However, this intensity does not reach federal statehood (Kirchhof, 2009, p. 743). The EU is based on the transfer (limit) of some of the competences of the Member States to the EU under the principle of conferral³. Provided the primacy of the EU law is being accepted unconditionally (Opinion of AG Cruz Villalon in Case C-507/08), the Member States, being and remaining the “Masters of Treaties”, would not have any legal measures to counter EU acts, with the sole exception being the possibility of challenging the measures before the ECJ.

On the other hand, the interaction between national law, and EU law – based on a monistic model with the supremacy of national law, would result in denying the basic characteristics of EU law, developed over the years by the ECJ. It is now generally accepted that EU law takes precedence over national law. Although this principle is acceptable in relation to ordinary law, this relationship

3 TEU Articles 4(1), 5(1) and 5(2).

is controversial and inconsistent in relation to constitutional law (Grabenwarter, 2009, p. 85-85). The overview of the EU Member States would require a much more extensive analysis, meanwhile it is sufficient to mention a Lithuanian case, where the Constitutional Court first established the relationship between EU law and the Lithuanian Constitution:

“Thus, the Constitution <...> in regard of European Union law, establishes *expressis verbis* the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising out of the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal force is), save the Constitution itself” (Ruling of Lithuanian Constitutional Court in Case No. 17/02-24/02-06/03-22/04).

The monistic legal system: *i)* is based on one *grundnorm*, that presupposes a hierarchical structure of legal norms with the EU primary law or national constitution in the apex; *ii)* has clearly established rules on the conflict of norms, consequently, the primacy of EU law, or the supremacy of a national constitution is unconditional in any case; and lastly *iii)* there is but one court with an example of a case such as the latter instance. Is this maintained in case EU law and national law interact? I would argue that - no. Firstly, from a practical point of view, and based on the above-mentioned argument about the Union of States. And secondly, from a theoretical approach, on multiple *grundnorm*. If we accept that both national and EU legal systems are independent and autonomous, they, according to the theory of H. Kelsen, are based on different *grundnorm*. In case of the collision of EU law and national constitutions, we would have a collision of different *grundnorm*. F. Myers made a statement that, in the sense of legal theory, there is no legal solution for a conflict of different *grundnorm* (Mayer, 2009, p. 425). It might appear that no theoretical model exists to solve the possible conflict between national and EU law, but it would seem that this is not the case.

The answer to the challenges that arise in a monistic theoretical model, is a shift from a monistic to a more sustainable pluralistic one. This model could go under many names: constitutional pluralism, multilevel constitutionalism, composite constitutionalism, polycentrism, etc. The key goal of this pluralistic theoretical model is to prevent the absolute authority of EU law, while leaving the question of *Kompetenz-Kompetenz* unaddressed (Halmai, p. 1). The pluralistic model accommodates multiple *grundnorm*, therefore reinforcing the interaction of EU and national law, not in a hierarchical, but heterarchical structure. Hence, establishing the idea that there is no ultimate arbiter. Legal pluralism does not require any specific mechanism that is established for conflict resolution. Each legal system sets its own rules for resolving conflicts, and legal systems compete for the right to resolution in the event of a conflict of norms (Cragl, 2018, p. 9). Moreover, constitutional pluralism is incompatible with federalism (Claes, De Visser, 2012, p. 85), and therefore it fits the concept of the Union of the States. But one might ask the question- how can the pluralist model accommodate for the interaction between the different *grundnorm*. My answer lies within the pattern of positivism: to use another theoretical concept – the *rule of recognition* by H. Hart. As established under the *rule of recognition*, one *grundnorm* should be recognised by another *grundnorm* to the extent that is acceptable for both *grundnorm*. A conflict between the *grundnorm* is impossible, and therefore, there could

be only full or partial acceptance, or alternatively non-acceptance, of the external *grundnorm* and the impact it brings. This is not a purely theoretical construction. On the flipside, it is a theoretical foundation which explains the functionality of the mechanism established in TEU Art.4(2), referred to as a national identity clause.

BRIDGING THE GAP

As explained above, there exists a major challenge for the primacy of EU law *vis-à-vis* the supremacy of the national constitution. The absolutist model may not work because of the distinct features of a monistic and hierarchical system. Positions of absolutism are not attractive in terms of primacy or supremacy, because they reject the values of another legal system. So, the question should be formulated differently: when does EU law take precedence over national law (Chalmers et al., 2014, p. 219)? Such an approach maintains the primacy, albeit not absolute, of EU law. On the other hand, it safeguards certain national constitutional provisions from the external overriding and unforeseen impact made by EU law.

It is important to recognise that the model being discussed is very complicated. It does not have a hierarchy, nevertheless, it has multiple *grundnorm*, and has multiple arbiters, instead of a single one. In these conditions, a coherent interaction between two autonomous and independent legal systems should be established. What makes it even more complicated, is that there is no uniform regulation for the division of competences. Therefore, the ECJ and the national Constitutional Courts operate according to different regulations of their respective jurisdictions (Jakab, 2016, p. 113). We may ask ourselves: “Is it possible to find a solution, despite the relationship between EU law and constitutional law of the Member States?”. This is one of the most conflicting issues in the European legal field (Bogdandy, 2011, p. 1417). It seems feasible, although it remains a very difficult task. It would require many preconditions, one of the most important is accepting the pluralistic model, while also facing all the downsides it possesses. We might also ask: “How would this model function in order to solve all the challenges that have been previously discussed?” The functionality of such a model is possible under current TEU Art.4(2), as it establishes the notion of national identity:

“The Union shall respect the <...> Member States <...> national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government <...>.”

Firstly, TEU Art.4(2) recognises the pluralistic model. As emphasised by A. von Bogdandy and A. Schill, the pluralistic concept of the relationship between EU law and national constitutional law is earning recognition with the advent of the wording of TEU Art.4(2). As it stands, the traditional hierarchical ideas of early jurisprudence that the ECJ and the Constitutional Courts stood by, are becoming increasingly obsolete (Bogdandy, 2011, p. 1452). As noted earlier, acceptance of the pluralistic model leads to a general disregard of the hierarchical model and the concept of a sole ultimate arbiter.

Secondly, a departure from the unconditional primacy of EU law safeguards the fundamental constitutional structures from the unwanted and unpredictable effects it can have. The removal of fundamental constitutional structures (usually referred to as a constitutional core) leads to a change in the primacy that current EU law possesses over the national constitutional norms. The national identity clause can be seen as a lawful derogation of the core constitutional elements from the absolute primacy of EU law (Dobbs, 2014, p. 301). This means, that two core principles of the primacy of EU law and the supremacy of constitutions are allowed to co-exist simultaneously, both in non-absolute forms, while both continuing to make concessions against each other.

Thirdly, due to the fact that the national identity clause does not carry any hierarchical or mandatory provisions, it is based on the mutual acceptance of it by both systems. It is also a tool that could make way for a judicial dialogue between two equal counterparts, neither being superior. National identity cannot be developed in any normative way under the current Treaties. Therefore, the cooperative judicial communication between the Constitutional Courts and the ECJ (according to the procedure of preliminary reference under TFEU Art.267) is the only institutional instrument that is currently available. In order to ensure the feasibility of such a level of cooperation, all parties, both the Constitutional Courts and the ECJ, should look towards the path of mutual concession to ensure the further development of the European project. The national identity procedure could be implemented by both supreme courts in a constructive dialogue to form a constitutional nucleus that would not be affected by the priority of EU law and would be acceptable to both courts (Tatham, 2013, p. 292-293).

Fourthly, the aforementioned clause could also be used “as a shield or as a sword”, an expression noted by P. Faraguna, who underlines the two main directions in the use of constitutional identity. It can be used both as a shield – to overturn or even block EU legal reforms, or as a sword – to create legal conflict in an integrated EU constitutional system (Faraguna, 2017, p. 1621). Indeed, the national identity clause could be used outside of the scope of TFEU Art.267 in a judicial dialogue. National identity creates a possibility to use it in TFEU Art.263 as well, in order to challenge the validity of EU acts (using this concept as a sword) (Konstadinides, p. 2). While also using TFEU Art.258 to defend against the procedure of the infringement of EU law (utilising this concept as a shield) (Guastaferrero, 2012, p. 297). However, there is another point that needs to be mentioned. If the TFEU Art.267 presupposes that the judicial dialogue between courts, then in the other two possibilities mentioned beforehand, it is going to be the Government that represents the Member State before the ECJ. In later cases, the national Constitutional Courts could be disregarded (incidentally or intentionally) in the determination of national identity.

Finally, the notion of national identity should be used very cautiously. The TEU Art.4(2) establishes a notion for resolving conflict between EU law and national provisions of constitutional law, which includes constitutional norms that form the constitutional core of hierarchical supremacy over EU law. But the national identity clause could also be used pretentiously, and therefore to avoid the impact of EU law. As is noted by F. Fabrini and A. Sajo, national identity, as a legal category, is too mysterious for the rule of law, and too vague for European integration, while also being too politically risky

because of populist movements that could take place (Fabbrini, Sajo, 2018, p. 15). Maybe because of this particular reason the national identity clause, which is *à la mode* today, is very cautiously developed by the ECJ. The ECJ seems to be hesitant when it comes to relying upon national identity, and only refer to this notion in isolated cases only.

In the 2010 *Sayn-Wittgenstein* (Judgment of the Court (Second Chamber) of 22 December 2010), the ECJ, for the very first time, mentioned national identity. Furthermore, in the 2011 “Lithuanian” *Vardyn* (Judgment of the Court (Second Chamber) of 12 May 2011), the ECJ, in a way that had never been done before, explicitly based its decision on TEU Art.4(2), and the respect of national identity. However, the ECJ is very cautious when it comes to widening the application of national identity, because the national Constitutional Courts are discovering a new method to oppose the unconditional primacy of EU law. The Constitutional Courts ground their decisions on national identity with the goal of limiting the ever-expanding EU law. Constitutional Courts have developed quite different concepts of constitutional identity in order to control the expansion of EU competences, and in order to overcome the absolute primacy of EU law over national constitutional law (Gamba, Lentzis, 2017, p. 1684).

TEU Art.4(2) counterbalances the expanding powers of the EU and the principle of the primacy of EU law (Konstadinides, p. 2). Understanding TEU Art.4(2) is central to maintaining the key EU constitutional principles, namely the primacy of EU law and the uniform application of EU law. This provision is often portrayed as a “European counter-limit”, which mainly consists of binding obligations to respect national constitutional identities (Faraguna, 2016, p. 500). Moreover, it might require certain concessions from the ECJ.

CONCLUSION

TEU Art.4(2) is a construct of purely pluralistic nature and requires concessions from both national and EU legal systems, led by their highest judicial authorities – the ECJ and national Constitutional Courts. The functioning of the national identity clause assumes that none of the judicial authorities have a final say, and neither has power over the other. The solution could be found solely through the constructive and open judicial dialogue. In this judicial dialogue, both parties have their say, both parties listen, and the cycle is allowed to repeat. Both parties have their arsenals of legal measures, such as the *ultra vires* review and the constitutional identity review for one party, and the EU law infringement procedure for the other, used to counteract the unsatisfactory developments. However, it is still to be fully developed in the future. It might appear that such an interaction between autonomous legal systems is chaotic, however, this is a pure manifestation of the pluralistic model, whose full-fledged operation is yet to come.

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THE DEFINITIONS OF INFORMATION AND SECURITY; HISTORY OF INFORMATION SECURITY DEVELOPMENT

Aytakin Nazim Ibrahimova¹

Abstract. Taking into consideration its historical evolvement, it is evident that information security is not a new concept. Starting from the very moment of writing down the information, it presents by itself a data that can be protected, stolen, or destroyed. Throughout the whole history, without even perceiving it people had to take steps to guarantee the security of important information that they have been able to maintain. The concept of information security is quite dynamic. A behaviour that is generally accepted today can be a peril to an entity that we will work with tomorrow. Developing technology brings along the continuous innovation. Everyone handles personal information when it comes to technology development or service provision. Besides already existing services, it includes banking and other activities. Therefore, we should bear in mind that personal security cannot be ensured without guaranteeing security within each organization.

Keywords: information, information security, data carriers, coverage area, information systems, information infrastructure, computer and network security, history of information security development.

INTRODUCTION

Information security signifies identifying persons who possess information security, detecting soft points, preventing hazards and undertaking preventive measures and researches to guarantee information security and protection against unwanted threats (Baykara et. al., p. 233). In other word, information Security means undertaking relevant measures to protect information covered by information systems against acquisition without approval, use, modification and damage (White, 2011, p. 394). Here one should take into consideration, that notion of information security should be considered despite of the form of saving of information. In spite of the fact whether the information saved on paper or in electronic form, it is always in need of protection from those who carry and use this information in case of threats posed by them. The initial area of use of information security is issues of diplomatic and military character. Here the notion of privacy and secrecy is crucial. Initially, information security was merely a review of all measures that were meant to protect national security. However, with the development of information and communication technologies, as a result of the digitization and storage of information in the system, the problem of securely storing, protecting and using information has become a common issue for anyone who has access to information systems. With the transition to the information society and digitalization process, considering all information

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systems, starting from personal computers to the most sophisticated information technologies that carry the information, the notion of information security has becoming significant.

1.1. THE NOTION OF INFORMATION

To grasp better the concept of information security, firstly, it is significant to understand the notion of information that is the basis of information and communication technologies. The words of information used in English (data, information, knowledge) is used as the Azerbaijani equivalent of information (Canbek, Sagirolu, 2006, p. 168). Although, the use of such notions as data, information, and facts in relation to these terms in our language will be more appropriate.

Data: Data is digital networks that are not connected with each other. The data contained in this information system is made up of figures and does not have any meaning. (for example: 1.400; 6.3 or 29,000 AZN). On the other hand, data provided by information technology can be explained as still unrelated information about one issue or, to put in short, as existing and moving signals in the digital environment.

Information: structured and correlated data. In order to be used data should be transformed into information. One data must be converted into an information form so to be used and applied. The data contained in the information system provided in the form of text message can be transmitted to the user in a cogent and structured way

Knowledge: Knowledge can be defined as the acquisition of experience and knowledge or perceiving realities, truth by internal observation. The knowledge can be divided into 4 classes depending on identifying what is to be known, why, how it should be known and who is the actor. The answer to these four main questions delineates the area of knowledge.

The mentioned concepts, such as data, information, knowledge, in addition to being theoretical, have a number of practical implications.

Data carriers

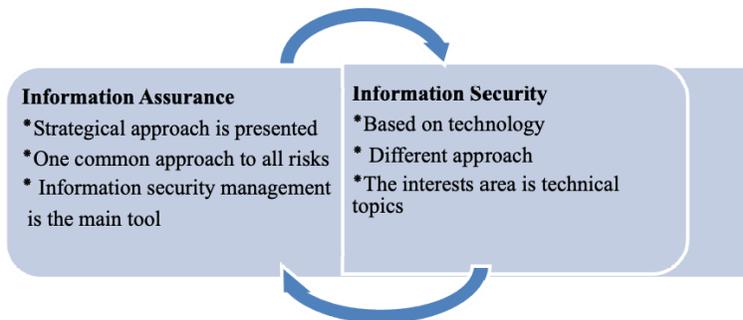
These are the carriers that constitute whole management system and cover all information in one information system that can be appreciated, written down. Some of these carriers are essential for ensuring the operating system and they are called key information carriers. The main target of information security is to ensure that the information in the information system is fully accessible and secure. Network browsers that are used to access such sources as databases, e-mails, and network servers given in one information system can be regarded as the main data carriers of the information system.

1.2. INFORMATION SECURITY AREA

The concept of information security signifies the notion of security that includes the personal computers and networks, corporate and national networks and covers information systems in a broad

sense (Asia-pacific publication catalogue. 2008). Information system on the corporate level includes also software, users as a third party and technical support systems. Information security means guaranteeing secure storing and processing data without distorting it and preventing unauthorized access to it in the digital environment.

To guarantee this relevant security policies should be defined and applied. These policies namely reviewing activities, following up the process of acquiring data, evaluation of the registration process of updates, deleting data are presented as limitations to some rules of application. In general, information security can be considered as a part of “security establishment” that overall covers security topics (Canbek, Sagiroglu, 2006, p. 171). On the other hand, information security in the broadest sense of the word connected with cryptology, risk management, security culture. The notion is still extending. The concept of “information security” in English is being translated into Azerbaijan using the similar wording. It would be relevant to translate the notion “information assurance” in an analogous way. To consider on a strategical level technical and temporary needs that are important to guarantee information security in the information systems in the realm of information assurance, the notion “information security” should be interpreted in more tactical way.



Source (Information Assurance versus Information Security, 2011).

Furthermore, the main definitions connected with information security are information systems and information infrastructure.

1.3. INFORMATION SYSTEMS

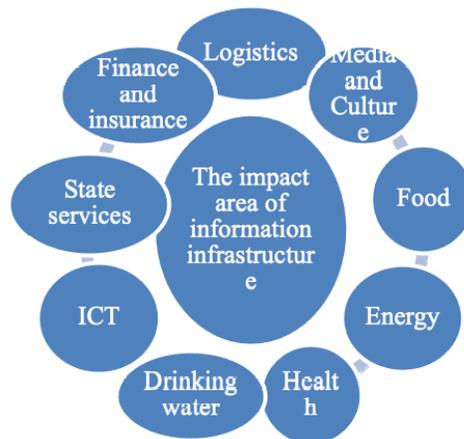
An information system is a tactical, controlling and supportive system applied among user and information technologies in reciprocal interaction (Trustworthy Refinement Through Intrusion-Aware Design). In this sense, the information system cannot be considered as only about the problems of information and communication technologies, but also as the ways in which people use them to interact with these technologies that support their work life. Nowadays, information systems are increasingly computer based. However, along with computers internet, world wide web, equipment, connection systems are significant for activity of digital based information system. On the other hand,

besides personal computers powerful information systems such as technologically complicated super computers possess such qualities as maintaining information, accessibility of information, storing.

1.4. INFORMATION INFRASTRUCTURE

From the perspective of information security, the role of information infrastructure is crucial. There is still no common approach to this infrastructure around the world. Each country has its concept of an information infrastructure within its own terms and needs (National Information Security Center, Japan, "Second Action Plan on Information Security Measures for Critical Infrastructures", 2009, p.10). However, while considering common features, it is possible to give an overview of networks, systems and structures that may have a negative impact on the continuity of public order or the performance of public services in case they do not perform their functions partially or completely (Ünver, Canbay, Özkan, 2011, p.4).

The impact area of information infrastructure (Bundesamtes für Bevölkerungsschutz und Katastrophenhilfe):



Sustainability of information infrastructure and adaptation to the community need are of the utmost significance. The aftermath of incidents such as the electrical breakdown in the Northeast America in 2003 and the nuclear leak as a result of the tsunami in Japan further underscores the importance of infrastructure security in ensuring information security. One should also emphasize, to guarantee infrastructure security one should take complex approach to the issue (Turhan, 2010, p.8).

1.5. THE AIM OF INFORMATION SECURITY

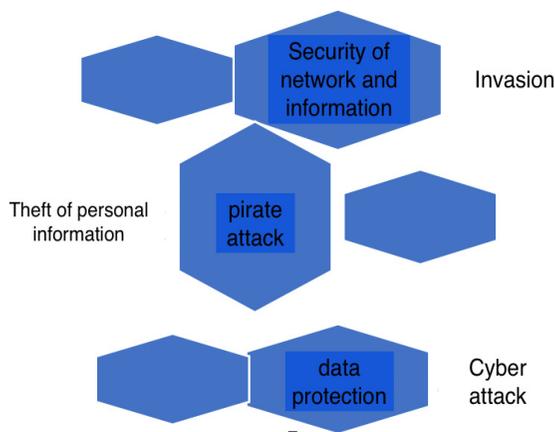
The purpose of information security is to provide continuous, secure and qualitative service while implementing activities of the information system. On the other hand, maintaining professional im-

age and reliability, protection of data carriers, and preventing unauthorized access are also key goals and priorities of information security.

The main issue targeted by information security is to prevent any attacks on the integrity, confidentiality and usage of the information system, and to eliminate any security weaknesses that may cause these threats. Although from the perspective of the definition itself one might find it easy, the security of information systems is increasingly difficult to maintain in the age of increasing cyber-attacks. From this point of view, it is potent to know what the risks and threats to information systems are in order to make information security activities more efficient. There are numerous regulations and policies regarding information security. Among them the following can be considered as of main significance: computer and network security, information security management systems, information security management, cryptology, cyber security, cybercrime, data confidentiality and protection, national security and international relations.

1.6. COMPUTER AND NETWORK SECURITY

As a result of the application of information security to computers and networks, the concept of network and computer security has emerged. Computer and network security is series of activities directed at preventing unauthorized access to network equipment and programs that interconnect computers, modification or deletion of system data. Computer security is also a way to secure and to provide safe access to information protected in information systems in case of unforeseen events such as natural disasters.



Network security technically differs from the concept of computer security. Computer security protects the computer-based information system against threats and attacks, while network security protects the network used by more than one computer to interconnect from potential hazards. Network security implements detecting threats to the network and preventing mechanisms while, on

the one hand, securing safe accessibility to the network and, on the other hand, analysing protecting and preventing undertakings against security threats (Joshi, 2008, p. 62). The need to ensure the security of network technologies has a great impact on shifting from the concept of national information security to the national cyber security concept in the process of the development of internet technologies which are widely used in the network. In fact, the crosscut for all close definitions such as information technology security, cyber security or digital security is the security of information systems. Implementing areas and reciprocal impact of information security policy (Commission of the European Communities, Brussels, 2001) (see figure).

1.7. HISTORY OF DEVELOPMENT OF THE INFORMATION SECURITY

Although the notion of information security became more popular after the introduction of computer the our lives, it is well known that information has been used since the first times of the history of humanity as a social and economic value, and it has always been prevented from being disclosed to the people, who were not supposed to have it. The discovery of writing provided the opportunity to store information and experiences, transfer it to others and use again when needed. Nevertheless, it is reality that this opportunity is granted only to those, who are literate. The articles found through archaeological excavations show that ancient human used more complicated alphabets, compared to the modern alphabets. According to Canadian historian Harnold Innis, ancient humans achieved to keep the power of information within certain group or class in society, by creating “information monopoly”. The hieroglyphs in Ancient Egypt formed quite a complicated and difficult alphabet and was able to be read by Jean Francois Champollion only in 1820 (Harold, 2007, p.44).

During ancient times, the confidentiality of the written communication among kings, leaders and politicians were being protected with special seals and glues. The characteristics of “Caesar coding technology”, named after its inventor Roman military general Julius Caesar, were very effective for its time, and was never decoded by his competitors. During the Middle Ages, there have been special security methods such as coding, special locked boxes to protect the written communication between kings and their ambassadors. Invention of electricity during industrial revolution enormously contributed the development and spread of communication technologies, thus resulted breakthrough in information security in the sector of communication with signals, voice and image carried through electrical current. Created with the usage of electricity, simple communication devices, telegraph and radio were used with trade purposes at first, and there were well-spread believes that these devices were highly secure. In 1903, there was a long-lasting professional rivalry between two famous inventors of these times in England, Sir John Ambrose Fleming and Nevil Maskelyne. The first computer hacking happened during the public introduction of radio receiver and transmitter, the devices which were considered of maximum security, invented by another eminent inventor of this time, Guglielmo Marconi, when Fleming secretly hacked the security and voiced rude messages in front of the spectators (Dot-dash-diss: The gentleman hacker’s 1903 lutz, 2011).

The hacking of the Enigma Encryption System by Polish cryptology experts and mathematicians Marian Rejewski, Henryk Zygalski and Jerzy Rozycki, which played huge role in defeating Germans before the World War II is one of the accepted turning points in the history of information security.

Called Enigma and used by Nazi Germany for the coding and decoding of communication, this code machine had very complicated encryption algorithm for this time. It is accepted that, this hacking which led to the revolution in the field of encryption had a big role in changing the results of the World War II.

Scientists such as Alan Mathison Turing, who is considered one of the founders of computer science and the inventor of the World's first digital and programmable computer Colossus, Thomas Harold Flowers are well-known mathematicians were the members of the team who hacked complicated German encryptions during the war.

The information period starting with the introduction of the first computers to human life after the World War II led to the introduction of the notion of information security as well. Surely, these computers were not used to store information and communicate through internet as in our times, and mostly appeared as a product of the encryption technology, which had vital importance during the World War II. During this period, within the circle of information security notion, using the opportunities of any type of audiovisual technology, including encryption technologies was limited with the purpose of preventing unauthorized entrance to civil and military areas where sensitive information regarding state security was preserved. Thus, information security at this period can be described as the actions against the risks of spying, information theft and sabotage. On the other hand, with the spreading usage of computers in military bases and the development of the opportunity to store documents in computers, prevention of gaining access to these documents and their unauthorized copying entered to a stage of adaptation with information security.

Developed by USA as a military project product and aiming to protect military communication even during nuclear attack Advanced Research Procurement Agency-ARPA and Advanced Research Projects Agency Network-ARPANET were created as the first form of the modern internet in 1968. Initially the was confidence regarding the security of ARPANET, however later on it was discovered he has time risks as well. A detailed report was created regarding these information security risks and actions to prevent them.

With this report, which was name as "RAND report R-609-1" it was certainly disclosed for the first time that even though the information systems look secure when they are disintegrated from each other, then these systems are connected through terminals, unpredictable information security risks can appear. This finding mentioned in a 45 years old report regarding the risk factors concerning information security when the systems are integrated in the project that was called as the first form of internet, ARPANET is very important to understand the coverage area and the scale of the concept of information security.

In 1990, when with the efforts of Tim Berners-Lee the global network project (world wide web-www) was implemented by a group of scientists in the European Organization for Nuclear Research (CERN), the ideas of science-fiction writer Sir Clark regarding a global network communicating through

internet since 1970 came to life². Called World Wide Web, this project enabled personal computers and information systems located in various places of the world to contact each other and in short, completed the establishment the network which we call internet.

The global information exchange stepped into a new development stage with the commercialization and civil usage of the internet. This also created opportunity for the increasing usage of internet for economic and social benefits. On the other hand, internet technologies lead to both quantitative and qualitative increase of information risk for the information systems and technologies. After the wide spread of internet, physical contact and accessibility need to gain information have been removed. It is a common case to face an attack against one information system by a hacker located in other side of the world. Even though governments turned blind eye for the computer attacks in the beginning of internet era, in our times cyber criminals are brought to justice and are being judged with cyber-crime laws, added to the traditional crime laws of pre-internet times. In previous times, governments preferred implementing punishments for the criminals, instead of taking effective precautions. The ineffectiveness of this method and the need for solution was not skipped by international organizations such as OECD, UN, NATO and EU, and several researchers have been started in this field. In this regard, with the international cooperation OECD has prepared Instructions regarding the Security of Information Systems and Networks, which was the first document with international status (OECD Guidelines for the Security of Information Systems and Networks, 1992), resulting from the importance of need for developing a legal procedure for the fight against cybercrimes and creation of international standards, which should be followed by all countries.

With the spread of internet usage in 1990s, the dangers aiming information systems appeared on internet as well. A number of organizations which discovered the commercial side of internet got involved a tense competition for taking the maximum share from this field of trade. The side effect of this competition was the very speedy innovations of information systems and transition to a new stage to make the best usage of these newly developed programs.

Nevertheless, the development and modernization of information systems and the applications presented by these systems with this modern approach could not be followed by the modernization security precautions and the level of security was overlooked as a result of the development period which did not match the main principles of information security: confidentiality, integrity, accessibility. If the usability-security balance, which is one of the main topics of information security is disturbed for the benefit of usability, facing several serious problems in terms of security is inevitable (Cavelty, 2012, p. 72).

² According to Clark, it would be possible to have the devices in our houses, which would bring all information to our hands and would combine the functions of photocopy, telephone, TV and small computers. These devices would allow people to contact other people on the other side of World via satellites.

1.8. CONCLUSION

Since the beginning of 2000s, as a result of interaction between information systems and computer networks as well as their users through internet, a large cyber space called internet was formed. Thus, both internet technologies, which made the life easy by offering unbelievable opportunities and a favorable condition for attacking humans or groups were formed. As a result, there was a boom in the cyber-attacks made through internet. The connection of information security with national and governmental security was understood in a more precise way. National security was enlarged with maintaining the security of information systems, which simply interacted with each other and worked on interdependence.

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ROMAN PRINCIPLES – FOUNDATIONS OF THE EUROPEAN LEGAL CULTURE AND THEIR POSITION IN THE CHANGING WORLD¹

Ján Ivančík²

Abstract. Roman law is considered to be one of the most influential elements of the continental legal culture. However, rapid technological development and changing social and economic situation bring new challenges for principles tested during the centuries. Consumer protection; fight against corruption and money laundering; data protection and other new fields of law emerge a fundamental question: Are the ancient Roman principles still valid and required?

Keywords: Roman law, legal principles, justice, bona fide, EU law, consumer protection.

INTRODUCTION

In 1994, William B. Ewald asked the following question: „*And what of the future? There are encouraging signs that Europe is drawing together, and that it may once again get a unified system of laws. If it does, those laws will be necessarily based on Roman patterns. It is no accident that the European Community was created by the Treaty of Rome.*“ (Ewald, 1994, p. 29).

From European Community became European Union and the legal system of its member states is in 2020 in many fields unified. However, is this unification in some form based on the Roman legal principles? Are the Roman legal principles still valid? May be these principles at least a source of inspiration for EU law?

This paper does not aim to analyse in deep the connection between institutes of private law and Roman law. It would be counterproductive, as there are numerous high quality researches made on this topic. This paper aims to point on the position of the selected general and also specialised principles in EU legal system and their possible evolution in the future.

All of the analysed Roman principles arise from the justice (*aequitas*), which was understood as the most fundamental principle - the base stone of the Roman legal system. The author applies the Roman principles on selected fields of EU law and by using the comparative method, he tries to find out, whether the Roman principles are applied in the EU regulation and if not, if their use may be a fruitful source of inspiration for the future development. With use of the analogy, the selected examples may be used also for a bigger picture, but due to limited scope of the article and broad topic, it is not possible to cover all aspects of the analysed topic.

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1. ROMAN INFLUENCE ON THE EUROPEAN LEGAL CULTURE AND RECENT CHALLENGES

For a long period, the Roman law was the most influential element for many European legal orders (Ewald, 1994, p. 341). After rediscovery of Justinian's *Coropus Juris Civilis* in approximately 1100, the Roman law spread throughout Europe and became the foundation of the continental legal systems. It is indubitable, that reception of the Roman legal system had a major impact on development of the whole Europe.³ Recapitulation of this process would result only into bringing more owls to Athens.

However, everything has changed with the adoption of new civil codes in 19th and 20th century. German Civil Code came into force in 1900 and with it, the Roman law ceased to be directly applicable in any substantial European state, even in a modernised form (Stein, 2004, p. 128). Was it also the end of indirect impact of Roman law?

Zimmermann states, that Roman law has both nothing and everything to do with the modern law. Rather than laws or norms themselves, we can speak of a shared legal culture, based on the legal science (Zimmermann, 2011). This legal culture is notable not only in the shared institutes, but mainly in the preserved principles and legal maxims. Although the term "legal culture" is quite undefinable,⁴ we can say for sure that without Roman contribution, the European law would be no better than a heap of rubble (Ewald, 1994, p. 24).

Relevance of these fundamental principles for EU law is often overlooked, but the European countries, which experienced the rule of communist regime already know results of strict denial of Roman legal heritage. The tension between communist and Roman approach to legal principles may be probably the best illustrated on the element of "justice", respectively *aequitas*.

In Roman law, the scholars identified two aspects of the justice - *aequitas naturalis* and *aequitas civilis*. This division is characterised by famous lawyer Antistius Labeo,⁵ who describes that *aequitas naturalis* arises from the natural law, while the *aequitas civilis* is expressed in norms of the civil law (i.e. *ius civile*). Finding the just solution was characterised as the main aim of the legal order. Tryphoninus described it as the effort to give to "everyone his own, in such a way that any person who has a better claim may not be deprived of it."⁶ In other words, acting in accordance with the legal regulations (*ius*) was not enough to fulfil the element of justice. In order to correct the insufficiency of formal application of *ius*, it was necessary to apply *ius naturale* and *aequitas naturalis* arising of it, i.e. the law which nature teaches to all living creatures.⁷ This perception of justice has been broadly incorporated into modern European legal systems (Compare with: Blaho, 1993).

3 As the European legal culture influenced basically the whole world, we can say that also impact of the Roman law has been spread all over the world (Illustration on Chinese legal system may be found in: Wang, 2006).

4 Zimmermann states that only from 1920 until 1950 arose more than 150 definitions of the concept of "culture" (Compare with: Zimmermann, 2007, p. 341).

5 Ulp. D. 47,4,1,1: *Haec autem actio, ut Labeo scripsit, naturalem potius in se quam civilem habet aequitatem, si quidem civilis deficit actio (...)*.

6 Tryph. D. 16,3,31: *Et probo hanc esse iustitiam, quae suum cuique ita tribuit, ut non distrahatur ab ullius personae iustiore repetitione.* (Translation: Scott, 1932).

7 Ulp. D. 1.1.3.

Communist regime, on the other hand, refused the Roman law as individualistic, cosmopolitan, materialistic and egocentric. Socialist legal theory tied the ancient principles with “bourgeoisie” and its aim to oppress working class. Along with the aforementioned was refused also the concept of *aequitas* or *ius naturale*, which was replaced by “higher” form of justice, which can be denominated as class justice. The legal orders of countries influenced by communist legal theory were therefore based on the principle of inequality before law for several groups of people - enemies of the communist ideology. These people were supposed to be eliminated (Gregor, 2018; Vojáček, Kolárik, Gábris, 2013).

After the fall of the communist regime in the Eastern Europe, numerous countries were concerned to re-establish their legal order in accordance with the tradition of Western legal culture. In order to succeed in these efforts, it was required to turn back to Roman legal principles.⁸ The element of justice is the base stone, however, there are numerous other principles following it. Namely, it is needed to mention good faith, respectively *bona fide*.⁹

As it was outlined hereof, basics of the Roman legal system are grounded on the philosophical values, which can be identified in Ulp. D. 1.1.10¹⁰ and which were derived by Ulpian most likely from Cicero’s *De Officiis* - to live honestly, to give everybody his due and to harm nobody (Thomas, 2004, p. 190). By reception of the Roman law, these principles were incorporated into medieval legal orders, *ius commune* and afterwards also into modern European legal systems (Compare with Foldi, 2014).

Good faith as a legal principle is now recognized also in several fields of European private law. With implementation of Directive on Unfair Terms in Consumer Contracts, all member states of EU have incorporated terms with a general notion of *bona fide* in their contract law (Zimmermann, 2000, p. 13). There are also several other indicators that influence of the good faith is growing in the supranational private law during the past decades.¹¹

The aforementioned principles have also reflected into more specific once, which have undoubted impact on the recent European legal culture.¹² Due to scope and limited extent of this paper, we can point mainly on the division between private and public law as described by Ulpian¹³ or the maxim that “the laws of the vigilant are written”.¹⁴ It is these principals, which conflict probably the most with recent challenges for EU legal regulation, such as consumer protection, anti-money laundering, fight against corruption, data protection and the others.

8 Stein, P. (1999), ‘Roman law in European History’, Cambridge University Press, Cambridge, p. 129.

9 It is needed to say that the origins of the most principles may be found in the ancient Greece, or other ancient nations. Only few of them were originally elaborated in Rome, however, the Roman legal science influenced them all (Domingo, 2017).

10 Ulp. D. 1.1.10: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

11 E.g. Art. 1:201 of Principles of European Contract law

12 Touber Muniz determines that there are eight categories of legal principles, starting with the very general norms up to maxims, which help to categorize the legal system (Muñiz, 2002).

13 Ulp. D. 1.1.1.2.: *Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.* (Author’s translation: Public law is that which has reference to the administration of the Roman government; private law is that which concerns the interests of individuals.)

14 The maxim *vigilantibus iura scripta sunt* arises mainly from the Scaevola’s fragment D 42.8.24: *ius civile vigilantibus scriptum est.* (Fellmeth, Horwitz, 20009, p. 293).

Division of the public and private law in Roman understanding is based on so-called “interest” theory. Ulpian differs between interest (benefit) of the state and the individuals. In case the area of legal relations does not interfere with the state interests, there is no need for public intervention and such area of legal relations shall be understood as private law. This theory is the basis for legal dualism, which is broadly accepted in the European legal culture, although there are numerous more recent theories justifying division between the public and private law (Fábry, Krošlák, 2007, p. 48).

It is obvious that the legal dualism is in strict opposition to consumer protection, where the state, respectively EU authority broadly interfere to purely private relations. This intervention is justified by protection of the weaker contractual party and nowadays it seems as undoubtedly reasonable step.¹⁵ Multiple regulations focused on the anti-money laundering, fight against corruption, or fair market competition also highly exceed the dualistic division. Purely private contracts between two private entities are regulated by public law.¹⁶

Consumer protection also contradicts with the protection of the vigilant contractual party, as there are numerous situations, in which the law favours the consumer, although he has not protected its rights duly. The same intervention in favour of the thoughtless actions may be recognized in the regulation of data protection and other fields of law.

All these examples show that the EU law is grounded on Roman heritage, but the ancient Roman principles and maxims are facing huge challenges arising from the modern social and economic relationships. Therefore, we come to a fundamental question: Despite of the role of Roman principles in the history of the European legal culture, what is their position in the modern world?

2. FUTURE PARTICIPATION OF ROMAN LAW IN EUROPEAN LEGISLATION

EU law is often associated and compared with the medieval *ius commune* (Compare with: Smits, 2002), which was in decisive way connected with Roman law. If there were significant connections between EU law and *ius commune*, it would seem rational to expect that the influence of Roman law shall increase once more. Nevertheless, there are not only similarities and connections, but also differences.

Some differences between *ius commune* and EU law are obvious; however, one is often overlooked. Peter Stein states that the medieval *ius commune* was adopted throughout Europe voluntarily, through the recognition of its superiority to any alternative, whereas the European legal regulation,

¹⁵ It is needed to point on the power of transnational conglomerates and their resources. In the era of virtual purchases and countless number of contracts concluded each day, it seems that the consumer protection is inevitable. In the next chapter, we will try to analyse this situation more deeply.

¹⁶ We may at least mention regulations under competition law, or identification of the beneficial owners under Directive (EU) 2015/849 of the European parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC and the most recent Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

such as, for example, the rules of product liability, is imposed from above in the interest of uniformity (Stein, 1999, p. 130).

Stein's notice seems to be still actual, perhaps even more than at the time of its formulation. European Union is a unique, but complicated concept. Recent data show that EU citizens are still not tightly connected with this supranational unit.¹⁷ EU is often seen as an organization far from national understanding, which over-regulates common life situations. Brexit could be in this sense a trigger factor for other "exits", which would possibly lead to the collapse of the whole EU project.

Strict legal positivism is in many cases also the reason of deviation from the Roman legal principles as we have described it in the first chapter hereof. In our opinion, the EU needs to find as many natural unifying factors as possible in order to stay connected with the real life of the ordinary EU citizens. Perhaps, it is needed to step back and search for the principles common for the whole European legal culture.¹⁸ In this form, "new *ius commune*" might be easier to build.

Roman heritage, based on the *ius naturale* may be in this sense an appropriate source of inspiration. *Ius naturale* was considered as a balancing element in contradiction to rigid and inflexible *ius civile*.¹⁹ Nowadays, it may be used as a balance to the over-regulated legal positivism, which tries to solve all possible problematic situations, but it also comes hand in hand with opacity of legal regulation, alienation to citizens and after all, there are always new forms, how to abuse the rules. Postmodern legal theory understands these challenges and therefore increasingly leads to use of the legal principles (Kasinec, 2015, p. 85).

On the first sight, the above-described idea may seem contradictory to recent challenges arising in the EU, as we have already identified numerous discrepancies between the Roman legal principles and modern legal regulation. However, a bit deeper analysis on some selected examples may bring different outcome.

Let us begin with the consumer protection regulation, which mostly defines the consumer as a "*natural person who is acting for the purposes which are outside his trade, business and profession.*"²⁰

17 This may be illustrated on the several examples. In 2019 EU parliamentary elections, the average turnout in the EU was the highest as of 1994, however it did not reach even 51%. Ten countries had turnout 40% or lower. More than half countries had turnout less than 50%. Some of these countries are well-established democracies, where participation in the elections is a matter of course. For instance, the Netherlands had in the EU parliamentary elections in 2019 turnout 41.93, however in national parliamentary elections in 2018 it was more than 81. Similar example may be found in Finland, where EU elections had in 2019 turnout 40,8%, however national average was in the same year 72%. This trend may be also seen in other countries like Czech Republic, Estonia, Latvia, Slovakia, Slovenia, Sweden, United Kingdom, etc. (Compare with 2019 European election results).

However, this is only one point. There are numerous other signs that the EU is remote for its citizens. The most obvious example is the referendum concerning Brexit and its result - Great Britain leaving the EU project. Another one may be seen in the Eurobarometer of 2019, in which more than one third of those surveyed answered that their first feeling associated with EU is "doubts" (2019 European election results) (Flash Eurobarometer, Emotions and political engagement towards the EU).

18 Obviously, there are required plenty of other steps to make the EU more substantial and understandable for the EU citizens. The legal system is, however, the base stone, on which this effort shall be grounded.

19 Compare with: Paul. D. 44,4,1: *Ideo autem hanc exceptionem praetor proposuit, ne cui dolus suus per occasionem iuris civilis contra naturalem aequitatem prosit.*

20 The consumer protection regulation arises mainly from Articles 4(2)(f), 12, 114(3) and 169 of Treaty on the Func-

The main aim of the legal protection is to safe the weaker party of contractual relationships and to legally correct the imbalance in factual situation.²¹

Consumer protection in EU focuses mainly on unfair terms in consumer contracts; protection of individuals with regard to the data protection; product safety, quality and product guarantees; consumer protection with regard to services in the internal market; unfair access to dispute resolution; challenges connected with the digital market and financial services (Compare with: Valant, 2015). The regulation is therefore broad and it strictly opposes the Roman understanding of contractual liberty, legal dualism, protection of vigilant party and other principles.

On the other hand, we have already outlined that the consumer law is strictly connected with *bona fide* and it aims to remove the factual imbalance arising from the social and economic situation of the contracting parties. Without this protection, strict legal regulation would favour large enterprises, in conflict with *aequitas* (not everyone is given what he is entitled to). Consumer protection therefore complies with the general principles of Roman law, but the specific principles contradict with the strict regulation by *ius positivum*. As we will try to outline, this conflict does not always support the benefit of the modern law.

Even after decades of application, the consumer law is not widely understood among the EU citizens. The most recent Consumer Survey executed by the European Commission shows that only 45,5% of the EU citizens have at least general knowledge about their consumer rights (The Consumer Survey 2018, 2019). This means that majority of the population is not able to duly exercise its rights due to lack of their knowledge. The inequality between the contractual parties therefore remains preserved, despite of the legislators intentions. From the Consumer Surveys arises another interesting fact that the situation with the general level of knowledge is not changing positively in the last decade.

Another significant disadvantage of the over-regulating approach is decreasing public vigilance in the contractual relationships, as the consumer always expects the law to be on its side. This habit is dangerous as it may result in decrease of the general legal knowledge. Inadequate reliance on the state authorities may also result in mistrust in public institutions in case they do not provide the expected protection.

The aforementioned issues may be solved by an appropriate use of *ius naturale*, mainly in form of *bona fide* protection in *ad hoc* cases. It is important to mention, that disadvantage of this approach would be the time required for creation of an applicable case law and in some extent possible decrease of legal certainty. It is also needed to think about the future development and rapid

tioning of the European Union and Article 38 of the Charter of Fundamental Rights of the European Union. The primary legislation is followed by a number of secondary legal regulations and legislation on national level.

The aim of the regulation may be well illustrated by Article 169 (1) TFEU, which states: "*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*"

21 Protection of a weaker party under EU law applies also to other groups, such as employees. However, for the purposes of this paper, we will use the consumer protection as the most suitable example (Cherednychenko, 2007, p. 9; Micklitz, 2004, p. 340-356).

involvement of the digital technologies, which may change current situation. This may paradoxically, lead to strengthening of the Roman principles.

With regard to the digitalization, mainly the threats and dangers are emphasised. However, modern technologies, arising availability of the online space and the possibility to dispose with so-called “smart technologies” bring also unthinkable opportunities. It is highly probable, that within next decades, the legal services will be increasingly provided in an automatic form by a software. It is possible that such software may be in the future able to identify potentially unfavourable issues in the consumer contracts. May this technological advantage help the consumer to protect its rights better than very broad legal protection?

In our opinion, huge amount of commodities and services used in everyday life cause, that the consumer does not have a chance to acquire expertise in all of the contractual relationships, he is entering into. Legal guarantee of the product liability, possibility of returning the goods and other rights shall be protected by mandatory legal regulation. On the other hand, we can easily imagine that recognition of unfair terms and conditions will be better guaranteed by caution of the consumer in connection with technical advantages. From this point of view, it would be unwise to bury the Roman principles in consumer law such as *vigilantibus iura scripta sunt* or legal bipolarity too early.

The above-discussed issue is closely connected with the data protection. General Data Protection Regulation empathises that natural persons increasingly make their personal information available publicly and globally as well as the information obligation towards the data subjects (Regulation (EU) 2016/679). However, it is questionable, whether the information obligation serves its purpose and whether data subjects actually read these provisions. Survey executed in 2018 by GDMA shows, that only 38 percent of the global consumers think that they should be ultimately responsible for their data protection. On the other hand, vast majority of global consumers (77%) show no fundamental objection to engaging in the data economy (Global data privacy: What the consumer really thinks, 2018). Even in this case it seems as appropriate to pay more attention to *bona fide* and vigilance. It is so, because lack of caution in the online environment by the consumer causes irreparable losses, which can be hardly protected by rigid legal regulation.

To sum up, these issues were actual for a long time, but the recent pandemic crises caused by the coronavirus COVID-19 may bring them to the forefront. We can expect increasing automation, which is possible answer to the blackouts of human labour; more limited globalization and even more dominant environmental issues. As we have outlined in this chapter, the Roman heritage, based on the *aequitas*, which gives everyone what is his own, may be useful source of inspiration and may serve as a unifying factor in Europe, which faces various forms of internal alienation.²² It is so, because the legal positivism used by the EU in the last decades seems to be insufficient.

In order to demonstrate our ideas in wider scale, we shall also focus on the second analysed principle, which is law division theory. Ulpian’s interest theory faces other types of conflict, which

²² We have already outlined the situation concerning Brexit and other possible “exits”, but the alienation from European concept is also obvious from arising support of EU sceptical parties in both European and national elections.

may be illustrated on the competition law; fight against corruption; money laundering and other similar public interventions to purely private legal sphere.

Main disadvantage of Ulpian's division is that the law shall always protect the interests of the state and the community. The law prevents the fight of all against all and therefore it is not possible to clearly determine, which regulation is solely private and which is solely public (Fábry, Krošlák, 2007, p. 48). On one hand, it is obvious that the analysed definition did not aim to determine exact boundaries of public/private sphere,²³ but it is also needed to mention that the complexity of contemporary cross-border and online relations require state interventions far beyond acceptable level in Roman perception.

Globalization and possibilities for cross-border links in ownership structures of private enterprises create unprecedented possibilities for legalisation of criminal activities, which are much more condemned than it used to be in Roman times (such as nepotism or corruption (For more about perception of corruption in the Roman Empire see: Gregor, 2018; Šurkala, 2017, p. 144)), or that were totally unknown (e.g. money laundering). These criminal activities require aggressive state interventions into private law, such as registers of beneficial owners, anti-trust regulations and controls, mandatory publication of contracts and other state interferences, far beyond limits of Ulpian's conception (For more about the EU combat against money laundering see: Mitsilegas, Vavoula, 2016, p. 261-293).

At this point, we must state, that if the Roman law and its principles were bound only to age of their creation, they would have lost their significance long time ago. Adaptability of *ius naturale* may be illustrated by a fragment from *Constitutio Tanta*, by which *Digesta* were published in 533. In Art 18, we can find the following words: "*Now whatever is divine is absolutely perfect, but the character of human law is to be constantly hurrying on, and no part of it is there which can abide forever, as nature is ever eager to produce new forms, so that we fully anticipate that emergencies may hereafter arise which are not enclosed in the bonds of legal rules.*"²⁴

In this sense, the "interest theory" in its original meaning arising from the Roman law may be easily considered outdated, but *ius naturale* shall be used to adopt it for contemporary situation. Although it is very difficult to predict what would Roman lawyers say about their rules in the modern age, we can expect that the state interest is also evolving. Decreasing the criminal actions and fight against tax evasion are legitimate aims and may be considered as the state interest. The overlap between public and private is from our view justified, but in each individual case, it is required to seek for the balance.

With regard to the above quoted fragment therefore arises a substantial question: may be *ius naturale* used as a corrective also in highly regulated fields of law, such as competition law or money-laundering regulations? May be *bona fide* used as the instrument, which softens the edges of strict legal regulation as we have pointed out in case of consumer protection?

23 The Roman law avoided closed definitions as much as possible. Compare with: Iav. D.50.17.202: *Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset.*

24 Art 18 of *Constitutio Tanta*: "*Sed quia divinae quidem res perfectissimae sunt. humani vero iuris condicio semper in infinitum decurrit et nihil est in ea. quod stare perpetuo possit (multas etenim formas edere natura novas deproperat), non desperamus quaedam postea emergi negotia, quae adhuc legum laqueis non sunt innodata.*" (Translation: Monro, 1904, p. 25).

It looks like a valid idea, but we must always bear in mind the challenges, which we have outlined hereof - mainly the time required for creation of relevant case law, possible decrease of legal certainty and most of all requirement of morally unquestionable decision makers.²⁵ On the other hand, wider involvement of *bona fide* may better achieve the purpose of legal regulation, because even the best-written mandatory provisions may be circumvented.

CONCLUSION

In the last decades, the EU regulation came a long way of unification in selected fields, which aims to fulfil the main objectives, as described in the primary legislation. May we say that the forecast of W. B. Ewald has come true?

In some extent yes, because the Roman legal thinking, based on the fundament of *aequitas* is undoubtedly present in the EU legal system. On the other hand, direct impact of the Roman maxims and more specialised legal principles is decreasing, which is caused also by the fact that the EU legal regulation is highly oriented on *ius positivum*.

This approach may not always be the most appropriate, as it is strictly connected with several not insignificant shortcomings such as over-regulation, connected with the alienation from the national states and their citizens; but also vulnerability towards new forms of abuse. Arising challenges, such as pandemics caused by the coronavirus COVID-19; Brexit and increasing Euroscepticism may accelerate the need for unifying legal elements and regulation that is more flexible.

As we have tried to outline hereof, the Roman approach was based on *ius naturale*, which corrected the sharp edges of strict *ius civile*. Application of this law by various magistrates, but mainly the *praetor*, created from Roman law endless source of inspiration, which (in some extent) may be useful also for EU law in the future. On the other hand, strict application of some more specialised principles and maxims is no longer entirely possible, due to development of difficult, often virtual, legal relations that were unimaginable in the Roman era.

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²⁵ We must take into the account the judicial activism, with which has Europe in recent decades considerable experiences. Unlike the decisions based on *ius naturale*, judicial activism often does not have any legal grounds.

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STRATEGIC LENIENCY: INSIGHTS FROM GAME THEORY AND EMPIRICAL EVIDENCE

Martynas Jablonskis¹

Abstract. Strategic leniency signifies potential exploits of leniency that could generate detrimental effects. Leniency could be exploited in three distinct ways: (1) used to punish cartel deviator; (2) used as a cartel exit strategy; (3) used as a way to report false cartels hoping that rivals will be fined. Strategic leniency has roots in game theory and has been used in theoretical works on leniency. However, it is difficult to verify, whether firms actually conceive leniency strategically. The article addresses the problem by analysis of 42 cartel cases, investigated by the European Commission, throughout the years 2010–2018. We find some support for the strategic leniency, but evidence is more indicative, rather than conclusive. We also find that 2002 leniency reform in the European Union generated no immediate disruptive effect on pre-reform cartels. Besides the article argues for insufficiency of leniency to uncover cartels in a form of concerted practices, and spots a seeming legal gap: there are no legal rules in current Leniency Notice to prevent abuses of leniency. Overall, the success of leniency should not be overstated.

Keywords: cartels, concerted practices, punishment, prisoner’s dilemma, strategy.

I. INTRODUCTION

The purpose of the article is to discuss the idea of strategic leniency in the EU competition law and to provide related empirical findings from the EC’s case law. According to the EC, leniency is very effective in finding cartels (European Commission, 2020). Currently, there is no comparable alternative to leniency for a discovery of cartels at the EU level, therefore leniency will likely remain the primary legal tool for cartel detection in a foreseeable future; thus, it is important to examine the effectiveness of leniency. In this regard, the article provides the exposition of the idea of strategic leniency that comes from economic and game theory research on leniency. Insights from game theory point to potential exploits of leniency that may be detrimental or even pro-collusive. The analysis is enriched by empirical results from 42 cartel cases, investigated by the EC throughout the years 2010–2018.

The legal mechanism of leniency is rather straightforward: a first undertaking, who reports a cartel to the EC, may get full immunity from cartel fines, while all subsequent applicants may get a reduction of fines up to 50 % (Leniency Notice, 2006). Leniency rules aim to provide incentives for cartel members to report cartels to the EC: in exchange for cooperation, the EC provides immunity or a reduction of fines. In this way, cartels, which would remain undiscovered otherwise, are being disclosed.

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Due to the importance and prevalence of leniency in cartel detection², legal and economic research on leniency is ever-growing. Spagnolo and Marvao (2016) provide a detailed summary of this body of research. They identify some problems related to leniency: the idea of too general leniency policy; limited effect of leniency on cartel deterrence; too low level of fines; over excessive use of leniency; poor leniency designs; empirical problem in establishing positive effects of leniency, etc. Miller (2009, p. 751), for instance, even suggests that competition authorities may have incentives to overstate the success of leniency. Thus, the EC's claims of the success of leniency need to be taken with caution. In this line of research, we further investigate the topic and focus on three specific issues of leniency described below.

(1) The issue of leniency and concerted practices. Leniency Notice (2006, item 1 of section I) defines cartels both as cartel agreements and/or concerted practices. These two forms of cartels differ in many important aspects, such as the complexity of cartel arrangement, traceable evidence, intensity of communication, etc.; not to mention, legal differences in proving these infringements. Based on that, *we put forward the idea that the statements on the effectiveness of leniency need to be qualified, depending on the form of a cartel*. In other words, leniency rules might be effective against *cartel agreements*, but at the same time, may not work for *concerted practices* (tacit collusion), which is comparably more difficult to detect and prove from a legal point of view. This remark has implications for theoretical models of leniency that, especially in economic research, tend to abstract from legal differences among distinct types of cartels (Spagnolo, 2000; Motta and Polo, 2003; Harrington, 2008; Chen and Rey, 2013). In particular, modeling parameters like a probability of detection or a probability of proving concerted practices outside the framework of leniency actually might be very low, making these parameters of limited use in formal models of leniency. Thus, theoretical results obtained by these models might be valid for cartel agreements, and not necessarily extend to concerted practices. In section II we elaborate further on why leniency is problematic to apply in cases of concerted practices, and section V empirically reinforces the observation.

(2) The issue of strategic leniency. Strategic leniency could be defined as a set of ways that firms could employ to exploit leniency. In turn, strategic leniency could generate undesirable pro-collusive effects. The idea comes from game theory considerations of leniency rules. Based on examined literature, we could distinguish three different ways of strategic leniency: leniency as a punishment; leniency as a cartel exit strategy; false leniency submission. Section III describes the basic logic behind these three different ways of strategic leniency. Yet, the key problem is to verify, if firms actually employ leniency strategically. Therefore, in section V, we provide empirical findings related to strategic leniency.

(3) The issue of the disruptive effect of leniency. Disruption and deterrence are the two main effects of leniency on cartels. Deterrence refers to *ex ante* prevention of cartel formation, whereas disruption points to *ex post* effect of leniency making already existing cartels less stable. A successful leniency policy must generate both of these effects. However, the problem lies in their empirical

² During the years 2010–2018, around 90 % of all cartel cases dealt by the EC originated from leniency applications (section V).

verification: even if we can observe frequency (number) and fluctuation (increase and decrease) of leniency applications, the total number of cartels in all markets remains unknown (Harrington, 2008, p. 238). Therefore, a simple increase in the frequency of leniency applications is only an indicative metric for measuring the effectiveness of leniency. Looking historically, the 1993 leniency reform in the U.S. has been widely regarded as a major improvement of leniency rules because the frequency of leniency applications increased significantly. Spagnolo (2008, p. 266) emphasizes that this seeming success of 1993 leniency reform is mainly because of the introduction of “automatic leniency”, i.e. the limitation of competition authority’s discretion in granting or rejecting full immunity. In the EU similar reform took place in 2002. Thus, assuming that in 2002 leniency rules became very effective, we could assess, whether pre-reform cartels collapsed soon after the reform, i.e. whether 2002 leniency reform generated observable disruptive effect. For that matter, section V sheds light on the disruptive effect of leniency as well as provides general empirical observations related to leniency.

Structure and contributions. The structure of the article follows the issues described above. The article contributes by the exposition and the attempt to empirically verify the idea of strategic leniency. The idea itself is not entirely new. Yet, in the examined literature strategic aspects of leniency tend to be explored on a theoretical level without empirical verification. Also, it appears that leniency has the gap: currently, there are no legal rules to prevent abuses of leniency; this gap could be rectified by amending Leniency Notice (2006). Also, the article contributes by emphasizing the limitations of leniency with regards to concerted practices and providing empirical findings, which might be useful for further research on the topic.

II. LENIENCY: CONCERTED PRACTICES

The main idea of this section is that the effectiveness of leniency may depend on the type of cartel. We further provide reasons, why leniency might not work against concerted practices. Article 101 of TFEU distinguishes cartel agreements from concerted practices. These distinct types of cartels differ, for instance, in terms of complexity, intensity, evidence left, and many other parameters. According to the CJEU, concerted practices are the least intense form of a cartel (Commission of the European Communities v. Anic Partecipazioni SpA, 1991, §131). It is usually proven by indirect evidence, thus firms could find it difficult to adduce a coherent body of evidence for leniency. In general, tacit and indirect nature of concerted practices makes leniency applications more difficult, compared to cases of cartel agreements.

Also, the definition of concerted practices is rather vague (Imperial Chemical Industries Ltd. v. Commission of the European Communities, 1972, §64). One can think of concerted practices as a concept, which defines the scope of the whole Article 101 of TFEU. Therefore, it is a natural reason, why the concept is defined in broad and general terms. Despite that, it causes a problem of the distinction between concerted practices and conscious parallelism, which is especially stark in oligopolies; this legal problem is also referred to as the oligopoly problem (Petit, 2013). In particular, parallel behaviour could result both from concerted practices (illegal) and conscious parallelism (legal). Hence, not only

there is a practical problem to adduce coherent body of evidence of concerted practices for leniency, but also a conceptual problem to distinguish, whether “practices” are concerted.

Finally, not only the *outer boundary* between concerted practices and conscious parallelism is not clear, but also the *inner boundary* between concerted practices and agreement is not in place. Recall that agreements include informal “gentlemen” agreements, thus it is difficult to draw a sharp line between agreements and concerted practices. This difficulty explains why since 1991 the CJEU established the concept of “complex infringement”, making, for practical purposes, the distinction between these two distinct types of cartel unnecessary (*Rhône-Poulenc SA and others v. Commission of the European Communities*, 1991, §127). Nevertheless, our points made in this section holds to the extent that there are cartels that are purely concerted practices.³

In conclusion, it seems that leniency faces additional problems in cases of concerted practices. Interestingly, the main conceptual problem, i.e. to provide a clear and sharp definition of concerted practices, could be explained through game theory: competition between firms could be represented in repeated game theory as a prisoner’s dilemma, where both cooperation and collusion can appear as a Nash equilibrium without any exchange of information (Carlton et al., 1996, p. 428). We defer a short discussion of elementary game theory and leniency to section IV.

III. STRATEGIC LENIENCY

Strategic leniency signifies potential exploits of leniency that could generate detrimental effects. We, in turn, discuss three distinct ways how leniency could be exploited strategically: (1) used to punish cartel deviator (credible threat); (2) used as a cartel exit strategy (pre-emptive strike); (3) used to report false cartels hoping that rivals get fines (abuse of law).

Credible threat or punishment. Cartels are difficult to sustain. No conspiracy can neglect the problem of enforcement (Stigler, 1964, p. 46). Yet, collusion could be sustained through credible punishments. Thus, if cartel deviations could be punished through leniency, then it may reinforce collusion. The basic idea could be illustrated by hypothetical reasoning: *imagine a duopoly cartel, where firm A deviates from a cartel but did not apply for leniency; then, firm B observes deviation and punishes firm A by applying for leniency; as a result, firm A gets fine, while firm B gets full immunity; understanding this risk, firm A sticks to collusion; therefore, the mere existence of leniency may reinforce collusion.* There are several reasons, why firm A may consider a deviation profitable, but would not like to report itself a cartel to competition authority: (a) leniency only protects from public fines; (b) risk of claims for damages, especially, in the U.S. system with treble damages; (c) harm to firm’s reputation and share price; (d) legal restrictions for immunity claims: for example, cartel coercer cannot get full immunity under Leniency Notice (2006, item A(13)); (e) foregone opportunity to renegotiate cartel in the future, etc. It is important to note that by definition, a successful credible punishment (in the context of game theory) needs not to be realized, therefore it is difficult to know if firms actually conceive leniency as a credible punishment. Also note that reasons a – e,

3 In section V we provide some examples of cartel cases that were qualified distinctly as concerted practices.

hold for firm B as well, therefore, at least in some cases, threats of leniency could be non-credible (outside Nash equilibria).

This very idea of leniency as a credible threat has been explored by Spagnolo (2000), who concluded that leniency could prevent cartel deviations even in one-shot Bertrand oligopolies. This result is based on the U.S. leniency rules, where a full immunity is possible only if leniency applicant makes full restitution to injured parties (Corporate Leniency Policy, 1993, item A(5)). By contrast, in the EU restitution of damages is not a necessary precondition to qualify for a full immunity under Leniency Notice (2006). The recovery of damages at the EU level depends on private litigation. For that reason, the Damages Directive has been adopted (Directive 2014/104/EU). Nevertheless, full restitution of cartel profits in the EU is not guaranteed even with the directive in place. Hence, given that a cartel deviator retains at least some of deviation profits, a strategy – to deviate from collusion and simultaneously submit leniency application – could be in equilibrium, i.e. in such scenario leniency cannot be used as a credible threat or credible punishment, because the deviator himself applies for immunity before his rivals observe cheating. This strategy exactly refers to the second possible way to exploit leniency strategically.

Pre-emptive strike. The idea is that firms, which anticipate cartel collapse, may apply for leniency as pre-emptive strike (Blum et. al., 2008). They analysed the idea in the context of the German cement cartel of 2003, where leniency applicant (maverick) had an interest in launching a price war; the cartel was on a verge of collapsed anyways, thus applying for leniency was a smart, profit-maximising move, which prevented potential retaliation through leniency from other cartel members; authors claim that this strategic leniency increases individual market power, which could finally lead to monopoly and therefore is detrimental (Blum et. al., 2008, p. 211). Besides, we can think that leniency is unlikely to produce the disruptive effect (in cases like the abovementioned) because a cartel would have collapsed regardless of leniency due to the existence of a maverick firm. So, instead of giving an additional competitive advantage to a maverick firm and relieving it from fines, cartels could be traced from a price war.⁴

Abuse of law. From the Sokol's (2012) survey emerges the third way of strategic leniency, which, by the majority of surveyed leading antitrust practitioners in the U.S. were described as a reality: firstly, a firm through leniency provide questionable information about alleged cartels in a "grey area" (where infringement itself is doubtful); secondly, rivals are exposed to costly antitrust investigation and are unwilling to litigate therefore accepts reduced fines, i.e. settle (Sokol, 2012, p. 212). In essence, this resembles an abuse of law and causes a risk for false negatives. Perhaps the main "grey area" in EU cartel law is already mentioned difficulty in oligopolies to make a distinction between concerted practices (prohibited) and conscious parallelism (allowed). A closer look at the Leniency Notice (2006) reveals a legal gap: there are no rules or mechanisms to prevent these "cheap" leniency applications. The Leniency Notice (2006) could be improved by establishing new rules that would prevent and punish attempts to abuse leniency; as a result, it would not potentially save the EC's

⁴ It is hard to know, if this strategic use of leniency is widespread, because actual reasons for leniency applications remains unknown, is not reported in decisions, and essentially remains known only for a decision-makers in a particular firm.

limited resources but prevent false positives as well. Although there is no publicly available data on the rejected leniency applications (on the ground that there has been no infringement), since antitrust practitioners report the pervasiveness of this form of strategic leniency, it should not be ignored.

Overall, the reviewed literature suggests that leniency could be exploited both in passive and active ways. In the passive form, leniency exists merely as a potential, credible threat, which might never be realized, and which allows sustaining collusive profits. Unfortunately, this effect of leniency is unobservable. In the active form, leniency might be used strategically: firstly, as a realized credible punishment, that is as an actual leniency submission, which results in fines; secondly, as a pre-emptive strike, i.e. used by the firm, who desires not only to deviate from a cartel but also to gain an additional competitive advantage by submitting leniency application before its rivals; thirdly, as a tool with the expectation that rivals will get significant fines, suffer from private litigation and reputational damage, especially in cases where at least some evidence is compatible with collusion, even though there is none. The latter might be conceived as a particular case of abuse of law.

IV. LENIENCY: GAME THEORY CONSIDERATIONS

We further review some elementary game theory related to strategic leniency. A game is a model, which consists of players (firms), strategies (collude / deviate), and outcomes (profit). Games could be represented in strategic form (matrix) or extended form (decision tree). In a well-known game of prisoner's dilemma (PD), which is often used to analyse market behaviour, there is the unique Nash equilibrium (NE) – not cooperate (deviate). Accordingly, concerning leniency, the central idea is that competition authorities shall create PD, where reporting a cartel becomes a dominant strategy (Leslie, 2006). However, the unique NE in PD appears only in *one-shot* setting (Figure 1), whereas in *repeated* PD, where players interact repeatedly, cooperation (collusion) may emerge in NE. This important result in game theory is called a Folk theorem (Fudenberg and Maskin, 1986).

	Collude		Deviate	
Collude	4	4	0	8
Deviate	8	0	2	2

Figure 1. Prisoner's dilemma: cartel problem.

Note that cartel members cannot form legally enforceable cartel agreements or concerted practices because of legal restrictions (Article 101(2) of TFEU). Therefore, strategy profiles (deviate, deviate) forms the unique NE, meaning that in a one-shot PD collusion is unlikely.

Does one-shot PD adequately depict the problem of leniency? McAdams (2008) argues that over-focus on PD obscures other insights from game theory on law. Leslie himself notes that competition authorities usually have no evidence to prove a lesser crime as in generic PD, therefore the underlying game is rather a coordination game, where firms aim to mimic each other (Leslie, 2006, p. 457, 460). In this line of critique, we further notice that: (1) in case of leniency, unlike in original

PD, actual payoffs are never symmetric, because leniency is of sequential nature: if one firm gets immunity, then others could get only a reduction in fines; this asymmetry in payoffs is what creates a “racing” effect; (2) it is not clear how authorities could in practice “create” PD: if a cartel already formed despite the existence of leniency, then there is a little competition authority can actively do, except for finding infringement on their own⁵, which would disqualify firms from immunity under leniency rules in the first place (Leniency Notice, 2006, item II(10)); (3) in reality, firms usually interact repeatedly, therefore a one-shot PD is naturally limited, thus it rather describes an end-game.

Repeated games provide a more realistic game theory approach to leniency. Not only firms usually interact repeatedly, but also in a repeated setting, unlike in a one-shot setting, the idea of punishment becomes relevant. Hence, strategic leniency refers to markets, where firms interact repeatedly. For our purpose, the most important difference between one-shot PD and infinitely or indefinitely repeated PD is that in the repeated setting there is no unique NE. To illustrate the point, let us consider once more the cartel game (Figure 1). Suppose that the same one-shot game is repeated indefinitely or infinitely. Then, based on a Folk theorem, strategy profiles (collude, collude) could be sustained as a Nash equilibrium, provided discount factor is sufficiently high (Fudenberg and Maskin, 1986). We need to make sure that strategy “collude” for both firms A and B are indeed individually rational and that there are no incentives to deviate, which could be expressed in the following inequality (Motta and Pollo, 2003):

$$\frac{CP}{1-\delta} > DP + \frac{\delta NP}{1-\delta} \rightarrow \delta > \frac{DP-CP}{DP-NP} \quad (1)$$

The inequality above assumes that DP (deviation profits) $>$ CP (collusive profits) $>$ NP (one-shot Nash equilibrium profits). The left-hand presents an infinite stream of collusive profits, provided that both firms A and B stick to collusion without any deviations, i.e. a stream of profits under perfectly stable collusion. By contrast, the right-hand shows overall profits, if a player decides to deviate instead. Namely, the deviator would get DP once and, starting with the next round, infinite stream of NP , which is discounted by because it takes exactly one round for the other firm to observe deviation. Such a permanent return to the initial one-shot Nash equilibrium is a so-called “grim-trigger” strategy, which means that a single deviation triggers infinite punishment. The punishment itself should be in line with a Nash equilibrium to be credible. Notably, a stronger punishment, than the reversal to the one-shot Nash equilibrium strategy, is unlikely not only because a model would have to assume irrational behaviour, but also because that the Article 102 of TFEU prevents pricing below costs, which is considered as an abuse of dominant position.

By inserting payoffs of the cartel game into (1) inequality, we obtain that strategies (collude, collude) form a subgame perfect Nash equilibrium, provided that agents are sufficiently patient, which means that $\delta > 2/3$ (see below). Therefore, collusion could be self-sustained in a repeated prisoners’ dilemma with two firms.

⁵ As examined case law in section V shows, cartel detection outside leniency is almost nonexistent.

$$\delta > \frac{8-4}{8-2} \rightarrow \delta > 2/3 \quad (2)$$

Implications for strategic leniency. Firstly, Leslie's (2006, p. 465) proposition that competition authorities should create PD, is not the end of the story, because collusion could be sustained as the Nash equilibrium in infinitely or indefinitely repeated games, including PD. Secondly, given full-immunity regime under leniency, the right-hand of inequality (1) remains unchanged, thus we can predict that a majority of cartel deviators (mavericks) will be whistle-blowers as in Blum et al. (2008). Nevertheless, leniency grants full-immunity only from public fines, meaning that exposed cartel may lead to private claims for damages, reputational harm, and similar negative effects on profits, which could reduce deviation profits (DP) in the first place, making use of leniency less likely even for a deviator. Thirdly, given that a cartel deviator does not apply for leniency, then it could be incorporated into a credible punishment strategy. In particular, rivals could not only play competitive one-shot NE strategies, which would give NP for a deviator but further impose harm that comes from antitrust fines, private damage claims, etc. In this sense, leniency functions as a credible threat or punishment: leniency allows punishing the deviator even more severely, than a simple reversal to one-shot NE strategy.⁶ Finally, since public fines and other negative effects from leniency application appears in the right-hand of inequality (1), we could conceive leniency as a special type of punishment, which *ex ante* may be exploited strategically and, consequently, reinforce collusion. This applies especially to duopolies and situations, where one or more firms are ineligible for leniency.

V. EMPIRICAL FINDINGS

In this section, we provide some findings based on the examined EU cartels with regards to previously raised issues of strategic leniency and concerted practices. During the period 2010–2018 there were in total 42 cartels investigated by the EC (Table 1 in the Appendix).

a) General observations

Leniency is the key source for cartel investigations. We found that 37/42 cartels originated from leniency (Table 1 in the Appendix). It shows the importance of leniency in cartel detection, but it does not show the effectiveness of leniency rules as such, because a total number of cartels (revealed and unrevealed), remains unknown (Harrington, 2008, p. 238). Also, the question arises, whether the EC, is sufficiently capable of finding cartels outside the framework of leniency, or perhaps, leniency generates enough workflow, which exhausts the EC's resources for stand-alone investigations.

The ratio of prohibition decisions tends to decrease. We found that the EC adopted prohibition decisions in 33/42 of cases (Table 1 in the Appendix). Figure 2 below shows that prohibition decisions

⁶ In addition, note that in a case of duopoly, leniency could become a targeted punishment. In principle, every restriction on eligibility of leniency brings leniency closer to a targeted punishment. Therefore, we could argue that coercers and instigators of cartels should not be barred from a full-immunity under leniency rules in order to neutralize pro-collusive effects, which comes from the existence of targeted punishments.

tend to slightly decrease in relation to other types of decisions. One possible explanation would be that after the development of a sufficient level of legal practice and legal certainty, firms are less willing to litigate. This tendency is in line with the fact that the majority of cartel investigations come from leniency, meaning that there usually exists strong internal incriminating evidence.

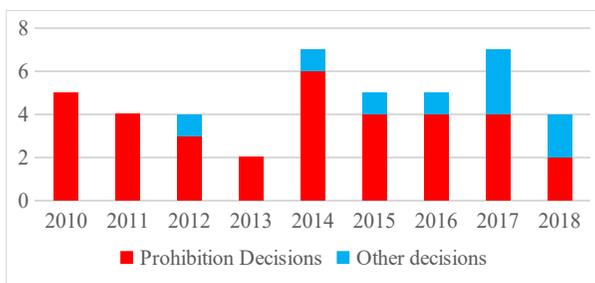


Figure 2. Prohibition decisions.

We observe very limited disruptive effect, at least immediate, of 2002 leniency reform on pre-reform cartels. Assuming that “automatic leniency” is a major improvement in leniency rules (Spagnolo, 2008, p. 266, 290), which were introduced in the EU in 2002, we were able to test, whether the reform generated immediate disruptive effect on cartels that have formed before 2002 (pre-reform cartels). Based on strategic considerations, *pre-reform* and *post-reform* cartels are in a different position. Namely, rational firms that have formed cartels after the reform at a stage of cartel formation had to take into consideration improved or “effective” leniency rules, which posed a substantially higher risk of being caught, in comparison with those cartels that formed before the reform with “ineffective” leniency rules or no leniency rules at all.⁷ This strategic consideration is also reflected in formal models, such as in Motta and Polo (2003), where they incorporate leniency into deviation strategies. We found 15/42 relevant cases, where cartels formed before the reform. It appears that only in the DRAMS case leniency application has been submitted within 1 year after the entry into force of 2002 leniency rules (12th of February 2002). From this, we conclude that the 2002 leniency reform had very limited, at least immediate, disruptive effect on pre-reform cartels. This observation suggests that leniency is likely not that strong or even a primary precursor of why cartels collapse.

b) Observations regarding concerted practices

We looked for cases, where (1) leniency was the original source of cartel investigation (37/42 cartels), and (2) infringements were qualified distinctly as concerted practices. Not a single case matched these two requirements. This seems to reinforce our previous proposition that leniency is not adequate for concerted practices. Almost all infringements have been qualified as complex infringements (Table 1 in the Appendix).

⁷ Especially, if we take into consideration the fact that stand-alone cartel detection, i.e. outside the framework of leniency are rare (see the previous trend).

We argue that it is equally important to catch infringements that are distinctly concerted practices because harm to competition could be the same or comparable to harm from complex infringements or cartel agreements. Also, cases, which are distinctly concerted practices, are not just a theoretical possibility, but occur in practice: for instance, in cases of *ICI v. Commission* (1972), *Suiker Unie and Others v. Commission* (1975), where the concept of concerted practices has been established; in cases of *T-Mobile and Others* (2009) and *Dole Food v. Commission* (2015), where exchanges of information were found as distinct examples of concerted practices; or more recently, in case of *Eturas and Others* (2016), where the CJEU clarified that a sending of information (about a planned discount cap) by electronic platform administrator may amount to concerted practices.

Furthermore, it seems that the development of the concept of concerted practices has been, at least to some extent, stalled by the emergence of the concept of complex infringement. Currently, we have a situation, where those early judgments of concerted practices still play a major role in judicial reasoning about concerted practices, even though the competitive environment significantly changed in past decades. If we consider a previously noted trend that the ratio of prohibition decisions, where the EC can develop concepts, tend to decrease, we can further raise the question not only, if leniency is effective for concerted practices, but also, whether the concept of concerted practices in a future could deal with more unconventional cartels that employ artificial intelligence, such as algorithmic pricing. It is hard to expect effective enforcement for more sophisticated and less intense forms of collusion (especially in the absence of direct communication or other contacts), without further developments of leniency and concerted practices.

c) Observations regarding strategic leniency

By checking, whether cartel collapses were shortly followed by leniency applications, we could discern whether firms potentially used leniency strategically as a cartel exit strategy (pre-emptive strike). By “shortly” we assumed 6 months.⁸ Due to imperfections in data, we further assumed:

- (1) That the EC’s reaction time to make down raids or requests for information upon receipt of initial leniency application is on average 3 months. There is no specified term for the EC to act on initial receipt of a leniency application, but 3 months average term is mentioned by the EC’s representatives (Parliamentary questions E-0890/09, E-0891/09, E-0892/09, 2009). We also deduce same 3 months term from our data, where the EC provide both a date on initial leniency application and date on its down raids or requests for information (Table 3 in the Appendix);
- (2) That the EC properly determine actual cartel duration. In practice, a cartel duration may be slightly different from what the EC was able to prove. This is because in some cases the EC may have had a lack of sufficient evidence to prove a longer infringement. Also, even if firms submit leniency applications, they might have incentives to misrepresent the duration of cartels, because they

⁸ Note, however, that depending on a market, its transparency, firms’ ability to detect deviations, frequency of price changes, and other factors, a term for using leniency as a credible punishment or as an exit strategy may vary. In any case, our data allows examining the same question with shorter or longer periods as well.

might be not the first to report cartel and therefore not be eligible for full immunity, or they might have had simply destroyed evidence in the past, etc. Therefore, the real duration of each cartel might be longer than established in the EC's decisions. In the absence of alternatives, it was natural to adopt the dates provided in the EC's decisions.

We find that in 20/37 of cases cartel collapses were shortly followed by leniency submissions, which is in line with the idea of strategic leniency as a pre-emptive strike (Table 4 in the Appendix). However, the remaining 17/37 of cases did not follow the pattern, so we cannot provide very strong conclusions for strategic leniency. In addition, these 17/37 cases also could be interpreted against the effectiveness of leniency: even though cartels collapse, firms are still hesitant to rush to submit leniency applications sometimes for years. This behaviour again could be partially explained by limitations of leniency and usual arguments that firms fear private claims for damages, price wars, reputational harm, foreclosed opportunity to renegotiate cartels, etc., which sometimes might outweigh the benefits of leniency, whereas an impetus for eventual leniency applications might be a belief that rivals will soon do so.

Finally, our cursory search in Lithuanian case law adds a further glimpse of evidence in support of Sokol's (2012, p. 212) survey, where the U.S. leading antitrust practitioners noted a reality of strategic leniency. In the Lithuanian Internal Combustion Engine (2017) duopoly case, one defendant put forward arguments that the other defendant intentionally submitted leniency application to completely eliminate competition from its only rival in the market. However, the Supreme Administrative Court of the Republic of Lithuania rejected these arguments on the ground that law did not require checking true intentions behind leniency submissions. This shows that the concept of strategic leniency and its various modes are not yet fully acknowledged by legal authorities and fall outside current legal assessment. However, we think that at least in the most severe attempts to abuse leniency, i.e. with the aim to harm rivals and gain competitive advantage, it should be prohibited and fall within a domain of legal assessment. For that purpose, the current legal gap in the EU competition law should be filled by establishing legal norms that would prevent abuse of leniency.

VI. CONCLUSIONS

Strategic leniency is the idea that comes from game-theoretic considerations of leniency. It gained some attention in theoretical research by legal and economic scholars, but for the most part, the idea is overlooked by competition authorities and courts. We can think of three distinct aspects of strategic leniency.

- (1) Leniency implies that firms, who want to deviate from a cartel arrangement but does not want to be exposed to private litigation, reputational harm, etc. could be threatened by rival cartel members, who can punish such deviations by applying for leniency. This possibility may *ex ante* reinforce collusion and prevent deviations in the first place. Since credible threats or punishments by definition need not be realised to be effective, this way of strategic leniency remains

unobservable. Therefore, it is hard to know, if firms actually conceive leniency this way, or it is merely a theoretical construct.

- (2) On the other hand, if a cartel is on a verge of collapse and cartel deviator finds it profitable to deviate regardless of private litigation, reputational harm, etc., then a strategy “deviation + leniency application” could be a dominant strategy, which could work as a pre-emptive strike, i.e. could prevent potential punishment through leniency by rival firms. In such cases, where cartels are destined to collapse due to maverick firm, leniency may give an extra competitive advantage to a deviator, which in a long term may help the maverick firm to create or strengthen its dominant position or even eliminate competition. We find some support for the “deviation + leniency application” strategy in the EC case law, but strong conclusions would be unwarranted.
- (3) Finally, when the line between legal and illegal behaviour is thin (e.g. in so-called oligopoly problem, where it is difficult to distinguish between concerted practices and conscious parallelism), firms may submit false leniency applications to gain competitive advantage by getting full immunity under leniency and exposing rivals to fines. This may lead to false positives and inefficient use of limited resources of the EC. Currently, the EU leniency rules have no legal norms to prevent such abuses of law. Therefore, one possible solution would be to introduce fines for procedural attempts to abuse leniency.

Through the analysis of 2010–2018 EC’s cartel cases, we found that the 2002 EU leniency reform had no disruptive effect, at least immediate, on pre-reform cartels. This finding supports the scholarship position, which argues that the EC tends to overemphasize the effectiveness of leniency. Besides, both theoretical considerations and empirical evidence suggest that leniency is unlikely to reveal concerted practices. As a rule, the EC qualifies cartels as complex infringements, but this practice has negative implications for the development of the concept of concerted practices, which is arguably critical in addressing emerging problems in competition law caused by artificial intelligence and algorithmic pricing.

Despite the critique, leniency remains (and likely will be) the single most important source for cartel detection. Examined cases indeed show that the EC rarely find infringements outside the framework of leniency, even cartels last for five or even more years. Therefore, to make leniency more effective, strategic considerations should be taken into account in future developments of leniency and concerted practices, which in turn may help to address emerging problems in digital markets or due to artificial intelligence. Game theory as methodology could be fruitfully employed in researching cartel-related problems in competition law, which the author will further explore in his doctoral thesis.

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APPENDIX

Table 1. Cartels investigated by the EC during the years 2010 – 2018.

No	Year	Title	Leniency was a source for investigation	Prohibition decision	Infringement
1	2018	Capacitors	+ (Sanyo)	-	Complex
2	2018	Spark Plugs	+ (Denso)	+	Complex
3	2018	Braking Systems	+ (TRW & Continental)	+	Complex
4	2018	Maritime Car Carriers	+ (MOL)	-	Complex
5	2017	Occupant Safety Systems	+ (Tokai Rika & Takata)	+	Complex
6	2017	Lighting Systems	+ (Valeo)	-	Complex
7	2017	Envelopes	-	+	Complex
8	2017	Raw Tobacco (ES)	-	+	Complex
9	2017	Airfreight	+ (Lufthansa)	-	Unspecified
10	2017	Thermal systems	+ (Panasonic & Denso)	-	Complex
11	2017	Car battery recycling	+ (JCI)	+	Complex
12	2016	Rechargeable batteries	+ (Samsung)	+	Complex
13	2016	Euro Interest Rate Derivatives	+ (Barclays)	+	Complex
14	2016	Steel abrasives	+ (Ervin)	+	Complex
15	2016	Mushrooms	+ (Lutèce)	+	Complex
16	2016	Alternators and Starters	+ (Denso)	-	Complex
17	2015	Optical Disc Drives	+ (Philips & Lite-On)	-	Complex
18	2015	Blocktrains	+ (K+N)	+	Complex
19	2015	Retail Food Packaging	+ (Linpac)	+	Complex
20	2015	Parking Heaters	+ (Webasto)	+	Complex
21	2015	Yen Interest Rate Derivatives (YIRD)	+ (UBS)	+	Complex
22	2014	Swiss Franc interest rate derivatives	+ (RBS)	+	Complex
23	2014	Smart card chips	+ (Renesas)	+	Complex
24	2014	Power cables	+ (ABB)	+	Complex
25	2014	Automotive bearings	-	+	Complex
26	2014	Power exchanges	-	-	Complex
27	2014	Polyurethane Foam	+ (Vita)	+	Complex
28	2013	Shrimps	+ (Klaas Puul)	+	Complex
29	2013	Automotive Wire Harnesses	+ (Sumitomo)	+	Complex
30	2012	TV and computer monitor tubes	+ (Chunghwa)	+	Complex
31	2012	Water management products	+ (Pneumatex)	+	Complex
32	2012	Mountings for windows and window-doors	+ (Roto Frank)	-	Complex
33	2012	Freight Forwarding	+ (Deutsche Post)	+	Complex
34	2011	Refrigeration compressors	+ (Tecumseh)	+	Complex
35	2011	CRT glass bulbs	+ (SCP)	+	Complex
36	2011	Exotic fruit	+ (Chiquita)	+	Complex
37	2011	Consumer detergents	+ (Henkel)	+	Complex
38	2010	LCD	+ (Samsung)	+	Complex
39	2010	Animal Feed Phosphates	+ (Kemira)	+	Complex
40	2010	Pre-stressing steel	-	+	Complex
41	2010	Bathroom fittings & fixtures	+ (Masco)	+	Complex
42	2010	DRAMS	+ (Micron)	+	Complex

Source: the EC's cartel database at <https://ec.europa.eu/competition/elojade/isef/index.cfm>

Note: Sometimes the EC's delay to publish prohibition decisions, thus the information in the table reflect actual data that were available on 1 January 2020.

Table 2. Cartels that emerged before the 2002 leniency reform and lasted afterward.

No	Case	Whistleblower	Date of leniency submission	Cartel duration
1	Capacitors	Sanyo	04/10/2013	Overall: 26/06/1998 – 23/04/2012 Sanyo: 19/09/2001 – 19/04/2011
2	Spark Plugs	Denso	20/04/2011	Overall: 19/01/2000 – 28/07/2011 Denso: 16/02/2000 – 08/02/2010
3	Airfreight	Lufthansa	07/12/2005 (EC opened the case)	Overall: 07/12/1999 – 14/02/2006 Lufthansa: 14/12/1999 – 07/12/2005
4	Retail Food Packaging	Linpac	04/06/2009 (EC made inspections)	Overall: 02/03/2000 – 13/02/2008 Linpac: 02/03/2000 – 13/02/2008
5	Parking Heaters	Webasto	15/11/2012	Overall: 13/09/2001 – 15/09/2011 Webasto: 13/09/2001 – 15/09/2011
6	Power cables	ABB	17/10/2008	Overall: 18/02/1999 – 28/01/2009 ABB: 01/04/2000 – 17/10/2008
7	Shrimps	Klaas Puul	13/01/2009	Overall: 21/06/2000 – 13/01/2009 Klaas Puul: 21/06/2000 – 13/01/2009
8	Automotive Wire Harnesses	Sumitomo	23/11/2009	Overall: 06/03/2000 – 22/12/2009 Sumitomo: 06/03/2000 – 20/10/2009
9	TV and computer monitor tubes	Chunghwa	09/03/2007	Overall: 24/10/1996 – 15/11/2006 Chunghwa: 24/10/1996 – 14/03/2006
10	Mountings for windows and window/doors	Roto Frank	04/05/2007	Overall: 16/11/1999 – 03/07/2007 Roto Frank: 16/11/1999 – 04/05/2007
11	CRT glass bulbs	SCP	2008	Overall: 23/02/1999 – 27/12/2004
12	LCD	Samsung	23/11/2006 (EC granted conditional immunity)	Overall: 05/10/2001 – 01/02/2006 Samsung: 05/10/2001 – 01/02/2006
13	Animal Feed Phosphates	Kemira	28/11/2003	Overall: 19/03/1969 – 10/02/2004 Kemira: 19/03/1969 – 28/11/2003
14	Bathroom fittings & fixtures	Masco	15/07/2004	Overall: 16/10/1992 – 09/11/2004 Masco: 16/10/1992 – 15/07/2004
15	DRAMS	Micron	29/08/2002	Overall: 01/07/1998 – 15/06/2002 Micron: 01/07/1998 – 15/06/2002

Source: the EC's official cartel database at <https://ec.europa.eu/competition/elojade/iseff/index.cfm>

Table 3. The delay between leniency submissions and the EC's inspections.

No	Case	Date of leniency submission	Date of the EC's inspections	Delay (months)
1	Automotive Wire Harnesses	23/11/2009	01/02/2010	3
2	Shrimps	13/01/2009	24/03/2009	2
3	Polyurethane Foam	30/04/2010	27/07/2010	3
4	Power cables	17/10/2008	23/01/2009	3
5	Smart card chips	22/04/2008	23/09/2008	5
6	Euro Interest Rate Derivatives	14/06/2011	18/10/2011	4
7	Lightning systems	01/01/2012	01/07/2012	6
8	Car battery recycling	22/06/2012	22/09/2012	3
9	Steel abrasives	13/04/2010	15/06/2010	2
10	Water management products	21/10/2008	01/12/2008	2
11	Animal phosphates	28/11/2003	10/02/2004	3
12	Pre-stressing steel	18/06/2002	19/09/2002	3
13	Bathroom fittings & fixtures	15/07/2004	01/11/2004	4
Average:				3

Source: the EC's official cartel database at <https://ec.europa.eu/competition/elojade/iseff/index.cfm>

Table 4. Evidence on whether a cartel collapse was shortly followed by a leniency application.

No	Case	Whistle-blower	Cartel duration	Whistle-blower's participation in a cartel	Leniency date	Subtract 3 months	Delay (Months)
1	Airfreight	Lufthansa	07/12/1999 – 14/02/2006	14/12/1999 – 07/12/2005	07/12/2005	-	0
2	Car battery recycling	JCI	23/09/2009 – 26/09/2012	23/09/2009 – 22/06/2012	22/06/2012	-	0
3	Steel abrasives	Ervin	03/10/2003 – 15/06/2010	03/10/2003 – 30/03/2010	13/05/2010 (inspections)	3 months	0
4	Mushrooms	Lutèce	01/09/2010 – 28/02/2012	01/09/2010 – 22/12/2011	22/12/2011	-	0
5	Power cables	ABB	18/02/1999 – 28/01/2009	01/04/2000 – 17/10/2008	17/10/2008	-	0
6	Polyurethane Foam	Vita	26/10/2005 – 27/07/2010	26/10/2005 – 30/04/2010	30/04/2010	-	0
7	Shrimps	Klaas Puul	21/06/2000 – 13/01/2009	21/06/2000 – 13/01/2009	13/01/2009	-	0
8	Mountings for windows and window-doors	Roto Frank	6/11/1999 – 03/07/2007	16/11/1999 – 04/05/2007	04/05/2007	-	0
9	Exotic fruit	Chiquita	28/07/2004 – 08/04/2005	28/07/2004 – 08/04/2005	08/04/2005	-	0
10	Animal Feed Phosphates	Kemira	19/03/1969 – 10/02/2004	19/03/1969 – 28/11/2003	28/11/2003	-	0
11	Bathroom fittings & fixtures	Masco	16/10/1992 – 09/11/2004	16/10/1992 – 15/07/2004	15/07/2004	-	0
12	DRAMS	Micron	01/07/1998 – 15/06/2002	01/07/1998 – 15/06/2002	29/08/2002	-	0
13	Automotive Wire Harnesses	Sumitomo	06/03/2000 – 22/12/2009	06/03/2000 – 20/10/2009	23/11/2009	-	1
14	Freight Forwarding	Deutsche Post	01/10/2002 – 21/05/2007	01/10/2002 – 21/05/2007	24/09/2007 (cond. immunity)	3 months	1
15	Braking Systems	TRW & Continental	13/02/2007 – 07/07/2011	TRW: 13/02/2007 – 18/03/2011 Continental: 13/02/2007 – 07/07/2011	13/07/2011	-	4
16	Maritime Car Carriers	MOL	18/10/2006 – 06/09/2012	18/10/2006 – 24/05/2012	01/09/2012	-	4
17	Optical Disc Drives	Philips & Lite-On	13/06/2004 – 25/11/2008	23/08/2004 – 25/11/2008	29/06/2009 (req. information)	3 months	4
18	Water management products	Pneumatex	21/06/2006 – 15/05/2008	21/06/2006 – 15/05/2008	21/10/2008	-	5
19	Yen Interest Rate Derivatives	UBS	19/01/2007 – 22/06/2010	19/01/2007 – 03/06/2010	17/12/2010	-	6
20	LCD	Samsung	05/10/2001 – 01/02/2006	05/10/2001 – 01/02/2006	23/11/2006 (cond. immunity)	3 months	6
21	Blocktrains	K+N	02/07/2004 – 30/06/2012	02/07/2004 – 30/06/2012	23/03/2013	-	9
22	Occupant Safety Systems	Tokai Rika & Takata	06/07/2004 – 26/07/2010	Tokai Rika: 06/07/2004 – 25/03/2010 Takata: 06/07/2004 – 22/05/2010	07/06/2011 (inspections)	3 months	10
23	TV and computer monitor tubes	Chungwha	24/10/1996 – 15/11/2006	24/10/1996 – 14/03/2006	09/03/2007	-	12
24	Retail Food Packaging	Linpac	02/03/2000 – 13/02/2008	02/03/2000 – 13/02/2008	04/06/2009 (inspections)	3 months	13
25	Refrigeration compressors	Tecumseh	13/04/2004 – 09/10/2007	13/04/2004 – 09/10/2007	11/02/2009 (cond. immunity)	3 months	13
26	Spark Plugs	Denso	19/01/2000 – 28/07/2011	16/02/2000 – 08/02/2010	20/04/2011	-	14
27	Alternators and Starters	Denso	14/09/2004 – 23/02/2010	14/09/2004 – 23/02/2010	22/07/2011 (inspections)	3 months	14
28	Parking Heaters	Webasto	13/09/2001 – 15/09/2011	13/09/2001 – 15/09/2011	15/11/2012	-	14
29	Thermal systems	Panasonic & Denso	29/11/2004 – 02/12/2009	Panasonic: 14/05/2009 – 21/10/2009 Denso: 11/11/2004 – 02/12/2009	22/07/2011 (inspections)	3 months	16
30	Swiss Franc interest rate derivatives	RBS	07/05/2007 / 07/07/2009	07/05/2007 – 07/07/2009	09/08/2011	-	25
31	Capacitors	Sanyo	26/06/1998 – 23/04/2012	19/09/2001 – 19/04/2011	04/10/2013	-	30
32	Smart card chips	Renesas	23/09/2003 – 08/09/2005	23/09/2003 – 08/09/2005	22/04/2008	-	31
33	CRT glass bulbs	SCP	23/02/1999 – 27/12/2004	23/02/1999 – 27/12/2004	2008	3 months	34
34	Consumer detergents	Henkel	07/01/2002 – 08/03/2005	07/01/2002 – 08/03/2005	12/06/2008 (cond. immunity)	3 months	36
35	Euro Interest Rate Derivatives	Barclays	29/09/2005 – 30/05/2008	29/09/2005 – 30/05/2008	14/06/2011	-	37
36	Rechargeable batteries	Samsung	01/04/2004 – 10/11/2007	01/04/2004 – 01/10/2007	02/05/2011	-	41
37	Lighting Systems	Valco	07/07/2004 – 25/10/2007	07/07/2004 – 25/10/2007	01/01/2012	-	51

Source: the EC's cartel database at <https://ec.europa.eu/competition/elojade/isef/index.cfm>

UPCOMING LEGAL CHALLENGES FOR CROSS-BORDER eHEALTH SERVICES IN THE EU

Rūta Janeckaitė¹

Summary. The paper briefly describes the current EU legal framework in the healthcare field and assesses to which extent it could apply to the provision of cross-border eHealth services. In particular, it analyses the provision of such services from the free movement angle, i.e. whether EU law guarantees to health professionals access to and exercise of activities in the 3rd type of situations, as well as whether the insured persons have the right to reimbursement of costs of such healthcare from their social security system.

Key words: Healthcare services provided via ICT; Telemedicine; The right to reimbursement of costs of cross-border telemedicine; Telemedicine services provided via collaborative economy platforms.

1. INTRODUCTION

There are essentially three categories of situations, which fall under the scope of the fundamental freedom to provide services.

The situation explicitly foreseen in Article 56 TFEU is where providers are moving to another Member State to provide their services on a temporary and occasional basis (in this article also called “the 1st type of situations”). In addition, the Court of Justice of the EU (“the CJEU”) has established that free movement of services comprises two other types of situations, namely where the service recipients move to another Member State (“the 2nd type of situations”)² and where neither the service provider nor the recipient move across a border, but only the service itself (“the 3rd type of situations”)³.

In the healthcare field, all three situations raise specific legal issues, which have required the introduction of measures on the EU level and, as argued in the following, will necessitate further action.

The paper will briefly describe the current EU legal framework in the healthcare field and assess to which extent it could apply to the provision of cross-border eHealth services. In particular, it will analyse the provision of such services from the free movement angle, i.e. whether EU law guarantees to health professionals access to and exercise of activities in the 3rd type of situations, as well as whether the insured persons have the right to reimbursement of costs of such healthcare from their social security system.

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2 In the healthcare field, see, e.g. cases *The Society for the Protection of Unborn Children Ireland Ltd*, C-159/90 and *Kohll*, C-158/96.

3 Case *Alpine Investments BV*, C-384/93.

By contrast, the paper will not consider another equally important angle of eHealth services, namely the use and transfer of electronic health data⁴. The legal challenges related to eHealth from the perspective of data transfer, data protection and cybersecurity have been analysed by many authors, including at the conferences organised by the International Network of Doctoral Studies in Law (e.g. Januševičienė, 2017; Sogomonjan, Kerikmäe, 2017). However, there is paucity of literature assessing such challenges from the free movement of healthcare services viewpoint.

This topic is very relevant to our times, where the COVID-19 crisis has revealed the importance of access to healthcare in general and access to healthcare via information and communications technology (“ICT”) in particular. A number of Member States, such as France, Poland, Belgium, have relaxed their limitations to the latter services during the crisis (Chittim *et al.*, 2020), as they proved to be essential for guaranteeing healthcare in the midst of the pandemic⁵.

2. CURRENT EU LEGAL FRAMEWORK CONCERNING CROSS-BORDER PROVISION OF HEALTHCARE SERVICES

2.1. The free movement for health professionals

In the light of public health, most health professions are regulated in the Member States. Thus, free movement of health professionals would hardly be possible without a recognition mechanism of their qualifications. Currently, Directive 2005/36/EC on the recognition of professional qualifications (“the PQD”), which was modernised in 2013, takes care of this and related aspects. In particular, the PQD lays down the rules under which Member States recognise professional qualifications obtained in other Member States and authorise the pursuit of that profession on their territory.

Under these rules, professionals can work temporarily in another EU Member State or can pursue a permanent activity in that State as employed or self-employed persons.

Under the PQD, qualifications are recognised according to three systems:

- 1) automatic recognition of qualifications applies to those professions for which minimum training requirements are harmonised at the EU level (general care nurses, midwives, doctors (basic medical training and specialist doctors), dentists, including specialist dentists, pharmacists, architects and veterinary surgeons);
- 2) the general system for the recognition of qualifications applies to most other regulated professions (in the healthcare field, e.g. physiotherapists, dental technicians, psychologists);
- 3) recognition on the basis of professional experience (applies to the professional activities listed in Annex IV to the PQD; the list, however, does not contain health professions).

4 Indeed, e.g. telemedicine by its nature involves personal data processing through the generation and/or transmission of personal data related to health (European Commission, 2012b, p. 13) and access to electronic health record by both the treating physician and the patient could be considered as a key element in realising cross-border care (Hervey *et al.*, 2017, p. 246).

5 Consequently, such a situation might raise questions about the proportionality of the previous restrictions.

In order for the provisions on the automatic recognition of qualifications to apply, the PQD is, in principle, also a measure of legal harmonisation laying down minimum requirements for the training of the professions concerned. This is particularly true in the healthcare field, because, with the exception of architects and veterinarians, all the professions covered by the provisions on the automatic recognition of qualifications are health professions.

As regards the movement of health professionals to another Member State to provide their services on a temporary and/or occasional basis, according to the PQD, the recognition process in such instances is not applicable, i.e. such professionals can work in another Member State solely with a prior declaration, renewable once a year (Article 7(1) PQD). Whether and to what extent such a declaration can be required, has to be assessed under Directive (EU) 2018/958 on a proportionality test before adoption of new regulation of professions (“the PTD”).

Under Article 6 PQD, the host Member State shall exempt service providers established in another Member State from the requirements, which it places on professionals established in its territory relating to:

- (a) authorisation by, registration with or membership of a professional organisation or body;
- (b) registration with a public social security body for the purpose of settling accounts with an insurer relating to activities pursued for the benefit of insured persons. However, the service provider shall inform this body of the services, which he has provided.

Some authors have argued that, based on the principles formulated by the CJEU in cases *Kohll*, C-158/96 and *Decker*, C-120/95, Article 6(b) PQD, together with Article 56 TFEU, should be interpreted as having the effect that cross-border services provided by health professionals on the territory of another Member State on a temporary and occasional basis must be covered by the statutory social security system of that Member State (Zaglmayer, 2016, pp. 156-158). Even if the situation assessed in cases *Kohll* and *Decker* concerned the movement of patients (the 2nd type of situations), the same principles should apply in a “reverse” case of the movement of a health professional. Currently, there is no case-law clarifying this issue.

2.2. The free movement for patients

Settled case-law of the CJEU concerning cross-border movement of patients to receive healthcare was eventually codified in Directive 2011/24/EU on the application of patients’ rights in cross-border healthcare (“the PRD”). The PRD, *inter alia*, ensures the rights of patients to reimbursement of cross-border healthcare costs by their statutory social security system and complements the rights granted under the EU Social Security Coordination Regulations (“the SSCRs”)⁶.

Under the SSCRs, insured persons are entitled to receive necessary healthcare in another Member State during their stay in that State, as if the persons concerned were insured under the legislation of that State. In other words, during a stay in another Member State, individuals are entitled to receive necessary healthcare under the same conditions as insured persons in that Member State. This right

⁶ Currently, Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004.

is confirmed by the European Health Insurance Card (EHIC), which is issued by the health insurance provider of the insured person. Under the SSCRs, the insured person may also travel to another Member State for healthcare, but only with the authorisation of the competent institution of the Member State of affiliation. There are two conditions for issuing this permit. First, the treatment in question is provided for by the legislation of the Member State in which the person concerned resides and, second, in that country, such treatment cannot be granted within a medically justified time, having regard to the patient's current state of health and presumed course of illness.

Meanwhile, according to the case-law of the CJEU codified in the PRD, Member States are generally obliged to reimburse insured persons cost of healthcare provided in another Member State, if these services are among the services to which the insured person is entitled in the Member State of affiliation. In particular, these costs must be reimbursed even if the above-mentioned conditions under the SSCRs are not fulfilled. However, given the serious risk of financial imbalances in the social security system and the objective of maintaining balanced and accessible medical and inpatient services, the CJEU has recognised that EU law does not in principle preclude prior authorisation in the case of inpatient care or highly specialised and expensive medical infrastructure or equipment. However, the system of prior authorisation shall be restricted to what is necessary and proportionate with regard to the aims sought.

3. CROSS-BORDER PROVISION OF EHEALTH SERVICES

3.1. The definition of eHealth services

The PRD is the first and, currently, the only binding EU act regulating some issues related to cross-border provision of eHealth services. It employs both the term “*eHealth services*” and “*telemedicine*”. First, Recital 26 of the PRD states essentially that the freedom to provide services should apply to patients seeking to receive “*healthcare provided in another Member State through other means, for example through eHealth services*”⁷. Further, under Article 3(d) PRD, “[in] the case of **telemedicine**, healthcare is considered to be provided in the Member State where the healthcare provider is established”. In addition, Article 7(7) PRD allows the Member State of affiliation to impose on an insured person “*seeking reimbursement of the costs of cross-border healthcare, including healthcare received through means of telemedicine*”, the same conditions, criteria of eligibility and regulatory and administrative formalities, as it would impose if this healthcare were provided in its territory.

However, neither of the concepts are defined in the PRD or other legally binding EU acts. In the European Commission's (“the EC”) documents, eHealth is defined very broadly as “*the use of ICT in health products, services and processes combined with organisational change in healthcare systems and new skills, in order to improve health of citizens, efficiency and productivity in healthcare delivery, and the economic and social value of health. eHealth covers the interaction between patients and health-service providers, institution-to-institution transmission of data, or peer-to-peer communication between patients and/or health professionals*” (European Commission, 2012a, p. 3). Based on this

⁷ Here and further the author's emphasis.

definition, eHealth encompasses a much broader range of activities than just healthcare services: it also includes, e.g. products and processes⁸.

For the first time “*telemedicine*” was defined by the EC in 2008 as “*the provision of healthcare services, through the use of ICT, in situations where the health professional and the patient (or two health professionals) are not in the same location. It involves secure transmission of medical data and information, through text, sound, images or other forms needed for the prevention, diagnosis, treatment and follow-up of patients*” (European Commission, 2008, p. 3)⁹. Thus, telemedicine specifically concerns provision of healthcare services (defined in the PRD as services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices) through the use of ICT. Telemedicine entails electronic transfer of data and encompasses a wide variety of services, including consultations and medical interventions, such as surgeries. Those most often mentioned in peer reviews are teleconsultation, telediagnosis (teleradiology, telepathology, teledermatology *etc.*), telesurgery, telemonitoring.

This definition was included and further developed in the EC’s staff working document SWD(2012) 414 final. According to it, health information portals, online pharmacy, electronic health record systems, electronic transmission of prescriptions or referrals (ePrescriptions, eReferrals) are not regarded as telemedicine services. ePrescription is, e.g. excluded as it is an ancillary and independent act, which can also be delivered in a face-to-face meeting with a doctor (European Commission, 2012b, p. 3).

Based on the above-definitions, when talking about healthcare services delivered via ICT in the EU context, it is more correct to employ the term “*telemedicine*”. On the other hand, this concept still covers a very broad range of services¹⁰. For the purposes of the current paper, the telemedicine services will be further classified into:

- professional-to-patient services (e.g. alcohol abuse therapy using videoconferencing equipment). Such services are already quite commonly used since long time, in particular, in remote areas and long-haul ships;
- professional-to-professional services (e.g. teledermatology consultation between a general practitioner and a specialist that allows patients to obtain a specialist assessment of their skin problem when they visit their own doctor (eHealth Stakeholder Group, 2014, pp. 14-15));
- services provided via collaborative economy platforms (e.g. health professionals offering their services on a temporary and occasional basis through an eHealth platform, but engaging in a constant activity in their Member State of establishment).

The Digital Agenda for Europe sets out to achieve widespread deployment of telemedicine services by 2020 (European Commission, 2010, pp. 29-30). Through the eHealth Action Plan 2012-2020, the EC aims to support patients and healthcare workers, to connect devices and technologies and

8 The World Health Organisation (WHO) provides a similarly wide definition of “*eHealth*” (World Health Organisation, 2020).

9 The WHO’s definition of “*telemedicine*” is similar to the EC’s one (World Health Organisation, 2009, pp. 8-9).

10 See more about the range of activities covered under the term “*telemedicine*”: European Commission. Market study on telemedicine (European Commission, 2018b).

to invest in making medicine more personalised (European Commission. 2012a). In addition, digital health is one sector of the Digital Single Market (“the DSM”), which is one of the EC’s main priorities. In this direction, in 2018, the EC adopted an action plan in order to enable the digital transformation of health and care in the DSM (European Commission, 2018a).

3.2. Access to and exercise of telemedicine activities in the Member State of establishment

In the EC’s view, a specific feature of telemedicine services is that they have a dual nature, i.e. they are at the same time healthcare services and Information Society (“IS”) services (European Commission, 2008, p. 9)¹¹.

With regard to telemedicine activities as healthcare services, the TFEU provisions concerning the freedom of establishment essentially require that Member States do not maintain in force any national rules or practices, which restrict access to and exercise of activities in that State, unless those restrictions are justified by imperative reasons of public interest and are proportionate with respect to the aims sought¹². This test should apply to national provisions effectively restricting telemedicine activities, such as the Polish provisions requiring the physical presence of the patient and health professional at the same time and in the same place, for a medical act to be legally valid (European Commission, 2012b, p. 5)¹³, Dutch, German and Austrian rules rendering in-person examination conditional for reimbursement, therefore, prohibiting remote “*first time encounters*” with the patient (Hervey *et al.*, 2017, p. 247) *etc.*

Moreover, in the field of regulated professions, including health professions, the PTD requires that Member States undertake an assessment of proportionality in accordance with the rules laid down in this Directive before introducing new, or amending existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions. The PTD does not expressly stipulate whether this obligation also applies to the introduction and amendment of national provisions restricting pursuit of professional activities via ICT. However, nothing in the Directive allows claiming that such national provisions are out of reach of the PTD. Therefore, before introducing such national provisions, Member States should undertake an assessment of their proportionality and notify the EC thereof after the adoption, in line with the requirements of the PTD.

With regard to telemedicine activities as IS services, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“the eCommerce Directive”) creates a legal framework to ensure the free movement of IS services, where the latter are defined¹⁴ as a “*service normally provided for remuneration, at a distance, by*

¹¹ Although there are opinions, which argue that clinical telemedicine, such as healthcare services, should be distinguished from informative telemedicine, such as IS services (Simon, Lucas, 2013, p. 10).

¹² Note, however, that although healthcare services fall under Article 56 TFEU, they are excluded from the scope of Directive 2006/123/EC on services in the internal market (“the Services Directive”).

¹³ The Polish Medical Activity Act allows telemedicine services since 2015.

¹⁴ In Article 1(1)(b) of 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 (“the TRIS Directive”).

electronic means and at the individual request of a recipient of services". Thus, e.g. telephone medical consultations or medical call-centers providing services through traditional voice telephony are not IS services (European Commission, 2012b, p. 9).

Where telemedicine services fall under this definition, the eCommerce Directive prohibits Member States from making the taking up and the pursuit of the activity of an IS service provider subject to prior authorisation requirement (Article 4(1) of the Directive).

The TRIS Directive further provides that Member States wishing to adopt a regulation on telemedicine services as IS services will have to notify it to the EC and to other Member States before adoption. This requirement seeks to verify that the future regulation will not create obstacles to the free movement of IS services and to the freedom of establishment of IS service providers within the internal market.

3.3. Right to provide cross-border telemedicine services to patients in another Member State

It has to be noted that the PQD is not applicable where telemedicine services are provided: under Article 5(2) PQD, it only applies where a health professional physically moves to another Member State to provide services. Thus, the above-mentioned legal framework concerning temporal and/or occasional work of health professionals in another Member State with a prior declaration does not apply in case of telemedicine.

Under the TFEU, as a general rule, Member States should not adopt any national law, which would prevent service providers from exercising their freedom to provide telemedicine services. Any obstacle to the freedom to provide services across borders is prohibited, unless justified by imperative reasons of public interest, e.g. on the grounds of public health. Hurdles of an administrative and reimbursement nature might represent obstacles in this regard, and Member States should prove that they are justified (European Commission, 2012b, p. 5).

Moreover, under the eCommerce Directive, if the health professional complies with the legislation applicable to the taking up and exercise of an IS service in his Member State of establishment, he will in principle be free to provide its services in other Member States (Articles 3(1) and 3(2)). This is known as the "*country-of-origin principle*" (European Commission, 2012b, p. 12). However, Article 3(4)(a)(i) of the eCommerce Directive allows Member States to restrict eCommerce services for reasons of public health on a case-by-case basis and with regard to a particular online service from another Member State (European Commission, 2012b, p. 9).

3.4. Reimbursement of costs of cross-border telemedicine services

As already mentioned, the PRD is the first legally binding act on the EU level addressing some issues concerning the provision of cross-border telemedicine services. Essentially, it clarifies that the right to reimbursement under this directive applies in the 3rd type of situations and regulates certain issues, e.g. defines that the "*Member State of treatment*" in the case of telemedicine is the Member State where the healthcare provider is established.

However, not all the issues relevant for the provision of cross-border telemedicine are addressed by this directive. Some Member States, e.g. reimburse/cover domestically only face-to-face encounters with the health professional. Without prejudice to the proportionality of such national provisions in general (see above, Part 3.2 of this paper), the PRD does not clarify whether such Member States are obliged to reimburse cross-border telemedicine services (e.g. services of a psychologist abroad through electronic means, if the system of affiliation requires a face-to-face encounter) (Bensemmane, Baeten, 2019, p. 19). Some authors read Article 7(7) PRD as allowing the face-to-face first encounter as a regulatory or administrative measure, justified as long as it is not an unnecessarily stringent requirement impeding cross-border teleconsultations (Hervey *et al.*, 2017, p. 248).

In addition to certain ambiguities concerning the application of the PRD to telemedicine services, a more important issue is caused by non-applicability of the SSCRs in the 3rd type of situations. Similarly as in case of the PQD, Article 20 of Regulation (EC) No 883/2004 expressly requires the physical presence of the patient in the Member State of treatment, i.e. the one of the healthcare provider.

In this respect, it has to be noted that if the conditions for granting the authorisation established in the SSCRs are fulfilled, in most of the cases it would be more beneficial for the patient to use the SSCRs', compared to the PRD's, "*avenue*" for cross-border healthcare services. Having in mind the authorisation system under the SSCRs, there is no reason for not extending the application of the SSCRs to the 3rd type of situations.

3.5. Professional-to-professional cross-border telemedicine services

Further to the fact that the SSCRs are generally not applicable in case of cross-border telemedicine services, it is not clear whether the PRD and, accordingly, the right to reimbursement, applies to the costs of professional-to-professional cross-border telemedicine services.

On the one hand, the quite broad wording of the relevant provisions of the PRD could allow its interpretation as encompassing such services: Article 3(a) PRD defining "*healthcare*", e.g. does not require it to be *directly* provided by health professionals to patients. Further, Article 7(1) PRD stipulates quite broadly that what has to be reimbursed, is "*the costs incurred by an insured person who received cross-border healthcare*". On the other hand, e.g. Article 4 PRD regulating the responsibilities of the Member State of treatment might be read as entailing that there is just one Member State of treatment, thus effectively impeding cross-border professional-to-professional telemedicine.

In light of the above, it could be concluded that the PRD was not specifically intended to regulate professional-to-professional cross-border services and many ensuing questions, such as the responsibilities of the involved Member States, are left unanswered.

3.6. Cross-border telemedicine services provided via collaborative economy platforms

As regards telemedicine services provided via collaborative economy platforms, an additional complication occurs concerning the legal status of the intermediary (the platform).

The current EU approach on collaborative platforms in general is based on case-by-case assessments whether a platform provides the underlying services itself or not (European Commission, 2016, p. 6). E.g. in case *Asociación Profesional Elite Taxi*, C-434/15, the CJEU has decided that *Uber* renders a transport service rather than an IS service. On the other hand, with respect to *Airbnb* the CJEU has held that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of services ancillary to that intermediation service, must be classified as an IS service under the eCommerce Directive (case *Criminal proceedings against X*, C-390/18).

Based on this approach, if it is established that the platform only provides an IS service, the eCommerce Directive would be applicable to such a platform. In such a case, notably, the PRD does not provide an answer to the question whether the reimbursement of costs for cross-border telemedicine services includes remuneration to such an intermediary.

However, if the platform is considered as also (or only¹⁵) a healthcare provider, the legal situation is more complicated.

First, under the relevant provisions of the TFEU, any national limitations concerning such a model of telemedicine service provision would have to be justified and proportionate. As is also the case in other instances where only the proportionality test applies, this does not ensure legal certainty, because any national limitations would have to be challenged in the national courts in individual cases.

Second, as mentioned above, the PRD explicitly applies to telemedicine services. In this respect, according to the PRD, the standards and guidelines relating to healthcare provision of the Member State where the healthcare provider (the platform) is established should apply. However, this could be impossible to ensure in practice, if the platform engages health professionals established in other Member States.

Third, the PQD does not apply to telemedicine services. However, in light of public health, it would be reasonable to require at least some kind of notification requirement in the Member State where the platform is established, if health professionals from other Member States are engaged by the platform (Hatzopoulos, Roma, 2017, p. 117). In case of health professionals with a third country diploma, there should be a recognition procedure, to make sure that the minimum standards laid down in the PQD are observed (see, by analogy, Article 2(2) PQD for physically moving doctors).

4. CONCLUSIONS

In addition to the free movement provisions in the TFEU, in the 1st type of situations (where a health professional moves), the PQD and the PTD apply in the healthcare field. In the 2nd type of situations (where a patient moves), the SSCRs and the PRD are applicable. However, neither the PQD, nor the SSCRs apply in the 3rd type of the situations, i.e. where healthcare services are provided via ICT across a border.

¹⁵ Note that in case of *Uber*, the CJEU found that *Uber* only provides transport services. This approach differs from the EC's approach in its communication on telemedicine of 2008, according to which both the general framework for services and the eCommerce Directive apply to telemedicine (European Commission, 2008). However, by contrast to healthcare services, transport services are completely excluded from the scope of Article 56 TFEU and the Services Directive.

In the EU, healthcare services provided via ICT are defined as “*telemedicine*” rather than “*eHealth services*”. On the other hand, “*telemedicine*” still covers a very heterogeneous field. Therefore, legal issues could better be tackled by approaching the various situations covered by this concept separately, such as professional-to-patient services, professional-to-professional services and services provided via collaborative economy platforms.

The access to and exercise of cross-border telemedicine activities belong to the Member States’ regulatory competence. The TFEU, the eCommerce Directive and the PRD only require, in essence, that the Member States’ measures limiting or restricting such activities are justified by important public interest reasons and are proportionate with respect to the aims sought. Thus, on the one hand, lack of EU-level approach could result in having an unnecessarily too restrictive and fragmented national regulation in the EU, where the cross-border telemedicine could be impeded by the Member States who have a more reserved approach domestically.

The article has argued that in order to ensure cross-border provision of telemedicine services, some of the issues to be foremost addressed on the EU level concern the non-applicability of the SSCRs in case of cross-border telemedicine, as well as the lack of clarity in the PRD as to whether and how cross-border telemedicine services, including professional-to-professional services and services provided via collaborative economy platforms, should be reimbursed from the social security system of the insured person.

On the other hand, some EU-level measures are indispensable for the purposes of ensuring a high level of public health, in particular, with regard to the emerging field of telemedicine services provided via collaborative economy platforms. First, in light of the risks involved, the current EU approach on case-by-case assessment of such platforms might be considered unsatisfactory in the healthcare field. Second, the non-applicability of the PQD in the 3rd type of the situations could pose public health risks, if national provisions of certain Member States are too lenient. Therefore, a notification requirement in the Member State where the platform is established, if health professionals from other Member States are engaged by the platform, should be introduced in the PQD. In case of health professionals with a third country diploma, a recognition procedure should apply.

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DOES THE EU HAVE A SUBSTITUTE FOR A CONSTITUTION? THE RULE OF LAW AND COMMON IDENTITY¹

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Abstract. Constitution, like no other legal act, is the manifestation of what a community thinks of itself; what are its aims, values and priorities. But what if this common source of identity is lacking? Can a body politic exist without constitution? If yes – does it come at certain price?

Over a decade after the failure of a constitutional project for Europe I would like to ask whether EU has any substitute for the constitution for the following 10 years. I will consider that questions from two different standpoints – the rule of law and common European identity. First, I will ask whether existing legal order of EU needs the constitution to be consistent with the rule of law principle. This question was of great importance in Poland, as this decade started in our country with the EU triggering Article 7 of the Treaty of EU with the charge of breaching by Polish government the principle in question.

The recent events however have drastically changed the situation in European Community. The observance of the rule of law does not seem enough for EU to assert its legitimacy in the course of the ongoing turmoil caused by the pandemic. What is needed is unprecedented solidarity among European Citizens – solidarity which transgresses the demands of mere justice. I will claim that to maintain solidarity a common identity may be necessary. Thus, I will ask whether the constitution is necessary for the forming of European identity and whether it would be enough to achieve this aim.

Keywords: constitution, treaty, identity, rule of law, solidarity, community.

INTRODUCTION

The beginning of the new millennium marks, in the history of the European Union, the consequential fiasco of the European constitutional project. The reasons for this failure were complex and their analysis exceeds the scope of this article. On the one hand each individual Member State wished to ensure for itself maximum influence on decisions taken in the community, on the other, more ideological, hand there were profound differences in the understanding of European identity, its sources and current shape. It is difficult to clearly determine which of these problems turned out to be decisive, but it is worth remembering that the Lisbon Treaty adopted in 2007 included many of principles concerning the functioning and structure of the European Union, which were initially rejected as part of the European constitution. This fact allows us to put forward the thesis that the disagreement on the consolidation of the European community through a full-fledged constitutional

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act resulted from deeper objections than just doubts about the proposed changes in the organization of the Union.

The idea of working on a joint constitution for Europe was virtually abandoned after this first defeat. Neither politicians, nor representatives of academia, nor even European citizens themselves seem to be the least interested in bringing this prematurely dead concept back to life. The arguments which ignited works on the first constitutional draft are no longer the subject of discussion. Nobody wonders any longer why Europe once desired constitution and what were to be its tasks, besides technical transformations in the functioning of the community, which the Lisbon Treaty did well enough. So, is the European Union at the beginning of the third decade of the 21st century in need of constitution at all? I will try to answer this question by looking at the Union from two perspectives – first, I will look at it as at a political organism exercising the rule of law, and second, as at a community of people united by common identity and solidarity. The first understanding of the Union dominated, as it seems, in the decade just past. The second may prove crucial for its survival and prosperity in the next decade.

THE ROLE OF CONSTITUTION IN THE BODY POLITIC RULED BY LAW

In a democratic system, the constitution performs countless vital functions. However, having in mind the rule of law, there are four of them which are crucial. First, each constitution limits the power and determines the shape of government. The bulk of constitutional rules is concerned exactly in making very detailed arrangements concerning the division of power, election models and competences of crucial state bodies. Secondly, the constitution protects the fundamental rights and freedoms of persons in its territory. Thirdly, it serves as the supreme law, a measure by which the validity of all other provisions is assessed, which, by the way, does not preclude its direct application in certain circumstances. And finally, the constitution is a source of values and principles that serves as the standard of interpretation of all norms existing in the legal system. To the extent that the constitution performs these functions, it enables the existence of the rule of law – the principle according to which the authority of law delimits the activities of power and all other entities in a given body politic (Waldron, 2020).

The significance of the rule of law in the political and legal system of the European Union cannot be overestimated. Especially recent years have brought recognition of its role as both a legitimizing principle of the Union's actions and a standard enabling an objective assessment of the state of democracy in individual Member States. This emphasis on the rule of law was specifically articulated during Finland's presidency of the Council of the European Union in the second half of 2019. Finland recognized the rule of law principle as one of the basic pillars of the Council's activities, alongside such values as competitiveness, social inclusion and climate leadership (Finnish Government, 2019, p. 5). At the same time, the respect of Union institutions for the rule of law was reflected in proceedings against Member States implementing reforms that threatened the separation of powers, political pluralism and directly violate their national constitutions. An example of these activities is the proceedings against Poland based on art. 7 item 1 TEU.

In the context of our considerations, it is worth looking at the way in which the European Commission informed about the grounds for initiating this proceeding. As we can read in the official press release:

*“The European Commission decided to refer Poland to the Court of Justice of the EU due to the violations of **[4] the principle of judicial independence** created by the new Polish Law on the Supreme Court, and to ask the Court of Justice to order interim measures until it has issued a judgment on the case.*

(...)

*The European Commission maintains that the Polish law on the Supreme Court is **[3] incompatible with EU law** as it undermines the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfil its obligations under **[1] Article 19(1) of the Treaty on European Union** read in connection with Article 47 of the **[2] Charter of Fundamental Rights of the European Union**” (European Commission, 2019).*

In the quoted passage we find a reference to all four functions of the constitution we have listed above. Therefore, first, we have reference to the Union political system and the place of the judiciary in general, and the individual adjudicative organs in particular, in the structure of power [1]. Secondly, we are informed that Poland violated the right to a fair trial which is listed as one of the basic human rights and freedoms guaranteed by the European community [2]. Thirdly, the EU law is considered to be hierarchical over national legislation and is used as a standard for legislative control [3]. And fourthly, Poland’s fundamental guilt was to breach the principle of the independence of the judiciary, which is claimed to underly the EU legal and political order [4].

From the above, it seems that the European Union has at its disposal legal tools that perform functions analogous to those of the constitution, at least to the extent necessary to secure the realization of the rule of law. The Court of Justice itself expressed the same view on the constitutional nature of EU treaties:

*The EEC Treaty, albeit concluded in the form of an international agreement, none the less **constitutes the constitutional charter of a Community based on the rule of law**. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, the judgment in Case 26/62 Van Gend en Loos [1963] ECR 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (The Court of Justice, 1991, emphasis added).*

The theory developed by professor Neil Walker casts another, interesting perspective on the problem. Walker described the necessary features of a self-contained legal system. He claims that the necessary characteristics of “thin” constitutionalism, this is constitutional order without constitution, are (1) the self-ordering of legal system, which refers to the capacity of this system to reach and regulate all matters within its domain, (2) self-interpretation, which means the capacity of some organ (or organs), typically located in the judiciary, to have the final word as regards the meaning

of its own norms, (3) self-extension referring to the capacity of a system to determine the extent of its own jurisdiction, (4) self-amendment refers to the existence of a procedure enabling the change of content of the legal order, (5) self-enforcement which determine the ability of the legal order to secure the application and implementation of its own norms and finally (6) self-discipline which refers both to the generality and predictability of system's decisions and to the subjection of any power to the rules of community (Walker, 2012, p. 7-9/20).

According to Walker, EU almost fulfills the test based on above criteria as (1) EU legal instruments are generally effective in regulating the full spectrum of issues where the EU has competences, (2) ECJ has consistently strengthened its position as a judicial authority responsible for the final interpretation of European law, (3) the doctrine of implied powers enables further extension of EU competences, (4) there is a clear tendency toward simplification of the procedure of revision of treaty provisions and (5) the doctrine of the 'direct effect' of EU norms in national legal orders turned out to be effective tool of securing execution of EU law by member states.

The greatest problem for EU, Walker says, is to be self-disciplined, especially in the second understanding of the term. The great bulk of the competences and principles listed above were developed by European institutions without clear mandate from member states (Walker, 2012, p. 8/20). But is not it the most characteristic feature of any constitutional order? Habermas called the relation between democracy and the rule of law paradoxical, as the latter constrains the former which had to be initially unconstrained to put the constitution – law in place (Habermas et al., 2001). The same is well visible in a famous claim by Schmitt: "a constitution is not based on a norm, whose justness would be the foundation of its validity. It is based on a political decision concerning the type and form of its own being (...) There cannot be a regulated procedure, through which the activity of the constitution-making power would be bound" (Schmitt, 2008, p. 130). Later on, we will look again at Habermas and at Frank Michelman to try to resolve this paradox. Now, let us conclude what we have said so far.

The EU legal system meets the minimum requirements necessary for the rule of law to exist and in this respect has an effective substitute for the constitution. A brief glance at the history of the European community allows us to understand why this principle was (and is) so appreciated in the Union, and at the same time it explains why Member States considered its protection both necessary and sufficient condition to achieve the desired level of unification, at the same time giving up on a full-fledged constitutional document. The European Union has its source in the European Coal and Steel Community which was established to maintain international peace by creating a common economic interest between France and Germany. Indeed, the essence of all subsequent incarnations that the EU went through was economic cooperation. And nothing guarantees the flourishing of entrepreneurship, profits from international trade and stable economic growth as effectively as good, predictable and impartial law (Yu, 2015; Chow et al., 2014). So, as long as economic growth remained in the centre of international attention, and, above all, within the reach of the Member States, protection of the rule of law was a sufficiently strong binder and an incentive to remain in the community, despite numerous deadlocks. Thus, one could see the failure of constitutional proj-

ect as an “evidence of the success and stability of the existing” European constitutional settlement (Moravcsik, 2006, p. 219).

But 2020 has shaken all previous beliefs and aspirations. COVID-19 pandemic represents a powerful economic blow to all the countries of the European community, without exception. Dreams of continuous growth have fallen apart. But they were never anything but dreams. Because even if it was not for the coronavirus, national economies would have to slow down in the face of the impending climate collapse. What does this mean for the future of Europe? Is the humble compliance with the law enough to ensure that, in the face of upcoming crisis, the next decade brings something more than the progressive decay of the community, the decay initiated by leaving of her first member?

CONSTITUTION AS A SOURCE OF COMMUNITY

To answer this question, let us return to our reflection on the European constitution. We have already analyzed the legislative function of constitutional act. But any constitution has yet another, even more important, task than creating the legal framework for the existing community. It creates this community itself. It creates its own authors. It was this function of the constitution that Tushnet meant when he wrote: “A people can be constituted in many ways. But any one people is historically constituted in only one way. And here is where constitutional law comes in. It is, or should be, a commonplace that **the people** [of constitutional democracy] **are constituted by the Constitution**”, adding strongly: “We could mistakenly treat the Declaration and the Constitution as the organic seeds of a process that has been working itself out over history ... That denies that we are dealing with a project, that is, a self-creating activity ... We are self-creating, and so have the power to reconstitute ourselves at will” (Tushnet, 1997, p. 1559, emphasis added).

The constitution in this sense is a conscious fact of self-determination. On the one hand, its creation is possible only thanks to the pre-existing relations between the entities establishing it, on the other, it goes much beyond the existing state of affairs. Hence its character is not only declarative, but also performative, as it literally constitutes the future. The same intuition is evident in the words of Justice Holmes when he says: “from the perspective of the constituent power, the constitution is a human political construction. It denotes the moment ... of **the self-institution of society**. (...) **Constitutions do not merely limit power; they can create** and organize power as well as give power a certain direction” (Holmes, 1995, p. 228, emphasis added) or in Schmitt word’s: “The constituent power is the full immediacy of a legal power not mediated by laws, a type of **law that precedes the state**” (Schmitt, 2006, p. 73). These abstract considerations can be easily translated into the language of European praxis. EU Constitution could, in specific circumstances and under certain conditions, establish new people – European People endowed with European identity. Before we set off to determine these circumstances and conditions, let us first clarify how we do understand identity and why we believe it is of such a great importance for our discussion.

The sense of identity stretches between two poles. On one side there is the awareness of being in the essential sense the same as other members of my own group. However, it is not enough to feel that I am like the others which I identify myself with. I must also be recognized by them as one

of them (Honneth, 1992). On the other side there a sense of a fundamental difference between me and those whose identity is different (Connolly, 2002; European Commission, 2012, p. 22). Thus, the basis for the sense of identity is, first of all, the mutual perception of belonging and, secondly, opposition to however defined “others”.

The basic evolutionary function of identity was to define the members of one’s own category (understood in different ways, depending on the circumstances), who should be supported in case of danger. Hence, the collective identity was the evolutionary incubator of the sense of solidarity: “Communities connect us by means of our disposition to show special concern and loyalty to people with whom we share things. Community, I shall argue, has taken so many different forms because human beings share so many different things—from places and practices to beliefs, choices, and lineages—that can be imagined as sources of mutual connection” (Yack, 2018, p. 4). Research shows that common identity creates a sense of sympathy for persons with a shared identity, which generates the initial motivation for concern for the disadvantaged from the group and creates a sense of trust that is a precondition for individuals to act on their sympathy (Miller, 1995).

From the above, very specific conclusions can be drawn for each political organism operating in the model of “welfare state” and based on solidarity of stronger (and simply speaking – richer) members of the community with those who, for various reasons, are at a lower level of prosperity. And exactly such an organism is the European Union. According to scholars a sense of solidarity is not so crucial “to social programs that protect the population as a whole as in the case of health care which largely redistributes resources from the healthy to the sick, or pensions which redistribute resources to those who live longest” (Johnston et al., 2010, p. 355). However, “policies that explicitly redistribute resources on a vertical basis to the poor, such as welfare and unemployment benefits, require that better-off people “identify with the beneficiaries of the redistribution—an identification fostered by a sense of common national identity” (Miller, 2006, p. 328). To quote the most straightforward opinion on the matter: “the question of for whom are people willing to pay has replaced the traditional question of for whom they are willing to die as a test of collective affinity and solidarity³” (Gat, 2012, p. 321).

It is exactly the constant emphasis on the value of solidarity that not only defines the policy of the European Union (at least in its program declarations⁴), but also constitutes a feature that distinguishes it from other political associations, in particular the United States, with which the EU has always struggle for leadership in the democratic world⁵. This solidarity was to be at the heart of the

3 This pragmatic attitude toward the European Community is well visible in national politics. Gdy jeden z polskich kandydatów na urząd prezydenta postanowił wyrazić na Twitterze swą radość z okazji rocznicy wstąpienia przez Polskę do EU he wrote: “16 years ago Poland became a member of the EU. Today, we are part of a community that has supported our country with EUR 7,5 billion to fight coronavirus and save jobs” (Biedroń, 2020).

4 This struggle over identifying the credible vision of European exceptionalism is well-described by Muller: “We might want to ask whether there is a kind of constitutional morality that fits within the constraints of moral universalism and yet is also in some sense specific to the EU. We are, if anything, looking for a “moral surplus,” you might say, that the Union generates—and if there is no such moral surplus, then of course that should honestly be admitted” (Muller, 2007, p. 120).

5 See: “The constitutional treaty affirms the notion that Europe can find its identity only in delimitation from, perhaps even by standing against, the U.S. The delimitation arises, on the one hand, from the European social model (...)” (Bogdandy, 2005, p. 311).

constitution for Europe. Hence, in the preamble to this act we could read that “Europe, reunited after bitter experiences, intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived” (Treaty establishing a Constitution for Europe, emphasis added). The same idea permeates the European Commission claims that the Union’s development direction changed and although the economic foundations are still essential, the Constitution places the European citizen at the forefront.

But is giving European people such a constitution enough for the emergence of common identity among them? Obviously, the answer is negative. As I have said before, special circumstances must be present and demanding conditions must be fulfilled for the birth of a community from constitutional foam. Bogdandy is right when he says that “constitution directly affects identity formation, if it is a criterion per se for the relevant identity process”. Regrettably, it is “a long way from a constitution, which is initially a mere constitutional text, to the psychological processes of self-categorization by citizens. (...) This would require that the large majority of citizens identify and affiliate with their group on the basis of the constitution, as such, or on the basis of specific constitutional principles” (Bogdandy, 2005, p. 299). Bogdandy is right. But however accurate this statement is, it is still too obscure for our needs. It does tell us that something more is necessary to make the people from scattered nations of Europe but it does not show us what it is. We still do not know how the identification with constitution or with its specific principles can be triggered.

Nevertheless, the answer for this question is given when Bogdandy reveals us the painful details of constitutional negotiations. He recalls, that Intergovernmental Commission, which was responsible for the preparation of the draft of the constitution rejected “most dangerous, and possibly even foolish” proposal, namely stating in the introduction to the project that it is democracy which makes the highest value of the Union (Bogdandy, 2005, p. 309). The argument which the scholar gives to justify this amendment is crucial to understand the true reasons behind the failure of constitutional dream:

To suggest democracy as the Union’s primary value is risky. (...). Many citizens may—rightly—believe that democracy’s status in the Union is not fully satisfactory; moreover, considering the institutional alterations, the constitutional treaty is unlikely to improve significantly the so-called democratic deficit. Thus, discord would have been likely between the draft constitutional treaty’s most prominent declaration and the everyday experience of Union citizens. This would not have helped to foster identity but, rather, alienation and cynicism (Bogdandy, 2005, p. 309).

From here, one only need one step to reach the conclusion that “*the inclusion of citizens in political decision making is considered paramount to the formation of collective identity*” (Bogdandy, 2005, p. 312). Habermas makes the twin claim saying that „the substance of the constitution will not compete with the sovereignty of the people only if the constitution itself emerges from an inclusive process of opinion- and will-formation on the part of citizens” (Habermas, 2001, p. 771). And this is exactly this feature of constitution-making that makes Michelman believe that the paradox between democracy and the rule of law may be resolved. According to him, the only way to reconcile these

opposing values is to perceive the constitution as a project which continues across generation and never ceases (Habermas, 2001, p. 768).

Here again the hard-scientific research can be used to back these somewhat abstract ruminations. It is now commonly known that participation in group-relevant collective events increases one's investment in such group identities. And that, furthermore, even one-time experience of participation much increases chances of further involvement in collective activity. This effect is said to be strongest in case of, so-called, collective self-realization. What it means is that it is physical presence among other people involved in the same enterprise that makes the process of identity-formation accelerate (Khan, 2016). Needless to say, joint success bonds people stronger than failure.

These considerations can be, again, quite easily transposed to the pragmatic decision about European constitution-making process. However, when we come back both to the historic reality of this process, and to the constitutional text which it gave birth to, it seems that this knowledge remained obscure for the European policymakers. The glimpse at the constitution preamble tells us more about it than any scholarly analysis: "grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe", the introduction says and then a long list of these grateful rulers of the European world appears, in alphabetical order, starting somewhat symbolically with "his majesty the king of Belgians" and ending with assurance, that they "have agreed as follows (...)" (Treaty establishing a Constitution for Europe).

When the European Constitution was being prepared, many of us have just reached our civic maturity. However, no one asked us how we understand a common Europe, what constitution we want. And no one showed how we can influence its shape. The issue was absent in schools⁶, there were also few European, governmental and non-governmental, initiatives supporting grass-roots discussion, while those that were conducted were most often limited to superficial "for" or "against" agitation. At the same time, there existed an example of shaping constitution-making process in a way which would remedy all these deficiencies.

Over ten years before South Africa won its struggle to establish a constitution for a nation torn apart to the extent rare in the world. Being aware that no matter which side of the political dispute prepare a constitutional draft, it would not be able to gain legitimization in the eyes of the entire nation, The Constitutional Assembly decided to entrust the task of creating a constitution directly to the nation, to an extent unprecedented in modern democracies. Presenting the whole of this process exceeds the scope of this article, a few numbers which I will cite, however, makes the nature and scale of this undertaking clear. During the public consultation over 2 millions of grassroots amendments were submitted to the constitutional draft. 20,549 participants took part in the public meetings were oral submissions were recorded and transcribed. "Constitutional talk line" launched with the aim of raising the awareness of the constitution-making process answered more than 10.000 calls from citizens. There were 807 public events organized which explained the significance and intricacies of what is going on in the state and which were focused on provincial areas. Additionally, the

⁶ And we must remember that modern democratic states virtually no longer have any other fora for their citizens to physically meet in all their diversity.

Constitutional Assembly held 13 public hearings with 1,508 representatives from 596 civil-society organizations present on-site. There were also 259 briefings organized reporting to public opinion on progress in the constitution-making process. Furthermore, citizens could enroll to 486 constitutional education-oriented participatory workshops which preceded these public meetings (Ebrahim, 1999).

The contrast with European own constitution-making procedure is striking. The best opportunity to carve a European identity has been lost. What all it means is that 2004 Treaty establishing a Constitution for Europe, even if it was ratified by all the members states, would not have been sufficient to establish the European Community with common identity necessary to make it through the approaching decade jointly and severally. Or to say it in different words – even a Constitution for Europe would not have been effective substitute for European Constitution. However, this does not to have be the end of the story. As Rosenfeld puts it: “the popular rejection of a treaty or an accord—can be turned into part of a much more positive narrative; failure is a prelude to further inclusiveness, to hearing more voices, or hearing the same voices again with a different degree of attentiveness (Muller, 2007, p. 135).

CONCLUSION

The above discussion shows that the EU is able to protect the rule of law under the current legal order. However, the community lacks a binder that would make Europeans one family, united by a common identity and ready for collective sacrifices for each other. And this virtue will be crucial in the next decade. 2020 started with a serious dispute within the Union about the limits of mutual responsibility and liability of Member States. This dispute was settled in favor of deeper alliance in the face of pandemic, which was marked by creating the first time in the history of EU the, so-called, “debt union”, based on joint and several obligation of all members states for a debt of 750 billion euro incurred in order to secure recovery funding for European economies in crisis. This decision is certainly a big step towards dreamful “unity in diversity”, but the real test is still Ahead. In 2028 the EU must start to pay off borrowed money. And there will be many ideas on how to do this. It is a pity that we, Europeans, did not have the opportunity to promise each other in advance that we “are determined to transcend our former divisions and, united ever more closely, forge a common destiny” (Treaty establishing a Constitution for Europe).

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THE PHENOMENON OF MEDIEVAL *IUS COMMUNE*: THE PAST OF EUROPE'S LEGAL FUTURE?

Tadas Lukošius¹

Abstract. The historical approach enables us to perceive the specific legal phenomenon as continuous and to study the antecedents of current (or even future) legal challenges. This article discusses the possibilities of invoking the historical notion of *ius commune* (and various new concepts based on it) in a contemporary legal discourse on the future of the European Union (EU) law. Since issues of integrity and homogeneity remain central to the consideration of further legal developments of the EU legal framework it is especially relevant to look back at one of the most prominent phenomena in the Western legal tradition – *ius commune*, which to some extent united legal thought throughout pre-modern Europe. By analysing inherent characteristics related to its sources, methods and interaction with other (local) legal systems, we attempt to define the limits of such historical analogy. This may allow answering the questions as to whether and to what extent the model of medieval-originated *ius commune* could inspire further development of the EU legal framework (as a new *ius commune*).

Keywords: Roman law, canon law, medieval legal systems, legal history.

*What has been will be again,
what has been done will be done again;
there is nothing new under the sun.
Is there anything of which one can say,
“Look! This is something new”?
It was here already, long ago;
it was here before our time.
(Ecclesiastes, Ch. 1:9--10)*

INTRODUCTION

It is often said, both seriously or with humour, that history tends to repeat itself. Even without arguing about the specific theoretical concepts of historic recurrence or cyclical nature of history, such a statement – transferred in the context of Western law – at least reminds us about the important link between the historical approach and consideration of the future. The historical perspective enables researcher to perceive the specific legal phenomenon as continuous, to study the antecedents of current legal challenges and to draw new scenarios of how the law could (or sometimes should) develop. The claim that the history of law is the basis of legal prediction should not be reduced to a mere beautiful-sounding phrase (which allegedly has no real value). As some scholars note, the lat-

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ter approach of undermining the benefits of historical analysis is dangerous and makes a significant contribution to the spread of legal nihilism (Machovenko, 2013, p. 11).

Historical analogies are being widely used in contemporary legal discourse on today's and future's law. One of the most prominent examples in this field is a historical concept of *ius commune* – a Latin term that refers to the common European legal culture and ideas that once existed. In recent decades this historical notion has been extensively applied in a variety of legal contexts. There were calls for the EU jurists to pay more attention to comparative studies to successfully recreate the European *ius commune* (Pennington, 1997, p. 1115). Ius Commune Research School has been established in Maastricht where researchers combine their efforts in a search for a common ground of various national legal systems in Europe². Legal scholars employ this historical concept when talking about the initiatives of harmonising Europe's private law (Caenegem, 2004, 28-30), discussing the future of legal education (Padoa-Schioppa, 2017, p. 687) or the need of closer legal and academic co-operation between the national states (Markesinis, 1994, p. 2). Such are just a few of many examples. Moreover, the historical concept of *ius commune* inspired scholars to coin even new terms. For instance, administrative law researchers talk about the development of transnational *ius commune proceduralis* (Pünder, 2013, p. 960-961), constitutional law researchers examine the concept of *ius constitutionale commune* (Soley et al., 2017). Eventually, to highlight the differences from the historical *ius commune*, terms such as “new *ius commune*” (Koopmans, 1992, p. 49), “*ius commune 2.0*” or “*ius commune 3.0*” (Giesen, 2013, p. 159-161) were introduced in the contemporary legal lexicon.

Since historical *ius commune* was associated with European legal developments, this term (in various forms) nowadays is mostly used to justify the need for further harmonisation (or even unification) processes within the European legal framework. Thus, the pre-modern *ius commune Europaeum* may become a convenient point of reference for historical analogy when considering possible future scenarios for the EU law. Moreover, the ideas of “ever closer union” are still reverberating across Europe. Few years ago, in 2017 the European Commission published its White Paper on the Future of Europe, where five possible future scenarios for EU by 2025 were indicated (White Paper on the Future..., 2017). One of the most noticeable – the fifth scenario – was called “Doing much more together” where the cooperation between all Members States goes further than ever before in all domains, without excluding the legal one. In this context it may seem tempting to portray *ius commune* as a historical precedent that can be “revived” in a strengthened, more cohesive and unified future legal framework of the EU. As if the history should repeat itself once again. However, the inaccurate application of historical analogies may pose additional problems. It could not only undermine the argumentation (for which such historical analogy was applied) but also encourage the teleological approach to history, meaning that the complexities of the past could sometimes be ignored to justify the present purpose (when history is read “backwards”).

This paper analyses the possibilities of applying a historical concept of *ius commune* in contemporary legal discourse. The purpose of this article is to estimate whether and to what extent the

² More information about the activities of Ius Commune Research School is presented in the website www.iuscommune.eu.

concept of historical *ius commune* could be used in discussions on the future development of the EU legal framework (as a new *ius commune*). For this aim the study is divided in four parts. The first part analyses preconditions for an analogy between the historical *ius commune* and EU legal framework. The second part then introduces the very notion of historical *ius commune*. Finally, the third and fourth parts examine the distinctive features of historical *ius commune* (as regards its sources, methods and interplay with other legal systems) which determine the spectrum of application of this historical concept in contemporary legal discourse on the future of EU law.

In the research analysis we present our views that the historical referral to *ius commune* (or any usage of new legal concepts based thereon) must take into account the peculiarities of this legal phenomenon and simultaneously should not be loosely applied to substantiate any harmonisation or unification efforts within the EU legal framework.

1. PRECONDITIONS FOR A HISTORICAL ANALOGY

Every analogy between two phenomena requires some common ground as a basis for comparison. Naturally, the question may first arise whether the juxtaposition of centuries-old legal phenomena of *ius commune* to the 21st century law of the EU is valid at all.

There is no doubt that the EU has created a unique legal framework that operates at the supranational level and has no analogies in the contemporary world. Some scholars highlight the EU's legal system as a striking example of the post-modern type of law that is gradually emerging and that could be described as a global, based on common human values, developed at the transnational level with its application mostly by national authorities (Machovenko, 2013, 37-38). Indeed, the challenges that the EU and its legal system have been facing lately may be described as new, unique and even worldwide. The development of new technologies vs. the need for the adequate protection of personal data; fostering the single market and economic growth vs. coping with climate change; safeguarding the human rights vs. managing the migration crisis or fighting the current coronavirus pandemic - such and many more complex questions had not been encountered by any previous legal system.

On the other hand, the issues of integrity and homogeneity remain central to the consideration of the future of EU law. Despite the fact, that the EU has created a unique *sui generis* legal order – a model of shared sovereignty where relations between the Member States and EU levels constantly develop – deep-rooted tensions between national and supranational (EU) legal systems have not vanished anywhere. Moreover, such tensions are periodically reflected in the legal institutes of the EU itself.

One of the most eloquent examples is the doctrine of supremacy of EU law, where both European Court of Justice and national courts emphasise different legal grounds for the supremacy of EU law (Craig, Búrca, 2015, p. 313-314). Issues pertaining to the boundaries of EU competence is another example. There is an ongoing problem of so called “competence creep” with regard to the “flexibility” clause (Article 352 of the Treaty on the Functioning of the European Union (TFEU)) or harmonisation clause (Article 114 of the TFEU) which also raise concerns about over extensive of EU's legislative

competence (Craig, Búrca, 2015, p. 93). Finally, tensions between national and supranational legal systems leave their traces in various political issues, such as the constant rise of nationalist rhetoric, Brexit or lasting non-compliance by some Member States with the general principles of the EU law.

However, as the abovementioned tensions in recent years have led to a rethink of the future development of the EU, one should remember that the same EU legal system has emerged and continues to function in the context of a long-standing Western legal tradition.

The latter has formed as an outcome of the Investiture Controversy – a revolutionary process of late 11th and early 12th centuries, during which secular and ecclesiastical spheres finally separated from one another throughout Catholic Europe (Berman, 1999, 121-124). As prominent legal historian Harold J. Berman has emphasised, a Western legal tradition for many centuries has been characterised by certain inherent characteristics. The most distinctive of them was named as “coexistence and competition within the same community of diverse jurisdictions and diverse legal systems” (Berman, 1999, 26). In the context of the contemporary EU legal framework, such feature strongly resonates with the aforementioned tensions between the national and supranational levels. A constant struggle between the ideals and realities (the dynamic qualities and stability) – another typical feature of Western legal tradition (Berman, 1999, 27) – also reflects the current state of affairs for the EU. As European Commission indicated in its White Paper on the Future of Europe, “change in all things may be inevitable, but what we want from our lives and the European values that we hold dear remain the same.” (White Paper on the Future..., 2017). This struggle encourages the constant process of renewal, but its mismanagement could lead to the collapse of the whole legal system.

Finally, Western legal tradition presupposes the conviction of ongoing character of law. Moreover, all changes in Western law do not occur simply random – they are results of constant (re)interpretation of the past in order to meet the needs of today and tomorrow (Berman, 1999, 25-26). Accordingly, the future development of the EU legal system should not be considered as a process that is somewhat “beyond” of or simply “unrelated” to the legal past. As the EU law develops it (either consciously or unconsciously) employ legal concepts and models that were created many years ago. Some scholars notice, that in order for the facts of legal history to speak to us today more clearly, they should be “cleaned” from the specifics of their time (e.g. from the specific historical language, conjuncture, etc.), leaving only a “pure”, essential legal concept (Machovenko, 2013, 11). It may then become clear that the old legal institute, established many centuries ago, is essentially analogous to today’s legal constructs.

Since *ius commune* also arose within the Western legal tradition (as it will be seen in the later part of this paper), the latter could serve as a common denominator for the historical analogy between this *ius commune Europaeum* and contemporary EU’s legal order. Despite the significant time-period gap between the two, both such legal phenomena faced the fundamental challenges inherent in the entire Western legal tradition. Thus, the historical analogy of centuries-old *ius commune* could lead to a fruitful consideration of the future development of the EU law.

2. THE NOTION OF THE HISTORICAL *IUS COMMUNE*

Some of the authors, who invoke the concept of *ius commune* in contemporary legal analysis, as well as other legal scholars often tend to characterise *ius commune* by assigning to it short good-sounding labels. Among some of the most common are “shared legal culture”, (Heirbaut, Storme, 2010, p. 21), “common law of continental Europe” (Mousarakis, 2015, p. 23), “common legal heritage of European countries” (Giesen, 2013, 160) or even “a law potentially common to all” (Herzog, 2018, p. 87). Without a proper context, these simplified labels may give the impression that Europe once lived under the sole legal framework and was legally united. However, that would be completely contrary to historical reality.

As a European legal phenomenon, *ius commune* emerged from the revival of legal thought in the late 11th and 12th centuries. Legal historians sometimes refer to this period as to “Renaissance of law” to highlight significant progress from the previous era (which is sometimes gloomily called as “an age without jurists”) (Bellomo, 1995, 34, 52). During this time two unique European legal systems – medieval Roman law and canon law – began to form.

Following the rediscovery of the pivotal sources of Roman law (*Corpus Iuris Civilis*) and the establishment of the first European universities (starting with the University of Bologna), Roman law – which was a “dead” legal system at that time (!) – has become an independent subject taught at universities. Almost at the same time (starting from around the middle of the 12th century when the monk named Gratian finished his *magnum opus* named in its abbreviated form as *Decretum*) the canon law of the Catholic Church has emerged as a separate legal system. Even though canon law has existed for centuries until then, the early law of the Church in the first millennia has never been systematised (Berman, 1999, p. 268-273) and differed in significant degree from what it became in 12th and later centuries (historians who specialise in the subject often contrast this *ius novum* (“the new law of the Church”) or *classical canon law* era with the *ius antiquum* (“the old law of the Church”) that preceded it) (Helmholz, 2010, p. 4-5).

Medieval Roman law and new canon law systems had some distinctive features. Unlike other medieval legal systems of that time, both of them were not “enframed” by the criteria such as territory, estate and (or) subject matter. On the contrary, Roman law and canon law were recognised as extraterritorial (in their applicability) and universal (in their scope) legal systems. They were not limited to a particular estate of the realm. Moreover, for centuries both Roman and canon law were taught in universities as separate subjects.

Probably one of the most important features that led to the formation of *ius commune* was a close interaction between the two systems from the very outset. Civil and canon lawyers studied each other’s sources and exchanged ideas between themselves, the title *Iuris utriusque doctor* (i.e. the doctor of both Roman and civil law) was being bestowed at universities by the end of 12th century. In fact, it ultimately became impossible to thoroughly understand canon law without studying Roman law and vice versa – such circumstance is well reflected in a centuries old maxim “*legista sine canonibus parum valet, canonista sine legibus nihil*” (i.e. a civil lawyer without knowledge of canon

law is worth little, a canon lawyer without knowledge of Roman law is worth nothing) (Pennington, 2017, p. 249-255).

Thus, throughout the Middle Ages this convergence of Roman and canon law gave a start to *ius commune* – a law common to all university-trained jurists (Helmholz, 2010, p. 20). Some scholars also tend to enrich the definition of *ius commune* (which was centred around roman-canon law) by adding the main elements of other legal systems that were perceived as common throughout Europe at that time. Such examples include feudal law (Bellomo, 1995, p. x) (*Libri Feudorum* – a collection of feudal customs of Lombardy – was even integrated as part of the *Corpus Iuris Civilis* (Stein, 2004, p. 61)) or royal law of secular territorial kingdoms, which was characterised everywhere by its nine distinctive features (Berman, 1999, p. 537-539). During the times of legally fragmented Europe (before the emergence of nation-states with their own national law), *ius commune* proposed some common ground for jurists: it functioned as a platform for sharing legal concepts, terminology and techniques between legal scholars and students. After all, it was thought that *ius commune Europaeum* was based directly on reason (*ratio iuris*) and thus could be applied as a criterion for judging things as right or wrong (Helmholz, 2010, p. 87).

The scale of *ius commune* could also be portrayed by determining its position with reference to other legal phenomena. As a part of larger Western legal tradition *ius commune* simultaneously was more general, greater than particular legal systems and terrestrial legal practices that existed at the same time (so-called local laws of the land). Thus, as a legal phenomenon, *ius commune* could be depicted somewhere between the whole Western legal tradition and various local legal systems of different cities, counties, duchies, principalities or kingdoms.

Ius commune dominated the European legal landscape for centuries until the slow process of separating Roman and canon law has commenced in the 16th and 17th centuries. Protestant Reformation, a rise of nation-states and the increasing focus on teaching national law gradually diminished the significance of *ius commune*. By the end of 18th century Roman law and canon law finally detached from one another (Pennington, 2017, p. 257) and *ius commune* – once presented as *ratio iuris* – had to concede its influence to new rationalism and “codistic” vision of law (Bellomo, 1995, p. 4-6, 32). As some scholars notice, in today’s Europe the same vision, which encourages “one nation, one state, one code of law” and which does not tolerate any legal fragmentation, still prevails (Caenegem, 2004 p. 22-23). These peculiarities must be borne in mind when comparing legal phenomena from different eras.

3. SOURCES AND METHODS OF *IUS COMMUNE*

Ius commune centred around the pivotal texts of Roman and canon law. For medieval Roman law it was Justinian’s codification which was put together in the middle of 6th century by the Eastern Roman emperor Justinian I (later, in 16th century such codification was named as *Corpus Iuris Civilis*). *Corpus Iuris Civilis* consisted of 4 parts: Codex (collection of imperial enactments), Digest (collection of juristic writings), Institutions (student textbook) as well as Novellae (new imperial laws enacted

after the Codex). From the beginning it was supposed to be a comprehensive codification, meaning that no law could exist outside such *corpus*. To ensure the “purity” of the original text, Justinian even prohibited any elaboration of legal commentaries (Herzog, 2018, p. 32). Thus, medieval jurists who studied Roman law, confronted with texts of *Corpus Iuris Civilis* that not only were old (and as such no longer corresponded to realities of new era) but also were “frozen in time”: once collected, adjusted and adopted in the 6th century, they were no longer substantially changed. It can be concluded, that rediscovered Roman law was in principle a “departed” legal system that took a lot of effort to revive.

Canon law, on the contrary, was a functioning legal system. It was not only applied at the canonical courts and other church institutions throughout the Catholic Europe but also constantly developed through the adoption of new papal acts. Nevertheless, the *ius novum* (new law of the church) that emerged in the 12th century, was also based on some crucial texts, such as collections of papal decretals (*litterae decretales*), i. e. papal decisions on specific practical issues, that formed new common rules of conduct (papal decretals could be considered as legal precedents (Machovenko, 2013, p. 241)). Such collections were formed during the period of the 12th – 15th centuries. Finally, in the 16th century, these canonical texts were officially sanctioned by the pope and printed under the title of *Corpus Iuris Canonici* (to distinguish it from secular *corpus* of Roman law).

It could be said, that both *Corpora Iuris* formed a “backbone” of the *ius commune* and marked a *static aspect* of its sources. The text of these secular and ecclesiastical collections and the legal provisions contained therein have not changed over time.

At the same time, *ius commune* was shaped by the *dynamic properties* of its sources. The revival of law in medieval Europe was marked by the common understanding that in order to achieve justice, there must be something outside the *lex*. Otherwise – in the words of Cicero – *summum ius, summa iniuria*, i. e. the rigorous law could only lead to rigorous injustice. Moreover, some centuries old legal texts needed additional explanations in order to bring them to the new realities. Thus, starting from the outset of the *ius commune*, the civil and canon law jurists (*legista* and *canonista*) have created numerous commentaries (jurisprudence) that allowed to interpret the letter of law in a new perspective. Most importantly, the emerging jurisprudence allowed the interaction between civil and canon law and paved the way for *ius commune* to be taught at the universities (e.g. in the middle of the 12th century Gratian, who is titled as the father of the science of canon law, wrote his famous work *Decretum* as a textbook for students (Pennington, 2014, p. 683)).

More and more synonyms for *ius commune* appeared in the national languages: learned law, droit savant, Juristenrecht or das gelehrte Recht, el derecho docto (Bellomo, 1995, p. 81), just to mention a few examples. All of the above mentioned names highlight the scientific character of this legal phenomenon, which was first associated with scientific law. Some authors even describe it as a “law of professors”, emphasizing that at least in civil-law countries the professors in the Law Faculties for centuries were the most important makers of the law (Caenegem, 2004, p. 45).

Moreover, the longevity and viability of *ius commune* were ensured by the unique interpretative methods. Although legal grammar (*Corpora Iuris*) mainly remained the same for centuries,

interpretative methods constantly differed. For example, different schools for commenting Roman law sources have emerged, developed, coexisted and overshadowed each other over time. After the rediscovery of Roman law texts, they were seen from the perspective of scholastic method, i.e. as *libri legales* par excellence, which must be interpreted as if they do not (and cannot) contain any internal contradictions. Such a view was adopted by the first legal school of glossators (end of 11th – 14th centuries) (Urbanavičiūtė, 2009, p. 110-111). The latter was gradually replaced by the new school of commentators or post-glossators (14th – 15th centuries), which also emphasised the need for practical adaptability of legal texts to changing realities (Urbanavičiūtė, 2009, p. 129). Finally, in 15th, 16th and later centuries new methodological trends emerged and European jurisprudence began to branch off from one another: e.g., humanistic jurisprudence, the “Secunda Scholastica” (Bellomo, 1995, p. 204-206, 223-226), *Usus modernus Pandectarum* and topical method used by protestant jurists (Berman, 2006, p. 100-102, 108-111) ensured that attitudes toward the *ius commune* legal texts would undergo constant review. Numerous legal commentaries, written by *ius commune* jurists, not only enabled to study them in universities all across Europe but gradually became indispensable in the practical application of both Roman and canon law. Given the importance of jurisprudence, *ius commune* can in no way be considered only from a positive legal perspective alone.

Thus, one of the most striking features of *ius commune* is that for centuries this legal phenomenon derived its authority from its own scientific character and not from political power – be it secular or ecclesiastical (Coing, 1986, p. 489). *Ius commune* jurisprudence was constantly developed, changed and rebuilt by the initiative of private jurists who believed that *ius commune* texts (mainly both *Corpora Iuris*) reflect objective reason (*ratio iuris*). This eloquent characteristic rejects any direct connections between *ius commune* and state-centred legal positivism. It also presupposes that historical analogy of *ius commune* concept cannot be invoked in order to justify the process of uniforming the Member States’ law by simply adopting new positive legal instruments – such as EU regulations, directives or court decisions – “from above”. On the other hand, a model of *ius commune* may serve as an inspiring example of how EU legal thought (with its principles, terms, concepts, and techniques) could strengthen its influence in harmonising certain areas of national legal systems by the means of promoting the development of EU legal science and common legal education based on it.

4. RELATIONSHIP BETWEEN *IUS COMMUNE* AND *IURA PROPRIA*

The idea that *ius commune* embodied a unifying legal thought throughout Europe does not mean that medieval and pre-modern Europe itself was legally unified. On the contrary, at the local (land) level Europe lived under broad variety of heterogeneous jurisdictions. Moreover, local legal systems coexisted, overlapped and competed with one another within the same territory. Such pluralistic legal constellation of different kingdoms, principalities, cities or corporations are often called by legal historians as *iura propria* (i.e. particular laws, as opposed to *ius commune*). *Iura propria* encompassed different secular legal systems (or parts thereof), such as feudal, manorial, mercantile, urban or royal law, that often varied depending on different locations (Mousarakis, 2015, p. 52-53).

At first sight the interaction between *iura propria* and *ius commune* may resemble the contemporary cohesion of national (Member States') and supranational (EU) legal systems. However, such an assessment would be too hasty.

There is no doubt, that *ius commune* was tightly related to *iura propria*. The first strongly affected the second: after all, *ius commune* was extraterritorial, universal in its scope of regulation, comprehended as more perfect and more rational than a wide variety of local legal practices. Moreover, since *ius commune* was taught at universities (unlike *ius proprium*), more and more students received knowledge of the same legal principles, terminology, institutes, and, more generally, the way of thinking about law. After graduating from universities, and returning to their homeland, these jurists worked with local laws by developing, modifying, interpreting and applying them in the light of *ius commune* concepts. And despite the fact, that *ius commune* was used in local secular courts only as a residual law, where the local laws did not provide with any specific solutions (e.g. Roman-canon legal provisions were used to fill the gaps of the particular local system (Coing, 1986, p. 489)), *ius commune* retained its influence on *iura propria*. The eloquent example of such influence is legislation of King Roger II (first part of the 12th century), ruler of Norman Kingdom of Sicily and founder of the first modern system of royal law (Berman, 1999, p. 551). King Roger's Constitutions already contained multiple conceptual and verbal borrowings from Roman law texts references to the Roman law texts and terminology – this shows that King Roger's jurists even at that early stage had access and understanding about the main Roman law texts (Pennington, 2006, p. 40). In the words of the famous Italian legal historian Manlio Bellomo, *ius commune* influences terrestrial *iura propria* just like the sun affects its planets: they orbit around the sun but at the same time the latter does not suppress their unique local environments (Belomo, 1995, p. 192-193).

However, the relationship between *ius commune* and *iura propria* was not simply one-sided. Such interaction was highly reciprocal and dialectical. First of all, apart from universities (and in part church institutions that developed and directly applied canon law), *ius commune* itself did not have any institutional framework, such as courts or legislative bodies. As mentioned above, it was driven by medieval-originated academic tradition based on private scholarly initiative and in this sense was viable and dynamic. Secondly, *ius commune* ideas spread unevenly throughout Europe due to local specificities. For example, the reception of *ius commune* in France was not uniform, since the whole country was divided into two regions: northern part was long dominated by the local customs (*pays de droit coutumier*) while the southern part was strongly influenced by written Roman law (*pays de droit écrit*) (Mousarakis, 2015, 54-55). Or unlike English law, Scots law was more open to *ius commune* and its concepts, since many Scots jurists until the 18th century acquired their legal education in Continental universities (MacQueen, 2000). Finally, *ius commune* itself was strongly affected by different local legal cultures in different territories. For instance, in the Grand Duchy of Lithuania, a highly intense legal pluralism and coexistence of a wide variety of legal systems determined a unique and creative interpretation of *ius commune* provisions: *inter alia*, it allowed to secure a democratic regime for the nobility and to ensure a highly flexible model of legal regulation (Machovenko, 2014, p. 111-112).

And even though some “version” of *ius commune* by the 16th century was present almost everywhere in Europe (Herzog, 2018, p. 88), the above mentioned different local legal panoramas meant that interpretation, applicability and even further development of *ius commune* also varied. Thus, it could be said that over time *ius commune* became fragmented. In other words, *ius commune* cannot be perceived as a centralised, seamless, consistent and monolithic legal order, that simply “covered” highly jurisdictionally fragmented pre-modern Europe over centuries. Even though *ius commune* maintained its uniting elements, it has also become pluralistic in its nature (like the *iura propria*).

In our view, the notion of *ius commune* cannot serve as a historical argument for promoting further uniformity within the EU legal framework and at the same time reducing heterogeneity of different (national) legal systems. *Ius commune* may appeal to the legal harmonisation provided that such harmonisation is limited to the level of legal ideas, principles, concepts terminology and the way of legal thinking (most importantly – legal science). At the same time, the notion of *ius commune* highlights the continuous (never-ending) dialectical interplay of unity (an ambition to create common legal culture) and diversity (legal polycentricity), where neither of these elements completely eliminates the other. Interestingly, this balance is also clearly reflected in the current official motto of the EU – *in varietate concordia* (unity in diversity). Therefore, when considering those future scenarios of the development of EU and its legal framework where legal unity is not built solely at the expense (and denial) of legal diversity, the historical concept of *ius commune* can serve as an antecedent model for the creation (or revival) of the new *ius commune*.

CONCLUSIONS

1. The common ground of the Western legal tradition provides the justification for the historical analogy between the two legal phenomena of different eras – *ius commune* and current EU legal system. Such historical juxtaposition (both direct or indirect, i.e. through new concepts and terminology constructed based on historical notion of *ius commune*) may be invoked in the contemporary legal discourse as a source of inspiration.
2. However, the distinctive features of historical *ius commune* presuppose certain limitations of the use of this concept (or its derivatives) in the contemporary discourse about the future of EU law. At least the following caveats must be heeded:
 - 2.1. *Ius commune* indicates that to achieve a viable, lasting and balanced legal framework the emphasis must be shifted from political authorities to legal science (jurisprudence) and legal education. Thus, the use of such a historical model cannot substantiate the aspirations for strengthening the EU legal framework through the instruments of positive law.
 - 2.2. *Ius commune* may only serve as a model of legal harmonisation which is limited to its extent. Far from being uniform legal phenomenon itself, *ius commune* reflects the idea of legal polycentricity (legal pluralism) which is not compatible with the legal monopoly of state (or EU) cantered legal order.

- 2.3. The notion of historical *ius commune* does not implicate the reduction (or elimination) of dialectical interaction (which at some point may turn into tensions) between supranational and local legal systems. On the contrary, the reciprocal relationship between *ius commune* and *iura propria* (local laws of the land) highlights the continuity of such interplay, where neither of these elements completely eliminates the other.
3. Even though the pre-modern concept of *ius commune* may serve as an antecedent model for the discussions on further developments of EU legal framework (or parts of it, such as legal education, private law, etc.), such historical analogy can by no means justify legal unity without diversity in Europe.

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COMBATING DISCRIMINATION THROUGH BIG DATA – FUTURE OF EQUALITY?

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Abstract. The paper aims firstly to assess the future of anti-discrimination measures and policies, above all through the lens of ethnic data utilization. The question posed is not only whether massive collection and usage of such data is viable in relation to its result, but also whether such ethnic data collection is an obligation incumbent upon state authorities, in international and European human rights protection systems in particular. On the other hand, this article aims to compare existence of such obligation with the existing standards on right to privacy and implications for this right stemming from such use of Big Data. The negative impact resulting from such obligation in this regard could weigh heavily on protection of personal data, currently one of the main concerns throughout Europe and the EU.

Keywords: discrimination, ethnicity, Big Data, data protection, positive obligations, privacy.

1. INTRODUCTION

Personal data are at the crossroads nowadays, with data protection, technological development, and right to privacy all playing an essential role in current regulation of the matter. On the other hand, broad data collection can provide society with great insight into patterns of inequalities and direct public authorities to potential root causes and solutions to such persisting schemes. The problem then is whether the stricter approach to regulation of personal data and privacy protection collection should prevail, despite the potential benefits the opposite approach could bring to tackle the endemic discrimination against vulnerable communities.

The aim of this paper is to establish whether collection of sensitive data can be established as an obligation stemming from responsibility of states to protect human rights. The potential conflict between such obligation and protection of privacy is then analysed as well. If the results cannot conclusively support the equality data collection as an obligation of states, the paper seeks to outline the dangers of such practice, and consider the necessary safeguards, should the collection and utilization of ethnic data be contemplated as a good practice.

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2. COLLECTION OF ETHNIC DATA AS AN ANTI-DISCRIMINATION POLICY

It must be recalled that ethnic data fall under the category of so called „sensitive data“. Both the European Union’s General Data Protection Regulation,³ as well as the Council of Europe’s Convention 108⁴ generally prohibit the collection of sensitive data, including data on ethnicity, race, religion, sexual orientation and similar. Some countries still rely on the assumption that EU law prevents them from collecting such data whatsoever. Both mentioned legal instruments, however, include a list of exceptions which enable collection of sensitive data under specific conditions. One of them is for example processing for reasons of substantial public interest, which could well be tackling discrimination against ethnic groups.⁵ It is therefore clear that the prohibition is not absolute and the question we focus on here is rather the existence or non-existence of an obligation to collect ethnic data and its implications or risks, not the possibility or impossibility to collect them.

To properly assess the feasibility, or indeed necessity, of collecting ethnic data for the purpose of tackling discrimination, it is necessary to assess firstly the status of such practice. The two alternatives presented, having regard to effect of such data collection, are either that states have a binding obligation to collect, assess, and utilize ethnic data for anti-discriminatory policies, or such collection is a desirable measure, absence of which however does not infringe positive obligations of state. Such positive obligation would serve to prevent and investigate offences against human rights, in this case, unlawful discrimination. Prevention and investigation would accordingly form a component part of duty to ensure human rights (Kamber, 2017, p. 47). On the other hand, if collection of such data is not considered to be binding, and it did not attain the status of legal obligation, states cannot *de lege lata* be held responsible for omissions or deficiencies in implementation of the ethnic data collection. Therefore, it is essential to assess the abovementioned status, in order to fully appreciate the implications in this area.

2.1. The obligation approach

One of the most prominent actors amongst human rights bodies across Europe, the European Committee of Social Rights (“ECSR”), also offers one of the starkest impetus for assessing collection of ethnic data as an obligation incumbent upon State Parties to the European Social Charter (“ESC”). It required states to produce a specific data on disadvantaged groups, such as children that dropped out of schools, and disaggregate the data on the basis of ethnicity.⁶ Drawing in part from lack of evidence on effectiveness of state action supported by reliable statistical data, it considered situa-

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

4 Council of Europe, Convention for the Protection of Individuals with Regard to the Automatic Processing of Individual Data, 28 January 1981, ETS 108.

5 Article 9 (2) g) of the GDPR.

6 Such specific request was made by the ECSR regarding Bulgarian school system (see ECSR, Conclusions 2005 – Bulgaria – Article 17(2), 2005/def/BGR/17/2/EN, 30 June 2005).

tion in Bulgaria to be incompatible with right to education, as guaranteed by the ESC. Therefore, the ECSR considered collection of data on basis of ethnicity not as an obligation per se, yet it viewed the practice in conjunction with social rights guaranteed by the ESC as a necessary piece of evidence to further assess anti-discrimination policies. Absent such proof, the ECSR indicated it would not shy from finding a violation of state obligations under international human rights.

Similarly, the ECSR established that combating discrimination through official collection of sensitive ethnic data is not the only measure available to states, and even if official prohibition on such data collection is in effect under national law, the states must find alternative means of assessing the extent of the problem, even if such assessment should be based only on unofficial supporting estimates.⁷ Therefore, the ECSR apparently does not merely require states to collect the relevant data to assess effectiveness of its policies. Additionally, it requires states to consider data collected by third parties, non-state bodies, and consider them at least *prima facie* reliable source of evidence to be considered in policymaking.

The rationale behind this approach seems to be one of necessity. It has been argued that such data collection must be produced to picture extent of discrimination, as well as its tackling, specifically in areas where concepts of indirect discrimination are recognized (Simon, 2007, p. 69). Indeed, even the proper implementation of decisions of most prominent human rights bodies, such as the European Court of Human Rights (“ECtHR”), may require states to collect such data, even if they were considered earlier only as *prima facie* evidence of unlawful discrimination.⁸ However, the finding of such discrimination by the ECtHR is subject to execution under supervision of CoE’s Committee of Ministers (“CM”), under Art. 46(2) of the European Convention on Human Rights (“ECHR”). In the course of supervision in executing a judgment in which discrimination has been already found, the CM strongly urges states condemned to provide additional statistics, over a longer period of time, so that it can properly assess overrepresentation of members belonging to vulnerable communities that have been found to be subjected to discrimination.⁹

The approach adopted in the CM therefore unequivocally requires states to collect pertinent data on ethnicity once it supervises their execution of ECtHR judgments. This obligation therefore crystallizes before the CM only at a later stage of the proceedings, it does not however conclusively contradict the findings of ECSR that such obligation exists even before the discriminatory pattern is established by any ruling. As mentioned by Simon (2007, p. 69), the purpose of collecting these data on ethnicity is, *inter alia*, also to facilitate possible legal proceedings. Therefore, to allow aggrieved parties to lodge their claims, such data need to be available even without intervention by the CM. Accordingly, the view adopted by the ECSR has merit, and the teleological approach indicates collection of data must be approached as a means to prevent and suppress discrimination, not remedy it.

7 See in this regard ECSR, Conclusions XVIII-1 – Czech Republic – Article 1(1), XVIII-1/def/CZE/1/1/EN, 30 October 2006; ECSR, ERRC v. Greece, Decision on the merits, Collective Complaint No. 15/2003, 8 December 2004, para. 28.

8 The appreciation of available data is present e. g. in ECtHR, D. H. and others v. the Czech Republic, judgment [GC], application no. 57325/00, 13 November 2007, para. 191; ECtHR, Horváth and Kiss v. Hungary, judgment, application no. 11146/11, 29 January 2013, para. 128.

9 CM, Notes on the agenda, 1348th meeting, CM/Notes/1348/H46-11, 6 June 2019.

2.2. The good practice approach

This approach is similar to the first approach to data collection as an obligation, in that it views collecting ethnic data as a practice enabling states to properly understand the depths of discriminatory schemes within its territory, and assess effectiveness of policies adopted to eliminate it. Similar recommendation was made e. g. by Parliamentary Assembly of Council of Europe (“PACE”), or European Commission against Racism and Intolerance (“ECRI”), which outlined several areas where data collection is to be utilized, and reiterated necessity of sufficient safeguards against abuse.¹⁰

Similarly, the collection of disaggregated data is viewed as essential in pursuit of sustainable development, such as 2030 Sustainable Development Goals (“2030 SDGs”), which require accessible, timely and reliable disaggregated data to monitor progress.¹¹ In fact, states pledged to provide such data already by 2020,¹² and should therefore follow the proposed course of action. Although the 2030 SDGs were adopted by the United Nations General Assembly (“UNGA”) and establish therefore only recommendations for states (Öberg, 2006, p. 883), such approach establishes a good practice recognized in the international community.

Under the EU law, status of obligation to collect ethnic data as an anti-discrimination measure is ambiguous. On the one hand, it is argued that collection and analysis of such data is “[t]he most effective and economically viable way to assessing the impact and enforcement of anti-discrimination law and policy” (Farkas, 2017, p. 45). The research indicates that such data collection is at least implied in EU anti-discrimination law and the Racial Equality Directive (Farkas, 2017, p. 46). On the other hand, some voices call for active enforcement of this obligation, even calling for the European Commission to launch infringement proceedings under Art. 258 of the Treaty on the Functioning of the EU (“TFEU”) against those states that argue data protection legislation does not permit data collection on the basis of racial and ethnic origin.¹³

This however does little to resolve the dilemma whether EU law follows the principle establishing sensitive data collection as obligation, or it is merely one of possible ways to implement Racial Equality Directive. Arguing that it is an infringement of EU law to misrepresent data protection legislation as prohibiting such data collection does little to clarify whether the actual omission to collect the data violates EU law of itself, or it only arises to the level of infringement under Art. 258 of the TFEU once such omission is complemented by wilful misrepresentation of EU law. In the absence of authori-

10 For example, PACE asked inclusion of Roma and Travelers to be appropriately designed and its impact effectively monitored, in conformity with data protection requirements (PACE, Promoting the Inclusion of Roma and Travellers, Resolution 2153 (2017), 27 January 2017; ECRI, General Policy Recommendation No. 13 on Combating Anti-Gypsyism and Discrimination against Roma, 24 June 2011. See below for a more detailed discussion of the required safeguards.

11 This is outlined in para. 48 of Resolution of the United Nations General Assembly no. A/RES/70/1, adopted on 25 September 2015.

12 Goal 17.18 of the 2030 SDGs.

13 Such approach was proposed by Philip Alston, acting United Nations Human Rights Council Special Rapporteur on extreme poverty and human rights, End-of-mission statement on Romania, 11 November 2015, available online, URL: <https://www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid=16737&langid=e%252523sthash.42v5aef.dpuf> (last accessed 20.5.2020).

tative interpretation, it must be concluded that it yet remains to be seen which of the two outlined approaches shall prevail within the EU. Nevertheless, even if approach takes the view that a binding obligation is indeed established, it remains necessary to analyse the impact on protection of privacy and implications such obligation may bear on the communities concerned.

3. THE POTENTIAL FOR ABUSE AND PROTECTION AFFORDED

Despite the call of prominent human rights bodies including CM, ECSR, ECRI, and NGOs such as ERRC, for collecting ethnic data, many countries still remain reluctant to do so. What are their arguments and grounds for not complying with those recommendations? Are they relevant? In our opinion, the counter-voices shall never be ignored as any large-scale measures usually do carry side-effects and tend to impact the whole or big parts of the population. This part of the paper will therefore elaborate on the potential risks connected with collection of ethnic data on a massive scale. These include potential threats to privacy, data protection and last but not least, risk of abuse of information concerning ethnicity either by private actors or by the states themselves.

3.1. Privacy at risk?

Those calling for collection of ethnic data, as well as those opposing it, refer to potential human rights abuse. The main reason not to collect ethnic data put forward by the opposing states or scholars is usually to prevent violation of the right to privacy and the right to data protection.

Both rights are at stake when it comes to determining people's membership in certain groups or categories according to criteria such as race or ethnicity. These are contested concepts and often it is not distinguished between them at all. In the 19th century, they were understood as biological categories determining individuals' abilities and intelligence. This understanding often served as justification of domination, exploitation and even extermination. Nowadays, these theories are not supported anymore by the majority of scientists and they are considered to be a social construct (Ringelheim, 2006, p. 32-33), rather than an objective fact.¹⁴ Understanding ethnicity as a social construct means that its definition and categories will depend on the society itself. In practice, this leads to use of different classification criteria in different countries. The various methods include self-identification (a method used for census)¹⁵ and classification by a third party according to objective criteria (usually a state on the basis of language, parents' origin place of birth or similar) or even subjective criteria and feelings (classification by members of a community) as is the case of

¹⁴ Unfortunately, even this perception has not totally eliminated inequality and exclusion. Even today, discrimination takes either a hidden, indirect form (where data and technology are called for help) or explicit and direct discrimination. The latter just culminated in the United States after the police killed George Floyd and is strongly protested against at the time of writing this article.

¹⁵ The level of individual autonomy will depend on whether there is a pre-established list of ethnic groups which can be ticked or a space for writing down the perceived ethnicity freely. Usually there is already a list of options (such data is easier to analyse), however, in a few countries such as Slovakia, Romania or Estonia, only one ethnic origin can be selected in the census (see Farkas, 2017, p. 16).

Indians in the United States who are members of tribes recognized under federal jurisdiction (Ford, 1994, p. 1263).

The question is whether classification of individuals as members of certain groups by third parties is in compliance with the right to privacy and the right to data protection. For example, if someone is identified as Roma based on certain criteria but does not feel like Roma at all, is it alright to treat him as a member of this ethnic group? Being a member of a protected group may influence the way majority sees them and those memberships may carry also burdens, such as discrimination, which we focus on in this article.

Self-determination, individual identity and autonomy are notions which are considered to be at the heart of the right to privacy. They are all interconnected and aim to provide an individual with a power to define their own concept of existence.¹⁶ The ECtHR emphasizes these principles in its established case-law under the Article 8 (Right to privacy) of the ECHR. The notion of personal autonomy is considered to be “an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.”¹⁷

Individual autonomy is also an important principle of the right to data protection. Right to data protection was introduced later than the right to privacy and even though they are not the same, they are closely connected. While the European Union introduced the right to data protection in the Charter of Fundamental Rights of the European Union as a separate right in a separate article, the ECtHR considers it to fall under the Article 8 of the ECHR and the right to private and family life. Their scope differs and the ECtHR’s approach suggests that the scope of the right to data protection is narrower and could be even treated as a subcategory of the right to privacy. Notwithstanding the exact scope and relationship of those rights, it is important for this paper that both of them are considered to be at danger by collecting ethnic data.

The close connection of the right to privacy and data protection is manifested especially by the common value which they protect and that is the privacy¹⁸ understood as people’s privilege to influence the way they are seen and to be able to protect their personal life. In order to achieve this in the era of data and technology boom, they need to possess certain control when it comes to information concerning them. This is understood as an (individual) informational self-determination. This concept of “informationelle Selbstbestimmung” was developed by the German Federal Constitutional Court in its landmark Census case¹⁹. Relying on the principle of human dignity and free development of personality, this court stressed out the importance of individual autonomy which must be safeguarded by the states through enabling individuals to participate in the processing of their data. Despite not being an absolute right, every individual shall be protected against any disproportionate or unreasonable interference with their right to informational self-determination.

16 US Supreme Court, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

17 ECtHR, *Christine Goodwin v. the United Kingdom*, judgment, application no. 28957/95), 11 July 2002.

18 Recital 4 of the GDPR.

19 German Federal Constitutional Court, judgment, 15 December 1983, 1 BvR 209, 269, 362, 420, 440, 484/83.

If we look at the methods of determining people's membership in ethnic groups, the self-identification method seems to be the one which is in compliance with these values. On the other hand, classification by third parties does appear to be a rather disproportionate interference with the self-determination principle and individual autonomy as the pillars of both, the right to privacy as well as the right to data protection. ECRI, for example, reiterates in its recommendation documents that classification shall be, if no justification exists to the contrary, always based on voluntary self-identification.²⁰ Article 3 of the CoE's Framework Convention for the Protection of National Minorities²¹ stipulates that every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such. It follows that the states cannot determine the membership of individuals in any national minority and it would be contrary to the principle of self-determination, if ethnicity was not to be determined by the individuals themselves.

Even though many countries adopted the self-identification approach when collecting data on race or ethnicity in order to comply with privacy standards (Farkas, 2017, p. 4), this approach is not flawless. Paradoxically – data adopted on such basis may be less workable than other. There are three practical reasons therefor. Firstly, if individuals can identify their ethnicity freely, there can be basically an indefinite number of possibilities and it could be difficult to provide useful statistics (Skerry, 2000, p. 49-55) However, the compromise would be to provide a list of options which would include also a possibility to indicate "Other" if nothing in the list fits. Secondly, if the declaration of ethnicity is not compulsory ("voluntary self-identification" as suggested by ECRI), then the results of data analysis may not be in line with the reality, should people be reluctant to provide this information. This could concern especially groups which are stigmatized in the society (Rallu et al., 2004, p. 505). Again, the reasons for not revealing information, such as ethnicity, is connected with its true sensitivity, especially when there is a fear of abuse of such data. The third reason, why self-identification may challenge usefulness of such data is similar to the previous one. It is less probable, but not excluded, that people may indicate ethnicity which does not correspond with the real life conditions. Let us take an example of someone who lives in a Roma community, speaks the language, his or her parents are Roma, but indicates in the official census that he or she belongs to some other ethnic group or does not belong to any ethnic group. If this person does not get admitted to a school due to an indirectly discriminating measure (against Roma) then this would not be reflected in the statistics. If many people would act in the same way, then the statistics, which could have discovered discrimination, would be spoilt. Similarly, as in the previous case, the motivation not to indicate Roma ethnicity could be fear of abuse or fear of being labelled as Roma and face potential direct discrimination which stems from either individual or general experience.

20 See ECRI, General Recommendation VIII, 1990, A/45/18; ECRI, General Policy Recommendation No. 13 on Combating Anti-Gypsyism and Discrimination against Roma, 24 June 2011

21 Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157.

3.2. The “Equality paradox” and other concerns

There are two hypothetical scenarios which may happen if a state starts collecting equality data. If any of those occurs, we can speak of an “equality paradox”:

- i) People may not be willing to provide information on their ethnicity (due to any of the above mentioned reasons, such as lack of trust and fear) and/or
- ii) The provided ethnic data will be misused and will negatively affect members of the ethnic groups (e.g. will be used to directly discriminate against someone).

Equality paradox is a term which may be used to name an event, when an effort to combat discrimination leads to discrimination or at least to fear of discrimination and further stigmatization. There is one factor which always needs to be taken into account and that is the “human factor”. Prejudice, dishonesty, misuse, incorrect interpretation, misunderstanding or even malice has always been present in the human race and it will probably always be. A state collects data, but it is people who work with them. And it is not just the human factor in a true sense that could play a role. Algorithms, which are often involved in a decision-making process, could produce biased results, too. Discrimination can occur in their design as well as implementation if the input information is biased.

There is another paradox concerning fighting discrimination through big data. One of the main safeguards of data protection is anonymization. It is a technique which removes personal identifiers from the data. Anonymized data are considered to be safe data and therefore they are not covered by the GDPR as they do not relate to an identified or identifiable natural person.²² Anonymization could thus present a practical realization of another important equality data safeguard recommended by ECRI, namely confidentiality.²³ However, if a person is not identifiable, it does not mean he or she is not reachable (Barocas & Nissenbaum, 2014, p. 45). With big data, it is possible to infer certain information from a combination of other information. Sensitive data could be often inferred from other, non-sensitive data. The more data is available, the easier it is to link them together. It is even possible to infer sensitive data, such as ethnicity or religion from anonymous data. One real example comes from the US. The New York taxi commission released all taxi trip data, such as location coordinates or number of passengers. Although taxi licenses and medallion numbers had been anonymized, it was still possible to infer personally identifiable information by linking other data. As a result, it was possible (with high accuracy) to infer whether a driver was a Muslim or not, e.g. by finding out if he made a break during time of regular prayers (Kammourieh et al., 2017, p. 61). Anonymization is considered to be a failure also due to successful re-identification attacks. Theoretical and practical studies,²⁴ as well as real cases show that it is possible to re-identify data subjects by using various de-anonymization methods. One of the well known examples is the Netflix Prize Data Study. The Netflix company wanted to improve its recommendation algorithm and declare a public competi-

22 Recital 26 of the GDPR.

23 ECRI, General Policy Recommendation No. 13 on Combating Anti-Gypsyism and Discrimination against Roma, 24 June 2011.

24 See e.g. Wondracek, 2010.

tion with a reward for the best team. For this purpose, it published millions of records on how its users previously rated movies. University researchers found out that potential attackers would be able to identify the concrete users with a very little information about them available. Specifically, if an attacker knew when approximately a user rated six movies, he would be able to disclose his or her identity in 99% of the cases (Ohm, 2010, pp. 1720-1721). It should be also emphasized that this study is from 2006 and since then, there has been a huge progress in technology.

When it comes to misuse of data, the risk lies also with the states themselves who do or will collect ethnic data. History shows that states are the biggest human rights abusers. During the World War II, population registers played a key role in persecuting Jews and Roma people (Seltzer, 1998, pp. 511-552). Even nowadays, there are concerning incidents and treatment of minorities such as reported acts of police brutality against ethnic communities²⁵ or pervasive use of technology which includes methods such as profiling (e.g. criminal profiling).²⁶ The result of such profiling may be that a certain ethnic group is more prone to commit crime in general (or to commit specific crimes) than other group (Gross & Livingston, 2002, p. 1415). Ethnic profiling becomes an incisive technique of control and can be perceived as humiliating by members of a targeted group because they have been scrutinized on a basis of their identity and not on the basis of their individual behaviour (Goldini, 2013, p. 24). It is difficult to foresee or even take precautions against misuse of data by the sovereign states and the strongest safeguard is always the international community itself.

Fortunately, most of the times the ethnic data and population registers are not misused and, as a reliable source of data, serve a good purpose in many fields (Goldini, 2013, p. 30). The states however need to solve many problems connected with collection and meaningful use of equality data. In order for a state to develop a workable monitoring system, data need to be collected not only at the national level, but also on the lower, institutional level. While data collection on the national level provides for information on the percentage of minorities in the general population (obtained for example through population registers), data provided by relevant public or private entities (such as employers or schools) allow for comparing the proportion of the minorities' members present in those entities in order to identify potential underrepresentation, which may indicate discrimination (Ringelheim, 2007, pp. 19-20). What information do the states need from the institutions? Is it safe to store all the collected information about individuals, including the ethnic data, in one place? Should there be more state bodies controlling the whole process or some independent third parties? Does the state have financial sources for such a big scale monitoring? Is the monitoring going to be transparent and would the transparency undermine confidentiality of the data? Is it possible that the routine classifying according to ethnicity will cause even stronger polarisation in the society? These and many more questions will need to be taken into account by the states.

25 Note e.g. ECtHR, *Linguar v. Romania*, judgment, application no. 48474/14, 16 April 2019.

26 Council of Europe Commissioner for Human Rights, *Ethnic Profiling: A persisting practice in Europe*, 9 May 2019, available online, URL: <https://www.coe.int/en/web/commissioner/-/ethnic-profiling-a-persisting-practice-in-europe> (last accessed 25.6.2020).

4. CONCLUSION

Discrimination is still prevalent in our society. In order to fight against it, the most prominent human rights bodies such as ECSR or ECRI call for collection and evaluation of relevant data, including sensitive data. The so called “equality data” should provide useful statistics and enable identification of potential underrepresentation and other forms of discrimination against members of protected groups. Even though ECSR does not consider such collection to be an obligation *per se*, the absence of equality data may lead to violation of international human rights norms. However, such clear approach is not shared by all relevant international bodies, and it is often ambiguous if the states are actually obliged to collect ethnic data or it is only recommended as a good practice.

Despite the obvious benefits that ethnic data may bring to combat indirect discrimination of minorities, there are still concerns of their impact on human rights. The potential for abuse arising from processing of sensitive data has been recognized even by bodies arguing such data collection is mandatory. This article discussed the impact equality data may have on the right to privacy and the right to data protection. Two main problems were identified. The first problem is connected to the notions of individual autonomy and self-determination, which are at the core of both rights and which could be undermined if people’s ethnicity would be defined by a third party based on objective criteria. A feasible solution seems to be to apply the method of voluntary self-identification. However, this method has some practical flaws which may spoil the statistics. Secondly, there is a risk of misuse of ethnic data, either by those who have access to the data (especially the state itself), or those who manage to gain access to the data (hacking, re-identification attacks).

Even if the risks do not materialize, people may still fear to provide information on their ethnicity, especially members of ethnic groups which are stigmatized in the society. The term “equality paradox” was introduced to name the situations when the effort of combating discrimination actually leads to discrimination or violation of other human rights. The same applies to cases when there is only a fear of discrimination or persecution, which may have a very bad impact on the ethnic groups, as well as on the whole society due to risk of increased polarisation.

To conclude, it is, without a doubt, important to take positive action and combat discrimination using the potential of the new technologies. Nevertheless, careful scrutiny when it comes to collecting ethnic data, which has already culminated into one of the biggest massacres in history, shall never be underestimated. Any potential risks of harm, even the less serious ones, shall always be carefully analysed. This article highlighted some of them and recommends considering them *a priori* if any ethnic data collection is initiated.

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CAPTAIN AMERICA PROTECTING DIGITAL RIGHTS: “OLD SCHOOL” NATIONAL LAW vs. EMERGING INTERNET COMPLEXITIES IN AZERBAIJAN

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Abstract. It is indicated in the article that emerging information technologies influences human rights norms in any democratic society. Especially, the Internet has changed the traditional approach to methods of ensuring human rights, while adding new challenges at the same time, such as regulating cybersecurity, digital data protection, digital freedom of information, privacy, discrimination in the Internet, etc. The traditional flow of information through newspapers, radio and television is currently combined with new means of exchanging digital information, mobile and satellite communications, the Internet and other technological advances. Of course, these innovations make governments to review traditional human rights legislation to stay fit and updated. Yet, some fundamental norms of national human rights legislation should remain unchangeable. Simply put, it looks like Captain America from the movie “Avengers” – a very old guy who develops his abilities to defeat dangers, but also preserves “old school” strength and leadership skills. In the light of these issues, the present article is devoted to the analysis of the conceptual foundations of national legislation in Azerbaijan on the protection of digital rights in the Internet. The article emphasizes that digital rights themselves are one of the factors demonstrating the strong impact of communication technologies on human rights, especially information rights and freedom of expression.

Keywords: information rights, freedom of expression, freedom of information, digital human rights, cybersecurity, data protection, information security, Internet, privacy.

INTRODUCTORY NOTES

Rapid development of information society makes it necessary to improve social and cultural life of country, and to regulate new social relations. In this regard, special attention of legislators is attracted by the Internet and relevant digital human rights, prevention of electronic threats and cybersecurity, which play a crucial role in the management of the information society. Taking into account the emerging interrelation between the Internet and human rights, international and national legislator pay more and more attention to appropriate digital human rights regulations. The primary concern is that traditional human rights standards still comply with the digital use of rights and freedoms, but requires new analysis. Nowadays, we may observe digital rights as the new reflection of traditional landscape, especially freedom of expression and information. Probably all of universal and regional human rights mechanisms acknowledge digital freedom of expression and information as the cornerstone for information society building. Yet, international bodies keep silence in determining the content and scope of digital human rights. In its own turn, different approaches to the range of digital

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rights and their protection can be seen in national laws of various countries. We may classify groups of digital human rights based on criteria such as online user rights, digital security, data privacy, etc. But it is not sufficient to formulate ideal system of national digital regulation. In general, digital human rights as well as cybersecurity are the integral part of universal human rights system and there are several reasons to prove their importance. Digital rights as part of information rights are crucial for the enjoyment and realization of different groups of collective and individual rights. Thus, right to participate in political affairs and public life, right to education, other social-cultural rights along with right to life and fair trial are among the most interrelated human rights and freedoms for what information society is a new landscape to benefit from. International regulation of human rights also requires the full conditions for the use of human rights by special people groups such as children, youth, elderly people, migrants, refugees with no any grounds of discrimination. Bearing this in mind, digital rights contribute to strengthening political and social balance of the society taking it to the new step of development of information and knowledge society. On the other hand digital human rights could be derived from international obligations of state and non-state actors. In this regard, respecting, protecting and ensuring human rights entails direct reference to share and dissemination of information about human rights. This consideration raises public awareness about whole human rights system as well as supports human rights education what is impossible without digital human rights.

Azerbaijan, as a member of the CIS, has achieved significant results in the implementation of the requirements of international law, the elimination of cyber threats and the prevention of cybercrime. However, study on digital scale of human rights, information society and digital security is not so popular in Azerbaijan. One may prove that there is a strong need to study digital information security and human rights in civil and criminal law areas, human rights in Internet, digital media freedom, national and international regulations on social media, information rights in business and so on. Besides, although the 2030 Agenda of Sustainable Development together with relevant instruments requires strong engagement in digital human rights regulations and Azerbaijan conducts innovative reforms in this sphere, significant concepts and national laws have not been integrated fully in the country. Since the first years of its independence the Republic of Azerbaijan has made effective efforts on adapting national human rights standards and regulations to European human rights features. In this regard, the constitutionalization of information and media rights along with special provisions of domestic law on information society and information security create new opportunities for reviewing digital human rights standards in the country. Still, particular attention should be paid to problematic aspects in the national legislation, namely gaps of human rights norms related to digital human rights sphere and cybersecurity. There is a significant lack of legal studies and legislative research dedicated to cybersecurity concepts and discussion of relevant legislation. In this regard, the present paper seeks to get appropriate answers to the perspectives of digital rights, information rights and cybersecurity in particular, through the analysis of new legislative reforms and revision of conceptual fundamentals. It should be mentioned that, as it is the case of other post-Soviet countries, digital rights, right to cybersecurity and information society norms have not been the central objects of academic discussions and debates in Azerbaijan for a long time. That is the reason why one cannot

find enough scientific research and academic background in national literature on digital human rights. Of course, international organizations and bodies that Azerbaijan is in strong cooperation with, commends human rights innovations and implementation of international responsibilities by the national government. Nevertheless, the ground to discuss argumentative sides of national human rights legislation as well as legal attempts towards well-developed management of cybersecurity, preventing cyber attack and ensuring digital information space still keep importance what is the main purpose of the present article. Of course, it should be highlighted importantly that the present work does not follow the purpose to criticize negatively all of the legislative activity in the country forgetting the achievements in the field of Internet freedom, digital media rights along with national plans and strategy on information society as such kind of approach may be out of objectivity. In this view, the current work is a summary of governmental work on information legislation and national study of information law with all its negatives and highlighted achievements. Bearing this in mind, one can suppose the current academic work as a suggestion of citizens which is intended to improve the digital rights legislation and theoretical framework too. Without doubts, the principle of reality and objectiveness of academic work put a responsibility on us to overview all of the critical points of fulfilment of international human rights obligations by Azerbaijan that is only aimed to support and contribute of raising the effectiveness. Thus, critique for further development in economic, social, political and cultural fields obliges us to objectively analyze national law on information rights, freedom of press, national subjects of human rights protection and defence. Therefore, we hope and believe that our respected and honored reader would find the full knowledge on digital rights trends and the will of Azerbaijani government to create all of democratic conditions for our nation to live in peace and security that stress respect for human rights. In order to respond to these aims and prospects of the introduced topic, the article is divided to some conceptual parts. It starts with the brief introduction to the topic that is followed by some theoretical implications reflected in domestic legislation on digital human rights and information society. The main part of the article contains analysis of Constitution and important national laws. The final part of article is dedicated to the summaries and recommendations for the improvements of national framework on digital information rights and cybersecurity in Azerbaijan.

DIGITAL CHALLENGES AT A GLANCE

Of course, emerging Information-Communication Technologies (ICT) and computer devices, the creation of the Internet network provide great support for our use of human rights both in public and private life. The technologies make the development and renewal of human rights more efficiently. Nevertheless, it would be far from the truth to say that new technologies and the cyberspace have only positive impact on human rights. Problems introduced by digital human rights regulations such as the legal contradiction, theoretical and practical conflicts of technology in the traditional human rights system, and infinite debates are also enough. The problems created by ICT and computer technology in the field of human rights can be classified differently. In general, ICT creates difficulties for the

full enjoyment of certain rights such the “green rights”, i.e. environmental rights. New technologies cause more damage to nature and many global environmental problems. Besides, the adverse effects of new technologies could be noticed on the health and well-being of the people. These problems include excessive radiation, psychological dependence on digital games, programs, mobile phones and so on. ICT and computer network have a negative impact on social rights and labor rights too. By the fact that companies and employers want to apply new technologies, saving their workforce has led to problems with unemployment and social security. Additionally, modern technological discoveries and their application have created threats to living in peace, in a friendly atmosphere and in full security conditions. Application of new types of weapons, digital manipulation, dissemination of various non-realistic information, etc. make our daily lives hazardous. Still, in our opinion, the most significant challenge facing the ICT is the lack of digital environment management, the protection of digital human rights in virtual space, and the lack of direct application practice. The key issues facing the use of digital rights in digital area are influenced by concrete factors. Digital environment, especially Internet technologies, creates new types of conflict between human rights. For example, freedom of information and freedom of expression implies the free circulation of different types of books, articles, publications. In contrast, digital copyright recognizes the author’s exclusive rights over scientific creativity patterns and determines that there must not be free circulation without author’s permission. Hence, copyright infringement within the digital environment creates a conflict of interest. On the other hand, various kinds of electronic transactions carried out in digital market with regard to artistic works and creative pieces usually contradicts the requirements of intellectual property rights. In another area, information related to daily life of popular people is often shared on the social media. But the extent to which the sharing of this information is appropriate to the privacy and family life of the person is questionable.

Digital environment creates opportunities for new types of human rights threats and offenses. That’s why, digital rights are sometimes misused. Communication programs or social media disseminate sensitive information, transmit inaccurate information, and slander or insulting expressions. At the same time, there is a strong need for certain restrictive measures and penalties that still does not give the necessary result. On the other hand, the digital environment implies the use of rights in a safe and secure environment. However, digital theft, damaging information environments, application of certain malicious programs, electronic property infringement, etc. make it impossible. Digital environment regulation also raises the question of “Is there a sharp difference and separation between digital environment and real-life, between electronic legal regulation and traditional legal norms?” In our opinion, we must answer this question negatively. Because the digital environment and the real life are different from the first sight, but the rights regulated in both spheres are inter-related. This relationship is also linked to violations of law in both spheres. For example, it may be that the basis of any human rights violation is real, but the result causes threat in digital space. On the contrary, it is also possible that in the event of a digital violation damage occurs to the real person. For example, virtual identity contains personal information about concrete real human being. When this information is stolen on the Internet, our rights as a real person are violated. The loss of the

software in our e-sale process should, in fact, be regarded as damaging property rights in real life. The application of penalties and punishments also demonstrate the relationship between electronic and real-world. Thus, administrative, criminal and civil penalties mean physical and electronic constraints. For example, if a group of individuals infringe digital safety, present slanderous or insulting comments in digital space, they will be administratively punished. At the same time, digital profiles, technical equipment and malicious software programs used by them also will be confiscated.

It is a fact that when you say “digital rights” or “cyberspace”, people assume social media such as the Internet and virtual reality programs – “Facebook”, “Instagram”, etc. However, digital human rights should not be limited only to the Internet and social media, but to the broader sense of digital technology means. Originally, ensuring, protecting and regulating human rights is primarily the responsibility of the state, the key bearer of international human rights duties. Yet, in our view, the huge burden of electronic technology and the regulation of digital environment cannot be put only on the state mechanisms. This may, in any event, lead to the failure of the offender to bear responsibility for the digital offense. Along with state mechanisms, the problem of digital environments involves non-state actors – Internet service providers, digital companies, various internet programs and social media owners, and international organizations, legal entities and individuals dealing with information transmission in digital media, and ultimately, all active and passive participants in the digital environment. All legal entities and individuals who are engaged in entrepreneurial activity for other purposes are referred to as “internet intermediaries”. The responsibility of legal entities and individuals acting as Internet intermediaries in digital environment is a matter of concern and sensitivity. It is almost impossible to get a global agreement on the solution of this problem. Thus, responsibility for non-state subjects in the digital environment makes it more secure to use ICT and computer technology. On the other hand, excessively severe penalties and punishments may be viewed as pressure on information rights and freedom of expression in the digital environment. Therefore, while state bodies commit to the regulation of digital rights, they must take account of all the specific conditions in each national legal system and society. One may consider that main difficulties arising with the legal regulation of digital information rights and information society occurs because we are trying to put e-relations or virtual sphere to written law norms. The cyberspace is interpreted in the light of the Internet and simply said, while discussing the security and safety of cyberspace, vast majority of people limit themselves only to the notion of Internet. Notion of cybersecurity involves human rights-based approach to the Internet law. Most of prominent experts also proclaim respect to human rights and freedoms as one of the general principles that should be followed by the Internet regulations (Benedek et al., 2008, p. 47–48). However, in its real face cyberspace is not only about the Internet and it covers other digital information technologies, information databases and collections. Still, it should be confirmed that it is exactly the Internet that covers all of problems and difficulties about the cyberspace. Therefore, while analyzing the cyberspace and cybersecurity, we may centralize our attention on the security of the Internet and Internet users. The Internet and the problems that it encounters constitute a research object for many sciences and subjects of technical and applied character. We believe that it is expedient to clarify the technical,

historical problems facing the digital rights and, as a matter of fact, to clarify human rights and legal regulation issues on the Internet.

PECULARITIES IN NATIONAL LAW

Definition of the Internet in Azerbaijan varies as there are plenty of different approaches to the matter from social, informational, political and even ethic angles. The professionals from applied sciences usually try to conceptualize cybernetics and determine technical benefits of the Internet (Consalvo, Ess, 2011, p. 18–19). But one may agree that technological analysis of the Internet must not suffice legislators to establish proper regulations of digital human rights. As human rights are basically the result of social activities, we need to clarify the effects and negatives of the Internet in social terms. Therefore, most of internet researchers study social impact of the Internet as well as online behavior (Amichai-Hamburger, 2013, p. 120–121). We can say that in almost all international and regional documents, the Internet is interpreted from a social perspective. Hence, in order to make an objective appreciation, we should take into account both the technological and social features of the Internet.

Primary gaps exist in national human rights legislation of Azerbaijan in defining digital legal terms. For example, there is not any legal explanation or understanding of cyberspace, Internet, information, etc. in national normative legal acts. One cannot find even the definition of “digital human rights” in national law of Azerbaijan. Thus, we have to refer to the Constitution (1995) in order to find appropriate application of general norms in emerging digital area. Starting from the preamble, the constitutional provisions centralize main attention on international duties and obligations of government in the field of human rights. As so, key concepts for the realization of the digital rights in domestic law are included to the Preamble of the Constitution stressing out fundamental intentions of the Constitutions as an expression of the will of the nation while remaining faithful to universal human values. The general obligation of government to protect human rights and freedoms are proclaimed in Article 12. This idea contains criterias for obligations as the highest priority object of the state including their implementation in accordance with international treaties. Moreover, Chapter III introduces the inviolable and inalienable nature of human rights and freedoms in the territory of Azerbaijan and this declaration can be addressed to digital human rights and freedoms too. More precisely, Article 47 covers essential features of freedom of information and media rights. It establishes everyone’s freedom of thought and speech. Going further, Article 50 guarantees free flow of information through any means along with prohibiting unlawful limitation such as censorship regarding media and press. The term “any means” allow us to consider digital flow of information and digital data security as elements of media and press too. Article 51 establishes grounds for creative activity that promulgates freedom of new forms and means of information. Articles 54 and 55 introduce the right of people to participate in political, cultural life of the nation and well as in governing procedure. Article 60 guarantees legal protection of human rights, especially freedom of information. Going further, Article 71 introduces grounds for restrictions of rights at wartime, time

of emergency and mobilization in conformity with the international obligations of Azerbaijan. The Constitution stresses out the principle of publicity for the sessions of Parliament in Article 88 as well as establishes the obligation to publish judgements of the Supreme Court, the Constitutional Court in Articles 130–131 and also the normative legal acts defined in Article 149.

Yet, some critical points put doubts and questions to the maintenance of human rights by the Constitution. We consider that an individual and special provision should be added to the Constitution of Azerbaijan in order to modificate it in compliance with international standards on digital rights and cybersecurity. Of course, general provisions of ensuring any means of information freedom entails digital human rights reference too. But, at least, special commentary or explanatory memorandum should be established to apply these general norms precisely. Moreover, in our view, it would better to clarify the degree of restrictions upon digital human rights, the procedural side of restriction mechanisms, levels of restrictions during time of emergency and wartime and their interrelation with international obligations in the Constitution. However, Article 71 of the Constitution stipulates that restrictions to the human rights could be based on the other provisions and laws of Azerbaijan. We consider that this provision does not strictly stop the misuse of restrictions in digital sphere either. In our view, a full list of restrictions included to the Constitution as well as narrow interpretation of restrictions will be able to solve the problem.

It is without doubts that if the technical support of the Internet is low, it will have an impact on the social aspect too. It is impossible to speak about the normal communication between people and safe use of digital rights in conditions of poor technical level of cybersecurity. Therefore, it is necessary to clarify the principles on which the Internet is created and how the cybersecurity matters are included to these principles. While the guidelines for the Internet regulation are determined for its management, it essentially serves to protect basic human rights and freedoms in the network, including the effectiveness of information security (Weber, Grosz, 2010, p. 207–214). In this regard, the Criminal Code of Azerbaijan dedicates special chapter to information crimes and violations in cyberspace (1999, Chapter 30). After the deep analysis of this chapter, we may conclude that direct norm of punishment for Internet providers and host organizations does not exist. The non-existence of such norms gives freedom to Internet space more than enough what would result in raising number of digital crimes. Therefore, establishing precise penalty or punishment for crimes indirectly supported by Internet providers and IT companies is essential for national legal environment. It would also be commendable to control and manage cyberspace by digital regulations means. Thus, law experts strongly recommend Internet providers to create appropriate filters and restrict illegal circulation of information by digital means (Bayuk, 2012, p. 93–96). It should be noted that the legal sources of information law in Azerbaijan also contains special acts that are the regulations in the field of media, education, culture and etc. As the national legislator considers international agreements of Azerbaijan as an integral part of domestic law, one can include international agreements of Azerbaijan to the system on national framework for information law. For our discussion it means that the relevant international standards on information rights are defined as the part of domestic law in Azerbaijan. In this regard, the implementation of international human rights standards has affected

the Criminal Code too. Articles 155 and 156 of the Code establish criminal penalty for the disclosure of private conversation by phone, email and private life secrets. Respectfully, Article 163 aims to prevent the infringement to the professional journalistic activity by refusing to give or disseminate information or using force. Article 202–203 of the Code contains provisions prohibiting disclosure of commercial and state secrets. The Code of Administrative Offences also includes specific sanctions for violations of legislation on access to information. Taking into account the international recommendations, Articles 39–50 of the Code provide penalties on propaganda materials during election periods, prohibits dissemination of false information about deputies, establishes punishments for the media rights violations during elections, for violation of use of state information system and information collections. Articles 181–192 create a special chapter devoted to the violations against right to information and information protection.

Additionally, cybersecurity preserves its importance for safe digital economy and civil law arrangements too. However, national civil laws in Azerbaijan do not contain any direct provisions regarding digital use of human rights or security matters in cyberspace. This problem involves serious challenges and difficulties as regulation of digital economy and digital market is left by the civil law legislation as an open place for any kind of cyber attacks and illegal use of digital information. Nowadays, the information market develops more rapidly and in some countries labor resources concentrates more in the information sphere than in traditional fields of economy. It is widely recognized that information technologies aiming producing, analysing and importing information change the nature of industrial society towards information society. The establishment of internal information sphere in the country is one of the first conditions for the foundation of information society. However, information society needs international integration and globalization of relevant legal, social and political standards too. These trends add importance to the improvement and innovation of the whole information infrastructure including the digital rights, cybersecurity matters and digital security of Internet users. On the other hand, global information society supports the recognition of digital democratic values and contributes respect to persons and their participation in digital information relations by enjoyment of their personal and collective digital rights and freedoms. For the proper analysis and regulation of information society, we need to know main elements of information relations, at first. It is easy to define that information relations are the relations appearing while receiving, imparting and disseminating information as well as producing and expressing it. The participants of information relations are usually considered legal subjects as they have individual rights and obligations and bear responsibility. Thus, in order to be a subject of information relations you need to participate in the mentioned procedures as well as own rights and relevant duties. Indeed, right to information in its traditional meaning, also other elements of information rights contains the fundamental rights and duties for the subjects of information relations. Therefore, the international and national law on human rights in the information sphere usually addresses information rights and information society together.

In the light of international trends, the lack of national legislation of Azerbaijan on digital human rights and cybersecurity puts some crucial questions for discussion. Of course, the foundation and

development of information society in the Republic of Azerbaijan should be characterized by high rates and the activities in these spheres are realizing incrementally on successful practice. However, when it comes to digital law regulations and cyber law, there is a high demand to set up new binding rule (or normative legal act) that would be ground for the development of soft law principles. In this regard new presidential decrees create priorities for future reforms of digital legal framework (Decree of the President of the Republic of Azerbaijan, 2012). In international human rights law the regulation of information rights and freedoms contains various approaches to the issue. The traditional International Bill of Human Rights together with regional conventions, namely European Convention on Human Rights, Charter of Fundamental Rights, Inter-American Convention on Human Rights introduce the roots and starting points of digital rights. However, specific laws follow these documents that include more clear and precise requirements for the implementation of information rights on domestic level. The same approach could be referred to national information regulations as some of them are the basis for the specific other rules.

Summarizing all the discussed and introduced points, one can say that domestic law of Azerbaijan needs a marked shift in ensuring digital human rights. Significant attention must be paid to cybersecurity as individual human right as well as pre-condition for other human rights that are the building blocks of information law. Taking into account the new forms of cyber attacks and security threats, national norms regulating the Internet need to be improved. From a theoretical point of view, a new right-based approach to cybersecurity should be developed on the basis of international case law and human rights documentary what is supported by European scientists too (Wagner et al., 2019, p. 90). Besides, cybersecurity involves obligations not only for states, but also for Internet providers, civil society organizations and other participants of digital information circulation. Of course, some legislative problems should be resolved in the shortest possible time regarding the content and main elements of information freedoms and digital rights. It should not be forgotten that current protection of cyberspace is considered as one of the basic elements of national security. Therefore, use of Internet, high level of data protection along with digital information rights lay in the cornerstone of social, economic and cultural development. But, in general, our respectful reader can highly appreciate the integration way chosen by the young Republic of Azerbaijan towards common universal values. In this view, one can notice that legal thinking of society and legal ethics lay down on the fundamentals of globalization and integration. It is the same in terms of preventing cyber threats and ensuring safety of digital human rights too.

ARTIFICIAL INTELLIGENCE (AI) WAITING FOR TO BE REGULATED

Artificial Intelligence is a notion of ICT development and not all people understands its meaning. Simply put, there is no special legal norms regulating AI in Azerbaijan. However, experts consider AI is an element of our current daily life being used in all aspects of digital activities (Thomas, 2019, p. 3). At first glance, AI has nothing to do with rights and freedoms, but we need further detailed analysis. AI has a strong impact and AI technologies are entering to each and every corner of our

private as well as public life. Serious challenges for human rights are caused by AI and the difficulty of solving these problems is very high. AI-rooted problems in human rights law are colorful and the very root of this process is lack of knowledge about AI activities. Current AI controls ethics in the Internet, arranges our communication, manages statistics and prepare drafts, legal documents for future improvements. The complex character of AI starts from its definition, since there is no a unified explanation of AI in literature what can define AI from not-AI software (Partridge, 2013, p. 33). One thing is absolutely clear that nowadays it is absolutely impossible to ensure cybersecurity, human rights protection and safety without AI conduct. But AI is not always in friendly attitude to human rights. AI software is capable to violate or restrict our rights and freedoms what may result responsibility. I think that is the very root of the AI-based legal questions on whether or not AI can be fully regulated by traditional law. As it is mentioned before, AI can positively support and infringe human rights at the same time period. Taking into account the last trends in AI application to public and private spheres, I can introduce positive aspects of AI as following:

- Ability to predict: AI technologies have ability to see and inform about future danger. It can be dangers of earthquake or possible illness.
- Ability to sustain the development: Despite all the negative issues, AI is a tool for sustainable development. Thus, it can be examined as a crucial element of UN 2030 Agenda for Sustainable Development.
- Ability to adapt: AI is very sensitive to changes. It makes people's life easier. AI is very helpful in terms of economy, ethics, communication, etc.
- Ability to assist: AI is one of the useful instruments of us in resolving global problems such as climate change or environmental pollution. In this regard, AI function of data mining is of high importance.

AI contains some threats for human rights too. Social media users usually face the problem of AI while building new communication or creating new profiles. The issue is that probably all organizers of digital media platforms arrange software tools to prevent insult, humiliation or hate speech. Sometimes, ordinary words used in usual discussions with no insult purpose are recognized as negative and deleted or banned by the software tools. It means that algorithms that these software programs consist of, have not been set up well and were wrongfully developed. Whatever the reason be, the final act of AI software results violation of freedom of information. The same negative process can be suffered while forming new profile or web-page too. A wrongful design of software may recognize new page as spam or risk to digital safety. The outcome will be stopping or banning new page and violation of right to property in cyberspace. These are some simple examples of how AI can work in negative manner and harm human rights enjoyment. There are some other types of possible AI dangers to human rights what can be grouped as:

- Discrimination;
- Disinformation or false information;
- Violation of privacy;
- Harm to cybersecurity, etc.

In general, to systemize the AI impact on human rights, we need to build up some steps for effective academic research. These steps can be as following:

- Understanding the design and structure of machines or AI software;
- Creating models of AI activities in digital environment;
- Detecting primary challenges and finding solutions.

Understanding of AI technology is relatively difficult for experts from social sciences. In any case, one needs to take into account that AI technologies are built on the basis of simple codes and algorithms (Tyugu, 2007, p. 3). Algorithms and codes are the basic elements of digital language in the Internet space. And it is the same for all kinds of digital programs and software. All of actions of us in digital environments such as sending messages, sharing files, etc. are realized via digital commands. The programs and software understand these commands (orders) in the form of codes and algorithms. In general, algorithms build strategies and directions for codes as well as ensure the stable movements of codes. When it comes to AI, designers strive to establish algorithms and codes as free and independent mechanisms what can make decisions, learn and develop. Simply put, algorithms in AI try to increase their abilities, create new algorithms or change existing ones. Making robots or terminators are based on the same algorithmic strategies. It looks like a human brain able to be sensitive to innovations and changes. However, not every one of algorithmic system means a robot or a digital brain. There can be some simple AI technologies such as programs detecting hate-speech or illegal interference to content. The tough issue is how to differentiate simple programs from well-developed AI technologies. In this respect, legal literature examines different understandings and instruments to classify AI technologies. While building a classification, one should not forget that not all AI are fully independent mechanisms and not all of them are robots. On the other hand, AI is not only a mechanism, it is also a process. That's why AI-based classification is hard, but very important. Classification of AI technologies can be based on different criteria but they comprise of the same lifecycle phases (OECD, 2019, p. 26, 28). In any case, Data Mining and deep learning methods lay down in the cornerstone of AI. AI uses different methodology to collect information and study it. It means that AI should work in close collaboration with information security institutions. In terms of human rights, AI as well as data mining procedure touches privacy rights, cybersecurity and freedom of information. Yet, these connections are sometimes very painful, because data mining machines may easily violate human rights. For example, AI programs can prepare very private but new information via summarizing ordinary data about a person's daily routine, behavior, habits, skin color, etc. Of course, that person will not be very happy to see his / her name and all characteristics of his / her body in AI-based statistics. It would mean violation of private life. Therefore, AI and ML have lot in common with privacy rights. I may claim that sometimes they can impact human rights in such a level that new rights could emerge. E.g., if a person is not glad about AI technology collecting personal information, he / she may ask to stop it. Or he / she can ask for non-disclosure of that information. In order to do this, the person should be aware about the information collection. Simply put, before information collection and analysis, persons must be informed about possible AI activities, in order

to comply with requirements of access to information. However, it is not always possible or allowed. Governments may arrange AI to collect information about dangerous diseases or criminal acts in one region without informing people living there. Thus, previous character of inviolability in terms of privacy can be put under danger what should be properly regulated by national law.

CONCLUDING REMARKS

In order to change the legal behavior and legal ethics understanding of societies, some countries prefer to us the “shock therapy”, namely immediate reforms and changes in social, political, cultural life of the country that is usually followed by social conflicts or aggressive public debates. In terms of digital law and digital human rights regulations, it is quite impossible to renew the whole picture in one or two years by hard laws and punishment. Because, Internet ethics, digital legal behaviour and better use of information rights need to be assisted by relevant social, economic reforms in regular and very soft manner. Moreover, it is not only the situation in Azerbaijan, but also in most of European countries that drawing precise scale of legal liability and obligations upon digital information users, Internet providers and digital persons is still an ongoing question that has not been able to find suitable solution (Riordan, 2016, p. 5–8). On the other hand, most of countries follow the way of so-called “soft method” that contains cultural, political and social steps to be done regularly during a certain period of time supported by interrelated educational, scientific and other more technological methods. The second way of changes and integration has been chosen by the government of Azerbaijan that demonstrates evidences in our daily life and activity. Bearing in mind the above-mentioned facts, it is easy for reader to realize the role of human rights education with newly proposed theoretical-ideological grounds in the country. Indeed, human rights education addressing digital rights and standards on information society are the serious attempts to review traditional way of thinking in Azerbaijan that could be detailed by some possible recommendations:

- a) Information society is conditioned by public awareness in digital human rights, especially information rights and standards on cybersecurity. Unfortunately, the real facts of Azerbaijan do not let us to prove high level of public knowledge in the sphere of digital information rights and cyberlaw. Although, the national legislation entails enough freedom and chances, public participation in decision-making procedure over information society issues, cybersecurity and digital information regulations in particular, is quite low. In this respect, I suppose the improvement of NGOs activities, organization of special legal courses as well as legal education in digital human rights, cyberlaw and cybersecurity would be beneficial for the solution to problems.
- b) Despite of the fact that relevant national laws and regulations establish all the possible rights and freedoms for press, still, popular digital newspapers, blogs and magazines misuse their position of public watchdog for financial or other business purposes. It's especially essential while sharing unrealistic information without checking the sources or disseminating false information. I consider that the main reasons of the noted problem are rooted in unsatisfactory level of legal understanding and legal behavior by some press offices. In this respect, special code of ethics and soft law norms should be developed.

- c) Of course, national courts of Azerbaijan representing judicial branch of the government implement and apply international human rights standards in the decision-making procedure. Yet, in terms of cybersecurity norms and digital rights, the courts seem to be reluctant to refer to the case law of the European Court of Human Rights and the EU Court of Justice. I suppose proper commentary and interpretation made by the Supreme Court or the Constitutional Court of Azerbaijan would be suitable for solutions to problems. Simply put, a well-developed case law on ensuring digital human rights and application of cybersecurity norms are of paramount importance for information society.
- d) Among others, the dangers caused by Artificial Intelligence contain more negative “gifts” for national law of former Soviet countries including Azerbaijan. AI is a very concept both for academic and legislator in the country. However, the government in Azerbaijan has already established digital programs and items for digital government, electronic citizenship and e-democracy. Thus, AI technologies are also applied in these frameworks what should be studied and regulated in a more detailed manner.

While analyzing the introduced problems and concerns, one can prove that digital illiteracy and lack of relevant highly-educated professionals is a special topic of individual discussion. Indeed, new generations of young lawyers with European or, at least, foreign education, change usual landscape of human rights experts in Azerbaijan. Regarding to this, both private and state educational institutions of Azerbaijan are widely engaged in human rights education and training of open-minded lawyers especially in the fields of information law, Internet law and information rights. On one hand, the Human Rights Institute of the National Academy of Sciences together with the Ombudsman Office strongly commits in human rights research and academic work. Moreover, law schools and faculties in the country have already included relevant subjects on information society, information law and information rights to their official study programs. A very good example in this field is demonstrated by the Law Faculty of Baku State University that introduces several master and PhD programmes in the specializations of human rights, information law, intellectual property law, medical law and etc. Courses as international human rights law, information law, human rights, intellectual property law and bioethics are among the compulsory subjects aiming to deepen knowledge of students in mentioned areas.

It is also remarkable that the government of Azerbaijan demonstrates its strong attitude to its obligations to respect, protect and fulfil human rights as well as digital rights and freedoms in the Internet. New ways of human rights education, research, academic study are noted in advisory regulations addressed to public bodies. With this aim, relevant orders and decrees of the government contain new chances and possibilities of the implementation of information rights and freedoms in a safer national cyberspace. These examples and facts themselves, together with state strategies and policy activities in the field of digital rights give us hope to effectively comply with relevant international obligations in close cooperation with democratic civil society institutions.

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BREXIT: LESSONS LEARNED, STATUS QUO AND WAY AHEAD

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Abstract. On 23 June 2016 almost 17.5 million citizens of the United Kingdom voted to leave the European Union. The UK government invoked the relevant Article 50 of the Treaty on European Union on 29 March 2017. As authors of the said provision have admitted, it was never to be used (Fabbrini, 2017). And yet here we all are/were (depending on when you are reading it), anno domini 2020, witnessing an unprecedented event of a sovereign state “taking back control” i.e. leaving in great pain the most powerful economic and political union of sovereign states ever established, taking advantage of the procedure that had initially not only been de iure impossible, but also seemed inconceivable in and of itself.

According to Theresa May, “Brexit means Brexit”. Little help did that tautological definition bring anyone. And yet, after Brexit came, the transition period started. Written in the middle of the said transition period, the purpose of this paper is to briefly treat on Brexit in general and the near-term future related thereto. In addition, also considering the timing of this paper, i.e. May / June 2020, a particular regard will be paid to the more distant future ahead of us – certain matters pertaining to international commercial dispute resolution after Brexit.

Considering the overall uncertainty surrounding Brexit that we find ourselves in, the relevance of the topic discussed in the paper is unquestionable. In addition, relevance-wise, one could consider whether the process we are all witnessing could result in encouraging or, rather, discouraging any similar future initiatives. In this context, a broader perspective will be utilised to come to certain indicative conclusions as to whether Brexit can result in good know-how practices learned for future similar initiatives, or rather serve as an example for “never again”.

Key words: Brexit, transition period, withdrawal agreement, resurrection of BITs.

INTRODUCTION

The timing of writing of this paper was somewhat unfortunate in that the author was left with little choice but to be guessing what was about to happen during the next month or so after the paper’s submission. Employing one’s best predicting capacities, it was our initial contention that what was going to happen was the United Kingdom’s application for the extension of the post-Brexit transition period beyond 2020. Such conclusion was drawn on the basis of a few years’ analysis and observation of events surrounding the painful and lengthy Brexit Withdrawal Agreement and post-Brexit trade and partnership relationship negotiations.

Even though the said application for extension at the moment of writing was indeed not lodged and the UK officially rejected any perspective of extending the transition period, currently we couldn’t definitely exclude the possibility of some sort of ad hoc extension thereof in fact taking place some time later in the year.

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In the first part of the paper general context of where we find ourselves, at the moment of writing, in the whole Brexit process, will be briefly outlined. Second part will consider the expected likelihood of the extension of the transition period and the formal lack of the extension. In this context it will be briefly explained why some sort of an extension of the Brexit transition period was in our understanding the most likely outcome in the current scenario, even if it were to happen by way of a “deal”. In the third part of the paper few ideas in relation to international commercial litigation as affected by Brexit will be outlined. Final part will provide conclusions.

1. BREXIT STATUS QUO AND NEGOTIATIONS IN EARLY 2020

One could argue that no good Brexit-related paper can do without at least a brief reminder of the facts - past and present. In addition to what was said in the introduction, we note that this paper is written basically 4 years after the Brexit referendum took place and more than 3 years after the United Kingdom invoked Article 50 of the Treaty on European Union. Sparing the readers the details of negotiations of the withdrawal agreement, and extensions thereof, once it entered into effect early 2020, Brexit took place, United Kingdom left the European Union and the transition period, which is in play at the moment of writing, began.

Whilst during this transition period, the parties – i.e. the United Kingdom and the European Union must agree on their future relationship, be it a “deep and special partnership”, as so desired by the United Kingdom, which would resemble the so called “soft” Brexit, or something in the sort of World Trade Organisation-like tariffs and quotas regime, a “no-deal” or “hard” Brexit, this period too does have a deadline of its own. Deadline of the transition period is 31 December 2020.

With the negotiations proper having started in early March 2020 with a round in Brussels, considering the ambitious plan of the United Kingdom, it seemed unlikely the desired result could be achieved within the established timeline. Whatever the negotiators agree to, would still have to be approved by the European Parliament in its penultimate session of the year. Members of the European Parliament would gather for it in the final week of November 2020, according to its work schedule. The final session comes in mid-December, so it would be too late to confirm any deal reached with the UK. The agreement between the European Union and the United Kingdom must therefore be reached no later than some time in the middle of November (Blitz et al., 2020). That would mean negotiations would have to take place unimaginably fast compared to how the process progressed during the four years since the referendum. Otherwise, the EU officials admitted to the press that they currently expected more work to be put in on behalf of the United Kingdom.

Coronavirus pandemic in the first half of 2020 hit both the Brexit negotiations themselves as well as the individuals participating therein, hard. In particular, not only did the UK’s Prime Minister Boris Johnson test positive for the virus, so did the EU senior negotiator. By April 2020 instead of having two rounds of negotiations behind them, negotiating parties had merely exchanged position papers and conducted informal teleconferences. By the moment of writing, little further progress have been achieved after now four rounds (Brunsdén, Hughes, 2020).

Accordingly, with social distancing and restrictions on travelling (with initial bans thereon having been only recently lifted) being the new normal these days, the talks between the European Union and the United Kingdom have been conducted by way of teleconferencing, rather than physical meetings. The struggles of negotiating remotely during the coronavirus pandemic crisis have so far been apparent with both sides agreeing little progress has been achieved to clarify the differences between the parties. Even more so, as previously to an extent mentioned, the EU chief negotiators criticized UK for failing to engage properly with the negotiations, a claim that was obviously denied by the UK (Brunsden, Kahn, 2020). Accordingly, quite a few of the stakeholders involved were coming to the conclusion that the extension of the transition period seemed inevitable.

2. NO EXPECTED FORMAL EXTENSION OF THE TRANSITION PERIOD

With little progress in the future partnership negotiations having been achieved so far, the overall expectation was that in most likelihood, United Kingdom would have eventually been forced to apply for the extension of the transition period. Deadline for such formal application was 30 June 2020. At the time of writing Boris Johnson denied any intention to apply for the extension. And other UK officials have been reported saying, among other things, that in the whole Brexit process “whenever a deadline was extended, the light at the end of the tunnel was replaced by more tunnel” and that the financial contribution Britain would have to make upon a prolongation could be spent on NHS – the UK public healthcare system, vital in the fight against the pandemic (Parker, Brunsden, 2020). However, the largest political group of the European Parliament, as well as stakeholders in the United Kingdom were conscious that the request for extension seemed eventually to be inevitable and it was then only a matter of time when UK itself would have recognised that.

Initially, to satisfy the hard-Brexiteers Boris Johnson achieved to have the deadline of negotiations written into English law by way of a Parliament act. Now, accordingly, for the extension to take place, the British Parliament would have to revoke or amend its relevant act (MacShane, 2020).

And yet, against pretty much all the odds, United Kingdom rejected the opportunity to extend the post-Brexit transition period on 12 June 2020.

Finally, on the basis of what we have seen so far, a third option is not impossible. With quite a few unorthodox moves from either side having taken place in the Brexit story already, we cannot definitely exclude, that the transition period could in fact be *quasi*-extended in some other way, than by the simple relevant request from the United Kingdom within the required timeline, as we now know has not happened. In this context, the transition period may formally end, but the deal reached in the meantime could only allow for additional time to agree on a more longer-term deal. This sort of a solution has already been mentioned in the media and has been referred to as “skinny” deal.

3. INTERNATIONAL COMMERCIAL LITIGATION AFTER BREXIT

After the transition period ends, whenever that is and however it happens, the relationship between the European Union and the United Kingdom will of course continue. It will continue in

many different areas and the level of cooperation will most probably vary depending on the area in question. Accordingly, it will be a trade relationship somewhere in between the World Trade Organisation tariffs and quotas regime and the deep and special partnership so desired by the United Kingdom – i.e. something much closer to a full and proper EU membership.

In this context, this part of the paper shall briefly examine few specific initiatives in relation to how the adverse effect of Brexit in international commercial litigation area is likely to be mitigated. That is not to say that these ideas exhaust the topic, far from it, there are many different matters in the area of international commercial litigation affected by Brexit and the ones discussed here are only few quite straightforward and relatively simple fixes.

During the transition period, the UK government will seek to agree on new reciprocal arrangements with the EU to, among other things, facilitate civil justice cooperation. All things considered there is no definite certainty that such arrangements will be found within the relatively short time-frame. Therefore we will be looking at the UK's intent to accede to (i) the Lugano Convention 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and (ii) the 2005 Hague Choice of Court Convention. These sensible accessions are likely at least to an extent to mitigate the cut off effects of Brexit. Finally, we will have a look at the potential of bringing back into relevance some of the long forgotten bilateral investment treaties.

3.1. Lugano Convention

Regardless of whether the transition period were extended, little time would have been left to agree on sensible reciprocal civil justice cooperation instruments. Accordingly, the UK's intent to accede to the Lugano Convention 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as also urged by the England and Wales Bar Council, seems understandable. This convention, as many of the readers will be aware, determines which countries' courts have jurisdiction over cross-border civil and commercial disputes. The convention, which has been signed by the EU and several other European countries, also ensures that the resulting judgments can be enforced abroad. Readers will be spared a broader and lengthier discussion of how London's courts are considered as favoured global dispute resolution forum for commercial disputes, also since, it is our current contention, this is by now somewhat self-evident. Legal practitioners in the UK have admitted that lack of access to the Lugano Convention may encourage businesses to litigate elsewhere, since it would materially increase the costs and timeframes of recognition and enforcement of judgments of UK courts in the EU member states (Brunsden, Kahn, 2020).

Despite formally exiting the EU on 31 January 2020, the UK was at the moment of writing covered by the Lugano Convention through its standstill withdrawal agreement with Brussels. But once the transition period ends on 31 December 2020, unless extended, lawyers warn English court judgments risk losing their force in EU jurisdictions, a situation that could leave the UK reliant on other, more fragmented international arrangements. Those would primarily be the bilateral judicial cooperation agreements, of which there are only 6 with the European Union member states.

In order to become an independent contracting party to the Lugano Convention, in April 2020 the United Kingdom lodged their relevant accession request with the competent authority – Swiss Federal Department of Foreign Affairs. At the moment of writing the procedure of accession was yet to take place. Following Article 72(3) of the Lugano Convention, application requests are normally dealt with within around a year. The UK's accession is subject to acceptance of all current members of the convention, that is, the EU itself, Switzerland, Norway and Iceland. The three said individual parties to the convention have expressed their support to UK's accession even before the formal request has been lodged. Meanwhile, the European Union has expressed its view that the request will be analysed in detail, rather than granted almost automatically. In addition, reporters were saying the European Commission had indicated that there were clear grounds to reject the application. One of such clear arguments is the fact that all the current signatories are part of the single market and the UK is somewhat determined to leave it after the transition period expires (Brunsden et al., 2020). Nevertheless, United Kingdom hopes to be accepted in time for when the post-Brexit transition period expires (at the end of 2020), unless somehow extended, but it cannot join the convention without the approval of the Council of the European Union so there may be some convincing to be done.

Whilst accession to the Lugano Convention will solve quite a few problems, it is recognised, that some matters will still remain. In this context it is relevant to point out that the text of the convention is not as up to date as that of the Brussels I Regulation Recast. Accordingly, the House of Lords European Union Committee has admitted, that the Lugano Convention is “not as good as” the Brussels I Regulation Recast. The procedure of enforcement provided for by the convention is not as streamlined as the one established in the aforementioned regulation. The convention still requires litigants seeking enforcement of a judgement to initiate proceedings in the receiving country, while enforcement under the said regulation is quasi-automatic. Otherwise, authors consider the convention's enforcement of choice of court agreements not as effective. The convention does not prevent the parties from starting proceedings in a different court than the one that had been agreed to, for the mere purpose of frustrating a choice of court (Sacco, 2019).

The other issue is that the UK courts would in theory have to abide by the European Court of Justice's jurisprudence, when it comes to interpreting the convention, since this is the court ensuring its uniform application, as provided for by Article 1(2) of Protocol No. 2 to the convention. However, in this context, the United Kingdom has already expressed its view that it will reject post-Brexit CJEU jurisdiction overall. Whilst there is currently little doubt that it will eventually happen, it remains to be seen how and when will the United Kingdom actually accede to the Lugano Convention.

3.2. Hague Convention

In addition to aiming at accession to the aforementioned Lugano Convention, United Kingdom will also seek to accede to the 2005 Hague Choice of Court Convention by way of another sensible step in pursuit to resolve problems of international commercial litigation arising because of Brexit. Like with the Lugano Convention, this convention applied to the UK when it was part of the European Union

and so continues during the transition period. UK formally applied to accede to the Hague Choice of Court Convention on 2 January 2019, but has subsequently withdrawn the request. Interestingly enough, it happened the same day that Brexit happened – 31 January 2020.

In the context of the potential UK's accession to the Hague Choice of Court Convention, it is worth mentioning that the Private International Law (Implementation of Agreements) Bill had been introduced in the UK Parliament on 27 February 2020. This bill, if enacted into law will implement the Hague Choice of Court Convention as well as the 1996 Hague Convention on Parental Responsibility and Child Protection and the 2007 Hague Maintenance Convention in the United Kingdom's domestic law at the end of the transition period. At the moment of writing of this paper, the said bill awaited announcement of the report stage in the House of Lords – lower house of the UK Parliament.

Here, as well as in relation to the Lugano Convention, UK's activities in relation to withdrawal of accession documents can be qualified as negotiations' tactics or technicalities, but also as an optimistic commitment to agree on cooperation rules on matters relating to judgements and jurisdiction even more constructive than the two mentioned conventions.

3.3. Resurrection of certain BITs

United Kingdom recognises that foreign direct investments are expected to be a material source of boost for the economy following Brexit. Accordingly, it is likely that the established bilateral foreign direct investment treaties may become relevant (Sattorova, 2017). For lack of better word, we call this process a resurrection, since back into spotlight would come international agreements, the existence of which has in most likelihood been long forgotten. These are the bilateral foreign direct investment treaties between the United Kingdom and European Union member states having been entered into usually before one of their parties became an EU member state. For example, the 1993 Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Lithuania for the promotion and protection of investments.

These agreements interest us specifically from the perspective of investment arbitration, since it is by that manner that most, if not all, disputes arising from foreign direct investments are being resolved. There is a general consensus that international commercial arbitration as such shall not be materially affected by Brexit, also since it is in many aspects governed by the 1958 New York Convention, which is not a European Union law instrument. However, when it comes to investment arbitration, one cannot be that certain, thus the prospect of some of the bilateral investment treaties coming back to relevance is to be considered.

In early March 2018, the European Court of Justice delivered a ruling in the by now famous Achmea case. In this judgment the European Court of Justice in particular held that:

“Articles 267 and 344 [...] of the Treaty on the Functioning of the European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States, [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept...”

Thus, the ECJ took the view that the European Union law should take precedence over the bilateral investment treaties concluded between member states (intra-EU BITs). Accordingly, in the consequent declaration of 5 January 2019 the governments of the EU member states have, among other things, recognized the said precedence of the Union law over the intra-EU BITs, as well as expressed their intention to terminate the intra-EU BITs. Finally, on 5 May 2020, the 23 participating EU member states signed the relevant agreement to terminate the intra-EU BITs between them. Consequently, around 200 intra-EU BITs have been terminated and many investment arbitrations affected. Overall this initiative dates back to 2015, when the European Commission asked member states to terminate intra-EU BITs since investments in Central and Eastern Europe did not merit privileged treatment anymore and the non-discriminatory measures of EU law itself should suffice. Authors voice the view that during the last decade courts in Central and Eastern Europe have grown stronger in their independence and professionalism to be able to resolve investment disputes themselves, without resorting to arbitration (Martinkutė, 2020). Interestingly enough, Austria, Ireland, Finland and Sweden all decided not to join the said agreement on termination of the intra-EU BITs.

In the context of the aforementioned documents from 2019 and 2020, it is relevant to note that whilst the United Kingdom was party to the 2019 declaration, it did not participate in the 2020 agreement. The particular reason for that being that the UK, as already mentioned, left the European Union earlier in 2020. Based on the sources available and examined, one is safe to say that UK maintained its position as expressed in the 2019 declaration – intra-EU BITs had to be terminated. However, now that the United Kingdom is not itself an EU member state, the bilateral investment treaties it has with current EU member states, since Brexit happened, are not anymore intra-EU BITs. These treaties have been signed long time ago, before the counterparties, usually coming from Central and Eastern Europe, joined the EU, as, for example, the already mentioned one with Lithuania. In this context, we find authors who argue that investors may be interested in structuring their investments in a way that would allow them to benefit from the protection granted by such treaties (Taton, Croisant, 2020). This would be somewhat in line with the at times present but not so pleasant nor ethical international investment law practice of treaty-shopping. On the other hand, by means of private enforcement, the United Kingdom may find itself at the receiving end and become a respondent as recipient of investments. This is something it managed to previously avoid by claiming precedence of the European Union law (Sattorova, 2017).

In conclusion, bilateral investment treaties that United Kingdom had signed with EU member states, will once again become relevant. And it remains to be seen, first, to what extent private parties will use the aforementioned treaties in enforcing their rights, and second, whether United Kingdom will not in fact suffer from this development landing at the receiving end – i.e. as the recipient of the investments to be protected by the treaties.

CONCLUSIONS

Since the Brexit referendum, we have seen many twists and turns in the story. Based on these experiences, it would not come as a surprise if the United Kingdom and the European Union, also

considering the impact of coronavirus in the first half of 2020, agreed in the last minute on some sort of an informal extension of the transition period. This might even happen by way of an agreement to find an agreement in the future.

When considering how negative effects of Brexit on international commercial litigation could be mitigated, the United Kingdom should make the sensible move and accede to the 2007 Lugano Convention and 2005 Hague Choice of Court Convention. It is our contention, that whatever the negotiators agree for the post-transition period, it will not be as favourable and straightforward a regime as that provided for by the two aforementioned conventions.

The investment treaties concluded by the United Kingdom with countries in Central and Eastern Europe will be remembered and may be used by investors to enforce their rights in the relevant investment arbitrations. It cannot be excluded, that United Kingdom may eventually find itself on the receiving end of these arbitrations, as recipient of investments.

By way of an ultimate concluding remark, not only of the paper, but of the whole Brexit process as witnessed and examined in depth so far, one can be allowed expressing a broader and more general idea. 4 years after the Brexit referendum one can still only guess, whether it will be a hard-Brexit or a soft-Brexit. Accordingly, one can be excused for being a euro-optimist, but with what we have seen so far, it is safe to say it is impossible for us to see any other EU member state venturing into the exit from the EU exercise in the foreseeable future. Whilst this obviously merits a study of its own, it is our current contention that although coronavirus hit EU unity hard, great pain of Brexit will serve as lesson and the EU member states will rather continue to stick together. Especially since, as we have already seen in the past, the European Union is known to have underperformed at length without actually breaking up into pieces.

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SUSTAINABILITY: EXTENDING THE VIRTUE OF PERSONAL DATA LEGISLATION TO GOODS AND PRODUCTS

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Abstract. This contribution addresses the notion of sustainability and its modalities as an element of public order enabling the European Union to regain its technological sovereignty through the emergence of a possible new environmental measure. Constraining the manufacturers, this measure is compliant with the free markets requirements. Only the intellectual property rights may constitute a real obstacle to its application.

Keywords: sovereignty, European markets, environment, intellectual property.

INTRODUCTION

New technologies have never been so present in our lives, infusing the traditional areas of state sovereignty like defence, security, space (Cilingiroglu, 1975, p. 65). Technological dependence was not yet a subject for most Member States of the European Union (*hereinafter – E.U.*), its institutions and its bodies. The free common market was the goal. The origin of technologies was deemed as a negotiating parameter. Purchases were made anywhere to satisfy immediate needs according to the criterion of the most attractive price. Influenced by geopolitical relationships between States, its traditional acquisition process led to monopolistic practices schemed by suppliers of technical knowledge and modern production processes (Drub and Verna, 1994, p. 82). The example of GAFAM illustrates the dominant position of entities holding personal data and technical knowledge (Barraud, 2019, p. 52). The European desire to claim its technological sovereignty shows a considerable shift in policy. Marked by a consensual imprint, this protectionist trend can be interpreted as the Member States' desire not to completely rely on external resources for strategic areas.

However, the massive use of complex technologies makes this desire for autonomy difficult to achieve. In addition to the political and economic consequences, technological dependence generates collateral damage. The orientation of the economic growth towards the "*greening*" is the opposite of the current state of technological and financial dependence of supplier States on purchaser States. Technologies and environment have a complex relationship. When a technology develops, it does so in response to a major economic challenge. New technologies are supposed to bring progress (forms of energy, manufacturing processes, trades) and participate to make a more sustainable world to solve environmental matters. New fields of research are investing in new growth models that reconcile innovation and the environment, such as low tech and digital ecology, in order to establish the optimal framework and tools which put new technologies at the service of the environment.

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The environmental context needs to be reconciled with entrepreneurial freedom and market rules (Belaidi, 2014, p. 16). Article 37 of the Charter of Fundamental Rights of the E.U. invites private and public actors to rethink economic growth in a disturbed environmental context. Sustainable development has been accompanied by new strategic constraints (Faten, 2009, p. 40). Managerial practices are therefore based on sustainable development as a performance indicator by controlling the life cycle of goods and products.

The extension of the work carried out within the OECD extends the obligations of producers downstream of the consumption of goods and products, making them responsible beyond their life cycle (Thieffry, 2007, p. 12). The eco-design approach proposes to draw inspiration from Nature and to integrate it into technology projects. It pushes to implement a reduction of the waste loads in all the steps of the life cycle, i.e. from the very creation of the product to their recycling (EC, 2020). This openness contributes to the future gains of existing industries. A company that invests in environmental standards encourages the emergence of new and competing markets while ensuring a certain level of satisfaction for stakeholders like NGO, citizens and public authorities (Alchian and Demsetz, 1972, p. 783–784). Decision-makers and industrialists are invited to build “*eco-inspired*” services and to find new production paths that consider the objective of sustainability and the limited availability of natural resources.

Associated with resilience, sustainability is an emerging concept in environmental legislation. European law mentions this principle as a major objective of innovation and a performance driver within managerial practices (management, prevention, control of environmental factors). Suffering from a lack of definition, this notion highlights a relationship with Nature based on the enhancement of its capacities for physical and biological regeneration. Difficult to quantify and measure, it implies the abundance of the exploited resource, at least its “*non-scarcity*”. The rate of extraction does not exceed the rate of renewal (Clark, 1973, p. 631). The use of polluting materials is limited to its strict necessity, or even substituted for environmentally neutral materials. Associated with eco-design, this approach reverses the usual framework that has hitherto ignored natural and social damage by only recognising profit and capital accumulation. In terms of market rules, sustainability is observed in terms of the analysis of the life cycle of an object, a technology or a manufacturing process. Borrowing from the precautionary logic found in major international instruments, such as the 1992 Convention on Biological Diversity, sustainability guides private behaviour from the design stage and encourages the emergence of new trades, new practices and new tools.

This notion could be compared to the legal framework related to personal data. Through its *ratione loci* application throughout the European territory, this latter right fulfils a digital public order mission strengthening the sovereignty of the Member States. The extension of the scope of the controller’s responsibilities in favour of the rights granted to the data subject initiates the transition towards production, consumption and management methods converging with the principle of sustainable development. In addition to the unprecedented questions it raises about the activities of manufacturers and industrialists, introducing sustainability, both as a production objective and as a design tool, calls for consideration of its impact on the rules organising the movement of goods

and products within Europe. In view of the geopolitical stakes in relation to new technologies, how could sustainability be inspired by the European legislation applicable to personal data to constitute a budding argument in favour of the technological sovereignty of Member States?

1. SUSTAINABILITY, A TOOL FOR SOVEREIGNTIST REGULATION OF THE CIRCULATION OF E.U. GOODS AND PRODUCTS

New business models could emerge by integrating sustainability both as a stand-alone approach through standardisation (1.1) and as a tool for regulating the European market (1.2).

1.1 Sustainability as defined by soft law

The usual reflex of innovation is to improve the performance of products and processes available on the market without seeking to reduce the resources consumed and waste produced. Standardisation has proposed the approach of biomimicry as a *“framework for the development of materials, structures, surfaces, components and industrial technologies”* (ISO/TC 266 18457, 2015). Emphasising the integration of sustainable development as a primary motivation, this approach integrates sustainability, both as a new tool and a design method. Sustainable biomimicry is based on the observation of nature’s inventions and the principles of living organisms in order to adapt them to human activities. The ISO TC/266 - 18457 standard proposes to use the major strategies of the living world as methodologies for sustainable innovation. The ISO TC/266 - 184458 standard offers efficient tools such as the reasoned use of resources, the control of resources, interdisciplinary and the synergy of expertise.

The innovative approach of biomimicry provides substance to the methodologies developed by European data law. Our *“sustainability by design”* approach is inspired from the *“privacy by design”* approach. Article 25 of the GDPR n°2016/679 provides that the controller must implement, prior to the processing, the measures that ensure a high level of protection for personal data *“by default”*. With regard to the guidelines 4/2019 on article 25, these measures must be taken in the light of the specific sector involved, the state of the art, their costs, the nature of the processing and the risks to the individual rights and freedoms. This new influence makes it possible to include sustainability *“by default”* in business and production practices. Our approach to *“sustainability by design”* refers to preventive practices aimed at reducing the environmental impact of new goods and products, from their conception to the end of their life cycle. Taking into account the health and safety of consumers, it encourages the implementation of a principle of reparability *“by default”* of the good or product.

A restrictive or rigid legislative framework exposes the good or product to a planned obsolescence. Standardisation could be a response in terms of processes and organisations. It is an anchor that translates sustainability into concrete action plans and technical expertise adapted to the latest technological innovations. This normative process promotes the free movement of products by helping industries to manage the impact of their activities on the environment. Most organisations have realised that sustainable policy and profitable growth are intricately linked. The *“17 Sustainable*

Development Goals” proposed by the United Nations in 2015 to solve the world’s climate problems have been endorsed by various ISO standards. The ISO 37101 standard is based on 12 questions and 6 sustainability objectives which highlight the need to place the production of goods and products in a logic of continuous improvement and industrial ecology.

Standardisation promotes the harmonisation of Single Market rules and sectoral practices. In addition to rules defining essential requirements (safety, health, environmental protection, consumer protection) and design specifications left to the discretion of the manufacturer, products manufactured in accordance with technical standards expressly mentioned in regulations are presumed to comply with these requirements. As encouraged by the EU Council Resolution of 7 May 1985, a regulatory text makes the presumption of conformity of a product subject to compliance with all or part of a technical standard. This conformity covers two alternatives: either the manufacture conforms to the standards cited by the public authorities for the correct application of the national text, or the manufacture conforms to a model proposed by a third party certification body. The use of these standards, whether of Community or national origin, may come from a European technical harmonisation text, a directive or a regulation specific to product categories or a safety risk. A mutual recognition clause for goods legally marketed in another Member State must be included in these regulations in order to ensure a level of safety equivalent to that of the national system and not to create obstacles to the free movement of products.

The European Commission has introduced the “*New Approach*” as a method for drawing up directives and unifying the legislation of the Member States. In order to lighten the work of the European legislator, this approach involves delegating the production of technical standards to European organisations. Technical standards meet the requirements of professionals and take into account the specific features of the sectors identified. These guidelines let companies choose the most appropriate means to integrate them into the manufacturing processes. For the technical aspects of the product, they refer directly to the harmonised E.U. standards when it is placed on the market.

Standardisation is a means of technological independence as a constraint on third countries. They have to comply with it to distribute their products in the EU. In order to ensure public authorities’ control over these technical standards, their scope must be monitored, in particular if health, safety and the protection of public interests are concerned.

In addition, there is strong confidential standardisation activity outside the formal structures. It is often the same stakeholders who produce these standards on the one hand and benefit from them on the other. At the same time, formal standardisation systems deserve more openness, transparency and accessibility for other stakeholders who consider themselves insufficiently taken into account (environmental protection actors, local public authorities, small businesses). The European Commission is trying to take the necessary steps to ensure that these mechanisms meet the criteria of clarity and representativeness of the parties involved in the creation of the standard (Van den Abele, 2009, p. 8).

As part of the liberalisation of trade between the E.U. and foreign States, the incorporation of the rules of international trade law into state law modifies the binding force of the rules of soft law.

Through the substitution effect, E.U. shares the competence with the Member States at the WTO. The E.U. judge may deny a company the right to avail itself of the corpus of international trade law, relegating it to the same rank as soft law (CJEC, 1972, C-21-24/72). As soft law, WTO rules can only be invoked if they are recognised within an EU rule. However, these rules don't escape the control of the European judge, who can automatically lift public order to oppose their application on EU territory. Once a court recognises a rule as being a part of public order, any foreign rules or standards are deprived of any effect within its sphere of jurisdiction. International trade rules may be derogated from for public order reasons, integrating sustainability into its environmental component.

1.2 The impact of sustainability on the free movement of goods and products

The precautionary principle, enshrined in Article 191 of the TFUE, aims to ensure a high level of environmental protection. In the event of uncertainty, this principle of action requires public authorities to take all necessary measures to prevent damage from occurring (ECJ, 2018, C-528/16). The objectives of protecting health and the environment takes precedence over any other interest (ECJ, 2010, C-343/09). National legislators are bound by this duty. In order to protect the environment from any harmful substances, an assessment procedure has to be done. Once the impact and the extent of the risks have been assessed, the measures must be strictly proportionate to the aims pursued in the scope of the current state of scientific knowledge and the resources mobilised (General Court, 2011, T-409/09).

The notion of sustainability questions the E.U. freedom of movement. With direct effect, the provisions of Articles 34 and 35 of the TFEU prohibit any non-tariff barriers on all quantitative import and export (ECJ, 2008, C-205/07; ECJ, 2016, C-15/15) restrictions as well as all measures having equivalent effect within the Member States (ECJ, 1979, C-15/79; ECJ, 1974 C-8/74). As an exception, Article 36 of the TFEU authorises the maintenance of prohibitions or restrictions if justified on grounds of "*public morality, public policy, public security, the protection of health and life of humans, animals or plants*". Strictly interpreted, this article can only be applied to non-economic situations as a safeguard to those only objectives (ECJ, 1979, C-34-79).

Only a harmonisation directive can discard the possibility for Member States to summon the exception provisions. While all quantitative restrictions and measures having equivalent effect may be examined in the light of the provisions of Article 36, only measures restricting the free movement of goods may benefit from the exceptional arrangements for imperative requirements in the general interest established by the ECJ on the basis of Article 34 (ECJ, 1981, C-113-80; ECJ, 2009, C-132-08; ECJ, 2015, C-354/14). The principle of mutual recognition provides that any product lawfully manufactured and marketed in a Member State is deemed to be lawful and marketed in the territory of another Member State. The commercial rules of the destination State may not be invoked against it. Henceforth, "*obstacles to intra-Community movement resulting from disparities in national legislation on the marketing of products (...) must be accepted in so far as such requirements can be recognised*

as necessary to satisfy imperative requirements, relating in particular to the effectiveness of fiscal controls, the protection of public health, fair trading and the protection of consumers" (ECJ, 1979, C-120/78). Coming significantly closer to the justifications provided by Article 36, the benefit of a mandatory requirement is only possible in a situation characterised by the absence of measures for the approximation of national legislation. The reasons raised must also lie on an economic nature. Finally, measures affecting the free movement of goods must satisfy the components of the proportionality test. The contested measure must be appropriate, consistent, necessary and strictly proportionate to the objective pursued (ECJ, 2016, C-244/15). The obstacle resulting from the implementation of that measure must be minimalistic and not going beyond what is necessary to achieve the said objective (ECJ, 2010, C-108/09). Failure to satisfy this two-prong test will result in cancellation of the measure.

Among these imperative reasons of general interest is the protection of the environment. While the list of exceptions in Article 36 is limited, the list of mandatory requirements can be developed in a praetorian manner. It is therefore conceivable the objective of sustainability could be identified as a legitimate reason to justify barriers to free EU trade. Moreover, certain barriers have a legitimate interest to justify a restriction on a fundamental freedom guaranteed by the Treaty (ECJ, 2008, C-244/06). The compatibility of State legislation infringing the economic freedom of movement must be examined in the light of the exceptions provided by the EU's laws or Court's case law. In the area of environmental protection, the Court adopts a reasoning by examining jointly those based on public health and the imperative need to protect the environment (ECJ, 2011, C-28/09). These key cross-cutting objectives of the E.U are closely interlinked to limit the health risks associated with environmental degradation.

Finally, the hypothesis of damage to the environment has a stretching effect which may go beyond the borders of the Union in the case of multi-localized damage. Article 5(3) of Regulation 44/2001 provides that "*a person domiciled in a Member State may be sued in another Member State (...) in the courts for the place where the harmful event occurred or may occur*". The Court of Justice interprets the concept of the place of the harmful event as meaning the place where the damage occurred or the place where the event giving rise to the damage occurred (ECJ, 1976, C-21/76). Opening an option of jurisdiction to the plaintiff when these two places are dissociated, this jurisdiction makes it possible to apply the U.E's rules on the environment and to extend the effects of sustainability to territories outside Europe.

If sustainability has its pitfall in a sovereignty that regulates the circulation of goods and products on the territory, it also finds its echo as a modality of empowerment on the components of goods and products.

2. SUSTAINABILITY, A MODALITY OF EMPOWERMENT OF THE COMPONENTS OF GOODS AND PRODUCTS

Our "sustainability by design" approach suggests the consecration of a consumer right to the replacement of components (2.1). Its main limitation would be traditional intellectual property rights (2.2).

2.1 Towards the consecration of a consumer right to component replacement

Planned obsolescence is the deliberate reduction of the life or use of products to encourage their replacement. It forces consumers to acquire the successive new versions. Sustainability seeks to optimise the performance of goods and products and suggests that they take the path of self-renewal. There are several indicators that point in this direction.

As part of the guarantee of conformity, maintenance, maintenance comes in two forms: corrective and evolutionary. It organises the monitoring of the good or product to be maintained in its state for as long as possible. Evolutive maintenance works in favour of the “*sustainability by design*” approach by allowing the good or product to evolve according to its environment through new updates and by improving existing functionalities. To avoid the electronic waste, E.U. Parliament has adopted an environmental perspective by establishing a list of minimum resistance criteria. However, some Member States, such as France, have addressed this issue through economic law. This question was considered in consumer law concepts such as informing the consumer about the durability and reparability of products by the seller. A French decree of 2014 directs the buyer towards repairable products by requiring the seller to inform the buyer in writing of the availability of spare parts.

However, the putting into circulation of spare parts, authorised by Directive n°98/71 of 1998, calls into question the exclusive nature of the intellectual property (*hereinafter – IP*), rights of design holders. Article 110 of Regulation n°6/2002 enshrines the repair clause. It expressly excludes the exclusive right for parts of complex products intended to repair the product and restore its original appearance. This clause was initially adopted by the E.U. institutions to limit the monopoly of manufacturers and equipment manufacturers on the aftermarket for spare parts. It deprives the holder of a design for a spare part from exercising his right to prevent the circulation by a third party of spare parts intended for the repair of a complex product and to restore its original appearance. However, this right is limited to any spare part, visually identical to the original, with a view to restoring the original appearance of the complex product when it is placed on the market. Furthermore, the replacement part is only intended to restore the complex product to its original appearance (ECJ, 2017, C-397/16 and C-435/16). At the risk of being penalised for counterfeiting models or even brands, the manufacturer and/or seller of parts must make clear and visible markings on the parts or their packaging and put in place the appropriate contractual instruments.

The national courts strictly interpret the notion of complex parts in favour of the producers. For its part, the Court of Justice does not limit the concept of complex parts to those whose form is dictated solely by their technical function. The appearance of the complex product conditions the protected model: the spare part must have an appearance visually identical to that of the original part. Finally, the manufacturer or seller of the part of a complex product must clearly inform the consumer that the part incorporates a design of which he is not the owner and that it is exclusively intended to enable the product to be repaired in order to restore its original appearance (Kahn, 2018, p. 4). These provisions do not respond favourably to the situation where manufacturers of repair parts claim possible protection under design law.

The “*sustainability by design*” approach would overcome this difficulty by encouraging better consumer information. Going beyond labelling, the information envisaged is aimed at the components and plans of a good or product, specifying the existence of devices for replacing components. This high degree of transparency for sellers promotes this right of redress and stabilises these secondary markets. Without prejudice to the exclusive industrial property rights of its holder, information can be made available and then reprocessed for these specific frameworks. Franchise distribution and repair networks already exist and are expressly authorised for this purpose.

This transparency is part of the sustainability approach. At the time of purchase, producers, importers and distributors on the electronic equipment market communicate freely to purchasers the product’s repairability index and the parameters and criteria (reliability, robustness, etc.) used to establish it (E.Parliament, 2017, Resolution n°2016/2272). This information shall be transmitted by means of marking, labelling, display of the durability index of these products. This labelling obligation for tangible products extends to intangible assets.

2.2 The limits of the right to repair

The “*sustainability by design*” approach questions I.P rights in the age of the 3D printer. Because of the spread of this technology, 3D printing is a manufacturing technology whose use would infringe all IP rights. Encouraging local production, it also stimulates the international marketing of creative designs, while raising issues of legal liability.

3D printing makes it possible to reproduce various parts, components or even objects in their entirety without the owners’ knowledge, permission or financial compensation. The undue use of this technology may represent a loss of revenue and a discouragement investment in R&D. Classically, I.P rights are regulated by contract. However, the object reproduced may already be protected by an I.P right owned by a right holder. The latter has an exclusive monopoly over the exploitation of its creation. An authorised reproduction, even partial, a protected work constitutes an IP infringement.

The “*sustainability by design*” questions the author’s extended liability for damage caused by an object created in whole or in part by a printable reproduction process. In the event of a damage, liability for a defective product could simultaneously fall on the many players such as the seller of the 3D file, the producer of the 3D printer or its firmware, the supplier of the material used, or finally the producer of the object himself.

Thus, a specific liability regime is currently being considered. Nevertheless, the creation of approved secondary markets could clarify this. Primary market players will have to offer *by default* to their users / customers the appropriate measures to anticipate the life cycles of assets and direct them towards the secondary markets for maintenance and evolution. Users are generally not in a position to provide a solution to any problems that may arise from such use. Maintenance is an indispensable service for the peaceful enjoyment of any equipment, even if secondary markets already exist. To structure this market, certain independent sellers must be authorised to market spare parts and / or produce identical ones and must have the skills to ensure the maintenance and repair of the products.

The existence of two distinct markets is discussed. The first is the so-called “*primary*” market: it allows complementary purchases made on a second autonomous market called “*secondary*”. A tangible electronic good is qualified as primary; the acquisition of parts required for repairs including service with replacement is a secondary good. There are therefore many markets in which two complementary products are needed to obtain the service of the whole and form a “*system good*”. The purchase of the primary good limits the spectrum of choice for the secondary good. In fact, the consumer cannot put several suppliers in competition at the secondary purchasing stage. The lifetime of the primary good is locked into the purchases made on the secondary market, which is thus conditioned by the primary market.

In some cases, “*generic*” parts or parts manufactured under license by different manufacturers are available and compete with the original parts. Sometimes only original parts from the primary distributor are available. Final consumers have no choice but to obtain the spare parts from the supplier of the primary good (General Court, 2011, T-296/09). Whether the primary and secondary markets form a single market subject to the same competition rules or whether the primary undertakings exercise market power on the secondary market is analysed on a case-by-case basis. The answer lies in the behaviour of final consumers and their choice to continue sourcing from the same supplier, at least for the life cycle of the primary product. To change this paradigm, consumers need to be able to anticipate the entire life cycle of the product. This presupposes a number of conditions relating to the reliability and integrity of information and transparency. Consumers must no longer think in terms of successive and fractionated purchase costs, but in terms of a globalisation of costs in relation to the life cycle of the product. Consumers are often insufficiently informed about the probability of a breakdown, the lifespan or the methods of replacement of original parts. The dissemination of information is therefore imperfect and asymmetrical.

Encouraging the emergence of such secondary markets would mean abandoning the assignment of exclusivity, or at least regulating it by delimiting the elements of IP that could be the subject of circulation from those that require the prior approval of the owner. If new sub-sectors emerge, their autonomy requires anticipating all questions relating to out-of-stock situations and the duration of a licence.

The tools of I.P law allow their holders to control the use that third parties are likely to make of them. With the development of e-commerce, they contribute to commercial success while enhancing the value of intangible assets. The use of a selective or exclusive distribution network appears to be the solution for controlling I.P rights and their enhancement *via* selected co-contractors. However, this commercial structure leads to a risk of market compartmentalisation effect. The Court of Justice moderates this position with regard to the provisions of Articles 101 and 102 of the TFEU: I.P rights are a lawful tool for derogation from the requirements of E.U. competition law, the only limit being the abusive exploitation by its holder (ECJ, 1968, C-24/67).

However, the question of design protection for spare parts, or parts of a complex product, has always been a controversial issue in the E.U Member States. In the absence of an agreement, a *standstill* position was adopted in the framework of Article 14 of Directive No. 98/71 of 1998 on

the legal protection of designs and models. Member States keep applying their national laws. They can only modify them in the sense of a liberalisation of the market concerned and must respect the exception of Article 110 §1 of the Regulation n°6/2002 on Community designs and models which organises the mechanism of this repair clause.

In a prospective way, the event of a conflict between the rules of I.P law and those relating to environmental protection could allow the sustainability to be part of the actual construction of this E.U. ecological public order (Belaïdi, 2008, p. 461). Public order could be used as a tool to prevail some intangible social values like right to life or right to health in any potential conflicts between contradictory interests. Targeting a social imperative of protection in the material sense, environmental value exists in substance in the form of scattered rules escaping the free-market logic (Fritz, 2002, p. 430). Ecological public order refers to the insufficient consideration of the links existing within ecosystems and insists on the right of human and non-human populations to live in harmony within the sustainable limits set by the biosphere. This notion encourages the protection of life through a common base of essential social values and raising awareness of ecological risks (Belaïdi, 2010, p. 350). Thus, the former is being superseded by the latter, taken as a component of environmental public order.

CONCLUSIONS

1. The “*sustainability by design*” approach offers multiple vectors for reconciling the circulation of goods and products with the guarantee of the technological sovereignty of the Member States. Through standardisation, it promotes preventive tools and innovating design methodologies that are committed to reducing the environmental impact of new goods and products. Freely inspired by the European personal data law, sustainability draws the outline of a new framework by being applied from the design stage and throughout the life cycle of goods and products.
2. Sustainability will impact the circulation of goods and products. Upstream, it can justify the application of the precautionary principle. Downstream, sustainability could take advantage of the praetorian trend towards the globalisation of justifications, relating both to public health and to the imperative need to protect the environment, to become an imperative reason of general interest justifying barriers to free trade.
3. Sustainability is also echoed as a way of incapacitating the components of goods and products. Encouraging the implementation of a new principle of reparability, sustainability would become a means of combating planned obsolescence by promoting autonomous renewal.
4. As a component of an ecological European public order, sustainability may defeat classical property rights held by third party States and offer to the European States Members a means to displace/diminish their technological independence by favouring their own industries as it has been made possible by the GDPR. In addition to promoting greater transparency from the economic actors concerning their practices and the composition of the goods put into circulation, the prevalence of environmental law encourages the development of secondary markets which support Europe in times of crisis and defuse technological dependence.

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CAUGHT IN THE GREY AREA BETWEEN EUROPEAN ECONOMIC COMMUNITY AND EUROPEAN FEDERATION?

Uncertain limits of EU jurisdiction in matters concerning EU values

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Abstract. During the last decade of the EU history there has been an unprecedented increase of illiberal tendencies among certain EU Members – most notably Poland and Hungary, which in turn lead to violation of the values enshrined in Article 2 TEU. The present paper is brief attempt to determine whether the EU has any legal powers to confront rogue EU Members, which violate the rule of law and what these powers are.

Keywords: Solange doctrine, Reverse Solange doctrine, EU competences, rule of law, Article 7 of TEU.

I. INTRODUCTION

It is no exaggeration to state that the recent years in certain European countries were marked by radicalization of there legal regulations. Quite importantly the changes usually concern the same time legal norms crucial to the functioning of the State, which in turn have bearing on the protection of human rights and compliance with EU law. Notable examples in this respect are those of Hungary and Poland. In cases of those two countries, their legal developments led to EU's institutions expressing concerns over certain aspects of Member States' policies, which in turn resulted in triggering procedures provided for such situations – among others the procedure enshrined in Article 7 TEU. Understandably actions of the above-mentioned States on one hand, and reactions of European institutions on the other, led to a heated political debate on the subject, where the frontiers of Member States' sovereignty lie. What the author finds to be lacking, however, is an objective analysis of the legal interplay between the EU and the Member States, which could allow, political views aside, to answer the above question.

It is thus necessary to ascertain what exactly are the limits of the EU "jurisdiction" and its competences, especially in such delicate matters as regulations of fundamental aspects of the functioning of Member States (such as judicial system or media) and their compliance with the rule of law, which after all mostly remain within a domain of States' constitutional order. States that find themselves at odds with the EU do protest that their actions are internal matters, within their margin of appreciation, and most importantly well outside of competences vested in the Union. The Union, on the other hand, argues that this notwithstanding, certain core values of EU (rule of law primarily) have to be safeguarded because otherwise there can be no effectiveness to EU law. From that vantage

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point, it is said that assessment of how the Member States are organized especially in the matters of the justice system is open for ECJ and other EU authorities. That situation may cause a veritable legal dispute over authority, since, in the end, it may happen that both ECJ and competent national courts will be assessing these matters and will come to different conclusions.

The proposed analysis will depart from the scope of EU competences, perceived with regard to the principle of conferral (as envisaged in Articles 4 and 5 TEU) but also taking into account principles of EU law identified by ECJ – such as the principle of effectiveness, principle of EU law primacy and last but not least – a more recent concept of European citizenship. This analysis will then lead to the “reverse SOLANGE doctrine” (as opposed to widely accepted SOLANGE doctrine), which posits that under ordinary circumstances, protection of the substance of EU citizens’ rights (and of the essence of fundamental rights) is left to national law. This, however, can be ‘reversed’ in cases of ‘systemic’ failure in national law, which allows EU authorities to control the compliance of national law and its application with the values, all Member States obligated themselves to uphold as well fundamental rights. The author will critically assess the merits of this doctrine, its scope, and possible use of it by the ECJ.

The author posits that this doctrine also merits assessment from an unorthodox angle, namely from the perspective of international public law and most importantly the Vienna Convention on the Law of Treaties. The reason is that the EU is at its core a very special, but still an international treaty, binding its Parties as all other international agreements do. The legal issue at hand observed from that point of view will offer an answer, as to how to reconcile EU legal actions against “rogue” Member States with their sovereignty, and how to address the viability of the “Reverse SOLANGE doctrine”.

Finally and more generally the proposed research should be able to shed some light, as to where exactly the EU finds itself on its way on a scale between the “simple” economic community and the United States of Europe, how it can be changed and what are its likely lines of development.

II. ILLIBERAL DEMOCRACY

The last decade of European political history was marked by the rising popularity of the so-called illiberal model democracy (Sajó, 2019, p. 396). Oxymoronic as this term may sound, it remains the fact that this term of illiberal democracy is being used by architects of certain political structures. Most notably it was utilized by Victor Orban (Orban, 2014), who expressly declared in 2014 that he would like to build an illiberal state – i.e. a non-liberal state. Such a state, as he explained, would not deny foundational values of liberalism, as freedom, etc, but it would not make this ideology of liberalism a central element of state organization, proposing instead a specific, national-oriented approach in its stead.

The concept of illiberal democracy is by no means a new one, although before the last decade it had remained as an untried alternative among EU Members. The main premise of this model of democracy is that liberalism is not a prerequisite or a condition of democratic rule. An outright formulation of this thought came first from F. Zakaria (Zakaria, 1998), who noted that there are many

democratic systems (i.e. such in which those who govern a State are elected in a free and common vote and enjoy social legitimization), but whose political systems are not marked by the rule of law, separation of powers, and the protection of basic liberties such as speech, assembly, religion, and property (i.e. core characteristics of a liberal state). While the above-mentioned values did coincide with the emergence and development of democracies in Western Europe it is not so in other parts of the world, most notably in Russia, Belarus, or certain States in Latin America (Smith, 2009). The rationale for the development of this type of democracy are manifold, but curiously, among many three main ones are indicated. Firstly, that modern nation-states lead are inherently at odds with the idea of universal equality that characterizes liberalism (since they differentiate between the nationals, and the foreigners (Mestrovic, 2004)), further, that unrestrained capitalism leads to such wealth disparities that it does not promote the safeguarding of human rights (at least not without state's intervention). Finally, it is said that traditional morality and hierarchical social structures prevent societies from embracing liberal values (Ramet, 2007) one of the reasons are incompatibility between liberal state values and free-market capitalism (Ramet, 2007).

These remarks seem to explain why the growing popularity of right-wing values in Europe comes hand in hand with an awakened interest in the model of illiberal democracy and the criticism of liberalism.

III. CHALLENGES TO THE RULE OF LAW. TIMELINE

The two notable examples of EU Members which little by little gravitate towards the illiberal democracy model are undoubtedly Hungary and Poland, with Hungary being the pioneer and Poland the follower (Sajó, 2019, p. 399; Morillas, 2017, p. 31–45, 55–67). Characteristics of illiberal democracy logically bring those states, which adopt it, to clash with EU values enshrined in Article 2 TEU and most importantly with the rule of law, since those values are inherent to the model of liberal democracy.

As the present paper aims to address the possible solution to this clash of values within the current legal framework, a recapitulation of the stages of this clash and so-far reactions of its actors would not be without merit for the proposed analysis. Naturally given the paper's scope, the analysis will have to be summary.

In the case of Hungary, all began in 2010 with the coming to power by the Fidesz political party with Victor Orban, as its president. During the years preceding this triumph, Fidesz's program and rhetoric radicalized from conservative narrative of the family, nation, and god to a more strident form of ethno-nationalism that for its critics had overtones of anti-Semitism, intolerance and an ethnically exclusive form of Hungarian national (Marsovszky, 2010). Such rhetoric met with surprisingly extensive acceptance from the society, which, as is theorized was triggered by Hungarians' disenchantment with the government, capitalistic system and typical for Hungarian society social distrust and resulted in Fidesz securing the majority of 66% in the Parliament and allowing it to alter Hungarian's Constitution. As a result of changes enacted in 2012, Constitutional Tribunal was stripped of much of its jurisdiction and was staffed with government loyalists. Even before that, in 2011 new

institution was created, namely the National Judicial Office which practically nullified judicial self-government. Finally, the retirement age of judges was lowered, which, although declared contrary to EU law (ECJ, C-286/12, *Commission v. Hungary*), allowed the government to appoint new, more dependable members of the judiciary, also within Hungarian Supreme Court. Thus the party removed the preexisting system of checks and balances, gaining thus freedom to change the law, as it saw fit. Along with these developments Fidesz appointed its members or ex-members to highest positions in the State (including the positions of the chief prosecutor, President of the Supreme Court, and the chairman of the State Audit Office).

Also, although outwardly cooperating with many international organizations in the years 2010–2020 Fidesz was gradually striving to realize the vision of illiberal states. Among the liberties, which were curbed, one has to indicate freedom of media and speech (Lendvai, 2012), by the way of creating the Media Council loyal to the government and limiting journalistic freedom; right to privacy (ECHR, Szabó and Vissy v. Hungary), right of association and religion (ECHR, Magyar Keresztény Mennonita Egyház and Others v. Hungary); academic freedom; freedom of migrants (ECHR, Ilias and Ahmed v. Hungary), right to equal treatment also for foreigners and racial minorities (Council of Europe: Commissioner for Human Rights, 2014). With the outbreak of the coronavirus pandemic, in the Prime Minister, Victor Orban was granted emergency powers, which allowed to change the law with executive decrees, instead of bills adopted by the Parliaments. As of now, the powers are already revoked, but it is noted that the emergency power can easily be regranted (HCLU, Amnesty International, Hungarian Helsinki Committee, 2020). The last development of note was the judgment by ECJ, in which the Court contested the way, in which Hungary handles refugees (ECJ, C-924/19, C-925/19, *FMS, FNZ SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*). According to the Prime Minister of this Member State, this judgment will not be honored as it is contrary to the superior legal act, namely Hungarian Constitution (Bloomberg, Orban Rejects EU Ruling on Asylum Seekers in New Test for Bloc, 2020).

The developments in Poland were quite similar to the above described, and also began with the securing of the parliamentary majority by Law and Justice political party in 2015, coinciding with the election of President Andrzej Duda, appointed by the same party. The key difference between the Polish and Hungarian situation is the fact that the Polish governing party did not gain the majority necessary to alter the Constitution, and because of that it had to operate under limitations of the one being in force since 1997. This, however, did not prevent the politicization of the Polish Constitutional Tribunal and limitation of judges' self-government, especially since the party, backed up by the President could pass any standard bill. The process of subordination of judges did not proceed quite as smoothly as it did in Hungary. Firstly, the changes of retirement age did not allow to restaff the Supreme Court in Poland, as they were quickly counteracted by its judges and soon after declared contrary with the EU law (ECJ, C-192/18, *Commission v. Poland*). Also, there was a considerably negative social response to governments' attempts at limiting independence, which could have factored it in a less radical approach by the governing party. This notwithstanding the judicial system is far less independent than before the year 2015. The governing party was able

to appoint loyal presidents of the courts, including the president of the Supreme Court (although this took 2 years of legal and political strife). Besides that, certain judges who have been vocal about their discontent with enacted changes have been reported to be persecuted on disciplinary grounds and to even worse by the new Disciplinary Chamber of the Supreme Court created and staffed under the scrutiny of the governing party by subordinated National Council of Judiciary (ECJ, *Commission v. Poland*, C-791/19). Apart from attempted and partially completed erosion of judiciary system in Poland, the last 5 years were marked by increasing disrespect toward the rule of law (including respect for national and supranational courts' judgments), decreasing quality of law, the subordination of national public media and growing discrimination of certain social groups (most notably LGBT people).

During the above-mentioned developments in both Hungary and Poland, international organizations and the EU were not inactive. As this paper concerns the EU's relationship with its Members, only its reactions will be covered. As for Hungary in the years of power consolidation by Fidesz (European Parliament, 2012; European Parliament, 2013; European Parliament, 2015); European Parliament, 2017), numerous resolutions were adopted, which indicated in detail specific shortcomings concerning compliance with the EU values by Hungary and demanded it to address them.

Finally, procedures enshrined in Article 7 TEU need to be mentioned. Curiously enough it was against Poland, and not Hungary, that EU first formally triggered this procedure aiming at determining that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 (EP Resolution, 2017). Similar steps were soon after triggered against Hungary (EP Resolution, 2018). Both are currently slowly progressing and currently find themselves at the stage of hearings of each respective Member State. In not so many words, this means that so far the implemented measures have proved less than successful, especially given the fact that they did little to change policy courses of EU rogue States.

Certain aspects of policy changes described above were also the subject of judicial review by the ECJ (ECHR, *Szabó and Vissy v. Hungary*). As indicated before, judgments rendered in those cases, especially since they concern so-called "constitutional identity" of Poland and Hungary, have been widely criticized by their respective government both from a material as well as jurisdictional point, as it is said that ECJ cannot assess these parts of the legal system which traditionally belong to the domain of constitutional matters (ECJ, C-791/19, *Commission v. Poland*). This attitude of these Members States means in turn that implementation of those judgments if at all happens, happens reluctantly and half-heartedly.

IV. EU COMPETENCES

The above problem truly comes down to a general issue concerning the European Union legal system. Namely that it's plagued by an inconsistency arising from projecting upon the Union their most ambitious aims and ideals without giving the Union sufficient capacity to achieve them. Among others, the Union is charged with protecting fundamental rights and other components of liberal state

without, at least formally, being allocated the corresponding competence to ensure such protection (Azoulai, 2014) and even, as follows from the Article 4 (see below), being expressly forbidding EU from interfering with most crucial aspects of their policies.

To back up the above-mentioned statement, one has to consider both Articles 4 and 5 of the TEU. According to the Article 5, the limits of Union's competences are governed by the principle of conferral, under which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Moreover, the EU may use its competences only insofar, as such use is in line with the principles of subsidiarity and proportionality. What is crucial and what was constantly underlined in the evolution of TEU (ECJ, C-155/91, *Commission v. Council*) is that the Union does not have the competence to declare its competences (so-called *Kompetenz-Kompetenz*) (Blumann, Dubouis, 2010).

To complete the picture of the competencies it has to be noted that the Treaty indicates at the sphere of competences of Member States that cannot be interfered with by the EU law (Di Salvatore, 2008). According to Article 4 TEU, the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. From this follows that the EU competences whatever in particular they are, find their limits at the moment when they could encroach on the constitutional order of a Member State. This means in turn that the EU cannot issue any binding regulation which could change the above-indicated sphere of exclusive competences of Member States.

The above provisions cannot, however, be read in separation from the other parts of the Treaty. Both its preamble and Article 2 indicate that membership in the EU requires not just any national identity, but identity being and Members States' fundamental structure being in line with goals of EU (Blanke, Mangiameli (eds.), 2013). The main question remains, however, which authority is competent to assess whether a Member State's national identity conforms with EU values. Apart from procedure enshrined in Article 7 (which rightly so is called a nuclear option, and of political reason may not be employed, even it from the legal point of view it would be completely justified (Buchmaier, 2019), on the one hand, one could indicate ECJ, as the sole judicial body created to verify Member States against the obligations arising from Treaties. On the other hand exactly here lies the issue – constitutional measures adopted by the Members States are not, as stated before, within the scope of the Treaties, and thus it might be stated that it is constitutional tribunals of each state that are exclusively competent to conduct any review thereof. But this on the other hand would violate the jurisdictional exclusivity of ECJ and Member States' obligation not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than designed in the treaties. From this brief analysis, it follows that Treaties themselves do not give a clear-cut answer as to how to resolve this jurisdictional conundrum. The solution must then lie in functional interpretation of treaties or in principles of international law, to which EU treaties doubtless belong.

V. EU LAW EFFECTIVENESS AND PRIMACY PRINCIPLES – “REVERSED” SOLANGE DOCTRINE

For many years doctrine has been established concerning the limits of EU competences and exclusive jurisdiction of ECJ in those cases, in which EU law is contrary to fundamental human rights, i.e. one of the key elements of a liberal state. The doctrine was first developed in several judgments rendered by the German Constitutional Court (Federal Constitutional Court of Germany, 1974, 1986, 1993, 2009) and was named “SOLANGE doctrine”, where “solange” means “as long as”. According to the doctrine, as long as European Union ensures effective protection of fundamental rights substantially similar to the protection of fundamental rights required unconditionally by the Member States’ Constitution, and in so far as they generally safeguard the essential content of those fundamental rights, the constitutional courts of respective Member States should not exercise its jurisdiction to review such legislation European Union by the standard of the fundamental rights contained in the constitutions (Haratsch, 2006). This doctrine was first formulated through stages of development of the European Community when its reliance on a highly developed corpus of human rights doctrine was neither foreseeable nor certain. Now, as the treaties expressly accept the Charter of Fundamental Rights as part of primary EU law and accept at the minimum the standard of human rights protection on par with the standard envisaged by the European Court of Human Rights, the application of Solange doctrine, although possible, is not very likely.

What seems more interesting and much more practical would be the possibility of employing the logic of SOLANGE doctrine in reverse. Namely, the idea would be to honor Member States’ exclusive jurisdiction over constitutional matters under all ordinary circumstances and only in case of systemic danger of fundamental rights would there arise a possibility for the EU institution to step in and challenge Member States’ constitution clashing with EU values listed in Article 2 TEU (Bogdandy et. al., 2012; Bogdandy et. al., 2015).

Naturally, one could argue that such competence has not been vested in the EU and that a judicial review employing “reverse SOLANGE doctrine” would constitute an *ultra vires* act on the part of EU institutions. However, such a conclusion would be, from my point of view, premature.

There are actually legal arguments and reasons that suggest that despite the lack of express competence, the EU does dispose of competence to make use of “reverse SOLANGE doctrine”. First of all, it has to be noted that upon signing of the Lisbon Treaty, as mentioned before, the status of the Charter of Fundamental Rights was elevated to the level on par with that of the EU Treaties. Although according to the Article 51 of the Charter this legal act does not confer on the EU any new competencies, it seems that as long as rights declared by the Charter are simply extensions or clarifications of existing provisions within treaties, ECJ operates strictly within its prescribed competences even if by virtue of functional, dynamic and truly liberal interpretation of the law (similar to the one adopted for long by the ECHR) (Lenaerts, 2012). There exists precedent of such an approach and namely in the judgment (ECJ, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, C-64/16), then repeated in the judgment concerning the situation of the Polish judiciary, which was

described earlier (ECJ, *Commission v. Poland*, C-619/18). In this light, the ECJ may act and intervene in those cases when the fundamental rights of people are in jeopardy. In other words, it can, as an ultima ratio measure gain jurisdiction over those parts of constitutional systems of Member States which cannot be reconciled with the essence of those rights.

Next, although it does not follow from the Treaties, for years it has been established that the European law relies on the principles of primacy of EU law, as well as the principle of efficiency. According to the first one, the obligations of the Member States that arise for them from EU law would be incomplete, if Member States could override them with the national provisions (ECJ, *Costa v. ENEL*, 6/64). Therefore the national legislation cannot prevail over EU law. In 1970 this thought was followed by the ECJ to the extent of expressly confirming priority of EU law over provisions of a national constitution, including those, which guarantee fundamental rights (ECJ, *Internationale Handelsgesellschaft*, 11/70).

The next principle, i.e. principle of efficiency states that national rules may not 'have either the object or the effect of creating an obstacle to the enjoyment of EU rights, including fundamental rights'. The exact scope of this rule and the protection of fundamental law in this context is still evolving. It is evident from the rich case law of ECJ. An example of this strand of jurisprudence is e.g. *Zambrano* case. Thereafter, Member State actions are prohibited from issuing regulations impairing 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Although the precise meaning of the 'genuine enjoyment' and 'European citizenship' is yet to be determined, this case showed the importance of the principle of effectiveness in their delimitation on one hand, and the competence on the part of ECJ to put such regulations to judicial review.

From my point of view, the two above mentioned principles, when considered jointly, form a strong basis to back up the employment of 'SOLANGE reversed doctrine'. On the basis of the primacy rule, in all matters concerning EU law, that very law, according to the sole interpreter of it – ECJ, triumphs over national law, including constitutions. Because 'matters concerning EU law' have to be interpreted as including all such provisions which form an obstacle to fully realizing fundamental law prescribed by the EU, it clearly follows that whenever constitutional or fundamental order of a Member State forms such an obstacle, ECJ is, by all means, competent to intervene. Of course, given that the EU has to operate under the rules of proportionality and subsidiarity, such an intervention has to be undertaken as a last resort. Hence, ECJ must ensure that its inevitable in such a case violation of the national identity of a Member State can occur, only when there is a systemic failure to comply with the values of the EU. This, as explained before, is the whole premise behind the 'reverse SOLANGE doctrine' and is fully supported by the *acquis Communautaire* up to date.

VI. EU COMPETENCES THROUGH THE LENS OF VCLT

As signaled before, EU treaties form a part of a larger corpus of international law, i.e. treaty law, even the treaties in question are distinct among others. From that follows that all rules concerning treaties equally apply to the TEU and TFEU. The main legal act in the international law that covers

most important matters concerning the signing of treaties and their execution is the Vienna Convention on the law of treaties (VCLT), which entered into force in 1980. It is worth noting that almost all State Members of the EU are parties to this convention and because of that rules stipulated in the VCLT will apply to the European treaties.

Viewing TEU and TFEU as international treaties, Article 2 TEU can be perceived from a different viewpoint. While traditionally regarded as purely declaratory (Schorkopf, 2000), the wording of this norm clearly has another, more profound meaning. It starts by listing all of EU values and then goes on to say that they are common to the Member States. It can be easily noticed that such a phrase does not only contain a declaration but also an obligation addressed at the Member States to preserve their compliance with those values (Blanke, Mangiameli (eds.), 2013), which are after all the main conditions necessary to gain access to the EU in the first place.

Having established that Article 2 forms an obligation in the sense of VCLT, it is clear that it also can be breached. For such cases, the Vienna Convention does stipulate in Article 27 that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Dörr, Schmalenbach, 2018). This finds a curious application to the conundrum addressed in this paper. On the basis of this provision the national regulations, constitution including, are irrelevant to an assessment of a breach of a treaty. In other words, ECJ (granted the jurisdiction over the issues arising from a treaty) is given the right to determine that there has been a violation of EU values on the part of a Member State and can do that even if this violation resulted from changes in the constitutional order of the Member State in violation.

Of course, such a decision rendered by ECJ may be disregarded by the Member State that it concerns, or it can be deemed *ultra vires* act under the EU treaties, and the EU does not really have any legal instruments to counter such a stance (except for Article 7). This, however, is a question of enforcement (Jakab, Kochenov, 2015) but does not change the fact that purely from the international law standpoint, EU institutions can freely assess compliance of Member State's legal systems with EU values. This statement is based on the current version of EU treaties and even without sophisticated legal interpretation presented in the previous subparagraph. This, in turn, seems to support the possibility to use *Reverse Solange doctrine* by the EU institutions.

VII. CONCLUSION

Naturally, given the limited scope of this paper, all dimensions of EU competences concerning Member States not complying with EU values cannot be explored. However, from short the analysis proposed therein, there can remain little doubt that legally speaking EU institutions and ECJ, in particular, may and should interfere into the internal affairs of its Member States, whenever these internal affairs may endanger the core of fundamental rights of EU citizens and all other people being within borders of this organization. They may do so, because of the elevated status of the EU charter, principles of efficiency, and primacy of EU law and because of the way, in which international law disregards all internally based excuses for violating international obligations. They should do so

because the EU's commendable ambitions are to create and uphold not only economic union but the so-called union of law and form an organization more akin to a federal state than a loose economic community that EU was at its inception. It remains to be seen, whether these legal possibilities will be explored and to what extent they will prove successful in addressing systemic failure of upholding EU values in case of those countries, where failure comes democratically elected governments but whose goals and actions cannot be deemed as legitimate or even acceptable.

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INFORMATION CREATIVITY AS A RIGHT IN THE NEW SOCIETY

Gulnaz Aydin Rzayeva¹

Abstract. Formation of e-governance has resulted in the leading role of information in the digital society. Thus, the main feature of the information society is the participation of all members of the society in the interchange of information. Therefore, information creativity has become a subject of discussion as a modern form of freedom of artistic creativity. Of course, this is not about simple information, but rather the creation of knowledge, which is the most superior form of information. Such information creativity makes necessary to regulate intellectual property issues and restrictions on information creativity. In the article were analyzed these issues and were put forward suggestions and recommendations.

Keywords: information, information creativity, information society, freedom of artistic creativity, data, digital information, limitations.

1.1. INTRODUCTION

According to paragraph 1 of the Declaration of Principles, adopted at the World Summit on the Information Society in Geneva in 2003, information society is a community where anyone can create, access, use and share information and knowledge. It will give separate people and nations the opportunity to demonstrate their potential and improve their standard of living in accordance with the goals and principles of the UN, as well as following the Universal Declaration of Human Rights.

The information society has the functions of informing, that is, delivery of necessary information to all users, maintaining and disseminating knowledge, as well as instruction on use of information technologies tools and information resources for their own interests and benefits and the use of knowledge for progressive development of society. To sum up, the information society is a society where the majority of society members participate in the search, acquisition, production, storage, processing, transmission and dissemination of information using modern information technologies.

As a result of the aforementioned conditions, information and knowledge have become an important element of the digital age.

1.2. FREEDOM OF CREATIVITY OR RIGHT TO CULTURE: COMPARATIVE APPROACH

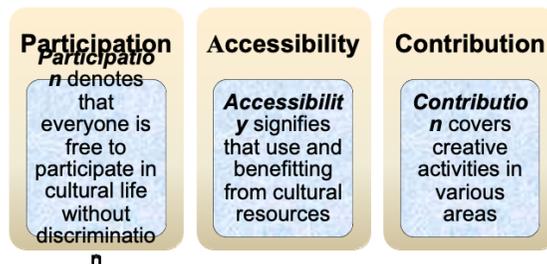
The constitutional declaration of freedom of artistic creativity is based on international norms on human rights and freedoms, which envisage three civil rights - cultural rights, freedom of artistic creativity and intellectual property rights. The proclamation of the listed rights and freedoms within

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the international context under the same article is due to the fact that these rights are interrelated. It is noteworthy to mention that the right to freedom of creativity and intellectual property right within the context of the international norms, is reflected in the article that covers right to culture. At the same time, the concept “the right to culture” includes not only the participation of the individual in cultural life and their use of cultural resources, but also his involvement in scientific progress and scientific creative activity. Thus, the right to science is analyzed in many literatures along with right to culture (Andersen Nawrot, 2014). The question then arises: Is it justified to combine the artistic freedom, the right to participate in cultural life and the right to intellectual property under the same title – the right to culture? What specific characteristics differentiate the rights mentioned above? We first need to define the concept of some common terms in order to answer these questions (“culture”, “cultural life”, “creativity”, etc.). Therefore, UNESCO Declaration on Cultural Diversity (2001) claims that culture is a combination of the inherent moral, material, intellectual and emotional characteristics of a society or social group in and covers ways of living, coexistence and spiritual values system, traditions and beliefs along with literary and artistic one (Universal Declaration on Cultural Diversity, 2001).

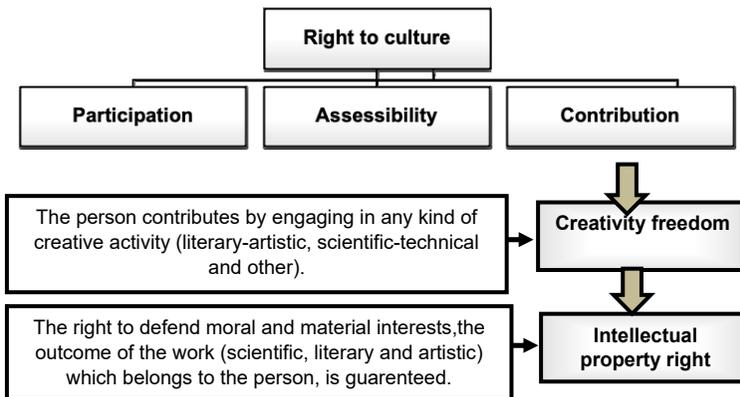
According to the UN Committee on Economic, Social and Cultural Rights, various interpretations of “culture” were provided different approaches. However, it was always regarded as a broad term. The Committee considers culture as a comprehensive concept encompassing all manifestations of humankind and emphasizes characterizing the definition of “**cultural life**” as a cultural history, dynamic and evolving process (International Covenant on Economic, Social and Cultural Rights, Art art. 15, para. 1 (a)). Although the “Law of the Republic of Azerbaijan on Culture” does not provide the definition of cultural life, the term “**cultural space**” as defined in Article 1.0.6 has the same meaning.

Creativity is a human activity aimed at creating material and moral wealth. **Freedom of creativity** means that everyone has a right to be engaged in any creative activity applicable to his/her world outlook, ethical and aesthetic ideals, interests and abilities. According to Article 51 of the Constitution of the Republic of Azerbaijan, the state guarantees free realization of literary, artistic, scientific and technical and other forms of creativity. The question arises: If freedom of creativity is a right derived from cultural rights, should all forms of creativity be considered as cultural participation? – The content of the abovementioned declarations shows that scientific activity and other forms of creativity are also a form of participation in cultural life. The UN Committee on Economic, Social and Cultural Rights also identifies three key components of “participation in cultural life” in definition No. 21 (see Figure).



It can be concluded on the basis of the aforementioned that all types of creative activity can be considered from an international legal aspect as a form of cultural participation. However, right to culture from the aspect of national legislation denotes that everyone has the right to participate in cultural life, to use cultural institutions and cultural resources, it does not embrace the right to engage in creative activity (Article 40 of the Constitution). Consequently, the contribution component provided by the Committee's interpretation and international norms is set out in the Constitution in a separate article (Article 51) in the form of creative freedom. Therefore, scientific activity, which is a process of scientific research and creativity that covers the acquisition, application and promotion of scientific knowledge, means a form of realization of creative freedom, but not of the right to culture. In fact, the person who exercises the right to creative freedom indirectly participates in cultural life. The right to participate in cultural life and freedom of creativity are reflected in separate articles in the Law of the Republic of Azerbaijan "On Culture", which regulates literary and artistic forms of creativity.

Thus, engagement of a person participating in various forms of cultural life, in creative activity depends on his/her own will. If his/her desire is realized, freedom of creativity can be considered be realized and thereafter issues over intellectual property rights emerge. The abovementioned can be summarized by the following scheme:



1. 3. INFORMATION AS AN ESSENTIAL ELEMENT OF CREATIVE FREEDOM

The transformation of information into a central element in public life as a result of the formation of a global information society resulted in a emerging a new approach to a range of rights and freedoms. Thus, knowledge and information are considered a global public product in the modern world. It also confirms the importance of information and knowledge as a key element of creative activity. At the same time, the freedom of anyone to seek legally, receive, transmit, prepare and disseminate information that he/she needs is proclaimed internationally and locally. The preparation, i.e. production of information is a creative process in itself. Freedom of creativity and information are interrelated in this regard. It is no coincidence that freedom of creativity is not defined in the European

Convention for the Protection of Human Rights and Fundamental Freedoms (1950), but the European Court of Human Rights gives interpretations on freedom of creativity in many cases concerning the application of Article 8 (the right of respect to privacy and family life), Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression) of the Convention. The Law of the Republic of Azerbaijan “On Culture” also implies provisions for freedom of information in the field of culture, including the right to prepare and disseminate information in the field of culture (Article 17).

It would be appropriate to clarify the notions of “information” and “knowledge” and to give information about their characteristic features before analyzing interrelationship of freedom of creativity and the information,

The concept of “**information**” assumes special importance as a key factor of development in many scientific areas. Daniel Bell², one of the founders of the postindustrial society concept, identifies under the notion “**information**” the apriori resource that is sought, processed and protected in the economy and society (Bell, 1973, p. 21).

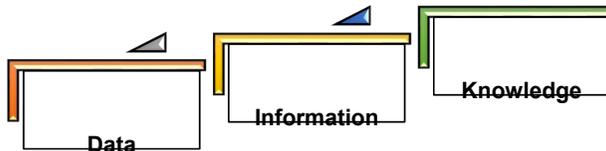
Norbert Viner (1894–1964) the founder of information theory defines the information as the information obtained in the process of adapting us and our feelings to the surrounding environment in the 50s of the 20th century (Viner, 1958, p. 31). The point is that N. Viner commented on the psychological and philosophical aspects of information. According to him, the acquired information is linked to the human brain and nervous system, and after their collection and comparison, the information is added to a person’s information resources and affects his/her subsequent actions. Therefore, there are four elements of information communication with objective reality: external environment (objective reality), consciousness (person’s brain and nervous system), image (noting and marking of content), and purpose (integration, adaptation). N. Viner viewed image as the main element among the listed elements. He notes as a result of the researches, that, information is neither matter nor energy. Information is simply the information.

American economist Fritz Machlup (1902–1983) wrote (Machlup, 1966) that information should be regarded as an industrial product and its production considered as one of the types of industry. He first introduced the term “knowledge economy” in the US economy in 1962, trying to determine the economic value of the areas, including education, law, publishing, mass media and computer science relating them to information industry concept. Machlup assessed information as knowledge. Such question arises: Is it expedient to interpret knowledge and information as the same concept? – Knowledge is processed information about the methods on processing of data that is suitable for decision-making and used or unused for decision-making or problem solving. In other words, knowledge is information that has been used repeatedly and validated. Knowledge can be formal and informal. Formal knowledge exists in the form of documents regulating decision

² Daniel Bell in his book “The Future Postindustrial Society” elaborated that the concept of postindustrial society emphasizes the impact of the development of knowledge and technology on the progress of the society. D. Bell considers that machine technology is being replaced by artificial intelligence in the postindustrial society and the main political perplexity in this society is the type and characteristic of governmental support to the science: there is now no place for the muscles and power, here one should consider the significance of information.

making; decision-making methods and techniques; standards and regulations. Informal knowledge might first of all be the knowledge and skills of advanced professionals, their intuitions, teamwork skills and habits. Informal knowledge is a non-specific category. But they play great role in decision-making. Thus, the proper management of any enterprise is directly dependent on the extent of its manager's use of informal knowledge and maximim benefitting of professionals' habits and abilities. Data, information and knowledge interact closely with each other in the implementation of economic processes. The data³ is usually transformed into information via the application of knowledge at each stage and later on into new knowledge. However, information that was considered as knowledge at an earlier stage might be regarded at some stage of the process as data and vice versa. In other words, information, data and knowledge exist in a circle and are the elements of the same ring; they are interconnected, depending on the factors such as conditions, requirements, problem-statement and ways of solution, and so on.

Thus, the interaction of information, knowledge and data can be explained as following:



Recently, from 90s of 20th century, the increasing attention to the difference between the notions of “knowledge” and “information” already replaced “the information society” with the expression of “**knowledge societies**”. This idea was first sounded in 2005 UNESCO report (UNESCO World Report, p. 17–23, 27–43). Thus, the report states that the epoch of transition from the information society to knowledge societies has already approached. According to the report, knowledge societies are the societies the source of which consists of individual diversity and individual skills. Information society is based on technology achievements. Knowledge societies cover a broader social, ethical, and political context. It is no coincidence that these societies are mentioned as a whole. Main purpose of this presentation is to emphasize absence of single model reflecting cultural and language diversity in the world.

The establishment of any society involves various forms of knowledge and culture, and modern scientific and technical development influences these forms. The issue of formation of single society within the logic of narrow technological determinism and fatalism of revolution in the field of information technology and communications cannot be considered acceptable. Thus, the use of the opportunities of Internet and multimedia tools should not force to deviate from such important tools

³ **Data** – is the registered information on accidents and occurrences. Namely, data is the information registered via technical equipment or as a result of long-term observation. Data can be structuralized or non-structuralized. If data consists of eternal values ordered according to specific indicators, then the data is structuralized. If data is provided in non-ordered way, i.e. it is taken from pictures and graphics, articles and TV shows, then it is non-structuralized data. Information is the data provided in the processed form and in a form that enables the receiver to take a decision or conduct an analytical research.

as press, radio, television and, basically, school. Most people in the world need books, textbooks and literate educators. Therefore, the knowledge societies created by different groups on the basis of different language and cultural qualities will lead to the recognition of this diversity in other knowledge societies, as well as perceive their own knowledge and skills in that knowledge societies. There is no social indifference in knowledge societies and knowledge is accessible to everyone because of its social nature. That is why UNESCO's report emphasizes that knowledge societies will eliminate digital (electronic) inequality.⁴

Thus information is considered a tool of knowledge in knowledge societies, but information is not regarded as knowledge in itself. It can be recognized as knowledge after proper "processing" of the information, and people are involved in such processing. UNESCO considers that the creation of knowledge societies will pave the way for the humanization of the globalization process (UNESCO World Report, 2005, p. 27–43).

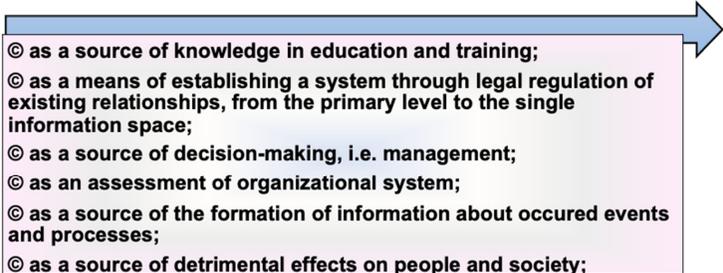
Various approaches to information continue to exist today. In general, legal nature of information differs from characteristics in other fields of science and representatives of different fields have come to common stand about its characterization at several levels to determine the content of the concept. O. A. Gorodov distinguishes three levels in his electronic textbook: syntactic, semantic and pragmatic levels (Gorodov, 2012). According to sources, the division of these levels was put forward by Paul Beynon Davies (1957). What is interesting is that, unlike O. A. Gorodov, P. B. Davies distinguishes four levels and speaks about empirical level. Another group of authors distinguish semantic, linguistic, pragmatic and technical aspects⁵. In our opinion, it is more rational to identify empirical and technical levels along with semantic, pragmatic and syntactic levels. Because the definition of conditions of information and communication technologies application (ICT) in the information process and the interpretation of the experience is important in making suggestions and recommendations. Information issues may not be related to ICT in some cases. However, accessibility level of non-electronized data is low under the conditions of the digital society. The interpretation of information at the technical level is absolute from this perspective.

The concept of "information" has a wider meaning in the modern legal sense. It is no coincidence that, Article 3 of the Law of the Republic of Azerbaijan "On Access to Information" dated September 30, 2005 defines "information" as facts, opinions, knowledge, news and other type of information, created or obtained as a result of any activity, regardless of its creation history, presentation form and classification. It means that, information can be created as a result of the activities of different entities and can be found in any subject. In short, information is universal. In any case, can information created become an object of creative freedom? – No. Although creativity is an activity that did not exist before and which results in the formation of a new object (material and spiritual), not every

4 Information inequality – the access to the information among different segments of population and countries of the world based on various aspects; including the difference that emerges during application of ICT. Internet as a main source of access to information is the essential attribute of global information society and its main boosting force. From this perspective, the limitation to the access to internet is the main indicator of information inequality.

5 S. G. Tchubukova, V. D. Elkin (2007, p. 41–42).

newly-created information should be considered a product of information creativity. Thus, information may act as a megacategory as the following:

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- © as a source of knowledge in education and training;
 - © as a means of establishing a system through legal regulation of existing relationships, from the primary level to the single information space;
 - © as a source of decision-making, i.e. management;
 - © as an assessment of organizational system;
 - © as a source of the formation of information about occurred events and processes;
 - © as a source of detrimental effects on people and society;
 - © as an object of intellectual property;
 - © as a commodity in the process of creation, storage, use, transmission and dissemination of information.

As it can be seen from the above, the scope of the information covers different areas in many cases. For example, it is impossible to create different types of information with limited access and to register their systems in a creative product. But what conditions are required for newly created information to act as an object of creative freedom? – In our opinion, there dominate **basically idealism, objective existence and requirements of innovation.**

Idealism is a sign that has been widely debated in legal literature. There are two approaches to idealism in philosophy:

According to the first approach, everything created by human consciousness is ideal.

The second approach considers everything that belongs to human, not matter, ideal. If we apply both cases to information, then idealism is linked to creation by human. In fact, most researchers (I. L. Bachilo, V. N. Lopatin and others) recognize that this sign is transient and its materialization after recording information. According to them, information appears as a concept, either as a result of the actions of legal entities, or after the information is recorded on the material carrier (Bachilo et al., 2001, p. 143–146).

It would be appropriate to clarify the aforementioned discrepancies: In case information is not expressed and not noted in any form, it is impossible to determine its existence. It is natural and unequivocal case. However, the transfer of information to any material bearer does not mean that it depends on that bearer. Responding to the following question is sufficient to solve the problem: Does the transmission of any information separate the information from the bearer through the Internet? – In this case, primary source and content of the information do not change by essence, which again confirms its idealism. A free and dependent division of information provided by Leon Brillouin (1889–1969) in the 50s of the XX century is considered as one of the important steps taken to solve this problem (Gorodov, 2012). Thus, independent information refers to information associated with the perceptual process and free circulating among the material bearers. For example, to broadcast any news on the radio or broadcast live talk of any person.

Dependent information, on the contrary, is characterized by dependence on the bearer of the information. However, the content of the information is not changed upon its transmit to another bearer, regardless of information's depending on the bearer. For example, the publication of any electronic information on paper form does not alter its content. It again confirms that, in terms of content, information differs for independence in any case.

Thus, the sign of the "dual unit of information and material bearer" should not be accepted unambiguously. Idealism of information means that it is created by the creator-person. From a legal point of view, a person is considered an "author" and the information product created by him is called a "work". Copyright applies to both published and undisclosed, objective, scientific, literary and artistic works that are the result of creative activity, regardless of their purpose, value and content, as well as form and method of expression. There the **sign of the creative product to exist objectively** comes into being. Copyright protection does not apply in itself to ideas, processes, methods of operation or mathematical concepts, but to expression forms. Forms of expression include written (handwriting, typewriting, note writing, etc.), oral (mass speech, public performance, etc.), audio or video recording (mechanical, magnetic, digital, optical, etc.), drawing (picture, sketches, pictures, plans, cartoons, cinema, television, video, or photographic staff etc.), dimensional-phase (sculpture, model, model, layout, building, etc.) and other forms.

As for the novelty requirement, it should be noted that the object of creative activity should reflect new information on the content of information expressed in any objective form. For this reason highlights of the day, news information about various events and facts are not recognized as creative products.

1.4. LIMITATIONS FOR CONFORMING INFORMATION CREATIVITY AND LEGAL INTERESTS

It is important to note that while freedom of creativity is of particular importance to creative people, abuses of this freedom are inevitable. Therefore, there are some restrictions on creative freedom, both internationally and nationally.

The UN Committee on Economic, Social and Cultural Rights believes that restrictions on the right to participate in cultural life should serve a legitimate purpose and be necessary to promote common welfare in a democratic society. In fact, this condition is exactly the same as the restriction on freedom of expression. Freedom of thought results in the emergence of a particular product of creativity in many cases. In this regard, the limitations and other provisions of Article 10 of the European Convention in the practice of the European Court of Human Rights also apply to the problems of freedom of creativity. Article 10 of the European Convention establishes three-part tests to assess the restrictions on freedom of expression as follows:

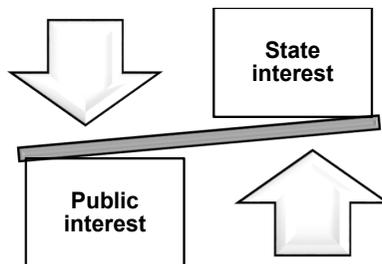
1. Restrictions should be provided by law. This condition is always governed by national legislation. Article 3 of the Constitution law of the Republic of Azerbaijan dated December 24, 2002 "On the regulation of the implementation of human rights and freedoms in the Republic of Azerbaijan"

states that restrictions imposed on human rights and freedoms must be aimed at the lawful purpose established by the Constitution and constitutional law of the Republic of Azerbaijan and should be proportional to the purpose.

However, the European Court interprets the concept of “law” in a broader context. In the case of *Sanoma Vitgevers BV v. Netherlands* (2010), in relation to the words “lawful” and “legally specified” in Article 8 to Article 11 of the Convention, the Court stated that it did not always use the term “law” in its official form; Meaning “substantive”. This includes both “written law” and “unwritten law”. The law should be understood both as “the law of law” and the “right” of judges. In the case of *Di Stefano Italy* (2012), the Grand Chamber’s decision stated that one of the requirements arising from the expression “prescribed by law” is certainty. Therefore, the norm cannot be considered as a “law” unless it is sufficiently developed to regulate the behavior of citizens (Mendel, 2007, p. 35). A few years before this case, the European Court of Justice in *Hungary* (1999) linked the definition of “statutory” and the principle of certainty directly to local legislation: can be. There is a more detailed local legislature that meets the legal requirements to interpret these provisions. In directing this, the Court found that in most cases (for example, in the case of *Gaweda Poland* (2002)) it was important to comply with the precise requirements set out in the law (Council of Europe Publishing, 2007, p. 8–9).

2. Restrictions should be directed to the protection of one of the legitimate interests (as provided in Article 10.2 of the Convention). Article 10.2 of the European Convention includes the following: public security and territorial integrity of the state, public order, prevention of riots and crimes, protection of health or morality, protection of the privacy or rights of others, prevention of elucidation of confidential information, ensuring reputation of justice judgement and impartiality.

An analogous norm is provided in Article 3 of the Constitutional Law of the Republic of Azerbaijan “On the regulation of the implementation of human rights and freedoms in the Republic of Azerbaijan”, where these legitimate interests are derived from the mutual harmony of state and public interests. Because the directions reflecting public interests are not legally enforced by government bodies, it is impossible to talk about their protection. In the meanwhile if the state does not act in public interest in its activities, the principle of democracy will be directly violated. According to German scientist Jürgen Habermas, who assures human rights and freedoms protection as one of the most important principles of a democratic society: “If you declare yourself a democratic society, you must guarantee human rights and freedoms. Otherwise, calling your society democratic country will be nothing but self-delusion” (Habermas, 1996).



The protection of legitimate interests applies not only to scientific works, but also to literary and artistic works. For example, Otto-Preminger Institut considers against Austria (1994) and European Court in trial work also considers the creation and dissemination of works of art or stage as a significant contributing factor in the exchange of information and ideas: "In his creative work, the artist expresses not only his personal vision, but also of his inner social outlook to the world. Art helps not only to form, but also to express public opinion from this point of view".

The "protection of morality", important among legitimate interests was put to the forefront by the European Court in many cases. For example, Muller and others in the case of against Switzerland (1988), Muller presented three major paintings of his own, depicting acts of sodomy, zoophilia, masturbation and homosexuality. The exhibition was open to the public widely and free of charge, with no age restriction for visitors. The Swiss courts fined the Muller and the exhibitors, the paintings were confiscated and submitted to the Museum of Art for storage. But they were given back to their owners in 1988. In response to the claim against Muller and exhibitors that they violated Article 10 of the Convention, application of penalty and confiscation, the Court stated that these paintings clearly portrayed sexual relations between human and animal roughly. They were open to the public. Because the organizers did not impose any entry fee or age restriction on visitors. The paintings presented at the exhibition were truly unrestricted to the audience in order to attract a wider audience. Therefore, the local courts' arguments of "enhancing their sexuality in the possible worst form" were not groundless. Those images could have offended people's perceptions of normal sexual life rudely.

Mainly the protection of morality and other legitimate interests suggests that hatred speech is condemned and banned all over the world, as well as in domestic law. According to the concept by Recommendations 97 (20) of Committee of Ministers of the Council of Europe "Hatred speech refers to intolerance expressed in racial hatred, xenophobia, anti-semitism or aggressive nationalism and ethnocentrism; discrimination and hostility in respect of minorities, migrants and immigrants, all forms of expression that spread, incite, promote, or justify other forms of intolerance-based hatred" (Committee of Ministers of Council of Europe, 30 October 1997).

National legislation of the Republic of Azerbaijan, guided by international legal norms also contradicts hatred speech. Thus, Article 47 of the Constitution prohibits propaganda and promotion based on race, nation, religion, social and any other criteria causing hostility and enmity. Non-consideration of offence and slander as critique is imperatively defined under Article 57. of the Constitution which implies law. At the same time, specific field norms reflect inadmissibility of hatred speech. For example, Article 10 of the law of the Republic of Azerbaijan "On Mass Media" considers abuse of mass media freedom and not allowed acts like dissemination of the secrets guarded by the legislation of the Republic of Azerbaijan, forcibly transforming existing constitutional state system, conspiracy against integrity of the state; promotion of war, violence and brutality, national, racial, social justice or intolerance; gossips on abusing citizens' honour and dignity under the name of a reputable source; fake or misleading articles, publishing pornographic materials, slander or other illegal actions, the use of mass media tools.

3. From democratic society aspect restrictions should be of absolute character. It is always necessary to check importance of restrictions “in a democratic community”. For example, the Court while considering the case on prohibition of the publication, distribution or sale of the Euskadian War book in France, published in many European countries ruled in its decision against Ekin France (2001), that there was no proportionality and interference with freedom of expression of the applicant is not considered urgent in the democratic society.

CONCLUSION

Information creativity, as a form of freedom of artistic creativity, implies a person’s involvement in various spheres of public life. As an information is a central element of the digital society, most economic indicators also change depending on the information flow. All this makes information dominating the information market as an economic product. Under these conditions, information products resulting from freedom of information are at the forefront of the independent intellectual property rights. The norms on freedom of information in all international documents also support information creativity. However, this does not exclude legal restrictions. Contrary to the limitations imposed by public and state interests, the freedom of information creativity in the legal form opens up large opportunities.

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THE SCOPE OF CRIMINAL LIABILITY FOR MISAPPROPRIATION OF AUTHORSHIP IN EU COUNTRIES: COMPARATIVE ANALYSIS

Ramunė Steponavičiūtė¹

Abstract. Intellectual property legal protection is undoubtedly one of the most important factors and conditions of effective economic, social and cultural development in modern society. According to researchers, absolute majority of countries in the world have set criminal liability for certain crimes against intellectual property rights, including all of the European Union (hereinafter – EU) countries. One of those crimes is misappropriation of authorship. Yet the criminal laws of EU countries criminalise misappropriation of authorship very differently - some protect not only author rights but also related rights, the conditions for criminal liability in the general *corpus delicti* are of a very different scope as well as the punishments for those crimes differ significantly. This analysis will present the scope of criminal liability in all the EU countries, including the reasons why, as well as will try to find the answer whether ways of coping with these difficulties exist.

Keywords: Misappropriation of authorship, Criminal law, Author law, Intellectual property.

INTRODUCTION

Intellectual property legal protection is undoubtedly one of the most important factors and conditions of effective economic, social and cultural development in modern society, especially considering the ever growing need for international exploitation of intellectual assets (Maskus, 1998). According to researchers, absolute majority of countries in the world have set criminal liability for certain crimes against intellectual property rights (Kiškis and Šulija, 2003), including European Union (hereinafter – EU) countries. One of those crimes is misappropriation of authorship – a violation of one of author’s moral rights.

However, EU countries criminalise misappropriation of authorship very differently, regarding the object of protection, the scope of protected rights, the conditions for criminal liability in the general and qualified *corpus delicti* as well as punishments for those crimes. This analysis will present an overview of international and EU criminal legal regulation, as well as peculiarities of national EU Member States’ norms, the scope of criminal liability for misappropriation of authorship in all the EU countries, regarding the qualifying features and size of two punishments: fine and imprisonment. The results are presented graphically in charts and a table, hoping to fill in some of the gaps of criminal legal analysis of copyright law.

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1. INTERNATIONAL LEGAL PROTECTION OF INTELLECTUAL PROPERTY

Intellectual property refers to original creations of the mind. Standard list of intellectual property objects consists of invention patents, registered industrial design, trademarks, copyright and trade secrets. Intellectual property consists of two categories: Industrial Property, which includes patents for inventions, trademarks, industrial designs and geographical indications, and Copyright, which covers author rights to original literary, artistic and scientific works and related rights, that include those of performing artists in their performances, producers of phonograms in their recordings, and broadcasters in their radio and television programs.

Intellectual property rights allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work in a creation (World Intellectual Property Organization, 2016). Article 27(2) of the Universal Declaration of Human Rights (1948) states that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Therefore, copyright grants a bundle of moral and economic rights to the author of literary, artistic and scientific works: moral rights protect the author’s intellectual and personal relationship with the work (there are conventionally three of them – the right of attribution (authorship), the right to authors name (to choose a name, pseudonym or remain anonymous) and the right to integrity of the work). While economic rights (right to publish, adapt, translate and so on) guarantee author’s participation in the commercial exploitation of his/her creation.

There are more than a few international and EU legal acts, protecting the intellectual property. The importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organization (WIPO, No. 450(E), p. 3). After that, there were several more². But regarding certain minimum standards of criminal legal protection of copyright on international level, there basically are only two international legal acts, forcing the countries parliaments to implement criminal liability for these crimes – the Convention of Cybercrime (2004) and The Agreement on Trade-Related Aspects of Intellectual Property Rights (1995)³:

1) Title 4 Article 10 of Cybercrime Convention (2004⁴) states that “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, <...> *with the exception of any moral rights conferred by such*

2 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), The Convention Establishing the World Intellectual Property Organization (1967), Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971), Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite (1974), The WIPO Copyright Treaty (1996) and Performances and Phonograms Treaty (1996), Unesco Paris Convention (Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005).

3 *Agreement on Trade Related Aspects of Intellectual Property Rights* is not an independent international treaty, but is a component of a 1994 April 15 Establishment of the World Trade Organization Agreement (Attachment 1 C) (entered into force on 1 January 1995) and therefore applies to all WTO members. Lithuania joined the TRIPS Agreement in May 31, 2001.

4 Members of this Convention include almost all of EU Member States, except Ireland and Sweden, which are observer countries to the Budapest Convention. See the member states in the page of Council of Europe here: <https://www.coe.int/en/web/cybercrime/parties-observers>.

conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.”

- 2) TRIPS is an international legal agreement between all the member nations of the World Trade Organization (WTO), connecting a vast majority of states in the world.⁵ Its section 5.713 on Criminal Procedures states, that it “requires that Members provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. They also have to provide for remedies such as imprisonment, monetary fines and seizure, forfeiture and destruction of the infringing goods and of any materials and implements predominantly used for the commission of the offense.”

In both of these documents, standards of mandatory criminal liability are quite minimum if we speak about whole IP law, including not only copyright, but also industrial property law. Both of them do not protect moral rights of the author.

Regarding the current EU’s regulatory framework for copyright and neighbouring rights, it is a set of eleven directives and two regulations, including several special additional instruments⁶. European Commission states, that “[b]y setting harmonised standards, the EU law reduces national discrepancies, ensures the level of protection required to foster creativity and investment in creativity, promotes cultural diversity and ensures better access for consumers and business to digital content and services across Europe.”⁷ In order to ensure the necessary level of copyright protection through these directives, European Parliamentary Research Service (2018) Comparative Law Library Unit conducted a research and prepared a study on copyright law in EU (June 2018 - PE 625.126): a research consisted of over 400 pages and covered salient features of copyright law across the EU Member States, regarding civil legal protection and transposition of one of the most important directives (the 2001 Copyright Directive)⁸ into national law, including an analysis of current legal situation in the area of copyright protection. Despite the thoroughness, however, no attention was paid to criminal legal protection of author rights as there are no criminal legal measures regarding copyright protection on EU level, which is understandable, as EU hardly has a competence in this matter.

This means that there are no mandatory provisions on international and EU level to criminalise most of the acts which violate author rights, including misappropriation of authorship. The international law of copyright and related rights is still based on the principle of territoriality, according to which, the protective reach of national copyrights is limited by space to the territory of the state in

5 For example, in Europe only Belarus, Serbia, Bosnia and Herzegovina are not member states of this agreement (neither are they members of EU for that matter). More at WTO site: <https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm>.

6 “Three additional instruments (Directive 87/54/EC, Council Decision 94/824/EC and Council Decision 96/644/EC) harmonise the legal protection of topographies of semiconductor products. Moreover, the E-commerce Directive and the Conditional Access Directive also contain provisions which are relevant to the exercise and the enforcement of copyright.” See more at European Commission website on EU copyright legislation.

7 See more at European Commission website on EU copyright legislation.

8 The main legal instrument governing copyright in the Union is the 2001 Copyright Directive, which aims to harmonise copyright rules within the Union and to adapt copyright legislation to new technological developments.

question, with the result that authors do not acquire uniform, globally valid copyright.⁹ Therefore, protection of author rights (especially – moral author rights) to this day remain a national prerogative. And here things get interesting.

2. PECULIARITIES OF EU MEMBER STATES' NATIONAL CRIMINAL LEGAL PROTECTION OF AUTHORSHIP

The analysis of EU Member States' criminal laws shows that most of them seem to have set criminal liability for misappropriation of authorship among other crimes against intellectual property. Regarding a legal source of the criminal legal copyright protection of right to authorship, some countries criminalise misappropriation of authorship in their criminal codes¹⁰, others - in Laws on Copyright and Related Rights¹¹. If it is set on a criminal code, it usually resides in a separate chapter called something like "Crimes against intellectual property", except several cases, where the crime is provided in another chapter¹². Criminal liability is usually set either explicitly stating the crime of misappropriation of authorship, or providing a wide norm, meant to protect the author from any illegal and dangerous infringement of copyright (so at least through wider interpretation of the norm, without the necessity to adopt another norm, it is possible to protect both economic and moral rights).¹³

There is a third way to protect authorship – namely using other legal norms (i. e. other *corpora delicti*). Cyprus and Malta seem to protect only economic rights of author (but not authorship itself), thus without a violation of economic rights, there is no protection of authorship against usurpation: these countries do not have a specific *corpus delicti*, aimed at protecting moral interests of authors and the norm, aimed at criminalising "copyright infringement", seems to cover only economic rights. Of course, there is a possibility, that these countries use another law for prosecution of usurpation of authorship, for example, a fraud, like it seems is an Austrian case (misappropriation of authorship is considered to be a fraud under Austrian CC para 146). However, in this case it is safer to assume, that authorship is not protected, which can be a result of historical nuances: "[n]ational copyright

9 Rather, they can benefit from the copyright protection that applies in each country. Hence a whole bundle of territorially limited national copyrights are available to them. See more: <<https://open-access.net/en/information-on-open-access/legal-issues/legal-issues-in-austria/copyright.>>.

10 Austria, Bulgaria, Czech Republic, Croatia, Estonia, Finland, Hungary, Latvia, Lithuania, Slovakia, Slovenia, Spain, see the Annex.

11 Belgium, Denmark, France, Germany, Italy, Ireland, Luxembourg, Poland, Portugal, Romania, Sweden, The Netherlands, see the Annex.

12 Croatia - Criminal Offenses Against Property, Finland - Violation of certain incorporeal rights, Latvia – Against fundamental rights and freedoms of a person, Slovenia - Human rights and liberties.

13 However, even if we have a broad norm, that doesn't guarantee a success of its application as the flawed application can also prevent the protection of moral author rights. For example, Latvia's criminal legal regulation seems to be very broad - Latvian Criminal Code Section 148 criminalizes any infringement, which causes substantial harm, which would easily include misappropriation of authorship if it caused substantial harm. But the Highest Court of Latvia in a plagiarism case in 2014 concluded that this broad *corpus delicti* is not meant to protect moral author rights: according to the Court, misappropriation of authorship is not explicitly mentioned in Section 148 Criminal Law and not punishable under Criminal Law. By saying this the court did not interpret the meaning of "copyright infringement" as provided for in Section 148 (1) Criminal Law and did not try to find out whether misappropriation of authorship could be a form of copyright infringement.

systems follow two different legal traditions: civil law in continental Europe and common law in the United Kingdom, Ireland, Malta and Cyprus” (European Parliamentary Research Service, 2018, p. 3). “The continental model is based on an authors’ rights legislation. It mainly takes inspiration from the French *droit d’auteur*, which arose following the French Revolution, and is characterised by the moral and economic double nature of the rights granted to the author of a work. In the common law system, where the notion of “copyright” found its origin as a system for granting official exclusive licences to print and trade certain works for a limited period of time, economic rights prevail. A certain harmonisation of the two systems began by means of the Berne Convention which internationally recognises the right of identification and the right of integrity as the “right to claim authorship” and the “right to object to certain modifications and other derogatory actions”. Those two main moral rights have consequently been incorporated into British and Irish law. They are however incorporated as rights that are granted and can thus be waived” (European Parliamentary Research Service, 2018, p. 4). This would explain Maltese and Cypriot regulation and would prove that there is no reason to presume authorship being protected through other *corpora delicti*, like aforementioned fraud. Without a way to be absolutely sure, the author of this article further chooses to exclude these countries from further analysis and depiction in graphics.

Greece criminal legal regulation raises a similar question too, despite the fact that it does not represent the common law system. Greek Copyright Law Art. 66, apart from economic rights, explicitly protects other moral rights: if a person “<...> acts against the moral right of the author to decide freely on the publication and the presentation of his work to the public without additions or deletions, shall be liable to <...>”. This means, that Greece explicitly protects economic rights and two moral rights - a right to decide on the publication¹⁴ as well as a right to integrity of a work, which are, so to say, derivative rights from the “crowning right” to authorship. Logic dictates, that if the norm was supposed to protect authorship, it would have been mentioned next to the others explicitly. Despite the fact that Greece belongs to continental legal system and it seems rather unlikely for it not to protect the authorship, the grammatical analysis of the norm’s questionable construction suggests,¹⁵ that for the sake of honesty and integrity of the analysis, it is better to exclude Greece from further analysis and depiction in the graphics as well.

Ireland, however, despite being a representative of common law system, has a rather suitable *corpus delicti* for protection of moral author rights, as a norm is construed widely, like in many con-

14 It means a right to decide on the time, place and manner in which the work shall be made accessible to the public (publication) This moral right is one of the less widespread rights of author, therefore, not mentioned before, next to right to authorship, right to author’s name and right to integrity of the work. See each EU Member States regulation either in their respective Copyright Act or see European Parliamentary Research Service (2018).

15 One of the biggest tackles of a thorough research of this field is the language barrier and the translations of legal acts into English. English language represents common law tradition and their law is called “Copyright law”, which quite literally represents the content of the rights themselves – “the right to copy” with a big focus on economic author rights. If we use the same term, trying to represent continental tradition, the better term should be “Author law and related rights law”. However, almost none of the EU Member States translate the name of their corresponding laws in this manner and blatantly use “Copyright Law/Act” instead, which complicates the understanding of the content of the protected rights, as well as the extent of the protection (does the protection include only economic, only moral, or both of these rights).

tinental countries: Irish Copyright Act, Art. 141 is called “False claims of copyright”: “A person who, for financial gain, makes a claim to enjoy a right under this Part which is, and which he or she knows or has reason to believe is, false, shall be guilty of an offence and shall be liable <...>”. Therefore, this country was designated to the group of countries, providing a wide norm for protection.

Some other EU Member States’ legal regulation stands out too.

Italian regulation is special in a way that it criminalises illegal use of economic rights, but not directly misappropriation of authorship (Art. 171). The latter is considered to be a qualifying feature of economic rights infringement. Therefore, there is a wide range of other highly qualifying features for committing misappropriation of authorship through illegal use of economic rights: by using (reproducing, duplicating, etc.) of over 50 copies, communicating to the public for profit by placing it in a system of telematic networks in any way, by exercising business activities or promotes or organizes the illegal activities (Art. 171-ter. 1 of Italian Copyright Act).

Hungary is also an interesting case. There are two similar *corpora delicti* in Hungarian Criminal Code: Article 384 “Plagiarism”, which describes a specific author’s right infringement by connoting as his own the intellectual works of another person (it is punished by imprisonment not exceeding three years), and Article 385 “Infringement of Copyright and Certain Rights Related to Copyright”, which describes a general copyright infringement (which is punished by imprisonment not exceeding two years). On one hand, it seems that Art. 384 is special to Art. 385, as Art. 384 seems to criminalise a more dangerous act than Art. 385 (Plagiarism is a felony while Copyright infringement under Art. 385 is a misdemeanour), but on the other hand, Art. 384 has no qualifying features, while Art. 385 has many, - with all the qualifying features, mentioned in part 3 and 4 of Art. 385 (causing considerable, substantial, particularly considerable or particularly substantial financial loss) makes it more dangerous than the general *corpus delicti* of Art. 384. So the question is, how to qualify plagiarism that causes substantial financial loss? According to Istvan Ambrus, Art. 384 “Plagiarism” is supposed to protect moral rights of the author, while Art. 385 – economic rights of the author. Thus if someone fulfils the statutory element of both criminal offences, this situation is considered as a real concurrence of crimes in Hungary (even if this happens with only one exact commitment), so the perpetrator can be punished for both.

Regarding the scope of protection by the object, it can be noted that not all EU Member States protect all of the copyright and related rights objects. Lithuanian example shows that it is more than possible. Lithuanian Criminal Code Chapter XXIX “Crimes Against Intellectual and Industrial Property” consists of 5 crimes, but only one of them protects the authorship of a creator, namely an author of a literary, scientific or art creation. No other article in this chapter (or in the rest of the Criminal Code for that matter) protects either authorship of performance, or authorship of industrial property objects (like invention, etc.). This creates a problem if the prosecution for these crimes, committed in other EU Member States, should be executed according to Lithuanian law (certain rules of double criminality may arise, depending on the type of sanction imposed, the way the crime was commit-

ted or other circumstances)¹⁶. However, the scope of this situation requires a thorough analysis, as many countries might protect these other objects (i.e. objects of related rights (including both artistic performances and sound or audio-visual records as well as radio or television broadcasts), or objects of industrial property (including industrial designs, patentable inventions, etc.) through different norms than the one, meant for protection of authorship of literary artistic scientific works and other objects of author law¹⁷.

But the biggest differences of the regulation start to occur in the scope of criminal liability, regarding the conditions for criminal liability to arise on the first place.

3. CONDITIONS FOR CRIMINAL LIABILITY FOR MISAPPROPRIATION OF AUTHORSHIP IN GENERAL *CORPUS DELICTI*.

If we look at the conditions for criminal liability to arise, provided in general *corpus delicti* of misappropriation of authorship, we see a wide range of possibilities: in more than half of EU countries (precisely – 15 of them) just the act of misappropriation of authorship is considered to be enough to qualify it as a crime. It is provided in general *corpus delicti*, which is formulated very broadly: Bulgaria, Croatia, Denmark, Estonia, France, Germany, Greece, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, and the Netherlands. It would seem, that the act of usurpation of authorship is considered to be detrimental by itself, disregarding the consequences of the crime.¹⁸ The rest 12 Member States criminal laws require additional specific conditions to be met:

- 1) **Mens rea**, regarding the motive: the act is “malicious or fraudulent” (Belgium, Luxembourg); offender acts with intent to illegally enrich themselves or a third party, i. e. commits the crime for financial gain or profit (Austria, Finland, Ireland, Spain)¹⁹; the person acts knowingly that claim is false (Ireland); acts for personal use (Italy).²⁰

In several countries’ regulation there is an additional rule that if the criminal offense is committed with the purpose of financial gain, either additionally a fine is imposed (for example, Art. 50, Hungarian CC), or, if the fine imposed is the main punishment, then the size of the fine is increased (for example, Slovenian CC, Art. 38(1)).

¹⁶ See chapter 6 of this article.

¹⁷ For example, Czech Republic Criminal Code Section 269 “Infringement of Protected Economical Rights”, that is constructed almost identically to the Section 270, criminalizing Infringement of Copyright, Rights Related to Copyright and Rights to Databases.

¹⁸ Polish criminal legal regulation also reinforces this idea: Polish Copyright Act Art. 115.3 states that if a person violates specific author rights “<...>in order to gain material benefits in a manner other than specified in paragraph 1 or 2, shall be liable to <...>”. The sentence in this case is also smaller – imprisonment for up to one year instead of three, like in the 1st part, where misappropriation of authorship is criminalised. This indicates, that stealing one’s authorship is a more dangerous act than any other.

¹⁹ The size of the profit is not usually explicitly named, it usually is a prerogative of the court to determine, except, for example, in Spain – systemic analysis of Spanish CC suggests, that it means more than 400 euros as it is the line of small amount of financial profit (Spanish CC, Art.270 (1)).

²⁰ Systemic analysis of Italian law suggests that if the act is committed not for personal use, than it is considered to be a qualifying feature (Art. 171-ter(1) of Italian Copyright Act).

2) **The objective elements of the crime:**

- a) **Actus Reus:** was committed not insignificantly (Czech Republic);
- b) **consequences of the crime:** causes damage (Austria), causes considerable detriment or damage to the person holding a right (Finland), causes financial loss to the right-holder (Hungary), causes substantial harm to rights and interests protected by law of a person (Latvia), the person acted to the detriment of a third party²¹ (Spain).

Italian example is interesting in a way that usurpation of authorship itself is regarded as a qualifying feature to infringement of author's economic rights.

4. QUALIFYING FEATURES OF THE CRIME

It should be noted, that, there are no qualifying features of the crime of Misappropriation of Authorship in criminal laws of 9 EU Member States: Belgium, Bulgaria, Estonia, Finland, Ireland, Poland, Slovenia, Sweden and the Netherlands.²² If we analyse qualifying (including highly qualifying) features of the crime in the rest of the EU Member States, we will see that they are very variant:

- 1) **Mens rea**, regarding the motive or aim: offender acts on commercial basis/intent (Germany, Austria, Italy); for purposes other than personal use (Italy); by reason of specific motivation (Slovakia).

In three cases, misappropriation of authorship is considered to be a crime, if committed not only with intent, but also with gross negligence, which expands the application of the norm significantly (Denmark, Sweden and Portugal).

2) **The objective elements of the crime:**

- a) **Actus reus:** commits such an act in large or considerable extent (Czech Republic, Latvia) or in a more serious manner (Slovakia); the act has attributes of business activity or commerciality (Czech Republic, Italy, Austria, Denmark) or was committed by distributing a large number of infringing copies (Italy, Denmark, Latvia) as well as the value of the objects unlawfully produced is big (Spain), or by the person acted making them available to the public (Denmark, Italy, Slovakia). Another qualifying feature is if the act was committed by compelling the renouncing of authorship by means of violence, threats or blackmail (Latvia, Lithuania). Some other rather general qualifying features include acting as a member of a(n organised) group of persons (Latvia, Lithuania, Slovakia, France), or Repetition/Recidivism (Luxembourg, Portugal)²³, or by promoting or organizing the illegal activities (Italy), as well

²¹ Systemic analysis of the CC suggests that the value is not fixed in any way and in each case court decides (it is an evaluative feature). For example, Article 236: Whoever, being the owner of an item of moveable property or acting with the owner's consent, takes it from whoever lawfully has it in his possession, *to his detriment or that of a third party, when the value thereof exceeds four hundred euros*, shall be punished with a fine of three to twelve months.

²² Considering the fact, that Bulgaria, Estonia, Poland, Slovenia, Sweden and the Netherlands have already very broad general *corpus delicti*, there is no disparity between a rather simple and more dangerous crime in criminal legal regulation, which leaves the court with a possibility to adapt to the situation only through the process and rules of imposition of the penalty.

²³ It should be noted, that this is likely only a specification of the structure of these countries' criminal codes and in every

as when persons under eighteen years of age are used to commit those offences (Spain).

- b) **The consequences of the crime:** the offender gains substantial or extensive profit (Czech Republic, Spain); the offender causes substantial or extensive damage (Czech Republic, Slovakia, Spain); the infringement results in considerable/substantial financial loss (Hungary).

There is only one country in EU that has provided privileged circumstances for misappropriation of authorship – Spain: in cases of retail distribution, in view of the circumstances of the offender and the small amount of financial profit, as long as the person doesn't intentionally export or import illegal copies of the work and when the profit does not exceed four hundred euros.

As you can see, some of the qualifying features coincide with the ones that are considered necessary for the qualification of the general *corpus delicti* of the crime in other countries. This will have an impact to the imposition of the crime, which is explained below.

5. PUNISHMENTS FOR MISAPPROPRIATION OF AUTHORSHIP

All of the EU countries have these two types of possible punishments for misappropriation of authorship: a fine and imprisonment (every country has imprisonment as a punishment either in the general *corpus delicti*, or in the *corpus delicti* with qualifying features, or in both of them). Of course, there are also many other possible punishments or other punitive measures, that the court can impose with or instead of imprisonment or a fine, but it is practically impossible to compare them all, as there are many rules of imposition of crimes, changing one punitive measure into another or imposing several of them at once (even fines in many EU countries can be either a main punishment, or an auxiliary measure next to imprisonment).²⁴ So only fines and imprisonment can be compared at least on some measurable level.

5.1 Fines

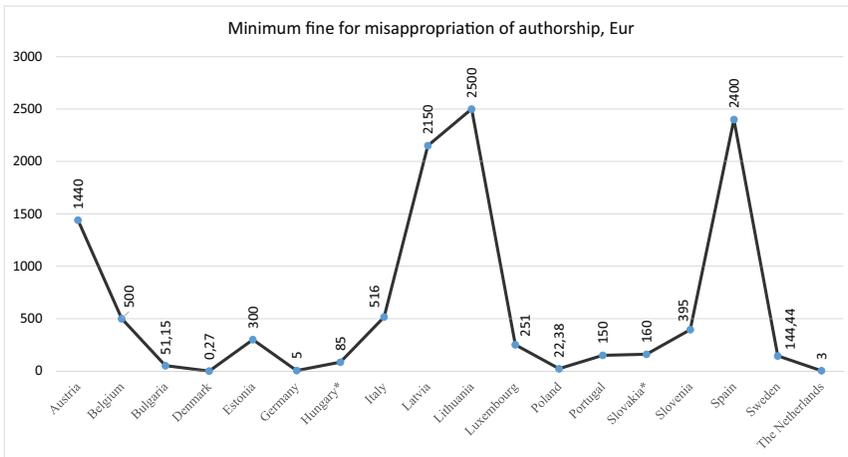
The graph below depicts a minimum fine, possible to impose for a person for the misappropriation of authorship crime (without qualifying features) in EU Member States.²⁵ It should be noted, that not all countries mention the size of a fine in the same norms as the crime itself, sometimes the minimum is only set in the general part of criminal code. Therefore, the graph depicts both: the

other country repeated crimes or crimes, committed by a group of persons are punished more severely, but the rules of imposition of the punishment are set in general part of the criminal codes instead of special part of the code. A(n organised) group in this case includes a group of accomplices, an organized group, including a criminal association, or any other form of complicity.

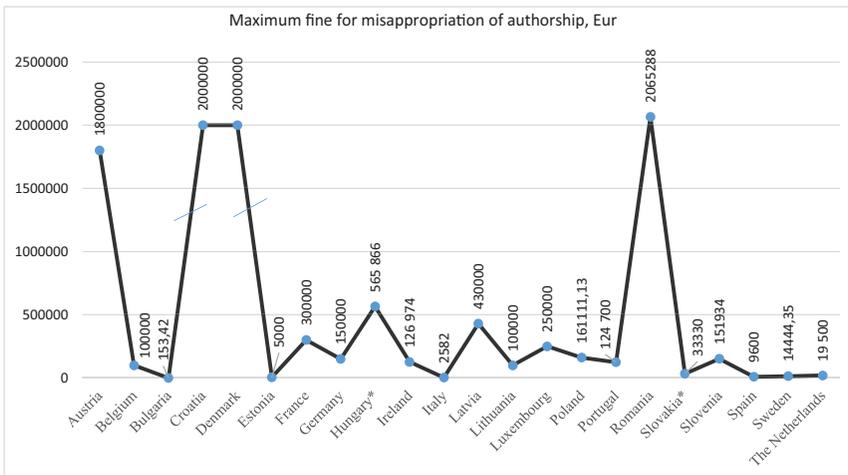
²⁴ It is interesting, that in Czech Republic confiscation is listed as one of the alternative punishments for the crime, while many other countries confiscate infringing goods as a mandatory provision with the punishment.

²⁵ Several countries were eliminated from these graphs for various reasons: in both of these graphs Croatia was eliminated, as there is no maximum or minimum limit to the fine; Finland was eliminated as well, as there is no threshold mentioned for the fine – it depends entirely on the income of the offender, in France and Ireland, there is no minimum limit, only maximum limit of a fine, and in Czech Republic there is no fine punishment in the general *corpus delicti*, it can only be imposed if certain qualifying features are stated.

one, specified in the norm criminalising the act and if the size is not specified – the size of the fine, stated in general part of country’s criminal code is used instead.²⁶



As we can see, the minimum possible fines for misappropriation of authorship are extremely different and the gap can consist of several thousand euros. Same goes with maximum fines (see the graph below).²⁷



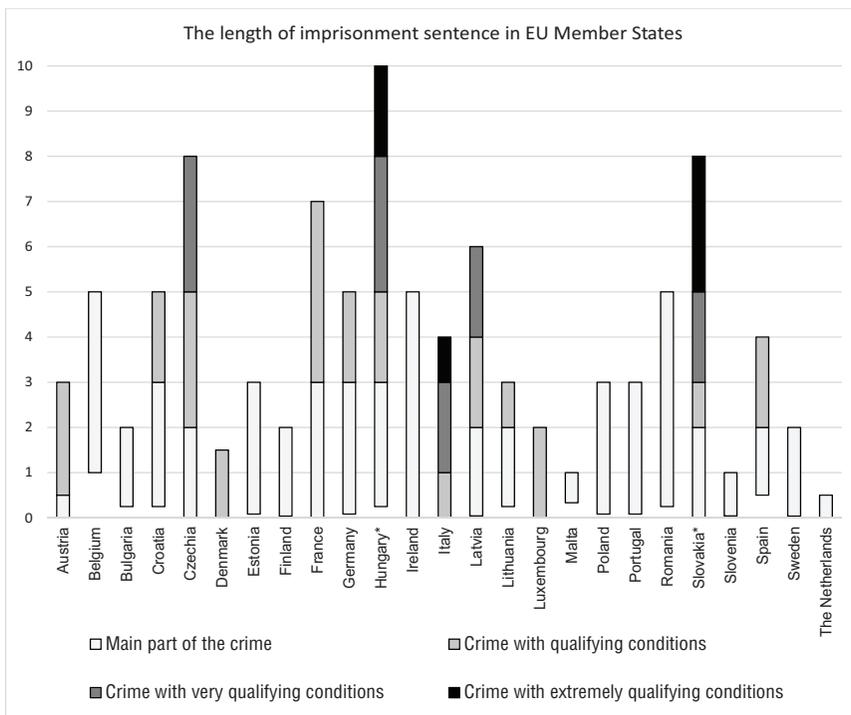
26 It should also be mentioned, that many states count fines by a range of days and one day also has a range of sum, so in several cases (see the Annex) the minimum and maximum size of the fine is an absolute minimum or maximum that can be possibly imposed for any other crime (minimum is counted by multiplying minimum number of days and minimum sum for one day, while the maximum sum is counted by maximum number of days and maximum sum for one day).

27 Maximum fines were counted in the same way – if they are explicitly provided in the norm, criminalizing misappropriation of authorship, then they are used, if not – the absolute maximum fine is counted using rules, provided in general part of Country’s criminal code. Croatia, Finland and Czech Republic were eliminated from the graph for the aforementioned reasons too.

There are four extreme spikes in this graph that make the rest of it rather flat: Denmark and Croatia provide minimum fines, but the maximum size is unlimited, so there is no way to actually depict it graphically and the court practice may fix it at any point of the graph. Austria and Romania, on the other hand, have a very high limit for a possible maximum fine. Austria is special in a way, because it considers misappropriation of authorship to be a variation of fraud and fraud is usually a very dangerous crime in all the EU as it can undoubtedly cause substantial damage to the victim. The rest of the countries' regulation visually seems less varying, but regarding the actual numbers, they are also drastically different and rather random: the size of the fines does not seem to correlate to the "wealth" of the country, nor does it seem to represent cultural or regional features of IP protection either. Of course, it is very unlikely for a person to be sentenced either with a minimum, or a maximum fine, so absolute majority of cases will be somewhere "in between" and legal practice can draw the lines anywhere.

5.2. Imprisonment

There is a very similar situation with imprisonment (see the chart below):



Not only the length of imprisonment is extremely different (including minimum and maximum terms), but several of the EU Member States – namely Czech Republic, Hungary, Italy, Latvia and Slovakia - stand out also in the quantity of levels, regarding qualifying features and sanctions for

them (See the Annex). Denmark, Italy and Luxembourg set the shortest terms for imprisonment, compared to other Member States, and this punishment can be imposed only for the *corpus delicti* with qualifying features, while for the general *corpus delicti*, it is possible to impose only a fine penalty.

As these two graphs show, the difference of both fines and imprisonment seems unjust. If we take, for example, Danish regulation and compare it with Hungarian, the extremities of the regulations become obvious: in case of a commercial misappropriation of authorship, that has caused substantial damage, the maximum term of imprisonment in Denmark would be one year and six months, while in Hungary the same act could be punished for up to 10 years of imprisonment.

6. CURRENT REGULATION AND POSSIBILITIES OF HARMONISATION

Obviously, this variant regulation can, does and will in the future create many legal and practical problems. For example, the incorporeal nature of copyright objects creates issues of dealing with crimes committed in virtual space (misappropriation of authorship is very easily committed online - i.e. regardless of national borders²⁸), therefore, problems of applicable law will arise.²⁹ Furthermore, questions of international criminal legal cooperation and certain act's recognition as a crime will be problematic too: as mentioned before, in some countries only a certain form of misappropriation of authorship is a crime (if at all), while in others – all moral rights might be protected by criminal means. This raises questions of double criminality. It must be noted, that infringement of moral author rights *per se* is not mentioned in the list of 32 crimes, provided in framework decisions of the Council of the EU, which would have given rise to recognition of the decision without verification of the double criminality of the act (i.e. without proving that the act is criminalised in both Member States). Therefore, the verification of the double criminality of misappropriation of authorship would be necessary, unless this crime falls under one of other categories, mentioned in the list of those 32 crimes. For example, Framework Decision's of the Council of the EU (2002/584/JHA) Art. 2.2 includes a "computer-related crime" or "counterfeiting and piracy of products" in the list, therefore, if misappropriation of authorship is committed through committing these crimes, then the European arrest warrant would be issued without verification of the double criminality of the act³⁰ and misappropriation of authorship would be punished jointly in the executing state (this means that authorship will be protected through the protection of economic authors rights). Otherwise,

28 Cyberspace Convention does not protect moral rights, only economic rights, which in this case can be also violated, as the act of stealing someone's work almost inevitably constitutes a publication of some sort.

29 Another reason why this variant EU Member States' regulation is questionable is because without harmonisation of minimum standards of protection of moral rights, people, while enjoying their right to free movement, have certain expectations on the regulation to be at least similar throughout all the EU, while in fact it is not, as shown in the graphs above. Therefore, the ensurance of the principle of legal certainty can be in question.

30 Furthermore, the size of punishment plays a big role in this too: These offences have to be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years in order to issue a European arrest warrant without verification of the double criminality. If the conditions are not met, then the European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

verification of the double criminality of the act is necessary, which will complicate legal cooperation between EU Member States. The same goes with other Framework Decisions of the EU Council, that provide an identical list of 32 mutually recognised crimes: 2008/947/JHA regarding the supervision of probation measures and alternative sanctions (Art. 10); 2008/909/JHA regarding imposition of custodial sentences or measures involving deprivation of liberty (Art. 7); 2009/829/JHA regarding supervision measures as an alternative to provisional detention (Art. 14).

However, Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to *financial penalties* provides additional 7 crimes to the aforementioned list of 32 crimes and the expanded list includes “infringements of intellectual property rights” and misappropriation of authorship falls under this group of crimes. Therefore, if a fine is imposed for misappropriation of authorship by a court of the issuing State, other States will not have to verify the double criminality of the act and will recognise and enforce the decision in accordance with the Framework Decision’s rules and their exceptions.

All of these problems suggest that we need a unanimous criminal legal regulation of certain crimes against intellectual property (at least for ones committed on a commercial scale) on EU level. But as TRIPS was so criticized for its unprecedented coercive nature (Rajan, 2001) and called “the most ambitious multilateral intellectual property (IP) treaty at that time” (Geiger, 2016, p. 4), any attempt to provide means of criminal legal regulation on EU level could also provoke similar reaction. It should be noted that there was one attempt to unify criminal legal protection of intellectual property on EU level as a way to solve namely these very different sanctions set on national criminal laws of EU Member States: in 2005 (July 12), European Commission submitted a Proposal for a European Parliament and the Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights³¹, which would have obliged the Member States to consider all intentional infringements of an intellectual property right on a commercial scale as a criminal offence, including attempting, aiding or abetting and inciting such offences (Article 3). The Directive even offered a certain range of possible penalties in Article 4: imprisonment, fines and the seizure (or in some cases - destruction) of goods belonging to the offender (including the infringing goods and the materials, implements or media used the infringement), etc., and offered the amount of the penalties (Article 2 of Explanatory memorandum). This Proposal has been repeatedly discussed and changed, but the consensus has not been reached: in 2010, the Commission finally withdrawn it. All other directives relevant to copyright protection, as mentioned before, are limited to civil legal regulation.

Therefore, an effective way to deal with this situation would be through judicial cooperation in criminal matters in the European Union, which is based on the principle of mutual recognition of judgments and judicial decisions, if all of the lists of mutually recognised crimes in the Framework Decisions of the EU Council would include intellectual property crimes. Otherwise, it is unlikely that the Member States are going to willingly transfer their competence to EU on such an important field as criminal law. Currently Article 83 of the Treaty on the Functioning of the European Union (2012)

³¹ 2005 July 12 *Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights* {SEC(2005)848} /* COM/2005/0276 final - COD 2005/0127 */.

limit's EU competence to crimes that are extremely dangerous and cross border (like terrorism, trafficking in human beings, drugs or arms, money laundering, organised crime, etc.). It seems, there is no place for less serious crimes, therefore, the expansion of the list of 32 mutually recognised crimes in the Framework Decisions would be a much less painful and more effective procedure, than harmonisation of the national laws.

So it seems, that on one hand, there is a universally accepted reason to standardise the enforcement of intellectual property rights with criminal legal tools - the scope of copyrighted material in the world as well as correspondingly increasing spread of counterfeiting and piracy on a global scale, which is an ever-growing international phenomenon with major economic and social repercussions (Geiger, 2016, p. 5), while on the other hand, we have a need of diversity: choosing a 'one size fits all' approach tends to ignore the complexity of criminal law and the need to differentiate between the various intellectual property rights, the infringing situations and the sanctions involved (Geiger, p. 5), as well as raise old nationalist legal arguments, suggesting that harmonisation undermines a national culture (Michaels Halpern and Johnson, 2014, p. 17).

However, some authors think that this struggle between pro's and con's of international harmonisation of criminal legal protection of intellectual property rights might be of a temporary nature. As Rene David put it: "Let jurists continue in their routine opposition to international unification of law; nevertheless that unification will occur without and despite them, just as the *ius gentium* developed in Rome without the pontiffs, and as equity developer in England without the common-law lawyers" (David, 1968, from Halpern and Johnson, 2014).

CONCLUSIONS

- 1) No international hard-law regulation requires countries to criminalise misappropriation of authorship, as well as any other moral author rights. All of the international and EU measures of copyright protection emphasize on establishing mandatory criminal responsibility for intentional copyright infringement on commercial scale, which means that these crimes regard the protection of only economic author rights.
- 2) Regarding national criminal legal regulation of EU Member States, considering criminalisation of misappropriation of authorship, few EU countries seem not to provide criminal liability for misappropriation of authorship: Cyprus and Malta with a certain reservation of adding Greece to the list. The rest criminalise misappropriation of authorship either in their criminal codes, or in laws on copyright and related rights. Most of the EU countries criminalise only intentional copyright infringement, while three countries provide a possibility to prosecute a person, who acted with gross negligence (Denmark, Sweden and Portugal).
- 3) More than half EU Member States criminalise misappropriation of authorship with very wide *corpora delicti* and don't require any additional criteria to be met for criminal liability to arise apart the commission of the act. The rest criminalise misappropriation of authorship only if it was somehow detrimental (causes damage, considerable harm, financial loss to the right holder,

etc.) or shows a specific *mens rea* of the offender (he acts fraudulently, with intent to gain profit, etc.). In one third of EU Member States criminal laws there are no qualifying features for the crime of Misappropriation of Authorship, only the general *corpus delicti* with the same features that are considered to be qualifying in other countries. This creates a situation where the same crime is being punished differently in each country, as norms with qualifying features contain harsher sanctions.

- 4) All EU Member States, that have criminalized misappropriation of authorship, have provided fines and imprisonment as possible sanctions for the crime.
 - a. The comparison of EU Member States' sanctions shows a wide range of possibilities to impose minimum and maximum fines. The minimum or maximum size of the fines do not seem to correlate to the "wealth" of the country, nor do they seem to represent cultural or regional features of intellectual property protection either. As both the very minimum or maximum fines are rarely imposed and absolute majority of cases will be imposed somewhere "in between", the size of actually imposed fines by the courts depend completely on the country's case law and are hardly comparable.
 - b. The length of imprisonment sentence varies radically throughout EU: the same crime could be punished by one and a half years of imprisonment in one country and by ten years in another. This contradicts to the expectation that similar situations will cause at least similar legal consequences throughout all EU Member States.
- 5) According to Framework Decision of the EU Council on mutual recognition of judgments and judicial decisions, if a penalty of imprisonment is imposed, the verification of the double criminality of misappropriation of authorship would be necessary, unless this crime falls under one of other categories, mentioned in the list of 32 mutually recognised crimes (namely, "computer-related crime" or "counterfeiting and piracy of products"). However, if a fine is imposed by a court of the issuing State, other States will not have to verify the double criminality of the act and will recognise and enforce the decision in accordance with the Framework Decision of the EU Council 2005/214/JHA "on the application of the principle of mutual recognition to financial penalties", as misappropriation of authorship falls into the category of "infringements of intellectual property rights" in the Framework Decision's list of mutually recognised crimes.

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ANNEX: TABLE ON EU MEMBER STATES NATIONAL REGULATION

	EU Member State	The main composition of a crime	Sanction for the main composition of a crime	Qualifying circumstances	Sanction for the composition with qualifying circumstances
1.	Austria Criminal code, §146-148 (as fraud).	Intent to illegally enrich themselves or a third party; creates damage	Imprisonment for six months or with a fine of up to 360 daily rates (1 daily rate ranges from 4 to 5000 euros, depending on the income of the culprit).	Commits fraud commercially	Imprisonment for up to three years.
2.	Belgium The Code of Economic Law. Chapter 13, Art. XI.293.	Malicious of fraudulent	The level 6 sanction, which consists of a criminal fine of 500 to 100,000 euros and imprisonment of one year to five years or one of these penalties only	-	-
3.	Bulgaria Criminal Code, Section VII, Art. 173 and 174.	-	Imprisonment for (3 months ¹) up to 2 years or by a fine from BGN 100 to 300 (=51,15 to 153,42 Eur)	-	-
4.	Croatia Criminal code Article 229 "Violation of Copyright or of the Rights of Performing Artists"	-	A fine or by imprisonment (from 3 months) ² not exceeding three years A fine is 30-360 daily units. 1 daily unit is 20 KN-10 000 Kuna (2,66 Eur-1328,76). So the fine can range is between 79,8-478 353,6 Eur.	3) Offences are committed against a protected item of cultural heritage 7) considerable pecuniary gain is acquired, or considerable damage is caused, while the perpetrator acts with an aim to acquire such pecuniary gain or to cause such damage	3) Imprisonment for six months to three years. 7) Imprisonment for six months to five years.
5.	Cyprus: NOT PROTECTED (only through infringement of economic rights). Copyright Act. Moral rights are not treated in Law 59/1976. ³				
6.	Czech Republic Criminal code Section 270 "Infringement of Copyright, Rights Related to Copyright and Rights to Databases"	Not insignificantly	Imprisonment for up to 2 years ⁴ or to prohibition of activity or confiscation of an item or other asset value.	(2) a) the act has attributes of business activity or another enterprising, b) gains substantial profit or causes substantial damage to another c) the act is committed in considerable extent.	2) An offender shall be sentenced to imprisonment for six months to five years, to a pecuniary penalty or to confiscation of a thing or other asset value

1 Art 39 of Bulgarian CC.

2 Croatian CC Art 44(1)

3 European Parliamentary Research Service (2018).

	EU Member State	The main composition of a crime	Sanction for the main composition of a crime	Qualifying circumstances	Sanction for the composition with qualifying circumstances
				(3) a) gains extensive profit or causes extensive damage to another b) commits such an act in large extent.	3) An offender shall be sentenced to imprisonment for three to eight years (Art. 68 of CC) A pecuniary penalty shall be imposed in daily rates in an amount of at least 20 and at most 730 whole daily rates. (2) A daily rate shall amount to at least 100 CZK (3,75 Eur) and at most 50000 CZK (1874,73 Eur)
7.	Denmark Act on Copyright (2014), Art. 76.	- (+By gross negligence)	A fine The size depends on income of the culprit. Minimum day fine is 2 Kr. (or 0,27 Eur), the fine is of 1-60 days, so minimum fine is between 2-120 Kr. (0,27-16 Eur). There are no limits of maximum fines.	Committed Intentionally by distributing copies among the general public and under particularly aggravating circumstances, which are deemed to exist especially where the offence is commercial, concerns production or distribution of a considerable number of copies, or where works, performances or productions are made available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.	Imprisonment (from 7 days) ⁵ in one year and 6 months, unless CC 299b provides a more severe punishment ⁶
8.	Estonia Criminal code Chapter 14 § 219. Violation of authorship	-	A pecuniary punishment or imprisonment (from 30 days) ⁷ up to 3 years' A fine is of 30-500 daily rates. Daily rate depends on the income of the offender. Minimum daily rate is 10 eur./day = from 300-5000 Eur	-	-

4 Czech CC Section 55 does not provide minimum sentences.

5 Denmark CC, Para 33(1).

6 § 299 b Any person who, for the purpose of obtaining for himself or for others an unlawful gain or who otherwise under particularly aggravating circumstances commits copyright infringements of a particularly serious nature, cf. Section 76(2) of the Copyright Act, or unlawful import of a particularly serious nature, cf. Section 77(2) of the Copyright Act, shall be liable to imprisonment for any term not exceeding six years.

7 Estonian CC Para. 45 (1).

	EU Member State	The main composition of a crime	Sanction for the main composition of a crime	Qualifying circumstances	Sanction for the composition with qualifying circumstances
9.	Finland Criminal code Chapter 49. Violation of certain incorporeal rights. Sec 1 "Copyright offence"	For profit and in a manner conducive to causing considerable detriment or damage to the person holding a right	A fine or to imprisonment (from 14 days) ⁸ to at most two years. Size of a fine depends entirely on the income of the fined person: a day is 1/60 of income and a fine can range from 1-120 days.	-	-
10.	France Intellectual property code. Articles L335-2 and L335-3.	- [+Gross negligence in some cases regarding use of databases]	Three years' imprisonment ⁹ and a fine of 300,000 euros.	The offenses have been committed by an organized gang	Seven years' imprisonment and to a fine of 750,000 euros.
11.	Germany Copyright Act. Article 106 "Unlawful exploitation of copyrighted works".	-	Imprisonment (from 1 month) ¹⁰ to not more than 3 years or a fine [A fine of minimum 5 daily rates ranges from 5 to 150 000 Eur A fine of maximum 360 daily rates ranges from 360 Eur to 10 800 000 Eur].	Offender acts on commercial basis	Imprisonment for a term not exceeding five years or a fine
12.	Greece. - NOT PROTECTED (only through infringement of economic or other moral rights, see Copyright Act. Article 66 Criminal penalties).				
13.	Hungary Criminal code Chapter XXXVII Crimes Against Intellectual Property Rights, Section 384 "Plagiarism"	Causes financial loss to the right-holder If the criminal offense committed with the purpose of financial gain, additionally a fine is imposed (Art. 50, CC)	Imprisonment (from 3 months) ¹¹ not exceeding three years. From 30 to 400 days (=84,89 Eur - 565866,4 Eur)	<i>On these circumstances – a real concurrence of Art. 384 and 385 Section 385.</i> (3) the infringement results in considerable financial loss. (4) If the infringement: <i>a)</i> results in substantial financial loss <i>b)</i> results in particularly considerable financial loss, <i>c)</i> results in particularly substantial financial loss,	<i>Section 385</i> (3) The penalty for a felony shall be imprisonment not exceeding three years (4) <i>a)</i> imprisonment between one to five years <i>b)</i> imprisonment between two to eight years; <i>c)</i> imprisonment between five to ten years.

8 Finnish CC Chapter 2(c), Section 2(2).

9 French CC Title III, Chapter I, Subsection 2 does not provide the length of minimum sentence.

10 German CC, Section 38.

11 Hungarian CC, Sec. 36.

	EU Member State	The main composition of a crime	Sanction for the main composition of a crime	Qualifying circumstances	Sanction for the composition with qualifying circumstances
14.	Ireland Copyright Act, 2000, Article 141.	For financial gain and knowingly that claim is false	A fine not exceeding £100,000, or to imprisonment for a term not exceeding 5 years ¹² , or both.	-	-
15.	Italy Copyright Act. Section II "Defenses and criminal sanctions", Art. 171.	Infringement of economic rights (for personal use)	A fine from € 51 to € 2,065	Crimes are committed over a work of others not intended for publication, or with usurpation of the authorship of the work, or with deformation mutilation or other modification of the work itself, if it is offended by the author's honor or reputation. (171-ter. 1.) if the offense is committed for purposes other than personal use and with gainful intent (171-ter. 2.) the offense is committed by using (reproducing, duplicating, etc.) of over 50 copies, communicating to the public for profit by placing it in a system of telematic networks in any way, by exercising business activities or promotes or organizes the illegal activities	Imprisonment of up to one year or a fine of not less than € 516 (171-ter. 1.) imprisonment from six months to three years and with a fine from € 2,582 to € 15,493 (171-ter. 2.) imprisonment from one to four years and a fine from € 2,582 to € 15,493
16.	Latvia Criminal Code, Chapter XIV, Section 148 Infringement of Copyright and Neighbouring Rights	Such infringement has caused substantial harm to rights and interests protected by law of a person	Deprivation of liberty for a term (from 15 days) ¹³ not exceeding two years or temporary deprivation of liberty, or community service, or a fine (of 5-1000 minimum wages= from 2150 to 430 000 Eur as 1 month minimum wage is €430)	(2) The offence has been committed by a group of persons pursuant to prior agreement,	(2) Deprivation of liberty for a term not exceeding four years or temporary deprivation of liberty, or community service, or a fine.

12 Irish CC does not provide minimum sentences.

13 Latvian CC, Section 38(2).

14 Lithuanian CC, Art. 50(2).

15 In addition, the court may order the closure of the establishment operated by the convicted person for a period which will not exceed 5 years, as well as order, at the expense of the convicted person, the publication and display of the judgment pronouncing the conviction.

	EU Member State	The main composition of a crime	Sanction for the main composition of a crime	Qualifying circumstances	Sanction for the composition with qualifying circumstances
				(3) If it is committed in large scale or by an organised group, or by compelling, by means of violence, threats or blackmail, the renouncing of authorship, or commits compelling of joint authorship, if it is committed by means of violence, threats or blackmail	(3) The applicable punishment is deprivation of liberty for a term not exceeding six years, with deprivation of the right to engage in specific employment for a term not exceeding five years and with or without probationary supervision for a term not exceeding three years.
17.	Lithuania Criminal Code, Chapter XXIX Art. 191 “Misappropriation of authorship”.	- Use of economic rights	Community service or by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term (from 3 months ¹⁴) of up to two year. Fine from 50 to 2000 MGL (2500-100 000)	2. By taking advantage of his official position or by resorting to mental coercion, forces the author to acknowledge another person as the co-author or successor to author’s rights or to renounce the right of authorship	A fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to three years.
18.	Luxembourg Copyright Act. Art. 82-83.	Malicious or fraudulent	A fine of 251 to 250,000 euros (1 August, 2001, formerly “10.001 to 10 million francs”).	Art. 85. Repetition	Imprisonment for 3 months to 2 years and a fine of 500 to 500,000 euros (1 August 2001, formerly “20,000 to 20 million francs”), or one of these penalties only. ¹⁵
19.	Malta. Does - NOT PROTECTED (only through economic rights or possibly Art. 298 Commercial or Industrial Fraud: “without the consent of the owner” (in this case - author) Imprisonment for a term from four months to one year. Use of economic rights should be qualified as another crime – 298B.				
20.	Poland Copyright Act Chapter 14, Article 115. 1.	-	A fine (100–720 000 Zł = 22,38-161111,13 Eur), restriction of liberty or deprivation of liberty, or imprisonment for (from 1 month) ¹⁶ up to 3 years	-	-
21.	Portugal Copyright Act. Title VII, Ch. I, Art. 197 and 198.	- Including negligence	1 - Imprisonment of (from 1 month) ¹⁷ up to three years and a fine of 150 to 250 days (=from 150 to 124700 Eur) ¹⁸ 2 - Negligence is punishable by a fine of 50 to 150 days.	recidivism	There is no suspension of the sentence in case of recidivism.

¹⁶ Polish CC, Art. 37.

¹⁷ CC of Portugal, Art. 41(1).

¹⁸ Each day corresponds to a fine from €1 to €498.80, which the tribunal fixes in regard to the economic and financial conditions of the convict and his personal duties (Article 47 of Portuguese Criminal Code, part. 2). https://www.legisla-tionline.org/download/id/4288/file/Portugal_CC_2006_en.pdf

	EU Member State	The main composition of a crime	Sanction for the main composition of a crime	Qualifying circumstances	Sanction for the composition with qualifying circumstances
22.	Romania Art 141 Copyright Act. Ch. III, Art. 141	(Making publicly known)	Imprisonment from three months to five years, or with fine from Lei 500,000 (=103264,4 Eur) to Lei 10 million (=2065288,07 Eur) ¹⁹	The competition of crimes – if the deed constitutes a more severe offence, then another article is applied.	
23.	Slovakia Criminal Code, Title 4. Section 283 Infringement of Copyright.	-	A term of imprisonment of up to two years. ²⁰	2) a) a person causes larger damage through its commission b) acting in a more serious manner, c) by reason of specific motivation, d) via computer system. 3) causes substantial damage through its commission. 4) a) and causes large-scale damage through its commission b) acts as a member of a dangerous grouping.	Imprisonment for a term between six months and three years Imprisonment for a term of one to five years imprisonment of three to eight years
24.	Slovenia Criminal Code, Chapter 16, Art. 147 Violation of Moral Copyright	Committed for one's own interest may increase the fine	A fine or sentenced to imprisonment from 15 days ²¹ not more than one year. A fine is 5-360 daily amounts = 395,66 - 151934,4 Eur ²² 1500 daily amounts = 118695-633060 Eur	-	-
25.	Spain Criminal Code, Chapter XI "On felonies against intellectual and industrial property, the market and consumers"	For profit (more than 400 euros) and to the detriment of a third party ²³	Imprisonment of six months to two years and a fine from twelve to twenty- four months (=2400– 9600 Eur). ²⁴	Privileged circumstance: In cases of retail distribution, in view of the circumstances of the offender and the small amount of financial profit, as long as the person doesn't intentionally export or import illegal copies of the work.	A reduced fine from 3 to 6 months, or community service of 31 to 60 days. Permanent traceability from 4 to 12 days, or a fine of 1 to 2 months (under Art. 623.5 as a misdemeanour).

19 1 Lei equals 0,21 EUR.

20 Neither Slovakian CC Section 46, nor any other article provides minimum duration of imprisonment sentence.

21 Slovenian CC, Art. 46(s).

22 See Slovenian CC, Art. 38 (1-4).

23 Systemic analysis of the CC suggests that the value is not fixed in any way and in each case court decides (it is an evaluative feature).

For example, Article 236: Whoever, being the owner of an item of moveable property or acting with the owner's consent,

	EU Member State	The main composition of a crime	Sanction for the main composition of a crime	Qualifying circumstances	Sanction for the composition with qualifying circumstances
	Subchapter 1. "On Felonies Related to Intellectual Property" Article 270			When the profit does not exceed four hundred euros Qualifying features (Article 276, a, b, d): When the profit obtained is of special economic importance; When the events are especially serious, in view of the value of the objects unlawfully produced or the special importance of the damage caused; When persons under eighteen years of age are used to commit those offences.	For qualifying features: imprisonment of 1 to 4 years, a fine from 12 to 24 months and special barring from practice of the profession related with the offence committed, for a term from 2 to 5 years.
26.	Sweden Copyright Act. CHAPTER 7. On Penal and Civil Liability. Article 53.	- [Including gross negligence]	Fines or imprisonment for (from 14 days) ²⁵ not more than two years. Swedish Criminal Code, Ch. 25 defines the size of fines: Day-fines are of 30-150 days, one day costs 50-1000 kronor. So absolute minimum is 1500-150 000 Kr. Or 144,44-14444,35 Eur.	-	-
27.	The Netherlands The Dutch Copyright Act: Section 34.	- impairs such a work in any other way that could be harmful to the reputation or honour of the author or to his dignity as an author	Imprisonment for a term of (from 1 day) ²⁶ not more than six months or with a fine of the fourth category (from 3 to €19,500).		

takes it from whoever lawfully has it in his possession, to his detriment or that of a third party, when the value thereof exceeds four hundred euros, shall be punished with a fine of three to twelve months.

24 Article 50 of Criminal Code: "4. The daily quota shall be a minimum of two and a maximum of four hundred euros, except in the case of fines imposed on legal persons, in which the daily quota shall have a minimum of 30 and a maximum of 5,000 euros. For the purposes of calculation, when the term is set by months or years, it shall be construed that months are of thirty days and years of three hundred and sixty days." So the possible absolute minimum fine is 2400 EUR (12*200), and maximum – 9600 EUR (24*400).

25 Swedish CC, Chapter 26, Section 1.

26 CC of the Netherlands, Section 10(2)

ONLINE DISPUTE RESOLUTION: QUO VADIS, EUROPE?

Goda Strikaitė¹

Abstract. This article discusses potential issues of current European Union regulations in regard to the online dispute resolution, together with potential reasons for low popularity of this way of resolving disputes. The author analyses Her Majesty's Courts and Tribunals Service (HMCTS) reform programme in England and Wales and compares the online dispute resolution systems as integral parts of courts to the ones functioning independently in the private sector. The article examines the potential for new legal framework promoting the development of online dispute resolution systems in either the private or public sector or in both of them.

Keywords: online dispute resolution; ODR; rule of law; HMCTS reform; alternative dispute resolution; courts.

INTRODUCTION

According to Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality, there are too many European Union citizens who don't trust their justice systems and wait too long for justice to be served (The 2019 EU Justice Scoreboard). Courts have huge backlogs dealing with many minor cases and usually it takes an unproportionable amount of time before decisions in courts are made. It is a legal maxim that justice delayed is justice denied, hence a change in the traditional dispute resolution system is demanded. In addition, technologies are developing rapidly – growth in the use of texting, electronic mail and videoconferencing melts borders between states and reduces distances between people to a minimum. Accordingly, it is creating a perfect environment for dispute resolution to evolve in online platforms. The world is shifting towards an internet-oriented routine where everything is within a reach of a gadget, hence clumsy court systems no longer keep up with current society as such. To sum up, current court systems are inefficient and inconvenient to respond to ever rising disputes.

Online dispute resolution has proven to be a time and cost-efficient method to resolve and contain disputes, however, although it has a vast potential, low implementation of this method shows that there are certain problems why this area does not develop as rapidly as it could. It should be emphasized that dispute resolution is a sensitive area - it directly correlates with peoples' trust in institutions and the rule of law as such. Bearing that in mind, further implementation and popularity of online dispute resolution systems in the private sector raise a question of what kind of opportunities and challenges it could bring.

Online dispute resolution is considered a global phenomenon that requires due consideration of cultural practices, global and local norms, technical and technological standards, and regulatory

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initiatives (Abdel, WMS et al., 2012, p. 8). Current European Union regulations in this regard is poor and demands initiatives and consequently changes.

The HMCTS reform programme in England and Wales' court systems presents new opportunities for online dispute resolution implementation in the public sector and is reshaping the current perception of such way to resolve disputes. Considering the new perspective, Europe has to make a choice whether there is an urge to customise current European regulations respectively.

The goal of this article is to review European Union regulations on online dispute resolution and identify the legal gaps that impede on wider recognition of initiatives in the private sector and potential legal risks of current regulation. This goal is achieved by identifying the issues of a jurisdiction of online dispute resolution and its correlation to the rule of law, recognizing regulatory gaps and reasons why society does not entrust their disputes to systems promoted in the private sector as well as discussing the perspectives of further European Union regulations on further development of online dispute resolution systems.

The author identifies the following problems and perspectives related to the online dispute resolution sub-institute. Firstly, the ambiguity of online dispute resolution definition in legal doctrine. Secondly, the scope of this sub-institute and potential risks to the rule of law. Furthermore, regulatory issues to be resolved in order for private initiatives in online dispute resolution to be further accepted and promoted by society. Finally, the rising potential of transferring online dispute resolution functions from a private sector to a public one.

WHAT DO WE MEAN BY ONLINE DISPUTE RESOLUTION?

There is no one definition to Online dispute resolution (ODR) – it varies according to numerous factors. Currently in legal doctrine the term online dispute resolution is being used to describe two distinctive conceptions. The first one – the broader one – indicates that ODR is deemed to be any type of dispute resolution that is mainly organised in the internet platform. For example, if a traditional court was transferred to an online platform, we would think of it as of ODR.

However, historically the idea behind the foundation of ODR suggests a much narrower definition where ODR is a sub-institute of alternative dispute resolution. More precisely, it is a traditional alternative dispute resolution form, such as mediation or arbitration, transferred online, and thus becoming e-mediation, e-arbitration and so forth. Nevertheless, it is worth mentioning that even though most of current ODR systems are on internet-based systems conducted more sophisticated forms of ADR, there are several hybrids or even nothing of the kind systems that are deemed to be ODR systems as well (for example, blind bidding or automated negotiation assistance). Accordingly, it should be emphasized that ODR belongs in the private sector, while online courts are a public service (Susskind, R. 2019, p. 63). For the purposes of this article, a narrow definition of ODR is preferred to avoid confusion in legal sphere.

DEFINING THE JURISDICTION OF ODR

The most obvious force driving online dispute resolution during what might be called its early childhood, has been the need to respond to growing numbers of disputes arising out of online activities and involving parties who, because of distance or cost, cannot use the courts (Katsh, 2007). The idea of transferring disputes arising exclusively on the internet to ODR was the core of this then new way of resolving disputes. The European Union support of this idea can be found in Regulation 524/2013 that came into force on 9 January 2016, where it is stated that ODR offers a simple, efficient, fast and low-cost out-of-court solution to disputes arising from online transactions (European Commission's ODR Regulation (No. 524/ 2013). However, as the system evolved, it went beyond solving disputes that arise online and successfully addressed disputes that originated offline too. Hence, it would be inaccurate to say that ODR can be used or is used for resolving disputes arising exclusively online. On the contrary, ODR is not limited to e-commerce disputes. ODR is particularly useful for all forms of disputes that involve small amounts of money and large distances. In this sense, ODR is an answer to some effects of globalization (Shultz, 2004, p. 73) and accordingly, ODR uses the opportunities provided by the Internet not only to employ these processes in the online environment but also to enhance the processes when they are used to resolve conflicts in offline environments (Prins et al., 2002, p. 278; Katsch, Rifkin, 2001, p. 2). As Graham Ross indicates, there is no reason to limit the application of ODR services to online disputes or to close one's eyes to the value benefits ODR can bring generally to other disputes, or indeed, to assist in the development of dispute resolution generally outside of the court system (Ross, 2003). Nonetheless, the question to what extent should we expand the scope of ODR systems in dispute resolution arises.

There is no reason to disagree with the position of The European Committee on Legal Co-operation that in addition to classifying disputes as 'online' vs 'offline', it may also be useful to develop a typology of disputes, in which it can be ascertained what types of disputes could be resolved through ODR mechanisms and what type of disputes might still require the traditional court process (Technical study on online dispute resolution mechanisms, 2018, p. 13). Nevertheless, it should be noted that to do so can be harder than it seems. A popular opinion is that low value claims should define the scope of ODR (Braeutigam, 2006; Shultz, 2004, p. 73). However, Article 2 of the Regulation 524/2013 expands the scope by indicating that the regulation shall apply to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident and a trader, where both of them are based in the EU, Norway, Iceland or Liechtenstein (European Commission's ODR Regulation (No. 524/ 2013), meaning that low value requirement is no longer relevant as long as a dispute is in relation to certain contractual obligations. In addition to that, worldwide ODR systems are used to resolve such a wide scope of disputes, that it is practically impossible to group them into one all-encompassing definition. Here are some of them: matrimonial disputes (including divorce), work-related or rent-related disputes (<https://rechtwijzer.nl/>), motor vehicle injury related disputes up to \$50,000, societies and cooperative associations disputes (<https://civilresolutionbc.ca/>), private parking tickets (<https://www.resolver.co.uk/>) and

others. To conclude, currently there are no boundaries to ODR jurisdiction – where the technological abilities are possible, ODR can be used to resolve basically any kind of dispute. As long as there are no boundaries, the principle of party-disposition and technical abilities allow people the freedom to choose ODR systems rather than traditional courts to resolve basically any kind of disputes. But is this the right approach?

IS OUR RULE OF LAW IN JEOPARDY?

Article 2 of the Treaty on European Union states that the union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Accordingly, the preamble of the aforementioned document indicates that member states are confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law (Treaty on European Union and the Treaty on the Functioning of the European Union, 2007). Evidently, rule of law is one of the core principles of the European Union. Yet, there is no one precise definition to the rule of law – the meaning varies between different legal systems – thus, it is important to look a little deeper into what is behind this rule of law in the European Union system. Undoubtedly, one of the most important aspects of the rule of law are legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination and access to justice (The Rule of Law checklist, 2016). Rule of law as such, controls the operation of courts – it imposes *inter alia*, that judges must always safeguard the fundamental rights of individuals, the law must be respected and effectively implemented by judges and the judiciary has to be independent.

In the light of these most important rule of law features effective in the European Union, certain concerns regarding the ODR and rule of law should be discussed. Back in 2001 it was remarked that one could ask to what degree online processes, even when led by in-person third parties, can address parties' expectations and needs from a procedural justice perspective (Welsh, 2001). As Richard Susskind observed, if private sector service were to be routinely preferred to public courts, we would be in danger of being governed less by the law of the land than by compromise, unpredictable social norms, and the market itself, none of which seek directly and publicly to uphold justice (Susskind, R. 2019, p. 22). Indeed, as to this day decision-making process of ODR systems in the private sector is usually based on algorithms, psychological aspects, dispute-solving strategies and other means rather than on law. And it is logical – if, on the contrary, decisions in ODR systems were based on law it would deny the whole idea behind this sub-institute to be an alternative to traditional courts and being conducted mostly online, because only judges in traditional courts have an exclusive right (and duty as well) to administer justice. In accordance to the just-mentioned rule of law standards, only judges have a duty to respect the law and make decisions based on applicable law accordingly. Given the above, we must ask ourselves, whether further development in ODR systems is a step forward or a step back? If eventually ODR systems become more popular than traditional courts, are we going to live in the world that is based on compromises rather than based on what is lawful and just? Are we gradually shifting back to the anarchy and sombre times before courts?

On the other hand, it should be noted, that *laissez-faire* allows people to choose where and how they want their disputes to be resolved. Moreover, it wouldn't even be objectively possible to regulate all existing ways to resolve disputes, since some of them are rather untraditional – for example, flipping a coin, numeration or even spells. Another important factor is that such alternative dispute resolution measures formed over time, meaning they became traditional and were accepted by the society.

To conclude, it is not possible for traditional courts to usurp the field of dispute resolution, however we have to find a way so that this freedom to choose ODR systems to resolve any kind of disputes won't eventually lead us to, in Thomas Hobbes's words, *bellum omnium contra omnes* (war of all against all) (Hobbes, 2018).

THE HMCTS REFORM PROGRAMME

Before moving forward to the final segment of this article concentrating on what is awaiting in this regard in Europe, let's briefly overview a new court reform project being implemented in England and Wales. Even though United Kingdom is no longer a member state of the European Union as of 1st February earlier this year, I believe that United Kingdom has and will continue to have a huge impact on the development of the European Union. Given that £ 1 billion is being invested to transform the court system of England and Wales, there are some weighty arguments to look a little deeper into what is happening there.

According to the Online Dispute Resolution Advisory Group, set up on 25th April 2014 to find ways to increase the use of online dispute resolution within the United Kingdom's justice system, in addition to ensuring that judges in courts are affordable and available to resolve disputes, it is also vital to help prevent disagreements that have arisen from escalating excessively and, furthermore to find ways of preventing legal problems from arising in the first place to improve access to justice (Online Dispute Resolution for Low Value Civil Claims, 2015). In order to do so, it is suggested to establish an Internet-based court service with extended court functions. The main idea is that court system is not simply dispute resolution by judges whether or not online, but to extend this concept to help contain and avoid disputes through a 3-level-system as well. Here level 1 is called online evaluation of the problems, it aims to help people evaluate their problems and understand options available to them. If problems are not resolved through initial online evaluation in level 1, then users proceed to a second stage – level 2, called online facilitation where case facilitators will be working to contain the disputes. They will review papers and statements from parties, and then help them by mediating, advising, or encouraging them to negotiate - a mix of alternative dispute resolution and advisory techniques will be used. If parties are willing to proceed to online judges making decisions, level 3 – called dispute resolution – will be reached. Here dispute resolution will be conducted by judges in an online platform. Accordingly, such decisions will be binding and enforceable and will have the same status as decisions made by judges in traditional courts nowadays.

The reason why this reform programme is important to ODR system lies behind the level 2. The spirit of level 2 is that disputes are contained instead of allowing them to escalate via mediation and/

or arbitration. Basically, dispute containment is the core of alternative dispute resolution, meaning it is the core of the online dispute resolution as well. Considering what was mentioned above, the first impression might be that private initiatives in the field of ODR will be welcome to help judges in level 3 to reduce their backlog. However, as Richard Susskind indicates, level 2 should be an integral part of the 'extended court', rather than a private sector helping courts (Susskind, R. 2019, p. 117, 136, 140). To conclude, dispute containment as a service shall no longer be an alternative to the public court system, but it would rather become an integral part of it.

WHAT'S NEXT IN EUROPE?

On 21 May 2013 the European Union adopted two legal instruments regarding alternative dispute resolution: Directive on consumer ADR (came into force 9 July 2015) and Regulation on consumer ODR (came into force on 9 January 2016). The Directive on consumer ADR regulates the implementation and functioning of consumer ADR systems and applies only if the ADR procedure is initiated by a consumer, whereas the Regulation on consumer ODR implements an EU ODR platform for consumers and businesses trading electronically and regulates aspects related to the platform. On 10 November 2015 the Committee of Legal Affairs and Human Rights of the Council of Europe adopted a resolution, where member states were encouraged to promote and further develop ODR mechanisms, acknowledging the potential of ODR procedures for settling disputes more speedily, cheaply and in a less conflictual manner than through litigation (Resolution of the Committee of Legal Affairs and Human Rights of the Council of Europe, 2015). On 25 April 2018 European Commission issued a communication "Artificial Intelligence for Europe" where it was announced that the Commission will support AI technologies both in basic and industrial research. This includes investments in projects within key application areas such as <...> public administrations (including justice) (Communication from the Commission, 2018). In December 2018 the European Ethical Charter on the use of artificial intelligence in judicial systems and their environment was adopted, where it was indicated that artificial intelligence can be used to resolve disputes online as well (European Ethical Charter, 2018). These cornerstone provisions adopted in the European Union legal system show that the European Union is supporting ODR initiatives and further development of ODR. However, it should be noted that the following two issues have to be resolved in order for private initiatives in ODR to be further accepted and promoted by society.

Firstly, the enforcement of decisions made using ODR systems has to be ensured. No system of dispute resolution can function effectively if the outcome of the procedure is not enforceable. Accordingly, it is necessary to implement systems of self-enforcement of outcomes of ODR procedures: cost-effective channels of private enforcement must be established, so as to ensure the efficiency of ODR without relying on the support of state courts and enforcement authorities (Ortolani, 2016, p. 595). If the enforcement of decisions made in ODR platforms is not ensured, for example, if the defendant is refusing to pay "amount X" owed to the claimant according to a decision made by the ODR system, the claimant has to go to a traditional court to have this decision enforced. In such way,

the whole idea of ODR – to ease the backlog of courts and provide faster and cheaper services is nullified. It is considered to be one of the main aspects why ODR systems are currently not as popular as they could or potentially should be.

Secondly, main standards of ODR systems have to be set. ODR requires governmental intervention to develop fully, to lessen the gap between its potential and its actual use - a gap that is vast. The argument for this assertion follows a simple path: ODR is in need of trust, trust can be provided through architectures of control, and such control should be in the hands of government in order to induce trust (Schultz, 2004, p. 72). Online dispute resolution in all its many forms must establish a set of standards in order to gain further acceptance of society. It is said that confidentiality and security are the most obvious standards to be implemented – it is thought at present, a great deal of unfamiliarity and it is an area which needs a set of standards, in particular reassurance to be given to potential litigants about the security and confidentiality of their communications (Online Dispute Resolution for Low Value Civil Claims, 2015). Accordingly, another problematic aspect that could be escalated – whether each state must ensure the reliability of ODR systems before promoting them as alternatives to traditional courts? It should be noted that before such standards are available, links to private ODR systems shouldn't be provided by the governments and consequently it is understandable why society does not trust such systems and accordingly they do not explore their potential. For the time being, Council for Online Dispute Resolution has prepared global standards for ODR programs (<https://icodr.org/standards/>), however, as mentioned, such standards are still required at the European Union level as well.

The issue of legal certainty connects to our present problem because legal certainty is about predictability and expectations. Predictability and expectations constitute the bedrock of confidence. This implies that, among dispute resolvers, only courts are able to increase predictability and thus confidence in a field they have jurisdiction over because they establish precedents that others and they themselves will follow. By setting rules, they increase their own predictability and thus the confidence in them, and they increase predictability in a given field and thus the confidence in this field (Schultz, 2004). One may also argue that government is the ideal host for dispute resolution, because government has a strong incentive to resolve disputes to keep society functioning smoothly and it usually has no vested interest in the outcome of most of the matters it is in charge of deciding (Rule, 2002, p. 174). To sum up, once some basic standards for ODR are in place, it is likely that society will trust their disputes to this perspective way of resolving them better.

To conclude, we are on a crossroad and have some serious decisions to make on how ODR should evolve in the European Union legal system – whether we continue to support private initiatives in the ODR section (hence, accordingly we need to adopt ODR standards and ensure enforcement of such decisions) or do we accept the England and Wales model and transfer ODR systems' functions to courts in the public sector? On one hand, ODR systems provided by the private sector offer less costly and faster services while developing and adapting new technological solutions more efficiently. On the other hand, providing justice in a form of enforceable decisions made by independent judges with a certain legal background is an exclusive right granted by the states to courts only. Both courts

and ODR exist to resolve disputes, however, courts go further – they provide legal certainty and have the power to create rules, whereas ODR systems don't have such powers (Schultz, 2004, p. 85), at least not currently. Finally, Europe can support both private and public initiatives in the ODR section, the main idea is to get out of the stagnation and adopt regulations respectively.

CONCLUSIONS

1. There are no restrictions in the European Union legal system in relation to what kind of disputes can be entrusted to ODR systems to resolve. Regulation 524/2013 only regulates out-of-court resolution of disputes concerning contractual obligations originating from online sales or service contracts, however, it is not asserted anywhere whether there are any kinds of disputes that cannot be settled in this manner. Accordingly, on the basis of the principle of party-disposition, any kind of dispute can be resolved using ODR systems. Such regulation may lead to the following potential issues. Firstly, current ODR systems in the private sector are generally based on algorithms, psychological aspects, dispute-solving strategies and other rules rather than on law - decision-makers are not obliged to follow the legal norms when making a decision. Consequently, people using this method are at risk of their dispute is being resolved in an unjust manner. Secondly, if gradually ODR services provided in the private sector become more popular than public courts a potential issue of living in a system based on compromises rather than on what is just and legal arises and rule of law might be in danger.
2. Current European Union regulations are not sufficient to promote a wider use of ODR systems in the private sector due to requiring the enforcement of ODR decisions to be ensured and secondly, standards of ODR systems having to be set. It is believed that implementing these previously mentioned regulations should encourage people to use alternative dispute resolution systems online.
3. A new approach in relation to the functions of ODR systems was presented with The HMCTS reform programme. Europe has to decide whether to take-over this model and target its regulation to promote ODR initiatives in the public sector, the private sector or in both and adopt related regulations respectively.

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THE EU LEGISLATION ON THE SUPERVISION OF ACTIVITIES OF ECONOMIC OPERATORS: SUBSTANCE OF PROCEDURAL RIGHTS AND IMPACT ON LITHUANIAN LAW

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Abstract. This article discusses the EU legislation, regarding main procedural rights of economic operators applied in the supervision procedure of their activities and its impact on supervisory procedures in Lithuania, as well as the institute of supervision of activities of economic operators in Lithuania and regulation of main procedural rights granted to economic operators. By analysing the EU primary, secondary and Lithuanian (national) legislation, as well as the case law of European and Lithuanian judicial authorities, the insights into future challenges for both the EU and Lithuanian law are provided. It is being claimed that the EU is moving towards codification and strengthening of procedural rights, which inevitably influences Lithuanian legal system and the protection of individuals, *inter alia* legal persons.

Keywords: procedural rights, supervision, economic operators, the right to good administration, the rights of the defence, codification.

INTRODUCTION

Keeping in mind that various economic activities inescapably raise environmental, public health, safety and other fundamental issues, the question of law enforcement and control is as old as the introduction of rules and laws themselves (Blanc, 2013, p. 4). That is why the state intervenes through control as a regulator in order to ensure the smooth functioning of the economy and the protection of public interest. Legal regulation, which is an integral part of the regulatory state, is one of the necessary preconditions for the functioning of a sustainable and efficient economy, operating in the interaction between the government, economic operators² and society.

Inspections and enforcement are relevant for economic development, to achieve public welfare goals and to strengthen the rule of law. From an economic perspective, the burden of regulations on inspections and enforcement is significant, as well as protection of business rights. It is important that on the World Bank's Doing business rating, Lithuania ranks 11th in terms of business conditions (The World Bank). According to the Index of Economic Freedom of the World, Lithuania is ranked 16th out of 180 countries (2020 Index of Economic Freedom). These achievements are very closely related to the reorganization of the system of supervision of economic entities (Ambrasevičiūtė et al., 2012, p. 32). As a result, business in Lithuania is beginning to value supervisory institutions more and more (Enterprise Lithuania).

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2 In this paper the notion of economic operator is understood as a legal person.

The importance of analysis of supervision of economic operators³ and their procedural rights is based on following arguments. Firstly, both Lithuania and the European Union (hereinafter – EU) went through some serious changes in the area of protection of fundamental rights in the past decade. Secondly, the quality of the legal regulation of the supervision of economic operators is one of the most relevant topics since Lithuania became a member of the Organisation for Economic Co-operation and Development⁴. Moreover, recent cases of “Grigeo scandal” and other accidents when pollutants were released into environment have shown that in Lithuania supervision is often ineffective or focuses only on one narrow aspect – punishment (Public outcry as...; Plastic released into...). After 33 patients were infected with the coronavirus at the Klaipėda hospis and when it was determined that the permit-hygiene passport was issued for one bed only, the Minister of Health promised to tighten up inspections (Veryga: situation in...). Thereby in Lithuania the common reaction to noncompliance is usually related to punishment and increased fines. Lastly, the state regulating economic activity restricts economic freedom and applies different measures (administrative sanctions), that might have a deterrent and criminal nature. Accordingly, restriction of economic freedom triggers certain fundamental rights⁵.

Legal scholars say that “procedural justice” is one of the core reasons, why economic operators obey law (Blanc, 2018, p. 481). That means that higher protection of procedural rights presupposes higher level of compliance. In view of this, procedural guarantees in the supervisory procedures are very important not only because of the interference with the fundamental rights, but also because of higher compliance with laws and regulations. While Lithuania still struggles to ensure procedural rights of economic operators, it is important to search for inspiration for better protection.

For the above reasons in this paper I am seeking to overview the EU legislation, regarding main procedural rights of economic operators, applied in the supervision procedure of their activities, and its impact on supervisory procedures in Lithuania.

In order to achieve this objective, major changes of the EU legal regulation regarding main procedural rights in the past decade, as well as the influence of the EU law over national law will be analysed in this article. The institute of supervision of activities of economic operators in Lithuania and main procedural rights granted to economic operators, main issues arising in this area will be discussed as well. By analysing these topics, future challenges for both the EU and Lithuanian law will be taken into consideration. For this purpose, the EU primary, secondary and Lithuanian (national) legislation, as well as the case law of European and Lithuanian (national) judicial authorities will be analysed, focusing on the past decade. The relevant legal doctrine will be referred as well.

3 The supervision of activities of economic operators includes consultation on matters within the competence of institution, inspections of activities of economic operators and application of sanctions.

4 Since 5 July 2018 Lithuania is a full member of the OECD.

5 It has been repeatedly noted by the Constitutional Court of the Republic of Lithuania that imposing administrative sanctions <...> procedural guarantees must be ensured (ruling of 5 November 2005).

1. PROCEDURAL RIGHTS OF ECONOMIC OPERATORS DERIVING FROM THE EU LAW

Various requirements arise from the EU legislation, that affect procedural rights of undertakings when their activities are supervised or under control. The Treaty establishing the European Coal and Steel Community already gave companies the right to be heard before imposing a fine. Under the Article 19(1) second subparagraph of the Treaty on European Union (hereinafter – TEU) member states have been required to establish more specific remedies to ensure the right to effective judicial protection in areas governed by Union law. From the wording of Article 296 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) derives the obligation of states authorities to give reasons, as well as from Article 298 of the TFEU (Explanations relating to...).

However, the most important achievement referring to procedural rights in the past decade is the Charter of Fundamental Rights of the European Union (hereinafter – Charter), which entered into force almost in 2010. It was clear that the Charter shall have the status of Union primary law (Article 6(1) of TEU). The adoption of the Charter has significantly strengthened the protection of individuals' procedural rights. The provisions of this document are particularly relevant to undertakings, after the Court of Justice of the European Union (hereinafter – CJEU) stated that the principle of effective judicial protection enshrined in Article 47 of the Charter must be interpreted as meaning that legal persons may rely on it (CJEU, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, par. 59). The CJEU has essentially recognized that the fundamental principles enshrined in the Charter also protect the rights of businesses.

There is no doubt that the Charter has made fundamental rights clearer and more visible and has helped to strengthen legal certainty in that way. The Charter has also contributed that economic rights are no longer considered as secondary (Hervey, Kenner, 2003, p. 1-4). It is worth to notice, that the Charter and codification also reflects the tectonic shifts in the framework of procedural rights, taking into account that previously “the EU has taken the inspiration from the case law of the European Court of Human Rights on the procedural standards of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – Convention) for sanctions that entail criminal charge” (De Moor-van Vugt, 2012, p. 5)⁶.

Legal experts say that the objective of adding Article 41⁷ to the Charter was to codify some of the most important principles of good administration and to give them the status of a fundamental right (Galletta *et al.*, 2015a, p. 11). The right to good administration is one of the “umbrella’s principle” (Gnes, 2019, p. 10) and is an important source of procedural guarantees for economic operators. It

6 Although the provisions of the Convention are still extremely relevant. The CJEU has stated that Articles 47 and 48 of the Charter provide the same protection in Union law as Articles 6 and 13 of the Convention, and that the CJEU therefore relies on the Articles of the Charter (CJEU, *UBS Europe SE*, par. 50). Article 48 of the Charter is the same as Article 6(2) and (3) of the Convention; the first paragraph of 47 Article is based on Article 13 of the Convention (Explanations relating to...).

7 Article 41 of the Charter enshrines the right to good administration, which includes rights such as the right of every person to be heard <... > (a); the right of every person to have access to his or her file <... > (b); the duty of the administration to justify its decisions (c).

is stated that according to its content, the right to good administration is the equivalent of the right to proper and efficient administrative procedures (Paužaitė-Kulvinskienė, 2009, p. 84).

The right to good administration is closely linked to the right to an effective remedy and to a fair trial and to the right to a fair hearing enshrined in Articles 47 and 48 of the Charter (CJEU, *M.*, par. 82). The CJEU states, that “the obligation of the administration to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand the grounds of the individual measure adversely affecting him is thus a corollary of the principle of respect for the rights of the defence, which is a general principle of EU law” (CJEU, *M.*, par. 88, *Sopropé*, par. 50).

The protection of the rights of the defence deriving from Articles 47 and 48 of the Charter is a general and fundamental principle of the EU law which must be applied to any proceedings brought against a person (including a legal person) and may result in an act adversely affecting him (CJEU, *Texdata Software*, par. 83). This principle must be guaranteed even in the absence of procedural rules (De Moor-van Vugt, 2012, p. 19). The principle of respect for the rights of the defence requires that the addressee of an adverse decision is placed in a position to submit his observations before the decision is adopted, so that the competent authority is able to take into account all relevant information (CJEU, *Glencore Agriculture Hungary Kft*, par. 41). From the case law of the CJEU it is clear that the right to be heard guarantees every person the opportunity to make his or her views known properly and effectively during the administrative procedure and before a decision is taken which may adversely affect his or her interests (CJEU, *M.*, par. 87, *Mukarubega*, par. 46), as well as the opportunity effectively to make known his views (CJEU, *Sopropé*, par. 24, 29). The case of *Sopropé* is very important speaking about the periods within which the rights of the defence must be exercised. The CJEU stated, that “it is for the Member States to establish those periods in the light of, *inter alia*, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration” (CJEU, *Sopropé*, par. 40).

According to the judicial practise of the CJEU, the right of access to the file in turn presupposes the effective exercise of the rights of the defence (CJEU, *Knauf Gips*, par. 22 p.). In recent case law CJEU stated, that requirement of the person concerned to have access to all the information and evidence is not satisfied by the tax administrator’s practice of giving the taxable person no access to that information, in particular the documents on which the conclusions are based, the minutes drawn up and the decisions taken during the relevant administrative procedures and only indirectly (in the form of a summary) selected on the basis of their own criteria, which cannot be verified in any way (CJEU, *Glencore Agriculture Hungary Kft*). In another case CJEU concluded that UPS’s rights of the defence were infringed, with the result that the decision should be annulled, provided that it has been sufficiently demonstrated by UPS that, but for that procedural irregularity (Commission did not disclose the final econometric analysis model to the applicant before adopting the decision at issue), it would have had the opportunity better to defend itself (CJEU, *European Commission v. United Parcel Service, Inc.*, par. 68).

However, fundamental rights are not absolute and may be restricted (CJEU, *Alassini and other*, par. 63, *Texdata Software*, par. 84). Such restrictions may be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents (CJEU, *Ispas*, par. 36, *UBS Europe SE*, 63 p.).

The jurisprudence of the CJEU of the past decade confirms, that the Charter has become an actively used “living” remedy. The CJEU develops application of the Charter and interprets its provisions regarding procedural rights consistently and strongly in different areas (e. g. in taxation, competition procedures), which are also relevant to inspections.

With the exception of the Charter, other procedural requirements for the supervision of economic operators are not set out or systemised in any catalogue of general procedural principles of administrative law in the EU. However, relevant requirements can be found in secondary legislation such as regulations (e.g., General Data Protection Regulation (hereinafter – GDPR), Regulation on the rules on competition) and directives (e.g., Directive on markets in financial instruments). Still, previously the EU has also been widely criticised for the lack of protection of procedural guarantees in EU directives and thus incompatible with the European Court of Human Rights’s case law, which provides flexible and enhanced protection (Criminal Procedural Laws... 2018, p. 40).

From recently adopted EU legislation it is determined that EU legislator tends not to specify procedural rights in every legal document, but to provide, that the supervisory authority shall ensure procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process⁸. This presupposes that on the EU level exists the equivalent degree of procedural rights that must be granted each time when any individual measures that could affect economic operator adversely are taken. The main principles of these procedural rights are codified in the Charter.

At the same time, it is very interesting what kind of disputes regarding procedural rights will arise over data protection, when GDPR allows extremely severe sanctions. Legal scholars assert that “the more intrusive the sanction becomes, the higher the safeguards need to be” (De Moor-van Vugt, 2012, p. 5.). Thus, the challenge to ensure procedural rights in the data protection, as well as the challenge of ensuring uniform procedural guarantees and procedural fairness throughout the EU are in front of whole Europe.

2. THE IMPACT OF THE EU LAW OVER NATIONAL LAW

In the legal doctrine it is stated that “the administrative power to dispose inspections which, as an authoritative act, could affect fundamental rights, requires specific guarantees to ensure that there will be no arbitrary exercise of the power” (De Benedetto, 2014, p. 3). As it was already mentioned before, because of fundamental rights the problem of “preserving a reasonable balance between agency powers and target rights” arises (Bagby, 1985, p. 319).

⁸ E.g., procedural rights in GDPR are not specified in detail: Article 83 (8) provides that: “The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.”

In relation to the Lithuania's institute of supervision of activities of economic operators it is necessary to remark, that Europeanisation and financial crisis were main reasons to reform this institute. What is more important, in 2014 national legislator has enshrined in the Law on Public Administration of the Republic of Lithuania main procedural rights of economic operators (Article 36⁸). This can be referred as an attempt to systemise or even to codify main procedural rights. Comparing to the Charter, these changes can be evaluated as being made following European tendency of codification. Moreover, new enshrined procedural rights reflect principles of good administration, established in the Charter. Although from *travaux préparatoires* it is determined that the main intention to strengthen procedural rights was based on compliance with the Convention (Resolution No. 1304).

It is worth to mention that the codification of principles of good administration was not only one initiative towards codification in the EU. European Parliament resolution for an open, efficient and independent European Union administration, which laid down the procedural rules which shall govern the administrative activities of the Union's administration, is a real proof that procedural rights were hugely significant on the EU agenda in the last decade. Moreover, the discussions on good administration within the EU led to the creation of a network of legal scholars from different EU Member States – the Research Network on EU Administrative Law that published “ReNEUAL Model Rules on EU Administrative Procedure” in 2014. However, this initiative was not successful and lacked political support, since “[t]he Commission considers that a binding EU Law on Administrative Procedure might be largely detrimental for the administration, as it would bring excessive rigidity and slow down decision-making” (Galetta *et al.*, 2015b, p. 10). Although legal scholars admit “that an administrative procedure act can contribute to balancing the need for sector-specific rules with clear generally applicable procedures as well as clearly defining individual rights whilst ensuring effective and efficient administrative decision-making” (Galetta *et al.*, 2015b, p. 8). Therefore, another challenge in the future EU might be more detailed codification of procedural rules. Initiatives on codifying general principles of EU administrative procedural law demonstrated that there is a real capacity to create a codified document on the EU level. Perhaps with some more political will, it might be implemented.

Concerning the EU law influence it should be added that the Supreme Administrative Court of Lithuania (hereinafter – SACL) in its case law developed substance of procedural rights, that have been inspired by the EU law. This court also determines that the Charter (Articles 41, 47, 48) expresses general legal values, that may be taken into account as an additional source of legal interpretation, when the content of the principle of good administration is under consideration (SACL, administrative cases No. eA-328-556/2017, No. A-585-415/2019). Therefore, although applied indirectly, Articles 41, 47 and 48 of the Charter can be called a fundamental list of procedural rights in supervisory procedures of economic operators. The case law of the CJEU was particularly significant in the administrative case No. A-638-492/2017 of the SACL, when the restricted right to be heard of a television broadcaster established in the United Kingdom has been under consideration. Especially in the competition cases the SACL often relies on the presumption of innocence (Article 48 of the Charter) (SACL, administrative

cases No. A⁸⁵⁸-1516/2012, No. A-97-858/2016). Moreover, Lithuanian administrative courts are being encouraged to rely on the Charter more actively (Andrijauskaitė, 2016, p. 572-573).

The EU's role in antitrust infringements is twofold. Firstly, in certain cases, the national competition authority and the national courts have the power to assess directly the compatibility of the conduct of undertakings with the EU law. Secondly, in cases where the provisions of EU law are not directly applicable when deciding on the application of sanctions, the EU law acts as an additional source of application and interpretation of the law (SACL, administrative case No. A-899-858/2017).

As regards the relationship between the rights of the defence and the right not to incriminate oneself, in historical *Orkem* case the CJEU has recognised the right of undertakings not to incriminate themselves and held that the Commission could not require an undertaking to answer questions in such a way that could incriminate it directly (CJEU, *Orkem*, par. 28, 36). The practice of supranational courts also seems to be followed to some extent in national courts: the SACL provided that Competition Council may not maliciously compel the investigated undertakings to admit the infringement (SACL, administrative cases No. A³⁹-1939/2008, No. A⁴⁴²-715/2008).

However, the analysis of the case law of the SACL over the last 5 years confirms that the parties to the proceedings, challenging the decisions of the supervisory authorities, relied on the Charter very rarely (e.g., SACL, administrative cases No. eA-240-822/2019, No. eA-378-629/2019). It can be argued that the Charter is not well known or familiar to national economic operators even as an additional legal remedy.

3. THE INSTITUTE OF SUPERVISION OF ACTIVITIES OF ECONOMIC OPERATORS IN LITHUANIA AND MAIN PROCEDURAL RIGHTS

The institute for supervision of activities of economic (business) operators, established *expressis verbis* in Lithuania in 2008, thus existing for more than a decade, still raises relevant questions in the context of the entire national legal system. The main initiative to reform this institute has been started in 2009. The main outcome of the reform was that the state was no longer positioned as a punisher, but more as an advisor for business. In 2010 and later revised Law on Public Administration has incorporated a comprehensive chapter (Section 4) on supervision, which refers to supervision rather than inspection and emphasise an integral approach to promoting compliance. Although on the international level the revised Law on Public Administration is being considered as one of the most innovative primary legislation on inspections (OECD, 2015, p. 31; Council of Europe, 2015, p. 26), this institute generally lacks attention and more detailed critical legal assessment, based on a holistic approach.

Though the Law on Public Administration codified main procedural rights of economic operators⁹, this attempt of codification was not very successful. Various procedural rights are still enshrined in different special laws and almost each law has a separate procedure (Law on Competition; Law on

⁹ Article 36⁸ provides the right to be informed of a breach; the right to have access to the file; the right to provide explanations; the right to a justify decision; the right to appeal against the decision.

Alcohol Control, etc.). Moreover, procedural provisions of Law on Public Administration in certain areas have only the status of recommendation, e.g., in taxation, competition, data protection, financial market supervision procedures. It is questionable whether that kind of exclusion is necessary. Nevertheless, the mentioned law seeks to unify and to strengthen procedural rights applied in supervisory procedures and this indeed is a positive thing.

It is essential to determine, what kind of impact on procedural rules and to the protection of economic operators the reform has made. From the case law of the SACL it is indicated that the application of sanctions in administrative court quite often is declared illegal due to the fact that a state authority (regulator) has violated the procedural rights that must be granted for economic entity during the inspection. The most common procedural irregularities are related to the right to be heard (SACL, administrative cases No. eA-725-822/2018, No. eA-328-556/2017, No. A-638-492/2017), which is usually deriving from *lex specialis*, and the right to a justified administrative decision (SACL, administrative cases No. eA-1307-556/2019, No. eA-2405-662/2019), which is stated in the Article 8 of Law on Public Administration (*lex generalis*).

In contrary to the CJEU, which actively relies on the Charter and interprets procedural rights, from the national case law (starting from 2014) it is identified, that administrative courts quite rarely apply or analyse systemised procedural rights catalogue of economic operators, enshrined in the Section 4 of Law on Public Administration (SACL, administrative cases No. eA-2252-629/2019, No. eA-57-602/2019, No. eA-1228-662/2017, No. eA-1489-858/2017). On the other hand, administrative courts are in favour to apply common rules of public administration in case of infringement of procedural rights, for example Article 8(1) of Law on Public Administration, which provides general requirements of an individual administrative act and the obligation to give reasons for sanctions applied (SACL, administrative cases No. A-1668-629/2020, No. A-397-822/2020, No. eA-290-525/2020, No. A-70-602/2020). In a certain sense the Article 8(1) duplicates the requirements of Section 4, which provides special procedural rules for economic operators. Analysing the case law it is identified that there is a room for application of procedural rules of Section 4, although the SACL does not apply procedural rules of Section 4 *ex officio* (SACL, administrative cases No. A-1554-822/2019, No. A-638-492/2017). Moreover, administrative courts tend to interpret the Article 8(1) broadly, as also covering the right to be heard, instead of invoking Section 4 (SACL, administrative cases No. eA-1135-822/2019, No. eA-1402-629/2019). However, according to the wording of Article 8 there is no reason to derive the right to be heard from it. Additionally, the Article 8(1) is not equal to the whole Article 41(1) of the Charter and expresses only one part (c) of it. Though procedural rights of Section 4 might be evaluated as in full expressing the principle of good administration. Therefore, the potential of these procedural rules is not fully exploited.

These implications might suggest that maybe there was no reason to systematise these procedural rights at all. That kind of approach might be denied since administrative courts rely on common rules of procedural rights and apply *lex generalis*. Consequently, it might be finalised that administrative courts are still developing the case law and they are still searching for the best way to incorporate the Section 4 into the unified case law.

In summary, more detail codification of procedural rules might be challenging Lithuania in the future. On the whole, single cases of violations and the pressure from society should not change the state's attitude towards supervisory procedures and undermine procedural rights.

CONCLUSIONS

1. Procedural rights and codification were hugely significant on the EU agenda in the last decade. However, the biggest achievement of the past decade is the Charter, which not only marks the tectonic shifts of the EU in the framework of procedural rights, but also is a "living document", demonstrating the equal degree of procedural rights that must be granted each time when any individual measures that could affect economic operator adversely are taken. Still, the requirement to ensure uniform procedural guarantees also in supervisory procedures throughout the EU is challenging the whole Europe.

2. The EU law has made a significant impact on legal regulation of supervision of economic operators and their procedural rights in Lithuania. The impact of the EU law over national law is determined not only by comparing initiative of codification of main procedural rights, but also analysing the jurisprudence of national courts. The provisions of the Charter regarding procedural rights in the national legal proceedings are being considered as an additional source of legal interpretation. Although indirectly applied to national institutions, Articles 41, 47 and 48 of the Charter can be called a fundamental list of procedural rights in supervisory procedures of economic operators.

3. Although the codification of main procedural rights of economic operators was not fully successful and the status of Law on Public Administration as a *lex generalis* requires to be enhanced, the mentioned law seeks to unify and to strengthen procedural rights applied in supervisory procedures. However, it must be acknowledged that administrative courts removing procedural irregularities quite rarely apply or analyse systemised procedural rights catalogue of economic operators enshrined in Article 36⁸ of Law on Public Administration, even though these procedural rules express in full the principle of good administration. Nevertheless, from the national jurisprudence it might be concluded that the need for common procedural standards is clearly expressed, that could also inspire more detail codification.

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FUTURE OF THE STATE – WELFARE STATE? LITHUANIA’S PATH

Gabrielė Taminskaitė¹

Abstract. This article analyses the rapport between the concepts of the welfare state and the social state. It also reveals the diversity of theoretical typologies of the welfare state and their significance in assessing the status of a country as a welfare state. By analysing the Lithuanian constitutional jurisprudence and legal doctrine, this article seeks to reveal Lithuania’s status as a welfare state, its origin and the connection with solidarity as an essential principle in the implementation of social rights nowadays and in the future.

Keywords: welfare state, principle of solidarity, constitutional principles.

INTRODUCTION

The development of industrial society, the rise of scientific positivism, the changing concept of solidarity and other changes in the 19th century created the preconditions for the emergence of the concept of a modern welfare state, sometimes also called a welfare state, enshrined in national legal regulation. As a result, the need to restore confidence in the state appeared in the democratic states by entrusting it with the legal guarantees of the social well-being of its citizens which are ensured in the field of economic and social relations. The historical development shows that the elements of the welfare state has constantly changed, therefore, the task of the modern welfare state is to establish such legal regulation in the national legal system that meets the real needs of society and ensures both their satisfaction and proper functioning of the state by implementing the constitutional principles of social solidarity, justice, proportionality and other principles of social security. The development of public services and social insurance, the consolidation of social and economic human rights and their guarantee presuppose the identification of Lithuania as a welfare state. This article, analysing the concept of the welfare state, reveals the status of Lithuania as a welfare state and the perspectives of the modern welfare state.

Despite the fact that the concept of the welfare state is widely analysed by various representatives of the social sciences both in Lithuania and abroad, from the scientific legal point of view, this field, especially in Lithuania, does not receive sufficient attention. The works of Lithuanian scientists are especially important in the topic of this article. J. Aidukaitė examines the development of social policy in Lithuania extensively in her works. Economist and sociologist R. Lazutka devotes a huge part of his research to the general basics of social security (Lazutka, 2012, p. 9–22), however, especially, he often examines individual elements of social security, such as pension reform issues (Lazutka, 2008) and economic indicators of social security, which influence the implementation of the concept of the

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welfare state in practice (Lazutka, Poviliūnas, 2010). The dissertation of legal scholar A. Bitinas “Models of Pension Systems and Management Tendencies in the European Union” and his monograph “Social Security in the European Union: Modernization of Pension Systems” was sufficiently significant for one of the fields of social security (a pension system). V. Petrylaitė had analysed welfare state models and social security principles in 2012 in her dissertation “Basic Principles of Social Security Law”. G. Svirbutaitė-Krutkienė and R. Dužinskas also analyse social models, distinguishing their characteristic features and characteristics. A. Guogis has paid a lot of attention to the general theory of social security, the concepts of the welfare state and, in particular, the analysis of solidarity. The development of Lithuania as a welfare state was examined systematically (observing the chronology of changes, identifying their reasons) and comprehensively (examining both the views of experts and the influence of historical and global factors) by revealing its factors, features and origins for the first time in 2012 in the co-authors’ book “Creation of a welfare state in Lithuania: Myth or Reality?” Certain constitutional aspects of social security law have been examined by constitutionalists T. Birmontienė and V. Vaičaitis. Social aspects are found in T. Birmontienė’s publications related to the analysis of constitutional doctrine which examines in detail the development of human rights, including social rights, in the jurisprudence of the Constitutional Court of the Republic of Lithuania. The principle of solidarity in medical law has been analysed by I. Špokienė.

Using historical, source analysis and systematisation methods, the article aims to reveal the status of Lithuania in relation to the welfare state. To this end, the analysis is carried out in the context of scientific tasks. Firstly, it seeks to reveal the relationship between the welfare state and social state. Secondly, the article aims to reveal the general concept of the welfare state with its characteristic features. Theoretical concepts of the welfare state are also examined to accomplish this task. Thirdly, it seeks to identify the status and perspectives of Lithuania as a modern welfare state.

1. WELFARE STATE AND SOCIAL STATE (IN)IDENTITY

The word welfare in itself means a good situation, a good life (see VLLK Consulting Bank). Welfare can be guaranteed by the family, a certain community, the state or the individuals themselves. The main goal of the welfare state is to ensure the welfare of society and its members through social means. Thus, the term welfare state is often equated with the term of social state. An analysis of texts from many different disciplines reveals that the use of one of these terms in individual fields is more common than another. For example, the term welfare state is more commonly used in the economic field. Meanwhile, the analysis of the works of the authors of Lithuanian law (J. Aidukaitė, A. Guogis, J. Žilys, etc.) allows to state that the concept of the social state is more common in the field of law. This may give the impression that each of these terms is a concept in a specific field (economics, politics, law, etc.). However, the use of each of them usually depends on the individual choice of the author (Bieliauskaitė, 2011). Most importantly, however, both the welfare state and the social state can be understood in a narrow and broad sense. In the narrow sense, the welfare state or the social state can be understood and defined only within the limits of social security. In a broad sense, such a state is understood as regulating not only social security, but also labor law,

employment policy, and, according to researchers, public services (Ramaux, 2016). The latter are considered to be inseparable from social security (Chevallier, 1987, p. 21–124) and are therefore not always distinguished as a separate pillar of the welfare state. However, in many works, the concept of a social or otherwise welfare state, defined solely through social security, is quite too narrow (Ramaux, 2016). French author C. Ramaux is inclined to take the view that, when it comes to the social state (French term *l'État providence*), we can also speak of both the social state and the British welfare state. It should be noted that these terms, however strange, are not defined internationally and there is no specific uniform definition of them. Although some authors acknowledge that historically the terms *l'État-providence*, *Sozialstaat*, and *British Welfare State* are not identical, they also argue that modern welfare the concept of the state arises from a triple nature (Merrien, 2007, p. 12–19). This means that it combines three historical and national concepts: the French idea of the welfare state (*l'État-providence*)², the German concept of the social state (German: *Sozialstaat*)³ and the British concept of the welfare state⁴ (Merrien, 2007, p. 12–19). Therefore, in accordance with this position, the choice to use any of these terms would be appropriate. Meanwhile, J. Bieliauskaitė states that the concept of the welfare state focuses on the result of the functioning of the state, while the concept of the social rule of law expresses the social goals of the state (social orientation) and emphasizes that these goals will be achieved by justice. It can be assumed that the Constitutional Court of the Republic of Lithuania would also be more in favor of the term social state, as it identifies in its rather abundant doctrine on this issue that Lithuania is a socially oriented state. Thus, it is likely that the welfare state in Lithuania is a more political and / or economic term. However, it is also considered to be broader than the notion of the social state, which falls within legal terminology only to a rather limited extent. It is also considered that the impact of globalization should take into account the correspondence of terms used abroad. As a result, the welfare state, although perhaps less legally precise than the social state, is chosen in this article as a key term (considering the welfare state as its synonym), also taking into account the threefold nature of the modern welfare state and the broader concept.

2 The French term *l'État-providence*, also used to define the welfare state today, historically expresses the idea that in a society where professional organizations or communities such as the family can no longer fulfill their solidarity function, the state must intervene, despite the emergence of the risk of a reduction in “natural solidarity”.

3 Historically, the German *Sozialstaat* defines the concept of social or otherwise the welfare state, which was introduced in Germany in 1850 by Lorenz von Stein, a lawyer, sociologist and economist, and inspired by Otto von Bismarck (Bismarck), a social peace-based model these days. According to this concept, the state has a social obligation, which Bismarck has realized by establishing a social insurance system in the state, which includes many laws regulating the relations of compulsory social insurance. Thus, the German social state has historically been a state that takes responsibility for the fate of the workers and in return expects it from them as an expression of absolute loyalty and solidarity.

4 The Anglo-Saxon concept of *Welfare state*, named after Archbishop William Temple, only emerged during World War II. At the beginning of the 19th century, the idea of “social security for all” as a means of strengthening democracy and social peace began to grow internationally. This is also reflected in Article 5 of the Atlantic Charter, signed in 1941, which states that international cooperation is essential to ensure the best working conditions for all, economic growth and social protection. After the war, *Welfare State* quickly became a term used in speech, originally describing a new British universal social policy that included free education, housing support, old-age pension, and so on. According to researchers, the *British Welfare State* is a democratic protectionist welfare state that guarantees minimum social rights and is no longer based on agreements between workers and employers, but on the provision of public services.

2. EXAMPLES AND TYPOLOGIES OF THE MODERN WELFARE STATE

History testifies that in individual states, welfare models were formed not only in different periods, but also under the influence of different societal experiences on the individual foundations of the nation-state. According to scholars, the common history, language, territory and religion of the nation formed a sense of solidarity and mutual help of citizens (Aidukaitė et al., 2012, p. 259). From which, over time, welfare states emerged and developed, on the basis of which solidarity and communion remain. The historical, political and economic context of each country created the preconditions for the emergence and establishment of different models of welfare states in each state. Constant change and model transformations are still taking place under the same influence. Thus, the formation of the modern welfare state is associated with the twentieth century. the end of the year, when the global market began to develop rapidly, limiting the financial and political powers of the state and changing the nature of ensuring human socio-economic rights (Bieliauskaitė, 2011). Researchers note that the attitudes of the administrative, political and economic elites towards social policy also have a significant impact. The dependence of welfare states on political decisions is unquestionable. Undoubtedly, the economic context, as a source of resources, as well as the legal, as well as defining legal boundaries and guaranteeing fundamental rights, carry considerable weight in the social policy that is being formed. However, in recent decades, the effects of globalization and Europeanization have become increasingly noticeable and emphasized (Aidukaitė et al., 2012, p. 15). Therefore, on this day, national welfare models in European countries, including Lithuania, regardless of the basis for their creation, must be assessed more globally, taking into account the current political, legal, economic and social situation and other national processes and common European Union policy. On the one hand, the situation of each state is unique due to its historical and national context, and the systemic nature reminds us that certain individual solutions that work well in one state, in another may be worthless or even lead to a negative outcome. On the other hand, it is under the influence of globalization and Europeanization that the processes of similarity between neighbour countries take place and the goal of achieving similar economic and social indicators encourages the transfer of good practices from one country to another. The important role of the European Union, which requires Member States to meet minimum common requirements, should also be borne in mind, including on issues relevant to the context of this article, such as work-life balance, employment promotion, etc. Therefore, in order to reveal the concept of the welfare state and Lithuania's path in creating the welfare state, it is important to briefly discuss the historical context, the main typologies and assess the current situation, not forgetting the international context.

It has already been mentioned that the general concept of the welfare state varies from narrow to broad and even extremely broad. According to N. Smelser, the concept of the welfare state implies an increased responsibility of the state to guarantee the material well-being of citizens through the provision of a service. The variety of services provided by the state is wide and includes health insurance, pension provision, unemployment benefits, maternity and paternity support, etc. Huber and Stephens also include the country's defense and police as welfare state services. The author of this

article follows a slightly narrower concept of the Welfare State, which does not include national and domestic defense and defense, but is limited to areas that directly affect and ensure social welfare and dignified and decent living conditions, *inter alia*, education, health care, etc.

As scholars note, the concept of the welfare state may have slightly different meanings in different countries. In Sweden, for example, the ideal welfare state model is one in which the state assumes responsibility for the comprehensive and universal provision of welfare services to its citizens (Aidukaitė et al., 2012, p. 259). Meanwhile, in many other welfare states in Western Europe, social security is a concern not only of the state but also of independent and voluntary public service providers. However, in a general sense, under modern comparative constitutional law, regardless of the scope and limits of its functioning, the welfare state is the one that takes care of the well-being of citizens and their social security and ensuring social justice. The philosopher A. Anzenbacher points out that the right choice of means to achieve a goal can be made only by knowing the goal, and in the welfare state it is the common good. This can be understood through everyone's personal well-being, i. e. by guaranteeing it to each member of society personally, universal well-being is also likely to be achieved. According to the philosopher, this requires an explanation of what constitutes the personal well-being of members of society. Thus, the welfare state, or otherwise the welfare state, is the one that ensures the universal welfare that meets the pressing needs of society.

Researchers note that since the Second World War, a broader concept of the welfare state has taken root, encompassing the functioning of the state through redistribution of budgetary resources, ensuring people's employment and an adequate standard of living, providing protection for workers, and so on (Žilys, 2006). Thus, over time, the role of the welfare state has increased in health care, education, family policy, and other areas of social life. According to scientists, the state that assumes the greatest responsibility for ensuring the well-being of citizens is considered to be the most modern and most advanced welfare state (Aidukaitė et al., 2012, p. 259). However, it is not possible for a state where at least a small part of the responsibility would be lost to the family, the individuals themselves and / or the communities. The extent to which the responsibility for the well-being of society lies with the state and other entities depends not only on the economic capabilities of the state, but most of all on the country's cultural and historical traditions influenced by religion, past experience, and so on. According to scientists, every state that has at least a slightly, albeit minimal, developed welfare services and social security system is considered a welfare state, although it will not be classified as a modern developed welfare state (Aidukaitė et al., 2012, p. 259). Still, the welfare status of such states is likely to be questioned. Meanwhile, other states that can boldly be classified as welfare states are also not, as already mentioned, identical. The concept of social policy in each state depends on its chosen model of the welfare state. As a result, each country can be assigned to an appropriate general typology. It is worth noting that its models of welfare states and the assignment of states to them are conditional. A unified ideal model of the welfare state. However, researchers divide states into welfare models in order to better understand the processes of policy development (Stankūnienė et al., 2001), to distinguish the strengths and weaknesses of the system in order to create and strengthen the welfare of societies.

The first models of the welfare state without assigning them to specific countries were constructed by the English political scientist R. Titmuss. He distinguished three models: the residual, in which the family and the individuals themselves take care of the welfare; the industrial achievement-performance model, the development of which meets the needs of social needs directly depends on the performance of work and productivity; institutional redistributive, in which the provision of social services to individuals depends on needs (Titmuss, 1963). With regard to the different areas of public life that receive state support, R. Titmuss also distinguished three types of well-being: financial, social, and professional (Bernotas, Guogis, 2003, p. 40). Financial wealth is created through various tax rebates and a system of financial incentives. Social welfare, which includes health care, social security, education, etc., is created through social means. Occupational well-being is created through social services and benefits provided in the labour market. A. Guogis observes that G. Ping-mus Andersen applied these models of R. Titmuss to the science of political science, calling them liberal (Anglo-Saxon), conservative-corporate (Bismarck) and social-democratic (Scandinavian) models (Guogis, 2000, p. 17). Thus, in essence, in her typology, Ms Esping-Andersen, like Ms Titmuss, grouped models of the welfare state according to who is responsible for the welfare of citizens, whether the state, the employer, the family or the individual.

Currently the most common and best known are the three aforementioned G. Esping-Andersen theoretical models of the welfare state. It should be noted that it would be not easy to find states that correspond to pure theoretical models. Regardless of the typology presented, specific states are usually characterised by mixed types of welfare states, with more or less model-specific features that allow them to be theoretically assigned to one of three categories. Moreover, the relative fourth model, the post-Soviet social model typical of the modern states that belonged to the Soviet Union, has been increasingly discussed and singled out recently. Meanwhile, according to the Lithuanian economist M. Skuodis, there are at least five models in the enlarged European Union. He takes the position that next to the typology formulated by G. Esping-Andersen and the post-communist social model, there is a fifth – southern model (Skuodis, 2009, p. 132). This model is also distinguished by Kleinan and Gelissen. M. Skuodis doubts whether all the states of the European Union can really be attributed to the respective models and to what extent each model should be interpreted and applied. Thus, to date, it is not even clear how exactly many theoretical models of the welfare state exist in the European Union, as different authors take different positions and see the existence of different types of typologies. However, based on G. Esping-Andersen's most common division of social models and the aforementioned historical French *l'État-providence idea* and German *Sozialstaat*, as well as, British *Welfare state* concepts, a theoretical general definition of the welfare state can be formulated, regardless of the specific model is in question.

Thus, a modern welfare state can be understood as a state whose legislations enshrines social rights, both providing for the possibility for a member of society at risk or belonging to a certain category of persons to acquire the right to a provided benefit, allowance or other form of assistance and service, as well as to receive and presuppose an obligation of the state, through its institutions and provided public services, to ensure an adequate standard of living for persons, allowing them

to be a full-fledged participants in social life and guaranteeing the person dignity, safe and decent living conditions. The welfare state covers the following areas of state legal regulation – ensuring a sufficient standard of living for citizens through social security, the labour market, housing, education, public security, income equality, regional development and health care.

3. LITHUANIA – A WELFARE STATE

The Constitutional Court of the Republic of Lithuania (also called the Constitutional Court) held in its ruling as of 12 March 1997 that Article 52 expresses the social nature of the state. Also the fact that for social security, i. e. the status of a constitutional value is recognized for the contribution of the society to the maintenance of those of its members who, due to important reasons provided by law, are unable to obtain self-employment and other income or are insufficiently supplied. In the opinion of the Constitutional Court, this corresponds both to the modern concept of state functions and to the 20th century. The constitutional tradition of the Lithuanian state, the origins of which date to the Constitution as of 1992. The social orientation of the state is revealed in more detail in the 2003 December 3 Constitutional Court ruling and in resolutions of subsequent years. They emphasize that according to the Constitution, the state, as an organization of the whole society, has a duty to take care of its members in cases of old age, disability, unemployment, illness, widowhood, loss of a breadwinner and other cases provided for in the Constitution and laws. Social security measures express the idea of social solidarity, help a person to protect themselves from possible social risks. According to I. Špokienė, such jurisprudence of the Constitutional Court creates serious preconditions for believing that the principle of solidarity is a part of Lithuanian national law (Špokienė, 2010, p. 329–348). It should be noted that solidarity plays an important role in both national legal systems and European Union law. Solidarity has been recognized as one of the most important values in European Union law for more than a decade. According to G. G. Balandi and T. Hervey, in recent years various expressions of solidarity have become particularly apparent in the discourse of European Union law.

The principle of solidarity is also on the list of values listed in the preamble to the Charter of Fundamental Rights. It, like dignity, freedom, equality and justice, is endowed with the status of a fundamental value on which the Union is founded and which it seeks to preserve and develop. However, the meaning of the content of this principle is not clarified in more detail in the acts of the European Union. The fact that solidarity is inseparable from the modern welfare state is also confirmed by foreign law. For example, according to M. Borgetto, fraternity in the French motto is nothing but an expression of solidarity. According to him, solidarity is a legal category that helps to put the fraternity into practice (Borgetto, 1993, p. 17–339). The French Social Security Code also states that all social security in the country is based on the principle of national solidarity. According to the practice of the French Constitutional Council, the principle of fraternity consists of two essential parts. One includes everything related to the demand for solidarity that arose from the proclamation of Article 1 of the Constitution, according to which, France is a social republic, and the other means tolerance in

society, respect for each other and the fight against exclusion. Solidarity is thus an integral principle of the welfare state, on which the whole typology of the welfare state is based.

According to the jurisprudence of the Constitutional Court, K. Lapinskas also identifies Lithuania's social orientation. According to him, the social orientation of the state is reflected not only in the provisions of the Constitution establishing the above-mentioned human social rights, but also in the provisions establishing economic and cultural rights, as well as civil and political rights, relations between society and the state, principles of nation organization and regulation (Lapinskas, 2006, p. 357). It is obvious that the Constitutional Court, when disclosing the content and essence of social rights, cannot interpret them in isolation, without relying on other, especially economic, human rights or without mentioning them. For example, the right to social security is almost always linked to a certain state-guaranteed financial assistance, which is expressed in certain cash benefits or services (pensions, benefits, social services, etc.). According to J. Bieliauskaitė, the fact of enshrining socio-economic human rights in the Constitution reveals the social orientation of the state and corresponds to the principle of social justice formulated on the basis of J. Rawls' theory of justice (Bieliauskaitė, 2011, p. 130). This means that every resident is given equal rights, which he or she has the potential to enjoy. However, whether if it can do it realistically will depend on the person's own abilities, efforts, desires, etc. and from the state's efforts to ensure the implementation of these rights.

Thus, the level of each country as a welfare state should also be measured by the extent to which the state can and contributes, through its institutions, public services, policies on individual issues, inter alia, family policy, to the realisation of each member of society, which must in any case meet minimum standards and, above all, be applied universally and uniformly.

T. Birmontienė observes that such rights as the right to social security, health care, healthy environment in constitutional jurisprudence can be interpreted both as social (programmatic) and as individual rights of a person, they are closely interrelated and mutually determining (Birmontienė, 2012, p. 1005–1030). K. Lapinskas also emphasises that the constitutional entrenchment of a wide range of social rights provides grounds for talking about the obligations of the state in the field of social policy, especially the obligations to take care of the creation of social welfare (Lapinskas, 2006, p. 357). Thus, for example, the provisions of the Constitution guaranteeing the right to social security oblige the state to establish sufficient measures for the implementation and legal protection of that right.

The fact that Lithuania is a social (or otherwise welfare state) is derived from the Constitution in the same way as the principle of the rule of law. J. Žilys states that in the modern doctrine of constitutional law the social state is not opposed to the rule of law – they form an indivisible whole, characteristic of the concept of a democratic state (Žilys, 2006). Although the Constitutional Court, unlike the institutions of constitutional review of some other states, *inter alia* France (see Decision No. 2006-540 of the Constitutional Council of the French Republic of 27 July 2006), has not ruled directly on the constitutional identity of Lithuania. According to D. Žalimas, some constitutional principles and values can reasonably be considered a part of this identity. The professor states that respect for natural human rights is in itself an integral part of Lithuania's constitutional identity (Žalimas, 2017, p. 35–49). From his point of view, in the context of the modern Lithuanian state, respect for

natural rights can be traced back to the Act of Independence, which proclaims the restoration of a democratic state. M. Maksimaitis notes that the idea of protection of natural rights was embodied in the Constitution of 1922, the chapter “Lithuanian Citizens and Their Rights” is linked to the 1789 the French Declaration of Human and Civil Rights was published (Maksimaitis, 1999, p. 98). In his opinion, even the Soviet occupation did not prevent Lithuania from committing itself to the Universal Declaration of Human Rights, the preamble of which states that “*the recognition of natural dignity and of equal and inalienable rights is the foundation of freedom, justice and peace in the world.*” D. Žalimas also notices that this commitment was achieved by the Declaration of the Council of the Lithuanian Freedom Fighting Movement as of 16 February 1949, i.e. two months after the adoption of the Universal Declaration of Human Rights. Thus, although the Lithuanian state, having a turbulent historical past, cannot boast of stably nurtured traditions in creating a modern welfare state, it can be seen that the basic principles and values characteristic of the welfare state have been entrenched and respected constitutionally for a long time. It is obvious that Lithuania, at least since the 20th century, began to build the constitutional foundations of the welfare state. The values that express them are constitutionally protected and cherished to this day.

As it was already mentioned, after the restoration of Lithuania’s independence and the establishment of the Constitutional Court, the Constitutional Court of the Republic of Lithuania stated in some rulings from the very beginning that according to the Constitution, the Lithuanian state is socially oriented and noted that social security, i.e. the status of constitutional value is recognised for the contribution of the society in maintaining its members who, for the reasons specified in the law, are unable to receive work and other income or are insufficiently received. Thus, first of all, it can be seen that the Constitutional Court has indirectly established the principle of public solidarity – mandatory assistance of members of society to each other in fact of the necessity. This position is also shared by T. Birmontienė (2006, p. 325–336). Secondly, the Constitutional Court linked the principle of solidarity to the social orientation of the state, which bases the status of Lithuania as a welfare state. And finally, it gave a special constitutional significance to the principle of solidarity, which is inseparable from the social status of the state.

It is important to mention that the Constitutional Court has also repeatedly noted that the principle of solidarity does not deny the personal responsibility of each member of society for his or her own destiny. For example, the resolution as of 25 November 2002 states that the legal regulation of social security must be such as to create preconditions and incentives for each member of society to take care of his or her own well-being, and not to rely solely on state-guaranteed social security. Meanwhile, the resolution as of 26 September 2007 no longer captures such an open position on individual responsibility for well-being. The resolution states that the state must create such a social security system that would help maintain living conditions that meet the dignity of the individual. The principle of solidarity presupposes that the burden of fulfilling certain obligations must be distributed to a certain extent to the members of society, but that distribution must be constitutionally justified, it shall not be disproportionate and shall not deny the state’s social orientation, as well as, constitutional obligations to the state. Such mutual recognition of personal and public responsibility is important

in ensuring social cohesion, guaranteeing personal freedom and the possibility to protect oneself from difficulties that a person alone would not be able to overcome (Ruling of the Constitutional Court of the Republic of Lithuania of 26 September 2007). It is understood that the state implements these functions primarily by redistributing income. However, another issue is already being raised here, although it is no longer within the scope of this article. What is the relationship between the principles of solidarity, proportionality and justice? As V. Petrylaitė observes, in the modern state, where a social security system based on legal instruments is in force, solidarity becomes essentially coercive, therefore, it is important to ensure that the limits of this principle are set correctly. Otherwise, the excessive demand for solidarity expressed for one group of persons could lead to distrust of the social security system and unwillingness to participate in it (Petrylaitė, 2012). Of particular importance here is the correlation between the principle of solidarity and the principles of justice and proportionality. Their relationship directly affects the country's status as a welfare state. This means that measuring it not only identifies the type of welfare state the country belongs to, how developed it is, but also whether it can be assigned to the status of a welfare state at all.

As a result of scientific progress, human work is being replaced by technology, medical advances and the average life expectancy of the population are increasing, and human rights are becoming more widely recognised, newly identified and strengthened. Due to this, the question arises as to what legal future, *inter alia* in terms of socio-economic rights, awaits modern states. The political system correlates with the rule of law and other principles, *inter alia*, of the welfare state. There is no doubt that the population's expectations for prosperity in democracies are increasing, but as in all ages, and in the future, the challenge is to reconcile the individual and general needs of society and the state's ability to meet them. As consumerism and manifestations of individualism emerge in society, it is important to understand the content of the modern welfare state. It is understood that ensuring the social peace, the principles of justice and equality will remain an unquestionable priority. However, the redistribution of income and state intervention in more and more spheres of public life, even with positive goals and results, risks becoming excessive and upsetting the balance between the fundamental principle of the welfare state – solidarity and other main legal principles of justice and proportionality.

CONCLUSIONS

1. It is recognised that the term social state is more common in the legal terminology than the term welfare state, which is more widely used in economic and political spheres. However, given the concepts of the welfare state and the social state, it would not be a mistake to consider both of these terms synonymous, depending on the individual choice of each author, i.e. to what extent, by expanding or narrowing, do they understand the social, or otherwise welfare, state.
2. The concepts of the welfare state differ not only depending on the theoretical typology (the number of which is not specific, although based on the most common opinions, vary between the existence of 3 and 5 different theoretical models), but also on the values and priorities cherished

in different states. Nevertheless, a possible general definition of the welfare state, according to which even states with the least developed welfare services and social security systems are likely to be included in the list of welfare states. Therefore, the mere classification of a country as a welfare state does not mean the existence of a modern and developed national welfare system.

3. Lithuania is undoubtedly a social state, and in keeping with the prevailing position of the identity of social and welfare states prevailing throughout the article, it must be stated that Lithuania also belongs to the category of welfare states. The constitutional jurisprudence developed in Lithuania since the restoration of independence not only develops the idea of the state's social orientation, but also indirectly establishes solidarity as a constitutional principle.
4. The role of welfare states in the application of the principle of solidarity in the life of society is likely to increase in the distant future in proportion to the scientific and technological progress that is leading to population growth, longer life expectancy and declining employment. Ensuring a balance between the common interests of individuals and society as a whole, by reconciling the three fundamental principles of the welfare state – solidarity, justice and proportionality – should be a key challenge for welfare states.

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THE POSSIBILITY OF USING REPRESENTATIVE ACTIONS TO PURSUE CLAIMS RESULTING FROM THE DIESELGATE SCANDAL – THE FUTURE OF REDRESS FOR INFRINGEMENTS OF COLLECTIVE CONSUMER INTERESTS

Anna Urbanek¹

Abstract. Since the disclosure of unethical and illegal solutions used by Volkswagen A.G. during exhaust emission tests in many countries, proceedings are underway to impose an appropriate penalty on the company and to compensate the victims. On a global scale, the USA, Australia, South Korea and Canada can be mentioned. The European Union is not standing still. Until mid-February 2020, national courts and administrative bodies imposed various types of sanctions in Spain, Germany, Portugal, the Netherlands, Austria and Poland, among others. However, although the Volkswagen case is an infringement of collective consumer interests on a pan-European scale, Member States are resolving the problem through internal proceedings. Does this ensure effective and adequate compensation of affected consumers? The increase in protection would ensure, among other things, that there is a valid injunction for adequate compensation and that the proceedings are international in nature. The paper aims to show how the representative actions mechanism proposed in the “New Deal for Consumers” package could affect the effectiveness of decisions taken in the Volkswagen case by Member States’ competent authorities.

Keywords: consumer protection, New Deal, representative actions.

INTRODUCTION

On 11 April 2018 the European Commission presented its Communication ‘A New Deal for Consumers’ and the accompanying proposals for two Directives – a Directive on representative actions² and a Directive aimed at better enforcement and modernisation of consumer law³. Both drafts aim to thoroughly reform EU consumer law, adapting it to current challenges. The new representative actions mechanism is intended to make it easier for consumers to seek redress to eliminate the effects of infringements of their rights, including claims for damages, and to ensure effective protection of consumers’ collective interests.

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2 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/184 final, hereinafter: draft directive on representative actions.

3 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM/2018/185 final.

The European Commission has referred to the so-called Dieselpgate⁴ scandal several times in its explanatory memorandum. A car producer has misled thousands of consumers by selling cars that do not comply with emission standards required by EU law. The new deal for consumers is to ensure that in the future traders will not commit similar cross-border infringements and consumers will have effective means of redress. The European Commission confidently stated that if the rules proposed in the New Deal for Consumers in all Member States existed at the time of the Dieselpgate scandal, consumer organisations or independent public entities could bring representative actions against the producer who is misleading consumers and seek compensation for the consumers affected. Under the draft directive on representative actions, qualified entities would bring actions against traders who infringe the collective interests of consumers. Courts or authorities will decide in a single injunction procedure on the form of compensation for damages caused to consumers.

The draft directive on representative actions is still subject to legislative work. If the proposed amendments enter into force, representative actions may be a solution to consumers' problems of harming their collective interests. Will the future decade of European Union law be free from scandals similar to those committed by Volkswagen?

THE DIESELGATE SCANDAL

In September 2015 the Environmental Protection Agency (EPA) and the California Air Resources Board (CARB) revealed that Volkswagen AG (VW) was using an exhaust emission control system in its vehicles that was only activated during emission tests (MacDaugald, 2017, p. 94–96). This allowed the cars to be advertised as more environmentally friendly than competing brands while consuming less fuel. In fact, Volkswagen A.G. was not able to reconcile the desired level of combustion with the production of exhaust gases corresponding to the required standards. For this reason, the company used software that recognized that the vehicle was being tested for the release of toxic substances, which resulted in switching to the low emission mode. At the end of the test, the engine control software returned to normal operating mode, where it was possible to improve vehicle acceleration while reducing fuel consumption (Ewing, 2015, p. B1). The President of the Management Board of VW confirmed the use of a special operating mode of the software embedded in the engine control units during the exhaust emission tests⁵.

In view of the VW scandal, consumers who decided to buy cars with built-in alternative modes of engine operation try to assert their rights by using the legal instruments provided by the applicable national law. There are many similarities across the European Union in terms of consumer redress, but there are also significant differences. The process of settling consumer claims varies widely across Member States. At present, there are no uniform mechanisms that would allow all victims in the European Union to receive adequate compensation, as is the case in the United States⁶.

4 https://ec.europa.eu/info/sites/info/files/ndc_factsheet4_redress_mechanism.pdf.

5 <https://www.media.vw.com/en-us/releases/575>.

6 https://www.washingtonpost.com/business/economy/court-approves-15-billion-emission-settlement-by-volkswagen/2016/10/25/5f94f474-9ad9-11e6-b3c9-f662adaa0048_story.html.

CONSUMER REDRESS

Consumers seeking compensation in the Member States are faced with a number of problems arising from the circumstances of the case, such as the cross-border nature of the case, which, in the absence of adequate harmonisation of rules, slows down proceedings and, above all, does not guarantee identical compensation for victims of the same infringement in different EU countries.

Jurisdiction can be established on the basis of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EU, 12 December 2012, p. 1–32). According to Article 18(1), a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled. This provision is without prejudice to Article 7(2) of the Regulation, which provides that in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

However, there are also doubts concerning the attribution of liability for damage caused to consumers. Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (25 May 1999, p. 12–16) imposes a liability on the seller by stipulating that he must deliver to the consumer goods which are in conformity with the sales contract (Article 2(1)). Although in most cases the claims were initially directed against car sellers (Nemeth, Carvalho, 2015, p. 35), there have gradually been allegations directly against producers⁷.

An additional obstacle is the lack of binding character of decisions by national administrations on the violation of collective consumer interests. For this reason, consumers must always prove the existence of an infringement before a court in private law proceedings.

COLLECTIVE CONSUMER INTERESTS

Advertising cars as ‘environmentally friendly’ has caused the average consumer to make a transactional decision that he would not have taken otherwise (Henning-Bodewig, 2016, p. 153). As a consequence, VW’s practices can be accused of infringing the collective interests of consumers. According to Directive 2009/22/EC on injunctions for the protection of consumers’ interests (23 April 2009, p. 30–36), the notion of “collective interests of consumers” should be understood as interests which do not include the cumulation of interests of individuals who have been harmed by an infringement (recital 3).

Where there is no definition of the collective interest of consumers in national law, the court or administrative authority must always examine whether there is a collective interest of consumers and whether there has been an infringement (Sieradzka, 2016, p. 1). In this case, it is helpful to refer to the infringement of the public interest, which can occur when a number of consumers are affected by an act or omission of the trader or when the functioning of the market is adversely affected (Sieradzka, 2016, p. 2). In addition, it is essential that a potentially unlimited number of consumers

7 <https://www.stopvw.pl/afera-na-swiecie/>.

can be affected by the infringement. Therefore, the specificity of the collective interest of consumers lies in the fact that it includes, but also exceeds, individual interests, being more than the sum of the individual elements of a set (Wesołowska, 2014, p. 92). However, this term cannot be given purely economic significance (Borkowski, Chmielewski, 2017, p. 143–144).

The doctrine states that the term “collective” refers to both an abstract consumer and an abstract interest. In addition, the trader’s practice must be such that each individual person may be affected, whether he is the trader’s contractor or potentially becomes one. However, even incidental practices by a trader will be regarded as harming the collective interests of consumers insofar as they adversely affect the rights of an abstract consumer (Sieradzka, 2016, p. 5).

In addition, the term “collective interest” may be understood differently depending on the context and nature of the legal relationship with the consumer (Sieradzka, 2012, p. 24–33). The definition of who the trader’s practice is addressed to is also relevant to the remedies available to the consumer in the event of damage. In the case of an infringement of an individual interest, the consumer can pursue his claims in private law. On the other hand, if collective interests have been infringed, the entitled entities represent consumers in court proceedings (Wesołowska, 2014, p. 93–94; Sieradzka, 2007, p. 175).

Collective redress involves a wide range of procedural mechanisms for the collective enforcement of consumer rights. Although these mechanisms are very diverse, four main forms of collective redress can be identified. The first is a representative action on behalf of a group to obtain redress, in which a qualified entity is granted a standing entitlement. In addition, a group action can be distinguished, in which a legal representation is granted to a group member. The so-called model case, in which an action is brought by one or more persons and the judgment is based on other cases against the same defendant. The last type is characteristic of the common law system in the United States, where group actions are conducted by professional lawyers (Durovic, Micklitz, 2017, p. 81).

DIRECTIVE 2009/22/EC ON INJUNCTIONS FOR THE PROTECTION OF CONSUMERS’ INTERESTS

By adopting Directive 98/27/EC on injunctions for the protection of consumers’ interests (19 May 1998, p. 51–55), the EU legislator initiated a process of approximation of the laws, regulations and administrative provisions of the Member States on injunctions against traders. The reason for this was the inefficiency of the legal mechanisms available to consumers in the event of an infringement (Directive 98/27/EC, recital 2). The problem was in particular due to the lack of effective injunction mechanisms for cross-border infringements, as raised in the preambles of Directive 98/27/EC (recital 3) and repealing Directive 2009/22/EC (recital 4). Firstly, ineffective actions or passivity of public authorities risk losing consumer confidence in the market. Second, the aforementioned lack of uniform legislation within the Union results in the helplessness of public authorities in cross-border practices. Proceedings concerning the same practice may take place across the Union in different modes and may not necessarily result in a similar outcome. Directive 2009/22/EC, like its predecessor 98/27/

EC, obliged Member States to introduce into their national legal systems the possibility for qualified entities to bring actions for the cessation of practices that harm the collective interests of consumers. This could be done by placing the injunction procedure in national judicial or administrative proceedings, with the option of a mixed system.

In order to be considered harmful under Directive 2009/22/EC, a practice must endanger or infringe the collective interests of consumers and must furthermore be incompatible with the Directives listed in Annex I to the Directive. Qualified entities are defined in Article 3 of the Directive as bodies or organisations with an interest in ensuring compliance with the consumer protection provisions in Annex I. Under Directive 2009/22/EC Member States shall select the authorised entities according to their choice, either by extending the competence of existing bodies or by setting up new ones whose task is solely to pursue the objective of the Directive (recital 10).

According to Article 2(1)(a) of Directive 2009/22/EC, qualified entities may apply to a court or competent authority for an injunction requiring them to cease the practice or to prohibit it in future. These may be preventive in the form of providing the details of the case and the decision to be taken by the public (Directive 2009/22/EC, Article 2(1)(b)), or they may be punitive in the event of an undertaking's failure to comply with its obligation. In case of failure to comply with the obligation on time, the court or authority may charge certain amounts for each day of delay (Directive 2009/22/EC, Article 2(1)(c)). These optional elements of an action for an injunction, according to part of the doctrine, indicate that the legislator has doubts as to the effectiveness of the injunction itself (Bogdan, 1998, p. 369–375).

The Directive is also intended to open the door to bringing actions in the case of cross-border infringements without interfering with international law on the choice of law applicable to the settlement of a dispute (Article 2(2)). The effectiveness of the procedure in the case of cross-border infringements is limited by the cost of bringing an action, the complexity of the procedure and its duration (COM 2012/0635 final, 1.1.).

According to the report on the application of Directive 2009/22/EC, a detailed list of proceedings pending in the event of infringements of consumers' collective interests is difficult to compile, as Member States are not obliged to keep records of such cases. During the first 4 years of application of Directive 2009/22/EC, approximately 5600 actions for an injunction were brought, of which only 70 covered cross-border infringements (COM 2012/0635 final, 2.1.). The lack of accurate data makes it impossible to make a reliable assessment of the effectiveness of the procedure.

Although Directive 2009/22/EC has contributed to reducing the incidence of harmful practices, injunctions under the Directive have mainly future effects. In addition, existing procedural measures are primarily aimed at eliminating infringements and not at enabling consumers to seek damages (Mucha, 2019, p. 212). Another factor contributing to the low popularity of injunctions is the length of proceedings and the significant differences in the duration of injunctions for cross-border infringements. Cases pending in several Member States are additionally characterised by the complexities of the order.

EFFECTIVENESS OF REDRESS FOR INFRINGEMENTS OF COLLECTIVE CONSUMER INTERESTS

In 2017 the Commission carried out a detailed evaluation of consumer protection legislation. The assessment of the adequacy of the REFIT (SWD(2017) 209) and the evaluation of the Consumer Rights Directive (COM(2017) 259; SWD(2017) 169) showed that, while these provisions fulfil their role, their enforcement is still not fully effective. The European Commission has analysed the effectiveness of existing collective redress methods (COM(2018) 40). The outcome of the study showed that when collective redress occurs for a significant number of consumers in several Member States, the available means of enforcing redress from traders are not fully effective (Communication from the Commission – “A New Deal for Consumers”, 1.1.), as the Dieselgate scandal seems to confirm.

After analysing consumer protection legislation and diagnosing problems in ensuring its effectiveness, the European Commission has started to draft directives in the framework of the “New Deal for Consumers”. An impact assessment of the proposed legislative changes was also published on 11 April 2018, together with the Communication and the draft directives (SWD/2018/096 final).

As part of the package of options to ensure that traders comply with consumer protection law, the European Commission identified three options. Option I focused on improving enforcement to stop infringements by ensuring dissuasive and proportionate penalties and strengthening injunctions to stop violations of Union law with the exception of collective redress for the elimination of the effects of the infringement. There would be a uniform list of criteria for assessing the seriousness of infringements across the European Union, which would be binding on authorities when dealing with an infringement by a trader. When imposing a fine, a court or national authority would be obliged to take into account the size and turnover of the undertaking to ensure that the fine is appropriate (SWD/2018/096 final, 5.1.4.). Option II would partly consist of the measures under Option I, reinforced by the possibility for consumers affected under the Unfair Commercial Practices Directive (2005/29/EC, 11 May 2005, p. 22–39) to benefit from contractual and non-contractual remedies. As an argument, the European Commission once again referred to the Dieselgate scandal. Consumers affected by the carmaker’s practice have had the possibility in many Member States to use only contractual remedies. These remedies were only available to car dealers and not to the manufacturer actually responsible for the damage (SWD/2018/096 final, 5.1.5.). Option III was a combination of the previous two. The European Commission envisaged improving the enforcement of Union law and individual and collective consumer redress (SWD/2018/096 final, 5.1.1.). In addition, the privileged entities would have the power to apply for an injunction to stop the infringement and to seek redress to eliminate the effects of the infringement.

A NEW DEAL FOR CONSUMERS – REPRESENTATIVE ACTIONS

Finally, in two draft directives adopted on 11 April 2018, the European Commission opted for Option III (Explanatory Memorandum, COM(2018) 184 final) to improve the enforcement of Union law and individual and collective consumer redress. Particularly far-reaching changes were included

in the draft Directive on representative actions to protect the collective interests of consumers, which would replace Directive 2009/22/EC. The changes are intended to empower consumers by ensuring effective redress where an act or omission of the trader is considered harmful⁸.

Like Directive 2009/22/EC, the draft Directive on representative actions provides for the empowerment of qualified entities to bring actions to protect the collective interests of consumers. The proposal also extends the requirements for qualified entities qualified to represent the collective interests of consumers (COM(2018) 184 final, Article 4(1)). Article 5(2) of the draft Directive on representative actions obliges qualified entities to demonstrate the grounds on which the application or action for an injunction is based. To this end, it is necessary to prove evidence of damage to consumers or of the intention of the trader to cause damage or of negligence on his part.

Under the draft directive on representative actions, qualified entities will seek an injunction before a court or administrative authority as a temporary measure to stop an infringement or, if the practice has not yet been carried out but is imminent, to prohibit it. Alternatively, the claim may include a request for an injunction finding that the practice constitutes an infringement and, if necessary, for the practice to be stopped or prohibited if it has not already been carried out (COM(2018) 184 final, Article 5(2)). In addition, the proposal extends the competence of representative bodies to cover claims for measures to eliminate the effects of the infringement, including, in particular, claims for damages. Under Article 5(3) of the draft Directive, a prior injunction or decision by a court or authority declaring that a practice constitutes an infringement of the Directives listed in Annex I to the draft is required in order to seek damages. The draft directive on representative actions also provides for the possibility for qualified entities to pursue these measures together with an injunction (Article 5(4)), a key change in the injunction procedure.

Under the draft directive on representative actions, the court or body seised will be able to order the cessation of the practice by the trader and, at the same time, to award consumers adequate compensation for their collective claims if so requested by qualified entities. In addition to monetary compensation, in accordance with Article 6(1) of the draft, these may include sanctions such as requesting repair, replacement of goods, reduction of price, termination of the contract or reimbursement of the consumer.

In cases where the complexity of the matter makes it impossible to give a ruling with an order or decision to compensate consumers who have been harmed, Member States will be able to authorise the competent courts or authorities to issue a declaratory ruling on the trader's liability towards affected consumers. Consumers will bring individual actions under private law based on the declaratory decision (COM(2018) 184 final, Article 6(2) and recital 35). This procedure will not apply if it is possible to identify consumers who have suffered damage as a result of the practice or have suffered a small loss and the compensation paid to them could be disproportionate. In the latter case, the compensation in its entirety is to be allocated to public objectives serving the collective interests of consumers (COM(2018) 184 final, Article 6(3)). The proposal does not specify how small the amount

8 https://www.uokik.gov.pl/aktualnosci.php?news_id=14867.

is in accordance with the Directive. Member States should therefore develop similar criteria for assessing whether the consumer's claim should be taken into account. At the same time, the provisions of the draft Directive on representative actions do not prevent consumers from pursuing private law claims, even after having obtained compensation (Article 6(4)).

AN OLD DEAL FOR CONSUMERS?

The first reading of the draft Directive on representative actions in Parliament took place on 26 March 2019. The European Parliament, after hearing the comments submitted to it by EU bodies, institutions representing the interests of consumers and traders, made a number of changes to the draft Directive on representative actions. The legislative procedure is ongoing. The last work on the draft took place in the Council on 30 June 2020⁹.

In line with the text agreed by the European Parliament in first reading, the qualified entities will continue to seek an injunction, but without the possibility to pursue remedies for the infringement simultaneously, based on the decision finding the infringement, including an injunction¹⁰.

The legislative work in the Council resulted in an agreement with the European Parliament on EU-wide rules on the protection of collective consumer interests. It is not yet clear when the Directive on representative actions would enter into force, but the European Commission already sees in its statement an opportunity to protect the collective interests of consumers more effectively¹¹. Unfortunately, changes have been made to the original draft of the Directive which call into question its impact on consumer empowerment.

Of the many amendments made in the course of the legislative work, the modification of Article 5(4), according to which Member States shall ensure that qualified entities are able to seek the measures eliminating the continuing effects of the infringement, is questionable. As adopted by the Council and the European Parliament in the framework of a recent agreement, Member States may enable qualified entities to seek, where appropriate, means to remedy the persistence of an infringement¹². As Member States will not be obliged to ensure that the qualified entities are able to seek enforcement measures, there may still be a situation where consumers from different countries are protected to different levels.

Another important change in the text of the draft directive concerns the binding of a final decision by a court or administrative authority of a Member State finding an infringement of the collective interests of consumers. Article 10 of the draft directive as it was originally drafted provided that Member States shall ensure that final decisions of courts or administrative authorities are recognised as irrefutable evidence of the existence of an infringement for the purposes of any other action seeking compensation in their national courts against the same trader for the same infringement

9 <https://eur-lex.europa.eu/legal-content/PL/HIS/?uri=COM:2018:0184:FIN>.

10 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6759_2020_INIT&from=EN, p. 114.

11 https://ec.europa.eu/commission/presscorner/detail/pl/STATEMENT_20_1227.

12 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9223_2020_INIT&from=EN, p. 40.

(COM(2018) 184 final, Article 10(1)). In addition, final decisions taken in other Member States were to be recognised by national courts or administrative authorities as presumed to be a rebuttable infringement of collective consumer interests (COM(2018) 184 final, Article 10(2)). Also, a declaratory decision on the trader's liability towards consumers (taken when, due to the nature of the case, it is not possible to specify in the order for individual compensation, pursuant to Article 6(2) of the draft directive) was to be considered as irrefutable evidence of the trader's liability (COM(2018) 184 final, Article 10(3)). However, amendments made in the course of the legislative procedure have limited the effect of decisions of final courts and administrative authorities in such a way that the new Article 10 only obliges Member States to ensure that a final decision finding an infringement which harms the collective interests of consumers can be used as evidence of the infringement for any other action to obtain redress¹³. As a result, consumers are deprived of the means to ensure effective individual redress. This measure was to be the essence of representative actions. By depriving consumers of the guarantee that they will effectively invoke the final decisions of courts or administrative authorities in their individual cases against the same trader, the New Deal may not be as important as the European Commission originally attributed to it. Binding the final decisions of courts and administrative bodies in cases against the same trader was an important novelty, without which the European Commission's package of changes will rather resemble the old deal for consumers.

CONCLUSIONS

The European Commission has highlighted on several occasions that the New Deal for Consumers is meant to be a remedy for inefficient consumer protection by, among other things, ensuring effective private redress in the draft Directive on representative actions. The first part of the package of amendments in the form of a Directive amending Directives 93/13 EEC, 98/6/EC, 2005/29/EC and 2011/83/EU¹⁴ has already entered into force. However, the changes during the legislative process of the draft Directive on representative actions are questionable.

In assessing the effectiveness of EU consumer protection law, the European Commission has identified many irregularities and ineffective protection mechanisms in EU law. These have been identified, among others, in Directive 2009/22/EC, as preventing individual consumer claims from being settled. The Dieselgate case was a kind of a starting point for changes to the existing provisions on collective and individual consumer redress. Following the REFIT assessment, the Commission concluded that the most effective model to prevent similar problems to the VW case in the future would be to choose the option to allow qualified entities to apply for an injunction and to seek redress for the infringement in a single action and the decision in the course of the procedure would be binding in individual cases.

¹³ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9223_2020_INIT&from=EN, s. 48.

¹⁴ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7–28.

The new deal for consumers was to ensure that the injunction would be enforced at the same time and that the persistent effects of the infringement would be eliminated. However, changes in the course of the legislative procedure have led to a deviation from the original approach. Also in the case of binding by a final decision of a court or administrative authority, amendments have been introduced that weaken consumers' ability to pursue individual claims. It is difficult to see why there are such significant departures from the original draft Directive. What is certain, however, is that the announced revolution in consumer protection law will not have as significant effects as the European Commission has announced.

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