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RESPECTING NATIONAL IDENTITY AND PRINCIPLE OF LOYALTY IN EU LAW – BORDERS – CONFLICT - HARMONISATION

BRATISLAVA LEGAL FORUM 2018

Zborník príspevkov
z medzinárodnej vedeckej konferencie
22. - 23. februára 2018

REŠPEKTOVANIE NÁRODNEJ IDENTITY A ZÁSADA LOJALITY V EURÓPSKOM PRÁVE – HRANICE – KONFLIKT - ZOSÚLADENIE

BRATISLAVSKÉ PRÁVNICKÉ FÓRUM 2018

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CONTENT / OBSAH

NATIONAL SPECIFICS AND NATIONAL IDENTITY - IS INSTITUTIONAL COMPETITION DESIRABLE IN THE EUROPEAN UNION? CASE OF ENFORCEMENT OF COMPETITION LAW[1]

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Abstract: Thereis no doubt that effective enforcement of competition rules is essential building block of the EU's internal market. It is also clear that in the semi-decentralized system of enforcement established by Regulation 1/2003 effective enforcement by the national competition authorities is crucial. The paper raises a question if the European Commission's "Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market" is a suitable tool within the competence of the European Union and whether it does not disproportionally interfere with national approaches and incentives to the enforcement of the EU competition rules by national competition authorities.

Key words: EU law, competition law, national identity, harmonization, Regulation 1/2003

1 INTRODUCTION

Economic competition shall usually maximize effectiveness of production, distribution and consumer welfare in market economy. It also has got its "darwinian" aspect – only the fittest survive at the market. The European Union established internal market with safeguards for effective economic competition (or at least not disturbed, distorted, restricted, etc.). Along with the economic competition, another type of competition in legal sense can be observed – regulatory competition, or competition of legal orders, jurisdictional competition, competition of institutions or systems competition. Indeed, this type of competition is the most evident in private-law cases of choice of law, i.e. choice of private law system by parties to a civil contract or other relationships. "Consumers of the law" choose the legal order which provides the higher "consumer welfare". In the sphere of public law the competition of legal system is usually aimed to attract prospective foreign investors, e.g. tax law, effectiveness of judicial system. On the other hand, effectiveness of regulatory system focused on economic competition and consumer protection can produce both encouraging and discouraging effects. It can attract consumers (including business purchasers) as well as enterprises that wish to be active in fair and just environment, but also can haunt entrepreneurs that want to achieve their profits by unfair practices.

Due to decentralization of EU competition law in 2004, system of national competition regimes and their possible mutual competition is much more complex. Satisfying wishes of own voters or desires of business is not enough, since national system of enforcement of competition law must meet criteria laid down by EU law in terms of its effectiveness. Regulation 1/2003 served inevitably as an inspiration or framework for voluntary convergences leaving enough space for the national legislator to create specific solutions. And these "national" solutions could have served as cross-Europe inspiration for other Members States as well as the European Commission. Thus each of 28 Member States could have served as "legislative laboratory" for effective rules for enforcement of EU law. Nevertheless, in 2017 the European Commission found that this approach is not suitable for common enforcement of EU competition law on the internal market and therefore it is necessary to harmonize certain enforcement rules in order to achieve effectiveness of EU competition law. Harmonization of enforcement rules undoubtedly influences national administrative regimes.

[1] Paper prepared within the project VEGA 2/0109/16 „Inštitucionálna konkurencieschopnosť vo svetle zmien vonkajšieho prostredia".

2 REGULATION 1/2003 – STARTING POINT OF HARMONIZATION

In 2002, more that 50 years since regulation Nr 17 of 1962, the European Union[2] reformed its framework for enforcement of competition rules on internal market by adoption of Regulation 1/2003[3]. Regulation 1/2003 terminated European Commission's monopoly in EU competition law enforcement empowering both the European Commission and national competition authorities to enforce EU competition law. This regulation described basic rules of application of antitrust provisions of Article 81 and 82 then-time Treaty Establishing of the European Community (currently Articles 101 and 102 of the Treaty on Functioning of the European Union), powers of the European Commission and framework rules for operating of national completion authorities, particularly in cooperation with the European Commission. Side effect of Regulation 1/2003 was harmonization of national competition rules due to requirement of parallel application under Article 3(1) Regulation 1/2003[4]. Furthermore, article 3(2) Regulation 1/2003 can be considered another harmonizing provision of the regulation[5] and finally, Article 35 of Regulation 1/2003 contains wording typical for directives: "The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. (..)"[6] [7]

The establishment of European Competition Network composed by national competition authorities of the Member States and the European Commission can be seen as another forum for continuous convergence of competition regimes of EU Member States. There were other motives for convergence than purely legal requirements. The first one is economic since when states declared affiliation to a certain economic theory and accepted a certain approach to solve market failure at international level they can hardly deviate from it at national level. Then it is clear that when legal regulations share the same aim, these regulations naturally converge. The second one is law-application reason, since it allows countries to develop application theory and practice in parallel with other member states and at the same time they can profit from judicature and decision practice of European courts, the European Commission as well as bodies of the other member states. Therefore national competition arrangements are not only similar, but, e.g. Lithuania promulgated harmonization of Lithuanian and European competition legislature as a purpose of law on competition.[8] Hence, national competition authorities apply the same EU competition rules, almost harmonized national competition rules via application non-harmonized procedural rules. Although Regulation 1/2003 set no common regulatory framework, despite Art. 35 and the list of powers of national competition authorities, enforcement practices of national competition authorities converged. There are at least two motives

[2] More precisely the European Communities. However, in further text, EC competition rules and EC will be labeled as EU competition rules and EU, respectively for the purposes of better reading.

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 , 4.1.2003, p. 1.

[4] "Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty."

[5] "The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings."

[6] Article 35(1), Regulation 1/2003.

[7] Other provision of the Article contain some details, but they are not decisive for this analysis.

[8] The Republic of Lithuania: Law on Competition of 23 March 1999, No VIII-1099, Art. 1(3) (English text: http://www.konkuren.lt/en/index.php?show=antitrust&antitrust_doc=law_competition)

of convergence. First, all EU countries share the same legal framework for protection of human rights, including right for a fair trial, protection of privacy. Second, national legislators and national competition authorities try to follow effective models enforced in other EU states, e.g. inspection powers, leniency programme, settlement procedure.9

3 EVALUATION OF DECENTRALIZED ENFORCEMENT BY THE EUROPEAN COMMISSION

The European Commission evaluated the decentralized model of enforcement of EU competition rules established by Regulation 1/2003 twice: in 2009, i.e. after five years of application[10], and in 2014, i.e. after ten years of application[11].

Report 2009 was quite optimistic. The Commission reported that: "Regulation 1/2003 has brought about a landmark change in the way the European competition law is enforced. The Regulation has significantly improved the Commission's enforcement of Articles 81 and 82 EC."[12] The Commission was also satisfied with coherence and cooperation within the European Competition Network: "The EC competition rules have to a large extent become the " law of the land " for the whole of the EU. Cooperation in the ECN has contributed towards ensuring their coherent application. The network is an innovative model of governance for the implementation of Community law by the Commission and Member State authorities."[13] Only several areas were identified which "merit further evaluation", however, without any urgent requirements of immediate interference.[14] Four of these areas focus purely on the Commissions actions, six on enforcement of EU competition rules by national competition authorities. The Commission in these particular areas found that:

1. the divergence of standards regarding unilateral conduct which was commented on critically by the business and legal communities which consider that the diverging standards fragment business strategies that are typically formulated on a pan-European or global basis;[15]
2. question whether the ban on the use of information by a national competition authority for the imposition of custodial sanctions which has received the information from a jurisdiction which does not have such sanctions, is too far-reaching and is an obstacle to efficient enforcement;[16]
3. experience indicates that national competition authorities are generally highly committed to ensuring consistency and efforts undertaken in the ECN have successfully contributed to this aim.[17]
4. while Regulation 1/2003 does not compel Member States to adopt a specific institutional framework for the implementation of EC competition rules, many Member States have reinforced or reviewed their enforcement structures to optimise their effectiveness.[18]
5. regulation 1/2003 does not formally regulate or harmonise the procedures of national competition authorities, meaning that they apply the same substantive rules according to divergent procedures and they may impose a variety of sanctions; regulation 1/2003 accommodates this diversity; it has also given rise to a significant degree of voluntary convergence of Member States' laws that has been supported by policy work in the ECN.[19]
6. Regulation 1/2003 provides for a number of devices to promote coherent application of the competition rules by national courts; both the Commission and the national competition authorities

[9] See eg. NAGY, C.I.: The Procedural Aspects of the Application of Competition Law. European Frameworks – Central European Perspectives. Europa Law Publishing: Groeningen, 2016.
[10] Communication from the Commission to the European Parliament and the Council - Report on the functioning of Regulation 1/2003 {SEC(2009)574} (hereinafter „Report 2009")
[11] Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM/2014/0453 final) (hereinafter „Report 2014")
[12] Report 2009, par. 46.
[13] Report 2009, par. 47.
[14] Report 2009, par. 48.
[15] Report 2009, par. 22.
[16] Report 2009, par. 27.
[17] Report 2009, par. 35.
[18] Report 2009, par. 35.
[19] Report 2009, par. 37

have the power to make observations as amicus curiae under Article 15(3) and this is a tool which is well used by several national competition authorities.[20]

Thus Report 2009 found the reform by Regulation 1/2003 a successful project leading to effective enforcement and accepted different procedural approaches, welcoming mutual convergence within the ECN. Nevertheless, Report 2014 found several weaknesses of enforcement by the national competition authorities and found it necessary to remove them:

"- further guarantee the independence of NCAs in the exercise of their tasks and that they have sufficient resources;

- ensure that NCAs have a complete set of effective investigative and decision-making powers at their disposal; and

- ensure that powers to impose effective and proportionate fines and well-designed leniency programmes are in place in all Member States and consider measures to avoid disincentives for corporate leniency applicants."[21]

Based on these outcomes, in March 2017 the European Commission submitted "Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2017/0063(COD)) (hereinafter "Directive Proposal"). Under the Explanatory Memorandum to the Directive Proposal it is needed "to empower the NCAs to be more effective enforcers of the EU competition rules to ensure that NCAs have the necessary guarantees of independence and resources and enforcement and fining powers. Removing national obstacles which prevent NCAs from enforcing effectively will help remove distortions to competition in the internal market and stop consumers and businesses, including SMEs, being put at a disadvantage and suffering detriment from such measures." This quote from the Explanatory Memorandum shows the substantial shift from the wording of Report 2009 since the Explanatory Memorandum finds national enforcement of competition law not only ineffective but also found national legislation obstacle to effective enforcement.

4 LEGAL BASIS FOR THE DIRECTIVE PROPOSAL AND ITS CONTENT

The competence of the European Union to harmonize national procedural rules is quite limited and some commentators see no such competence.[22] The European Commission found two legal bases for the Directive Proposal: Article 103 TFEU and 114 TFEU. The difference between these two legal bases is substantial and each of them is linked to a different level of competence of the EU. Article 103 is linked to protection of competition on internal market which is an exclusive competence of the Union (Art. 3(1)(b) TFEU[23]. On the other hand, Article 114 TFEU is linked to "the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." These approximation measures shall follow the aim laid down in Article 26 TFEU ("…measures with the aim of establishing or ensuring the functioning of the internal market"). Thus in this area the Union has shared competence with the Member States due to Article 4(2)(a) TFEU. It is obvious, that in the area of exclusive competence the Union need not show fulfilment of the principle of subsidiarity. This double legal basis suggests some questions: If the aim of the Directive Proposal is to harmonize rules in order to properly enforce competition rules on internal market, which of these rules are not rules on enforcement of competition rules? If the Directive Proposal contains rules other than on competition enforcement, why is it necessary to harmonize them? The Explanatory Memorandum tries to explain why following rule of Article 103 TFEU does not provide sufficient legal basis for the Directive Proposal: "The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament." Indeed, Article 103 TFEU does not empower the EU to harmonize national procedural rules. Therefore the Explanatory

[20] Report 2009, par. 40.

[21] Report 2014, par. 2014.

[22] See CSERES, K.: Comparing Laws in the Enforcement of EU and National Competition Laws. In: European Journal of Legal Studies – Vol 3 Issue 1 (2010), p. 43.

[23] „...the establishing of the competition rules necessary for the functioning of the internal market".

Memorandum tries to explain why different national procedural rules on enforcement of competition rules are obstacles to internal market.
"(1) tackling national rules which prevent NCAs from being effective enforcers thereby creating more equal protection of companies and consumers in Europe;
(2) ensuring that the same guarantees and instruments are in place for national competition law when it is applied in parallel to Articles 101 and 102 TFEU to ensure legal certainty and a level playing field; and
(3) putting in place effective rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the ECN."
Thus, the European Commission, in fact, admitted that it failed twice: for first by introducing decentralization by Regulation1/2003 and second, by leaving the system ineffective more than ten years. The Directive Proposal tries to face this failures by following measures:
(1) safeguarding independence of the national competition authorities,
(2) setting a minimal level of maximum fines,
(3) investigative powers of national competition authorities,
(4) rules of leniency programme,
(5) rules for the European Competition Network.
The Directive Proposal introduces "Commission-like" rules for enforcement and therefore national regulation shall be harmonized with the model set for the Commission by Regulation 1/2003. Such harmonization thus ends "institutional" competition between the Commission and the Member States[24] in favour of the Commission's model. Again, such harmonization powers of the Union are challengeable. The competence of the European Union in competition on internal market can be considered *lex specialis* to general shared competence regarding internal market. Therefore harmonization powers laid down in Article 103 TFEU are specific to general harmonization powers.

5 SPECIFIC NATIONAL APPROACHES AND NATIONAL IDENTITY

It can be hardly claimed that something like national identity in competition law exists. Contrary, the majority of substantial competition rules of the Member States of the EU are shaped on the basis of Articles 101 and 102 TFEU. However the situation is different regarding procedural rules. System of enforcement rules, constitutional structure of state bodies can be considered as a part of national identity of Member States that shall be respected by the Union. If the European Commission questions effectiveness of these enforcement systems, in fact, it also questions effectiveness of enforcement of national rules. Following this line, this means that some Member States do not provide sufficient protection of market participants, including consumers, within their territories and thus failing to fulfil one of functions of states. In other words, it shall be own responsibility of the Member States to establish effective rules of law enforcement. The Member States shall also find such approach which fits to national conditions and circumstances in order to maintain an effective system. E.g. stricter approach to leniency programme in a country with low competition culture and only several leniency applications can undermine effectiveness of leniency programme, while in other country more lenient approach can undermine sanction system as a whole. Similarly, in one country settlement reduction by 10% is sufficient incentive to settle, in another country even 30 % need not be sufficient enough. In these terms, Article 35 of Regulation 1/2003 provide legal requirement for effective enforcement rules as well as institutional framework. If the European Commission found that some enforcement system is ineffective, it could have been considered violation of Article 35 of Regulation 1/2003 and the Commission should have taken appropriate measures. The European Commission has launched several infringement procedures dealing with competition issues. These were dealing with transposition of sector directives, state aid, transposition of private enforcement directive, privileges of specific sector monopolies, exclusion some sector from powers of national competition authority (such procedure was launched against Slovakia, too[25]).[26] However, none of these infringement procedures has attacked ineffectiveness of

[24] CSERES, K.: Comparing Laws in the Enforcement of EU and National Competition Laws. In: European Journal of Legal Studies – Vol 3 Issue 1 (2010), p. 43.
[25] Infringement Nr 20082112.
[26] For Infringement Register see http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm

enforcement of Article 101 and 102 TFEU in terms of Article 35 of Regulation 1/2003. If the Commission declared that national regimes in particular Member States ineffective, in fact, it accused Member States for violation of Article 35 of Regulation 1/2003 without "fair trail" (infringement procedure) and used it as a basis for harmonization (or unification in some aspects).
Along legal reasons for certain harmonization of enforcement rules there is also political question. The Directive Proposal shall be approved by the Council of the European Union in ordinary legislative procedure and therefore consent of qualified majority is required. Thus the very same governments that "deprived" its own national competition authorities of independence and enough powers shall vote in favour of such independence and powers in the Council? If so, why have they not done it on their own initiative within powers and responsibility of national governments?

Powers of national competition authorities and their independence do not require harmonization in its proper sense via Article 114 TFEU but strengthening "only". Scope of the Directive proposal can be split in two areas from the point of view of harmonization. First, rules giving effect to Art. 101 and 102 TFEU, which perfectly fit into the scope of Article 103 TFEU, including sanction system, inspection powers, leniency programme. Second, rules that are not giving effect to Article 101 and 102 TFEU which shall fall outside of harmonization if Member State are safeguarding required level of effectiveness and equivalence in application of EU law.

6 CONCLUSION

There is no doubt that effective enforcement of competition rules is an essential building block of the EU's internal market. It is also clear that in the semi-decentralized system of enforcement established by Regulation 1/2003 effective enforcement by the national competition authorities is crucial. Although the European Commission submitted the Directive Proposal, in many accepts the directive will have more unification effects than harmonizations effects (e.g. leniency programme). In this context it is dubious if the Commission chose the best tool for the achievement of its aim. It is clear that rules similar to powers of the European Commission under Regulation 1/2003 shall apply to national competition authorities after lapsing transposition period. Transposition of the directive itself can generate some legislative delays and risks of insufficient transposition (and further doubts regarding effectiveness). In this context it seem expanding powers under Regulation 1/2003 to national competition authorities an effective and immediate solution. This approach can lead to paradox: even if there will be a unification of rules it will not actually influence national procedural rules (since detailed procedural rules are laid down in Commission's regulation). Furthermore, it will save resources of national bodies and these resources can be employed in enforcement of competition rules themselves not to transposition procedures. Last but not least, expanding rules laid down by Regulation 1/2003 will fall into the scope of Article 103 TFEU without the necessity to create artificial argumentation for application of Article 114 TFEU. This approach can be also considered logical: if the Union delegates enforcement of its exclusive powers to the Member States it can also delegate its enforcement powers. The remaining area (i.e. outside of the scope of Article 103 TFEU) shall remain in the competence of the Member States under scrutiny of maintaining effectiveness and equivalence of enforcement of Union's rules.

Nevertheless, it must be admitted that when the "legislative train" is launched and expected in the final station, it is not probable to stop it or change its course due to possible political consequences.[27]

Bibliiography:

CSERES, K.: Comparing Laws in the Enforcement of EU and National Competition Laws. In: European Journal of Legal Studies – Vol 3 Issue 1 (2010), p. 7-43.
NAGY, C.I. (ed.): The Procedural Aspects of the Application of Competition Law. European Frameworks – Central European Perspectives. Europa Law Publishing: Groeningen, 2016.

[27] http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-empowerment-nca

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THE ROLE OF THE REGIONAL COURTS IN IMPLEMENTING DECISIONS OF ORGANS OF THE REGIONAL ORGANISATIONS BY MEMBER STATES (IN THE LIGHT OF THE DECISION OF EUROPEAN COURT OF JUSTICE ABOUT PROVISIONAL MEASURES IN THE AREA OF INTERNATIONAL PROTECTION FOR THE BENEFIT OF THE HELLENIC REPUBLIC AND THE ITALIAN REPUBLIC)

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Abstract: Member states of regional organisation by their accession to the establishing treaty confer the part of their competences on the organs of regional organisation. But member states need also to comply with their international obligations assumed by them as a contracting party of the establishing treaty. It is therefore important for judicial organs of regional organisation to have granted the competence to examine if decisions of other organs of regional organisation are consistent with establishing treaty and also if member states are fulfilling their obligations. The aim of the contribution is to analyse the possible steps of member states and also the organs of regional organisation in case of non/compliance with their decisions by member states in light of the judgment of the Court of Justice of the European Union establishing the provisional measures in area of international protection for benefit of the Greece and Italy.

Key words: migration, provisional measures, solidarity, action for annulment

1. INTRODUCTION

Regional organisations in principle pursue their objectives by decisions of their organs.[1] These objectives were delegated on the organisations by founding states in founding treaty. Binding force of these decisions helps to the legal certainty within the organisation. It is natural that member states of regional organisation have interest on application and implementation of these decisions as they have an interest for the achievement of the delegated tasks and objectives on regional organisation. The problem arise when member states refuse to fulfil the decisions of regional organisation´s organs which are contrary to their interests. The dispute between member states of European Union (hereafter "EÚ") and its organs during the migration crisis can be an example. This dispute was the subject of the peaceful settlement of the disputes within the competence of Court of Justice of European Union (hereafter "Court of Justice of EU", or just "Court of Justice").

Contribution partly analyse the judgment of the Court of Justice of EU in relation with the emergency situation following the sudden inflow of migrants to the territory of member states of EU. With the purpose to deal with the emergency situation, EU adopted provisional measures in the area of international protection for the benefit of Italy and Greece (as these states were most affected by the migrants flow), known as quotas system. But not every member state was pleased by provisional measures based on the principle of solidarity according to the art. 80 TFEÚ[2] and provisional measures were contested in front of the Court of Justice of EU. Court of Justice of EU is in this case fundamental instrument for the peaceful settlement of the disputes between member states of EU and its organs, more precise Council of European Union. Member states refusing

[1] This paper is result of the research within the project VEGA 1/0709/16: Place and Significance of Regional Judicial Bodies in Context of the Contemporary Regionalism.

[2] Treaty on European Union and the Treaty on the Functioning of the European Union. [2012] OJ C 326 (EUR-lex, EU Law, 26 October 2012).

solidary help to the most affected states claimed the annulment of the Council Decision implementing provisional measures as solution of migration crisis. Nowadays, also the Council of European Union claims the fulfilment of the obligations of member states from provisional measures.

Contribution in its introductory part discuss migration crisis which broadly burst in 2015, then it deals with the reaction of member states on emergency situation which occurred in Europe after the massive inflow of migrants. The core of the contribution analyse the proceedings of Court of Justice of EU in relation to the non/compliance of member states with the decision of Council of European Union. The conclusion contains the resume of the contribution of proceedings of Court of Justice of EU in relation to the migration crisis.

2. MIGRATION CRISIS

Before 2015, migration was tolerated and even welcome by some states of Europe, especially according to the globalization and economic development. Just sudden flow of migrants to the territories of member states of EU during the summer 2015 produced security concerns and worries about cultural and social identity and welfare of member states of EU. Two parties of member states was created. The first part of member states was willing to accept the migrants and in case they fulfil the conditions of Geneva Convention[3] to grand them status of refugee. Other part of member states was not able to deal with the migrants and refuse to even allow them to enter their territory.

It is important to mention that the problems with asylum system in Europe were not the fruit of migration flow in 2015. Coastal states of Mediterranean Sea had to deal with the migrants for longer time and they were asking for help of other member states of EU for at least decade. For example Italy[4] was dealing with a few temporary migrant flows after the Arab Spring and Libyan civil war in 2011. But in 2015 European states have been facing the massive and sudden migrant flow in according to the strikes in the Middle East, concretely in Syria.[5] Long-awaited reaction of member states of EU was absolutely essential.[6]

The contribution of European Union to the solution of migration crisis is significant in two its actions. The first action was the adoption of the Council Decision (EU) 2015/1601 from September 22 in 2015 **establishing provisional measures in the area of international protection for the benefit of Italy and Greece**[7] (hereafter „contested decision", or „Council decision establishing provisional measures") based on the art. 78 (3) TFEÚ.[8] The purpose of the decision was to contribute to the resolution of the migration crisis on the basis of relocation of applicants for the international protection between member states according to the so called quotas system. It is the system of allocation taking into account the size of population of member state, total GDP, the average number of asylum applications per one million inhabitants over the period 2010-2014 and unemployment rate.

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[3] Convention and Protocol Relating to the Status of Refugees. http://www.unhcr.org/3b66c2aa10.pdf;

[4] Italy calls for European help on refugees as scores drown in Lampedusa shipwreck. http://www.telegraph.co.uk/news/worldnews/europe/italy/10353429/Italy-calls-for-European-help-on-refugees-as-scores-drown-in-Lampedusa-shipwreck.html;

[5] To the reasons and evolution of the civil war in Syria see for example: Crisis in Syria: Civil War, Global Threat. https://www.un.org/sg/en/content/sg/articles/2014-06-25/crisis-syria-civil-war-global-threat; Syria civil war timeline: A summary of critical events. http://www.dw.com/en/syria-civil-war-timeline-a-summary-of-critical-events/a-40001379;

[6] For the list of Commission´s measures proposed the Member States relating to the migration crisis in 2015, see for example: European Agenda on Migration- Legislative documents. https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en;

[7] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. **OJ L 248, 24.9.2015, p. 80–94.**

[8] Article 78(3) TFEU: In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

The second action was EU- Turkey Joint Statement.[9] According to this statement Turkey should accept the return of the unsuccessful applicants for international protection who came to the territories of member states of EU through the territory of Turkey. This statement was significant mainly due to the drop of the migrants flow, especially in to the Greece. In October 2015, there was a number of migrants up to 10 000, in December 2015 this number was up to 5 000 and in March 2016 only 47 was daily average of migrants coming to the Greece.[10]

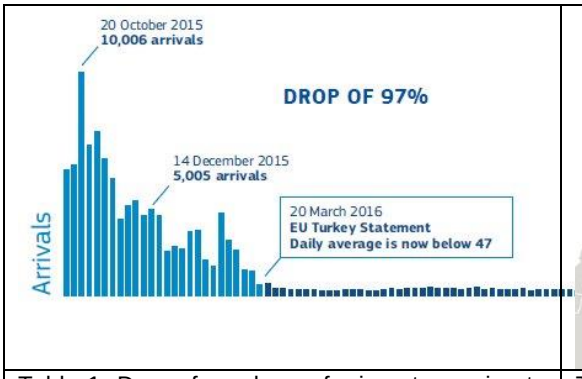

Table 1: Drop of numbers of migrants coming to Greece after EU-Turkey Statement[11]

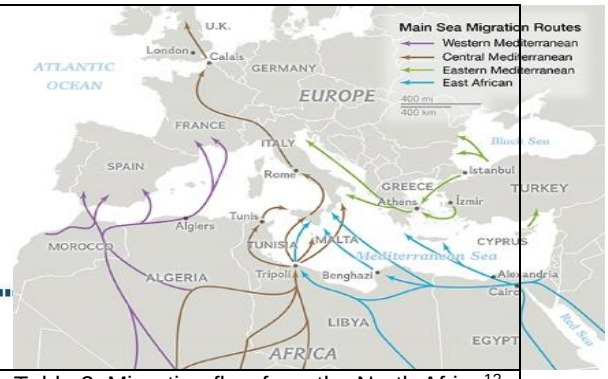

Table 2: Migration flow from the North Africa[12]

The subject of this contribution is Council decision establishing provisional measures which was also the subject of proceeding of Court of Justice of European Union.

3. MIGRATION CRISIS: REACTION OF MEMBER STATES OF EU, SOLIDARITY OR IGNORANCE?

Council Decision establishing provisional measures in reaction on migration crisis was based on solidarity (art. 80 TFEU) and fair sharing responsibility for the benefit of member states mostly affected by the flow of applicants for international protection in purpose of protection of their rights as well as of fight against irregular migration.

System of relocation and resettlement of applicants for international protection according to the Council Decision produce duplicity of opinions of member states of EU. Reaction of EU member states was based at the first side on the principle of solidarity (states were willing to accept the applicants for international protection), and on the other side, the some member states of EU misused the migration crisis and the vulnerability of migrants for political fight on ideological bases.[13] Some member states established their negative attitude to applicants for international protection on different terrorist attacks,[14] as well as information that terrorists are coming to the Europe within the flow of migrants. Among member states of EU therefore arise the fraction of member states refuses to take responsibility over the qualification of the legal status of applicants for international protection what reduced possibilities to solve the migration crisis.

[9] EU- Turkey Statement, 18 March 2016. http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/;

[10] EU- Turkey Statement: One year on. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf;

[11] *Ibidem*.

[12] The World's Congested Human Migration Routes in 5 Maps. https://news.nationalgeographic.com/2015/09/150919-data-points-refugees-migrants-maps-human-migrations-syria-world/;

[13] ŠABIĆ, S., Š.: The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear. http://www.fes-croatia.org/fileadmin/user_upload/171011_Publikation_Relocation_of_refugees.pdf;

[14] Paris, November 2015; Brussel, March 2016; Nice, July 2016;

Council Decision provided for the relocation of 120 000 applicants for the international protection, 15 600 from the Italy, 50 400 from Greece and 54 000 based on the future decision of Council based on the proposal of Commission. This number of 54 000 was set out in initial proposal of Commission as number of applicants that should be relocated from Hungary. But within meetings held within the Council Hungary rejected the notion of being classified as a „frontline member state" and did not wish to be among the member states benefiting from relocation as were Italy and Greece. Therefore Hungary was included as member state of relocation of applicants for international protection from Italy and Greece. Council Decision was adopted by qualified majority. Slovak republic, Hungary, Czech Republic and Romania voted against and Finland, state of opinion that relocation should be voluntary, abstained.[15]

Council Decision established provisional measures in area of international protection for the benefit of Italy and Greece with the purpose to support them in the emergency situation due to the massive and sudden flow of migrants. It did entail a temporary derogation from the rule set out in Dublin III. Regulation[16] according to which Italy and Greece would be otherwise responsible for the examination of the application for international protection, as well as temporary derogation from the procedural steps and time limits. According to the principle of solidarity and fair sharing of responsibility the Council Decision ensures that the member states that relocate[17] applicants from the Italy and Greece in clear need of international protection receive a lump sum 6 000€ for each relocated person. In process of relocation, national security and public order should have been taken into consideration. Most of the applicants for international protection should have been relocated from Italy and Greece to other member states. EU member state of relocation should qualify the application for international protection, consider to grant the status of refugee to the applicant and then grant temporary residence for the applicant.

Council Decision also provides some exceptions. It does provide that a member state may request a temporary suspension of the relocation of up to 30% of the applicants allocated to it. That provision was applied for example in case of Austria.[18] Similar process was applied to the Sweden according to the possibilities of suspension of the participation of the member state which is faced with a sudden inflow of nationals of third countries in the relocation (art. 78 (3) TFEU).[19]

Council decision entered into the force on September 25 2015 and it has been applied until September 26 2017, as well as to applicants arrived on the territory of Italy and Greece from March 24 2015 onwards. For example, the Council Decision is not binding for Great Britain (according to the Protocol (No 21) on the Position of the United Kingdom and Ireland in respect of the Area of

[15] The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers (Court of Justice of the European Union, Press release No. 91/17). https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf;

[16] Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (OJ 2013, L 180, p. 31, The Dublin III. Regulation).

[17] Contested decision explain the notion of "relocation" as the transfer of an applicant from the territory of the Member State which the criteria laid down in Chapter III of the Dublin III Regulation indicate as responsible for examining his or her application for international protection to the territory of the Member State of relocation; and „Member State of relocation" as the Member State which becomes responsible for examining the application for international protection pursuant to the Dublin III Regulation of an applicant following his or her relocation in the territory of that Member State.

[18] Council Implementing Decision (EU) 2016/408 of 10 March 2016 on the temporary suspension of the relocation of 30 % of applicants allocated to Austria under Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[19] Council Decision (EU) 2016/946 of 9 June 2016 establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Decision (EU) 2015/1523 and Article 9 of Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

Freedom, Security and Justice to the Treaty on the Functioning of the European Union), but decided to join the financial help to Syria[20] and relocated applicants for international protection to its territory.

Hereafter, the table highlights the number of allocations for every member state of persons in need for international protection from Greece and Italy according to the Council Decision and its annexes compared with the amount of persons in need of international protection actually relocated to these states:

	Allocation per member state[21]			**Actually relocated refugees[22]**		
EU member states	From Italy	From Greece	In total	From Italy	From Greece	In total
Austria	462	1 491	1953	15	0	15
Belgium	579	1 869	2448	259	677	936
Bulgaria	201	651	852	0	50	50
Croatia	134	434	568	18	60	78
Cyprus	35	112	147	34	96	130
Czech Republic	376	1 215	1591	0	12	12
Estonia	47	152	199	0	141	141
Finland	304	982	1286	755	1196	1951
France	3 064	9 898	19714	330	3948	4278
Germany	4 027	13 009	27536	3405	4447	7852
Hungary	306	988	1294	0	0	1294
Latvia	66	215	281	27	294	321
Lithuania	98	318	416	27	355	382
Luxembourg	56	181	237	111	271	382
Malta	17	54	71	47	101	148
Netherlands	922	2 978	3900	762	1595	2357
Poland	1 201	3 881	5082	0	0	0
Portugal	388	1 254	1642	299	1116	1415
Romania	585	1 890	2475	45	682	727
Slovakia	190	612	802	0	16	16
Slovenia	80	257	337	45	172	217

[20] PM dedicates £1bn in aid money for Syrian refugees and host countries. https://www.gov.uk/government/news/pm-dedicates-1bn-in-aid-money-for-syrian-refugees-and-host-countries;

[21] **Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.** OJ L 248, 24.9.2015, p. 80–94.

[22] Annex to the Report from the Commission to the European Parliament, the European Council and the Council (Fifteenth report on relocation and resettlement. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_fifteenth_report_on_relocation_and_resettlement_annex_3_en.pdf;

Spain	1 896	6 127	8023	168	1089	1257
Sweden	567	1830	2397	511	1392	1903
Total	15601	50398		6858	17710	

Table 3: Allocation of refugees in member states of EU

Interesting fact about numbers for allocation, there should be in total 15 600 allocations from Italy and 50 400 from Greece but after counting there are different numbers. Also the number of actually relocated persons from Italy and Greece are different according to the different reports of Commission and Council of EU, so Table 3 contains information from one of the last Report from Commission to the European Parliament, European Council and the Council.

4. MIGRATION CRISIS: THE ROLE OF EUROPEAN COURT OF JUSTICE

As stated above, not every member state of EU has been able and willing to adopt Council Decision establishing provisional measures in the context of migration crisis. According to the migration crisis, the Court of Justice of EU therefore plays significant role in the peaceful settlement of disputes mechanism about obligatory quotas between EU member states and organs of EU, especially Council of European Union.

The Court of Justice of EU dealt with the actions of Slovak republic and Hungary for the annulment of the Council Decision, on the one hand, and nowadays it deals with the actions of Commission for failure of the Poland (C-715/17), Czech Republic (C-719/17) and Hungary (C-718/17) to fulfil obligations in relation to the Council Decision on the other. As there are currently no documents and information about these actions of the Commission against these member states available, subject of this part of contribution is analyse of the judgment of Court of Justice of EU according to the actions for the annulment of the Council Decision establishing provisional measures.

In joined cases C-643/15 and C-647/15, the Court of Justice of EU dealt with the actions of Slovak Republic (C-643/15) and Hungary (C- 647/15) for annulment under art. 263 TFEU, supported by Republic of Poland. It was action for annulment of the Council Decision establishing the provisional measures in the area of international protection for the benefit of the Hellenic Republic and the Italian Republic.

Slovakia and Hungary first of all maintain that even though contested decision was adopted in accordance with the non-legislative procedure, regarding to its content and its effect it must be classified as a legislative act, because it amends many legislative acts of EU law, in particular Dublin III Regulation. Article 78 (3) TFEU as legal basis for contested Council Decision, in opinion of applicants does not provide legal basis for legislative act. They also argued that non-legislative act can under no circumstances derogate from a legislative act. In findings of the Court of Justice, legal act can be considered as legislative act of EU only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure. And therefore, the measures adopted on the basis of Art. 78 (3) TEFU must be interpreted as non-legislative acts because they are not adopted as result of a legislative procedure. Art. 78(3) TFEU provides legal basis for adoption of non-legislative measures intended to respond swiftly to a particular emergency situation facing member states. On the other side, Art. 78 (2) TFEU provides legal basis for adoption of legislative acts whose purpose is to regulate, generally and for an indefinite period, a structural problem arising in the context of the European Union's common policy on asylum. Provisional measures adopted on the basis of Art. 78(3) TFEU may derogate from provisions of legislative acts, but this derogation has to be circumscribed by material and temporal scope. Therefore it cannot be claimed that the ordinary legislative procedure provided for in Article 78(2) TFEU was circumvented by the adoption of the contested decision on the basis of Article 78(3) TFEU.

Applicants also claimed that contested decision is not just provisional and that its period of application is excessive. Court of Justice stated that art. 78(3) TFEU affords the Council discretion to determine their period of application on an individual basis in the light of the circumstances of the

case. It is clear from contested decision that the decision is to apply from 25 September 2015 to 26 September 2017 to persons arriving in Greece and Italy during that period and to applicants for international protection having arrived on the territory of those member states from 24 March 2015 onwards. The Council Decision must be found apply for a limited period.

Another claim of applicants was that the contested decision does not satisfy the conditions for the application of art. 78(3) TFEU, namely that the member state benefiting from the provisional measures must be confronted by an emergency situation characterised by a sudden inflow of nationals of third countries. The flow of migrants to the Italy and Greece was reasonably foreseeable and cannot be described as sudden.

Furthermore, there have been serious shortcomings in the asylum policy in Greece for a long time, which have no direct causal link with the migration phenomenon characteristic for the period before adoption of contested decision. Court of Justice pointed to the report of Grand Duchy of Luxembourg based on the statistics from the Frontex Agency which provided that in 2015 for the EU as whole, 1, 83 million irregular border crossings were detected at the Union's external borders as against 283 500 in 2014, and according to statistical data from Eurostat, in 2015, almost 1.3 million migrants applied for international protection in the Union as against 627 000 in 2014. There was a sharp increase in the inflow of migrants into the Greece and Italy over a short period of time, in particular during July and August 2015. Between emergency situation in Greece and Italy, particularly the significant pressure on the asylum systems of those member states, and the inflow of migrants throughout 2015, there has been established sufficiently close link, and it cannot be undermined by the existence of factors as structural defects in those systems in terms of lack of reception capacity and of capacity to process applications.

In case of claim relating to the lawfulness of the procedure leading to the adoption of the Council Decision and breach of essential procedural requirements, applicants noted that contested decision should be adopted unanimously. The Council Decision governs politically sensitive question for several member states. Hungary claimed that the conclusions of the European Council of 25 and 26 June 2015 expressly provided for the Council to take a decision only in respect of the relocation of 40 000 applicants for international protection, so the Council was not entitled to decide on the relocation of 120 000 additional applicants without having obtained the European Council's agreement. However, the Court of Justice considered that the art. 78 (3) TFEU does not make the Commission´s power of initiative conditional upon the European Council's having previously defined guidelines under art. 68 TFEU. On the contrary, art. 78(3) TFEU allows the Council to adopt measures by a qualified majority. The principle of institutional balance prevents the European Council from altering that voting rule by imposing on the Council a rule requiring a unanimous vote.

Slovak Republic and Hungary furthermore argued that the Council did not comply with the obligation to consult the Parliament, since the Council made substantial amendments to the Commission´s initial proposal and the contested decision without such consulting. Therefore the Council breached the principles of representative democracy, institutional balance and sound administration. The Court of Justice found that the amendments which go to the heart of the arrangements established or affect the scheme of the proposal as a whole are to be regarded as substantial amendments. The determination of the member states benefiting from those provisional measures is an essential element of any measure adopted on the basis of art.78 (3) TFEU. It must be noted that the President of the Council stated at an extraordinary plenary sitting of the Parliament that "Hungary does not consider itself to be a frontline country and has told us that it does not wish to be a beneficiary of relocation." The Parliament must necessarily have taken account of that fundamental change in Hungary´s status, which the Council was bound to respect.

The applicants also argued the breach of the right of the national parliaments to issue an opinion and that the Council failed to fulfil the requirement that the deliberations and the vote within the Council be held in public. The Court of Justice just stated that as the contested decision must be classified as a non-legislative act, it follows that the adoption of that act in a non-legislative procedure was not subject to the requirements relating to the participation of the national parliaments or the requirements relating to the public nature of the deliberations and the vote within the Council. Hungary also contested that the Council failed to comply with the rules of EU law on the use of languages, since the texts setting forth the successive amendments to the Commission´s initial proposal were provided to the member states only in English. The Court of Justice took the view that any member of the Council may oppose discussion if any proposed amendments are not

drawn up in governing languages. Moreover, all the amendments were read by the President of the Council and simultaneously interpreted into all the official languages of the European Union.

Slovak republic also claimed that the Council Decision violates the principle of proportionality, because it is not appropriate for attaining the objective which it pursues as it is not capable of redressing the structural defects in the Greek and Italian asylum systems. The Court of Justice stated that when the Council adopted the mechanism for the relocation of a large number of applicants for international protection, it carried out a prospective analysis which does not appear manifestly incorrect. Moreover, the small number of relocations so far carried out pursuant to the contested decision can be explained for example by the lack of cooperation on the part of certain member states. Slovak republic also contested that the decision is not necessary in the light of the objective which it seeks to attain, because it can be achieved by the measures which could have been taken in context of existing instruments, less restrictive for member states and impinged less on the sovereign right of member state to decide freely upon admission of nationals of third countries to its territory. In Court´s opinion, according to the emergency situation, the choise of binding relocation mechanism was necessary. Similarly, the Hungary claimed that the total number of 120 000 persons to be relocated under the contested decision exceeds what is necessary in order to achieve the objective of the decision, since that number includes 54 000 persons who, under the Commission´s initial proposal, were to be relocated from Hungary. The Court of Justice in this point noted the recital 16 of the contested decision, which states that it was very likely that significant and increased pressure would continue to be put on the Greek and Italian asylum systems after the adoption of the contested decision because of the ongoing instability and conflicts in the immediate vicinity of Greece and Italy.

Hungary furthermore claimed the breach of the principle of proportionality because of the particular effects of the contested decision on Hungary. Hungary took issue with the Council for having included it among the member states of relocation after it had given up the status of beneficiary member state assigned to it in the Commission's initial proposal. It cannot be disputed that it was subject to particularly strong migratory pressure both during the period preceding the adoption of the contested decision and at the time of its adoption, which places a disproportionate burden on Hungary by setting mandatory relocation quotas for it as it does for the other member states. The Court of Justice stated that the contested decision requires that a balance be struck between the different interests involved, account being taken of the objectives which that decision pursues. Therefore it cannot be regarded as being contrary to the principle of proportionality. Contested decision also contains the possibility for member state, under certain conditions, to request that its obligations as a member state of relocation under that decision be suspended which was applied in case of Austria (obligations relating to the relocation quota allocated to it were suspended for one year in respect of 30% of that quota) or Sweden (obligations as a member state of relocation under the contested decision were suspended for one year).

At last point, Hungary contested the Council decision because of the breach of the principles of legal certainty and of normative clarity, and also of the Geneva Convention. According to the interpretation of the Geneva Convention, the applicant should be permitted to remain in the member state in which he has lodged his request pending a decision on that request by the authorities of that country. But Court of Justice noted that under EU law an applicant does not have the right to choose the member state responsible for examining his application and submitted interpretation of Geneva Convention is inadmissible. It cannot be validly maintained that the contested decision, in so far as it provides for the transfer of an applicant for international protection before a decision on his application has been taken, is contrary to the Geneva Convention because that convention allegedly includes a right to remain in the state in which the application has been lodged while that application is pending. It must be understood as a particular expression of the principle of non-refoulement, which prohibits the expulsion of an applicant for international protection to a third country as long as a decision has not been taken on his application.

In those circumstances, the Court of Justice dismissed the actions and ordered Slovak republic and Hungary to bear their own costs and to pay those of the Council of the European Union.

As Ska Keller, [23] European Parliament rapporteur for relocation decisions stated, there is no excuse for the redistribution of refugees for Hungary and Slovakia. States which boycotted redistribution of the applicants for international protection must also fulfil their obligation. The solidarity in the EU is not just unilateral. The ruling of the Court of Justice is a milestone for the European Union and relations within the member states, because the court stated that the solidarity is a fundamental principle of common asylum policy. According to the principle of solidarity, it is important that member states will be act in favour of other member states also in case if it is not in their interest. One of significant points of the court´s decision is an expression of the principle of solidarity. The obligation of solidarity is enforceable if it is expressed in valid and legally binding measure based on the Treaties. General advocate Bot[24] in his opinion noted that solidarity is a founding and existential value of the Union. Solidarity between member states has a specific content and binding nature, especially within the common policy on asylum, immigration policy and external border control. In the view of the Obradovic,[25] the Court of Justice failed since it did not provide clear content of the principle of solidarity, which tent to be confused with the principle of loyal cooperation.

In the conclusion it need to be noted that even after the Court´s ruling, the obligations for relocation of the applicants for international protection have not been fulfilled. This is worrying in the view of the Rule of Law and legal certainty within the European Union. Therefore, the action of Commission against the member states refusing quotas system is of significant importance. The Commission brought the actions against Czech Republic (C-719/17), Hungary (C-718/17) and Poland (C-715/17) for failure to fulfil obligations. Information to these actions are yet not available so we need to wait for court´s opinion.

We might think that discussions about common asylum policy of the European Union, solidarity and sharing responsibility in emergency situations will be reflected in satisfactory way in form of the new Dublin IV. Regulation,[26] which will modify the process of determining the member state responsible for processing the application for international protection.

5. CONCLUSION

As general advocate Bot stated, solidarity is pillar and guideline principle of the common policy on asylum, immigration policy and external border control of the European Union.[27] The principle of solidarity is a binding principle since it is part of the legally binding act of the European Union, as in case of the contested Council Decision. Within the implementation of this principle in relations between Member States of European Union the Court of Justice of the European Union plays an important role. All the more so because, today, European union acting as organisation protecting the human rights, what was not obvious in time of migration crisis in reactions of Member States.[28] In contrary, across Europe there is a growing extremism and populism, which undermine principle of solidarity in relations of Member states and peoples.

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[23] ECJ ruling on refugees: no more excuses to delay transfers from Italy and Greece. http://www.europarl.europa.eu/news/en/press-room/20170906IPR83203/ecj-ruling-on-refugees-no-more-excuses-to-delay-transfers-from-italy-and-greece;

[24] Opinion of Advocate General Bot delivered on 26 July 2017. Slovak Republic and Hungary v Council of the European Union (ECLI:EU:C:2017:618). **http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0643;**

[25] OBRADOVIC, D.: Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy. http://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/;

[26] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM/2016/270/FINAL) . http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A52016PC0270;

[27] See footnote no. 24.

[28] Human Rights Watch World Report, 2018. European Union. https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf;

The Court of Justice as judicial organ of regional organisation, the European union, plays an important role not just in case of questions of validity and interpretation of acts of organs of the European union, but more important in case of questions of failure to fulfil the obligations of Member States. The judgment in case of contested Council decision shows the high level of the regional cooperation between Member States of the European Union. This cooperation made the creation of independent judicial organ possible and that judicial organ has a power to decide not just about doubts of the EU organs about the failure to fulfil obligations of Member States, but it has also power to decide about doubts of the Member States about exceeding of competences of the EU organs, what is essential for the balance of regional relations between states, legal certainty and Rule of Law.

Bibliiography:

Annex to the Report from the Commission to the European Parliament, the European Council and the Council (Fifteenth report on relocation and resettlement). https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_fifteenth_report_on_relocation_and_resettlement_annex_3_en.pdf;
Convention and Protocol Relating to the Status of Refugees. http://www.unhcr.org/3b66c2aa10.pdf;
Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

Council Decision (EU) 2016/946 of 9 June 2016 establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Decision (EU) 2015/1523 and Article 9 of Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

Council Implementing Decision (EU) 2016/408 of 10 March 2016 on the temporary suspension of the relocation of 30 % of applicants allocated to Austria under Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

Crisis in Syria: Civil War, Global Threat. https://www.un.org/sg/en/content/sg/articles/2014-06-25/crisis-syria-civil-war-global-threat;

ECJ ruling on refugees: no more excuses to delay transfers from Italy and Greece. http://www.europarl.europa.eu/news/en/press-room/20170906IPR83203/ecj-ruling-on-refugees-no-more-excuses-to-delay-transfers-from-italy-and-greece;

EU- Turkey Statement, 18 March 2016. http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/;

EU- Turkey Statement: One year on. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf;

European Agenda on Migration- Legislative documents. https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en;

Human Rights Watch World Report, 2018. European Union. https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf;

Italy calls for European help on refugees as scores drown in Lampedusa shipwreck. http://www.telegraph.co.uk/news/worldnews/europe/italy/10353429/Italy-calls-for-European-help-on-refugees-as-scores-drown-in-Lampedusa-shipwreck.html;
OBRADOVIC, D.: Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy. http://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/;

Opinion of Advocate General Bot delivered on 26 July 2017. Slovak Republic and Hungary v Council of the European Union (ECLI:EU:C:2017:618). http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0643;
PM dedicates £1bn in aid money for Syrian refugees and host countries. https://www.gov.uk/government/news/pm-dedicates-1bn-in-aid-money-for-syrian-refugees-and-host-countries;
Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM/2016/270/FINAL) . http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A52016PC0270;
Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (OJ 2013, L 180, p. 31, The Dublin III. Regulation).
Syria civil war timeline: A summary of critical events. http://www.dw.com/en/syria-civil-war-timeline-a-summary-of-critical-events/a-40001379;

ŠABIĆ, S., Š.: The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear. http://www.fes-croatia.org/fileadmin/user_upload/171011_Publikation_Relocation_of_refugees.pdf;

The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers (Court of Justice of the European Union, Press release No. 91/17). https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf;

The World's Congested Human Migration Routes in 5 Maps. https://news.nationalgeographic.com/2015/09/150919-data-points-refugees-migrants-maps-human-migrations-syria-world/;

Treaty on European Union and the Treaty on the Functioning of the European Union. [2012] OJ C 326 (EUR-lex, EU Law, 26 October 2012).

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NATIONAL IDENTITY AND LOYALTY IN EU LAW IN THE ERA OF MIGRATION?

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Abstract: National identity is overwhelmingly represented in the field of migration. European division deepened further with the migration crises. The migration issue accelerated the EU into a new level of political crises with clashes between EU law and national identity. The different approaches of the Member States, the EU, and the missing consensus in this vital area reached a new level with different approaches among the EU institutions. The paper analyses the emerging conflicts of compliance of member state's obligations in the light of decisions and stances of the main EU institutions and the Member States.

Keywords: solidarity, CJEU, Hungary, migration, relocation system

1 INTRODUCTION

The principle of 'solidarity', derived originally from the French system, brought into Community law by the Court of Justice, modified through adaptation to other Member State systems, and diffused through the European Community, may become one of those principles which characterise the European law on social protection.[1]

For a categorisation of solidarity based on the parties to the relationship, there are using the term 'national solidarity' to refer to obligations among citizens and residents of Member States, 'Member State solidarity' to refer to the obligations between the Member States, and 'transnational solidarity' to refer to obligations among EU citizens.[2] For a classification based on goals, there can be classifying Union solidarity as market solidarity, communitarian solidarity, and aspirational solidarity.[3] The notion of solidarity can be found in the preamble of the Charter of Fundamental Rights, where it is listed among the 'indivisible and universal values' on which the Union is founded.[4] The preamble of the TEU expresses the desire of the Member States to 'deepen solidarity between their peoples'.[5] Solidarity is expressed in Article 2 TEU as an attribute of European society, it is listed among the general Union objectives in Article 3 TEU, which requires the promotion of not only solidarity between generations, but also economic, social and territorial cohesion and solidarity between the Member States. These objectives are given concrete substance under sector-specific treaty provisions, such as Article 80 TFEU on solidarity in the area of asylum, border checks and immigration.[6]

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[1] https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/solidarity-principle

[2] A. Sangiovanni, 'Solidarity in the European Union', (2013) 33 Oxford Journal of Legal Studies, 1–29, 5.

[3] F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015.

[4] Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. Preamble, Charter of Fundamental Rights of the European Union (2000/C 364/01)

[5] "Intend to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations...".

[6] Küçük, E. (2016) The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?. European Law Journal, 22: 448–469. doi: 10.1111/eulj.12185.

With the abolition of internal border controls, interdependencies between EU Member States have increased and with it concerns about inequities in the distribution of asylum and refugee burdens across the EU. While Europe's relative burdens in global terms have been limited, they did increase very significantly as the result of the Syrian crisis and almost doubled from 2014 to 2015. Moreover, within the EU, the distribution of asylum seekers has been highly unequal.[7] The migration events in 2015 called for concrete measures of solidarity towards those Member States at the EU borders, to the the so-called frontline states. In April 2015, the European Commission presented plan of immediate action to be taken in response to the crisis: among others the relocation mechanism. Thus, in 2015, Council Decision 2015/1523 of 14 September 2015 and Council Decision 2015/1601 of 22 September 2015 on establishing provisional measures in the area of international protection for the benefit of Italy and of Greece were adopted. They were based on Articles 78 TFEU, which empowers the EU to pass laws benefiting states overwhelmed by a sudden inflow of migrants,[8] and Article 80 TFEU, which stipulates that such decisions must be governed by the principle of solidarity and fair sharing of responsibility between Member States.[9] These decisions were intended to reinforce internal solidarity in the EU and show the commitment of all EU Member States to share the migration burden with the two Mediterranean countries. The binding new relocation initiatives adopted as a response to the Syrian crisis constitute a significant departure from earlier voluntary relocation initiatives in that they are all quota-based rather than reliant on *ad hoc* pledging mechanisms which have proven so ineffective in the past.[10]

2 THE QUESTION OF SOLIDARITY

Poland, Hungary, the Czech Republic and Slovakia have refused to comply with these relocation decisions, and Hungary and Slovakia challenged the legality of the relocation decision. Moreover, under the Slovakian Council presidency, the Slovak government tabled an alternative proposal based on the concept of 'effective solidarity'.[11] The Court rejected this challenge and upheld enforceability of the duty of solidarity among EU Member States. In the case, Hungary's grounds were following:

1. The pleas alleging that Article 78(3) TFEU is not a proper legal basis for the contested decision:
- relating to the legislative nature of the contested decision,
- the contested decision is not provisional and that its period of application is excessive.

It was maintained that even though the contested decision was adopted in accordance with a non-legislative procedure, it must be classified as a legislative act because of its content and its effects, since it amends a number of legislative acts of EU law, more fundamentally the Dublin III Regulation. Also, it was argued that the decision applies for a period of two years that can be extended by one year, so it cannot be classified as a "provisional measure" within the meaning of Article 78(3) TFEU. Moreover, this is also the case since the temporal effects of the decision will far exceed that period since lasting ties and obligations will be created between the applicants for international protection and the Member States of relocation.

2. The pleas relating to the lawfulness of the procedure leading to the adoption of the contested decision:
- alleging breach of essential procedural requirements,
- alleging infringement of Article 68 TFEU,

[7] Thielemann, E. (2018) Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU. JCMS: Journal of Common Market Studies, 56: 63–82. doi: 10.1111/jcms.12662.

[8] In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

[9] The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

[10] Ibid.

[11] Barigazzi, J.(2016) 'Slovakia Outlines Alternative Migration Plan', *Politico*, 16 June.

- alleging breach of essential procedural requirements in that the Council did not comply with the obligation to consult the Parliament laid down in Article 78(3) TFEU,
- breach of essential procedural requirements in that the Council did not act unanimously, contrary to Article 293(1) TFEU,
- reach of essential procedural requirements, in that the right of the national parliaments to issue an opinion in accordance with Protocol (No 1) and Protocol (No 2) was not respected and that the Council failed to fulfil the requirement that the deliberations and the vote within the Council be held in public,
- breach of essential procedural requirements in that, when adopting the contested decision, the Council did not comply with the rules of EU law on the use of languages.

It was maintained that the decision had to be adopted unanimously or in the form of voluntary allocations, taking into account the politically sensitive question for several Member States. Moreover, Hungary submitted that the conclusions of the European Council of 25 and 26 June 2015 referred only to the relocation of 40 000 applicants, instead of the 120 000 number agreed in the decision. It was claimed that the Council made substantial amendments to the Commission's initial proposal and adopted the contested decision without consulting the Parliament afresh, resulting in a breach of Article 78(3) TFEU. Hungary also sustained that this failure led to a breach of the principles of representative democracy, institutional balance and sound administration under Articles 10(1) and (2) and 13(2) TEU. It was argued that the Council breached the essential procedural requirement under Article 293(1) TFEU by amending a Commission proposal without complying with the requirement for unanimity. In turn, the Council argued that the Commission's agreement (even if implicit) amounted to an alteration of the proposal on the part of the Commission. Also there was the claim that the right of national parliaments to issue an opinion on any draft proposal for a legislative act, as provided for in Protocols no. 1 and 2 to the EU Treaties. The Slovak Republic also sustained that should the CJEU find that the decision had to be adopted by means of a legislative procedure, the Council had breached the procedural requirement by adopting the decision *in camera*, instead of in public. The country with Slovakia put forward that the Council infringed its Rules of Procedure since the text setting forth the successive amendments to the initial proposal and the final text were provided to the Member States only in English.

3. The substantive pleas in law were:
- breach of the principle of proportionality,
- the contested decision is not necessary in the light of the objective which it seeks to attain,
- breach of the principle of proportionality because of the particular effects of the contested decision on Hungary,
- breach of the principles of legal certainty and of normative clarity, and also of the Geneva Convention.

The state claimed that the relocation decision is not capable of redressing the structural defects in the Greek and Italian asylum systems. It also relied upon the small number of people relocated under the scheme by the time of the CJEU's ruling to show that the decision is inappropriate for attaining the intended objective.It was argued that the objectives pursued by means of the decision could be achieved just as effectively by other measures which could have been taken in the context of existing instruments, namely the so-called Temporary Protection Directive, the recourse to the "EU civil protection" mechanism provided for in Council Regulation (EC) no. 2007/2004 establishing Frontex, and the assistance from Frontex in the form of a "rapid intervention". Also, the country argued that it was subjected to particularly strong migratory pressure both before the adoption of the decision and at the time of decision. Therefore, it argued, the decision placed a disproportionate burden on Hungary by setting mandatory relocation quotas for it as it does for the other Member States. argued that it was subjected to particularly strong migratory pressure both before the adoption of the decision and at the time of decision. Therefore, it argued, the decision placed a disproportionate burden on Hungary by setting mandatory relocation quotas for it as it does for the other Member States. argued that the Relocation Decision is not sufficiently clear as to how it relates to the provisions of the Dublin III Regulation, that it raises an issue regarding the right to an effective remedy of those applicants who are not designated for relocation, and that there is a lack of clarity to determine to which country an eligible applicant is to be relocated. Hungary also claimed that the Relocation Decision was incompatible with the 1951 Refugee Convention since, in accordance with the UNHCR Handbook and guidelines on procedures

and criteria for determining refugee status under that Convention, an applicant should be permitted to remain in the Member State in which he has lodged his request pending a decision on that request by the authorities of that country.[12;13]

3 INSTITUTITONAL RELATIONS

The foundations of a united Europe were laid on fundamental ideas and values to which the Member States also subscribe and which are translated into practical reality by the Community's operational institutions. These acknowledged fundamental values include the securing of a lasting peace, unity, equality, freedom, security and solidarity. The principle of solidarity of the European Union is a fundamental principle based on sharing both the advantages, i.e. prosperity, and the burdens equally and justly among members.

The Court of Justice of the European Union *ruled before that failure in the duty of solidarity accepted by member states by the fact of their adherence to the community strikes at the fundamental basis of the community legal order*,[14] but it has not been clear whether the principle of solidarity among Member States can be enforced in European courts. The Court ruled that the contested decision gives effect to the principle of solidarity between EU Member States. It argues that the Council, when adopting the decision in question, was in fact required to give effect to the principle of solidarity between Member States, which applies under Article 80 TFEU when EU migration policy is implemented (paras. 252 and 329 of the Judgment). Because the relocation decision represents a concrete expression of the principle of solidarity, it is capable of imposing the legal obligation of solidarity. Consequently, the duty of solidarity in this domain of EU law is enforceable when it is transformed into a valid, legally binding obligation through the process of the adoption of concrete measures in accordance with a Treaty-based legislative procedure. Advocate General Bot, also submitted that the principle of solidarity between Member States in the area of EU immigration policy has a specific content and a binding nature (para. 23 of the Opinion). In his view, the principle laid down in Article 80 TFEU is transformed into a valid, legally enforceable obligation through the process of the enactment by the Council of concrete measures such as the relocation decisions (para. 22 of the Opinion).

Although the Court does not provide a fully-fledged definition of the principle of solidarity between EU Member States, it identifies some elements thereof. The Court added, this principle imposes a legal obligation upon EU Member States to act for the benefit of other Member States even when such actions are not in their own interest.

The Court made a similar finding, namely, a state cannot breach EU rules for the sake of the protection of its own conception of national interest.[15] The Court expressly recognised that the application of this principle leads to the establishment of a clear distinction between beneficiaries of policies and the rest of the Member States, which should accept the responsibility of sharing the burden carried by the beneficiaries even if that sharing is not compatible with their national interests (para. 293 of the Judgment). Furthermore, in its ruling the CJEU rejected the view that the application of the principle of solidarity between EU Member States is based upon voluntarism.

The Court's ruling regards solidarity as a category which can impose legally binding effects, provided that it is concretized through specific measures taken in accordance with a legislative procedure. It implicitly rejects the opinion that the principle of solidarity among Member States should be a basis for voluntary commitments. The CJEU did not discuss the very nature of the duty of solidarity in EU migration policy, and the Advocate General in his Opinion on the case saw this concept as an EU value irrespective of the fact that it is omitted from the list of the EU values presented in Article 2 TEU (paras. 18-19 of the Opinion). According to Article 3(3) TEU, the EU aims at promoting 'economic, social and territorial cohesion, and solidarity among Member States'. The

[12] Joined cases C-643 and C-647 Slovak Republic and Hungary v Council of the European Union, 6 September 2017.

[13] http://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c-64315-and-c-64715-slovak-republic-and-hungary-v-council-european-union-6

[14] **Case 39-72 Commission of the European Communities v Italian Republic. Judgment of the Court of 7 February 1973.**

[15] Ibid.

Charter of Fundamental Rights of the EU in its Preamble also identifies solidarity as a value upon which the Union is founded. Value-laden provisions of EU law could be enforceable in courts through legally binding instruments which represent the expression or emanation thereof. It seems, based on the Court's findings presented above, that this approach to enforcement of the principle of solidarity between EU Member States is accepted in EU immigration policy. The Court's inconsistency in the interpretation of the legal effect of various solidarity clauses incorporated in the EU Treaties originated in its preposition that this principle can be a source of legally enforceable obligations only when concrete legislative measures operationalise its application. The general and abstract character of this principle necessarily entails that the margin of discretion that the European legislator enjoys when putting the principle into effect, through the enactment of secondary law, is wide. What solidarity effectively means depends, to a large extent, on the specific circumstances of the sector in which it shall apply. A EU immigration policy based on solidarity and fairness is not only a normative requirement enshrined in the Treaties, but also a functional necessity arising from the general objective of a single market without internal frontiers, one in which the free movement of person is realised. This is so because once internal borders between EU Member States are removed, the decision of migrants to enter the EU becomes a common concern to all Member States.

4 CONCLUSION

The Court failed to determine the distinction between the principle of solidarity and the principle of loyalty. In previous case law, the Court often refers to the duty of solidarity in the context of the application of the loyalty clause stipulated in Article 4(3) TEU. Article 80 TFEU stipulates that the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, and whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle: but it has limited enforceability, can be used for interpretation regarding the legality of solideraty instruments.

Bibliography:

Joined cases C-643 and C-647 Slovak Republic and Hungary v Council of the European Union, 6 September 2017.

Case 39-72 Commission of the European Communities v Italian Republic. Judgment of the Court of 7 February 1973.

Charter of Fundamental Rights of the European Union (2000/C 364/01)

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01

A. Sangiovanni*, '*Solidarity in the European Union*', (*2013*)* 33 Oxford Journal of Legal Studies*,* 1–29, 5.

F. de Witte*, Justice in the EU: The Emergence of Transnational Solidarity (Oxford University Press,* 2015*.*

Barigazzi, J. (2016) 'Slovakia Outlines Alternative Migration Plan', *Politico*, 16 June.

Thielemann, E. (2018) Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU. JCMS: Journal of Common Market Studies, 56: 63–82. doi: 10.1111/jcms.12662.

Küçük, E. (2016) The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?. European Law Journal, 22: 448–469. doi: 10.1111/eulj.12185.

http://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c-64315-and-c-64715-slovak-republic-and-hungary-v-council-european-union-6

https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/solidarity-principle

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THE CASE OF WESTERN SAHARA CAMPAIGN: COURT OF JUSTICE AS THE ORGAN OF CONTROL OF RESPECT OF INTERNATIONAL LAW IN THE EU LAW?[1]

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Abstract: European Union in its external action respects fundamental values that had inspired its creation including general international law. EU is in the field of its competence entitled to conclude international agreements in compliance with the Article 3 par. 2 of Treaty on Functioning of the EU. In such situations, EU acts on international scene as individual subject of international public law thus substituting individual member states. The Fisheries Partnership Agreement concluded between the EU and the Kingdom of Morocco is the subject matter of the case of Western Sahara Campaign UK (hereinafter also as "WSC") v Her Majesty´s Revenue and Customs and Secretary of State for Environment. The validity of the Agreement was challenged within the proceedings in domestic court and Court of Justice is about to give a preliminary ruling, while the Advocate´s General Opinion was presented recently (10.01.2018). Upcoming paper brings, in the light of mentioned case the broader picture of the Court of Justice of the EU as the unique regional judicial body, that is entitled to review the validity of international agreements concluded by the Union, while the review is based on primary law and by so doing it contributes to strengthening of respect to international law.

Key words: Validity of International Agreements, Western Sahara, Fisheries, International Law, Self-Determination, Court of Justice of the EU.

1 INTRODUCTION

Western Sahara is a territory located on the western coast of Africa, to the south of Morocco, west of Algeria and to the northwest of Mauritania. Historically the territory was part of Spanish imperial domain together with Morocco. The legal and factual status of the territory of Western Sahara is not finally settled. Firstly, most of the territory is under occupation of the Kingdom of Morocco that claims sovereignty over the Western Sahara. Secondly, part of the Western Sahara is controlled by the Front Polisario that consider it a territory of the Sahrawi Arab Democratic Republic (hereinafter referred to as SADR), partially recognized state, which is member state of the African Union (AU) since 1984.[2] However, the territorial sovereignty of SADR over Western Sahara is limited to piece of territory alongside the Mauritanian border, which is divided from the rest of Western Saharan territory by the sand wall raised by the Moroccan authority. Despite the situation, *in situ* SADR claims the sovereignty over whole Western Sahara, including adjacent zones of sea in accordance with the UN Convention of the Law of Sea.[3] The international community including the

[1] The paper is the output of the research carried out with support of VEGA agency; project number VEGA č. 1/0709/16: Place and Significance of Regional Judicial Bodies within Context of the Contemporary Regionalism (*Miesto a význam regionálnych súdnych orgánov v kontexte súčasného regionalizmu*).

[2] See the list and profiles of the African union member states. Online:<https://au.int/memberstates>. See also entry of Western Sahara in the CIA World Fact book. Online: <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html>.

[3] The claim over the adjacent waters is based on old rule of international customary law that basically states, that the *land dominates over the sea*. It means that the rights of the state to the waters adjacent to land are determined on the basis of the land possession. Compare Article 2 par. 1 of the United Nations Convention on Law of Sea: *"The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic*

African Union recognizes the SADR´s claim and the International Court of Justice in the well-known advisory opinion confirmed the right to self-determination of the Sahrawi people.[4] Despite international recognition, most of the Western Saharan territory remains in possession of Kingdom of Morocco, which for that matter is regarded as the occupying power under the rules of international humanitarian law. Moroccan occupation is constantly challenged and its sovereignty is rejected by the national liberation movement *Front Populaire pour la libération de la sagiua et du rio de oro* better known as the Front Polisario. Front Polisario is a national liberation movement, that represents Sahrawi people and it is a subject of international law.[5] The possession of Western Sahara by Morocco is only *de facto* possession and as such, it is the result of annexation of that territory by Morocco. Legally the Western Sahara is listed in the United Nations list of non-self-governing territories since 1963, when it was entered into list as the Spanish Sahara. Spain however, terminated its presence in Western Sahara in 1976.[6]

The situation outlined above led to the proceedings in the Court of Justice of the European Union (CJEU) in the past, mainly due to existence of several agreements concluded between European Union (EU) and the Kingdom of Morocco after 1987, mainly Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (*The Association Agreement*) of 1996,[7] partnership agreement in the fisheries sector of 2006 (hereinafter as *Fisheries Partnership Agreement*)[8] and Agreement between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products (*The Liberalisation Agreement*)[9] of 2012 and their purported application to Western Sahara. Ruling of the CJ EU already confirmed that abovementioned international agreements and

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waters, to an adjacent belt of sea, described as the territorial sea." United Nations Convention on Law of Sea, 10 December 1982, Montego Bay. Online:<http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>. See also: BING B. J.: The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges. In: German Yearbook of International Law, 2014, p. 6 – 9. Online:<http://www.iilj.org/wp-content/uploads/2016/09/JiaIILJColloq2015.pdf>.

[4] For more information, see: Summary of the ICJ Advisory Opinion *Western Sahara* of 16 October 1976. Online:<http://www.icj-cij.org/files/case-related/61/6197.pdf>.

[5] The legal personality of the Polisario was assessed by the General Court in *Front Polisario v. The Council of the European Union*, when it was necessary to ascertain whether the Front Polisario is the legal person and thus it is capable to bring an action in accordance with the Article 263 par. 4 of the Treaty on Functioning of the EU. See: Judgement of 10 December 2015, Front Polisario v Council of the European Union, T-512/12, EU: T:2015:953, paragraph 37 – 60.

[6] Western Sahara – entry in the UN list of non-self-governing territory. Online: <http://www.un.org/en/decolonization/pdf/Western-Sahara2017.pdf>.

[7] The conclusion of the Association Agreement was approved by the Council and Commission Decision of 24 January 2000 on the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (2000/204/EC, ECSC), Official Journal of the EU, 18.03.2000, L 70/1.

[8] Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Official Journal of the EU, 29.05.2006 L 141/4. The conclusion of Fisheries Partnership Agreement was approved by the Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Official Journal of the EU, 29.05.2006, L 141/1.

[9] The conclusion of The Liberalisation Agreement was approved by the Council Decision of 2 December 2010 on the signature of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part 2012/496/EU, Official Journal of the EU, 07.09.2012, L 214/1.

related acts are not applicable in respect of the territory of Western Sahara in its Judgment in *Front Polisario v. Council of the EU*.[10] Mentioned decision however, did not dealt with Fisheries partnership agreement in respect of which there was no ruling on its compatibility with the Treaties or validity of the related acts.[11] Fisheries Partnership Agreement had been challenged by the *Western Sahara Campaign* in the proceedings initiated before the Courts in United Kingdom.[12] Four questions were raised by the UK´s domestic courts within reference to the preliminary ruling, however, respecting the scope of this paper we shall focus on two of them as follows: a) is WSC entitled to challenge the validity of the EU acts on the grounds of failure to comply with the international law?; and b) is the Fisheries Partnership Agreement and Protocol of 2013 valid under EU law?[13] For the purpose of the presented paper, the second question will be given much of the attention. In this case, the domestic court raised the question of validity of international agreement concluded by the EU with the third state and s. While the case C-266/16 is not closed yet, the Advocate´s General Opinion was presented on 10 January 2018.

The cases of *Front Polisario v. The Council of the EU* and *Western Sahara Campaign* are interesting cases due to fact, that CJ EU as the primary judicial organ of the EU is about decide on validity of the EU acts and international agreements concluded by the EU with the third state on the basis of treaties almost solely on the grounds of general international law. Specifically, the WSC case is the first request for a preliminary ruling on the validity of the international agreements concluded by the Union and their acts of conclusion.[14] In the case of *Western Sahara Campaign,* the most prominent rules that are invoked are right of self-determination of peoples and rules concerning the sovereignty over natural resources. Presented paper aims to point to the possible role of the CJ EU as the guarantor of respect and integrity of international law in pluralist legal environment.[15] The paper firstly briefly addresses the relationship of the international public law and law of the European Union as it is set in Treaties as a part of constitutional principles including the role CJ EU. Secondly, we address the current *Western Sahara Campaign* case in the light of the Opinion of Advocate General.

2 RELATIONSHIP OF INTERNATIONAL PUBLIC LAW AND EU LAW

The problem outlined in the introduction is the issue of the relationship between the international public law and EU law. The WSC case raised new questions in respect of:

- the Court's jurisdiction to rule on the validity of international agreements concluded by the Union;
- the conditions which individuals must satisfy in order to rely on the rules of international law in the context of the examination of the validity of those international agreements;
- the interpretation of those rules.[16]

The WSC case raised several concerns in respect of validity of international agreements and the application of international law in relation to the acts of EU and agreements concluded by it. In following text, we will therefore, address the relationship of the EU law and international law as it was set in Treaties. The primary framework of relationship between the European Union and the

[10] See: Judgement of the Court (Grand Chamber) of 21 December 2016, Front Polisario v Council of the European Union, Appeal, C-104/16P, EU:C:2016:973, paragraph 82 and 125.

[11] The Front Polisario is challenging the Fisheries Agreement Protocol before the General Court Case T-180/14. The General Court has stayed proceedings in that case until the Court has given judgment in the WSC case. See: Court of Justice of the European Union, Press Release No 01/18, Luxembourg, 10 January 2018.

[12] See: Opinion of Advocate General Wathelet, 10 January 2018, Case C-266/16 Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, EU:C:2018:1, paragraph 23 – 30.

[13] Ibid., paragraph 32, questions 3 and 4.

[14] Ibid., paragraph 2.

[15] Read more on regionalism and pluralism in: ELBERT Ľudmila:Regionalizmus ako nástroj zmeny vo vzťahu medzinárodného a vnútroštátneho práva (Pluralizmus na obzore) – Regionalism as a Tool for Change of the Relationship between International and Municipal Law (Pluralism on the Horizon). In: Právny obzor, vol. 95, no. 6, 2015, pp.: 560 – 570.

[16] Ibid.

international public law is given in the wording of Article 3 paragraph 5 of the Treaty on European Union. Within the mentioned article, the TEU states that EU contributes *to strict observance and development of the international law, including respect for the principles of United Nations Charter*.[17] The notion of respect to the principles of the UN Charter and international law is reiterated again in the Article 21 par. 1 of the TEU, which enumerates standards that govern actions of the EU on international scene.[18] Another important reference to the international law are made within the paragraph 2 of the above mentioned article 21. Article 21 par. 2 states that the EU shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to "*inter alia consolidate and support democracy, the rule of law, human rights and the principles of international law and preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris*."[19] It is clear that the primary law of the European Union clearly recognizes the importance of international law. In the WSC, the validity of the Fisheries Partnership Agreement and the acts connected to that agreement based on abovementioned Article 3 par. 5 of the TEU due to purported violation of international law is challenged. According to the WSC the rules of international law concerning self-determination of peoples, the provisions of Article 73 of the UN Charter, the rules concerning sovereignty over natural resources and rules of international humanitarian law concerning concluding international agreements related to exploitation of natural resources on the territory subjected to the military occupation had been violated due to conclusion of the Fisheries Partnership Agreement.[20]

Court of Justice of the European Union addressed the situation when the validity of the EU act can be challenged due to non-compliance with the international law in its decision in the *Air Transport Association of America* case.[21] The rules stemming from international treaties can be invoked if the treaty is binding to the EU, the rules are unconditional and sufficiently precise and their *broad logic* does not preclude the judicial review of the challenged EU act.[22] The rules of customary law[23] can be invoked if they are capable *of calling in question the competence of the European Union to adopt the contested act and the act must be liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard*.[24]

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[17] Article 3, paragraph 5, Treaty on the European Union, Official Journal of the European Union, 26.10.2012, C 326/13.

[18] Article 21, paragraph 1, Treaty on the European Union provides: *"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."*

[19] Article 21, paragraph 2, Treaty on the European Union.

[20] Opinion of Advocate General, Case C-266/16 Western Sahara Campaign, paragraph 26, op. cit.

[21] Judgement of the Court (Grand Chamber) 21 December 2011, Case *Air Transport Association of America*, C-366/10, EU:C:2011:864.

[22] Ibid, paragraph 54: *"where the nature and the broad logic of the treaty in question permit the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise."*

[23] Ibid, paragraph 106.

[24] It is worth to mention that Advocate General observes that cited principles may not be applicable in the case of *Western Sahara Campaign*, for the case was brought before the CJ EU due to question of validity of the international agreement, not the secondary law. Compare: "*To my mind, if individuals must satisfy certain conditions in order to be able to plead the rules of international law in the context of judicial review of acts of the Union, the principles set out in that judgment are not automatically capable of being transposed to the present case. In effect, those principles relate to judicial review of unilateral acts of purely internal secondary law (regulations, directives, etc.), whereas, as the Commission observes, the present case raises the separate issue of the validity of*

European Union is the subject of international law and as such, it is capable to enter international agreements. Firstly, EU has exclusive competence to conclude international agreement when such agreement is **required** by the legislative act of the Union or it is necessary to enable Union to exercise its internal competence. Besides cited provision of the article 4 of the Treaty on Functioning of the EU (TFEU) the competence of the EU is further defined in the Title V of the TFEU.[25]

Under provisions of article 217 of the TFEU the agreements concluded by the Union shall be binding upon institutions of the Union and on its member states and thus becoming the part of the EU law. In the process of negotiation and conclusion of the international agreement the Court of Justice of the EU may play important role, while the provision of 218 par. 11 establish the competence of the CJ EU to deliver opinion of the court, whether the envisaged agreement is compatible with the Treaties.[26] Should the CJ EU deliver negative opinion, the agreement shall not enter into force unless it is renegotiated to comply with the Treaties, or the Treaties are revised. The mentioned competence of the Court of Justice is preventive by nature and its aim is to prevent the conclusion of international agreement that may be incompatible with the Treaties. Thus, it is clear that the provisions of agreement must be in full compliance with the Treaties as well as with the constitutional principle that stem from the Treaties. Such competence of the CJ EU can be compared with preventive review of the negotiated but not concluded international treaties by constitutional courts. From the perspective of international law, it may be somehow complicated to withdraw from once dully-concluded international agreement due to non-compliance of such agreement with the internal legal act of international organization or with its establishing instrument. In the Western Sahara case, the issue of validity of effective international agreement is raised and the validity of the international agreement shall be evaluated on the grounds of international law.

However, as Advocate General Wathelet pointed out, the Court has jurisdiction to examine *all questions that are liable to give rise to doubts as to the substantive or formal validity of the international agreement with regard to the Treaties.*[27] The Court will also be able to review substantive or formal compatibility with the Treaties *ex post* should the action for annulment is brought before the Court or if the validity of such agreement is subject matter of the reference for preliminary ruling. Advocate General in connection with mentioned pointed out that the term *compatibility* was intentionally used instead of *validity*, due to fact that international treaty might be declared invalid only according to rules of international law.[28] Nevertheless, CJ EU can evaluate the compatibility of such agreement with the Treaties and it has jurisdiction to review act of the European Council by adoption of which, the conclusion of that agreement was approved. That includes the review of the internal lawfulness of that decision in the light of the agreement in question. In that context, the Court may review the lawfulness of the act of the Council with regard to the TEU and TFEU and the constitutional principles stemming from the Treaties, including respect for fundamental rights and the rules of international law, in accordance with Article 3 paragraph 5 of

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an international agreement concluded by the Union by means of the act approving its conclusion (treaty secondary law)." See: Opinion of Advocate General Wathelet, 10 January 2018, Case C-266/16 Western Sahara Campaign UK, op. cit., paragraph 80.

[25] Article 4, Treaty on the Functioning of the EU, Official Journal of the European Union, 26.10.2012, C 326/47.

[26] Article 217 and article 218 paragraph 11 of the Treaty on the Functioning of the EU.

[27] Opinion of Advocate General Wathelet, 10 January 2018, Case C-266/16 Western Sahara Campaign UK, op. cit., paragraph 52.

[28] In respect of validity or invalidity of the international agreements, the customary law codified in Vienna Convention on Law of Treaties and Vienna Convention on Law of Treaties between states and International Organizations and between International Organizations shall be relevant. Under the international law of treaties, international agreements can be declared invalid or terminated only in accordance with the treaty and customary law of the treaties. See wording of Article 42 paragraph 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986: *"The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."* Online: <http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>.

the TEU. CJ EU has the competence to declare the act of European Commission approving the conclusion of international agreement and subsequently to declare international agreement incompatible with the Treaties.

Should the CJ EU come up with such decision, it does not mean that international agreement at stake shall lost validity or effectiveness under international law of treaties. In such a case, parties to the international agreement remain bound by the international agreement and it will be up to the EU institutions to remove the reason of incompatibility if it is possible or withdraw from such agreement in compliance with the Treaties and rules of general international law of treaties.

3 THE WESTERN SAHARA, THE COURT OF JUSTICE AND CURRENT PROCEEDINGS

In 2012 the Front Polisario initiated the proceedings before the General Court of the CJ EU, in which it brought an action against the Council of the European Union (hereinafter as „Council") for annulment of Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products that approved conclusion of the *Liberalisation Agreement* between the EU and the Kingdom of Morocco. Initially action succeeded and the abovementioned Council decision was annulled by the General Court in the extent as it was applicable in respect of territory of Western Sahara. However, this decision was reversed by the decision of the CJ EU in C-104/16 P in appellate proceedings initiated by the Council. Despite CJ EU rejected legal argumentation in the General Court´s decision on annulment of the abovementioned Council decision, it also argued that neither the contested Council decision nor the Liberalisation Agreement can be interpreted in such way, that they are applicable upon the territory of Western Sahara.[29]

Currently the *Western Sahara Campaign* case is to be decided upon the reference of preliminary ruling submitted by the High Court of Justice (England & Wales), Queen´s Bench Division regarding two connected disputes between Western Sahara Campaign UK and Commissioners for Her Majesty´s Revenue and Customs (1st action) and Western Sahara Campaign UK against the Secretary of State for Environment, Food and Rural Affairs (2nd action). In the first action WSC disputes preferential tariff treatment of products originating in Western Sahara, certified as products originating in Morocco and in the second action WSC disputes the opportunity offered to the Secretary of State by the contested measures to issue licences to fish in the waters adjacent to Western Sahara.

In his preliminary remarks, the Advocate General examined whether the Fisheries Partnership Agreement and legal acts are applicable to the Western Sahara. With respect to factual situation in above-mentioned *Council v. Front Polisario*, the situation appears to be rather different in a *Western Sahara Campaign* case. The *Fisheries Partnership Agreement* shall be in respect of the Kingdom of Morocco applicable on the territory of Morocco and on the waters under the Moroccan jurisdiction.[30] Moroccan fishing area, where the fishing activities shall take place is defined as the w*aters under sovereignty and jurisdiction of the Kingdom of Morocco.*[31] On the request of the Court, Commission provided the chart including the maps specifying the Moroccan fishing zones (see Chart no. 1). The Protocol to the *Fisheries Partnership Agreement* (hereinafter referred to as the Protocol) of 2013 defined 6 fishing zones.[32]

As the Advocate General points out: *The southern edge of those fishing zones is not specified, either in the Fisheries Partnership Agreement or in the 2013 Protocol. Since the border*

[29] See: Judgement of the Court (Grand Chamber) of 21 December 2016, Front Polisario v Council of the European Union, Appeal, C-104/16P, supra note 10.

[30] Article 11 of the Fisheries Partnership Agreement, op. cit.: *"This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community applies, under the conditions laid down in that Treaty and, on the other, to the territory of Morocco and to the waters under Moroccan jurisdiction.*

[31] Article 2, letter a) of the Fisheries Partnership Agreement.

[32] See Chapter III and Appendix no. 2, Fishing datasheet No 1 – 6 of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, Official Journal of the European Union 7.12.2013, L 328/2.

between Western Sahara and the Kingdom of Morocco is at parallel 27°42' N (Pointe Stafford), only fishing zone No 6, by subsequent agreement between the Union and the Kingdom of Morocco, explicitly covers the waters adjacent to Western Sahara. However, it is apparent from the charts produced by the Commission that fishing zones Nos 3 to 5 go as far as the maritime border between the Islamic Republic of Mauritania and Western Sahara, thus covering the waters adjacent to Western Sahara.[33] Regarding the application of the Fisheries Partnership Agreement and the 2013 Protocol on land, the 2013 Protocol provides that a part of the financial contribution paid by the Union to the Kingdom of Morocco and equivalent to EUR 14 million is to be paid as support for the fisheries sector in the Kingdom of Morocco, which, according to the Council and the Commission, includes investments in infrastructure on the territory of Western Sahara.[34] In addition, Chapter X of the Annex to the 2013 Protocol provides that a part of the catches must be landed in Moroccan ports including the ports of Western Sahara. As the Advocate General suggest, this reality may have its roots in the past.[35] It is indeed clear, that the Kingdom of Morocco considers the territory of Western Sahara the integral part of its territory and it falls under its jurisdiction and sovereignty. For that matter, it appears to be clear that the *Fisheries Partnership Agreement* is applicable to the waters adjacent to the Western Sahara.

3.1 The Court and the International Law: Grounds for the CJ EU to apply general international law

Primary judicial organ for application of International Law is International Court of Justice, which is the principal judicial organ of the UN. It is however, nor the sole neither exclusive judicial organ that applies rules of international law. It is also important to remind that only states can appear as the parties to the dispute before International Court of Justice. Furthermore, nor the *Fisheries Partnership Agreement* neither the Protocol provided for any other way of dispute settlement than consultation. Even if the EU´s external action breach the international law substantially or it would even infringe the peremptory norm of general international law (*jus cogens*),[36] no international court shall have jurisdiction to deliver a judgment. Therefore, the external action of the EU can be reviewed only by the Court of Justice, that remains the sole *forum* where the question whether the external action of EU respects the constitutional principle defined in Article 3 par. 5 of the TEU and whether it contributes to the strict observance of international law (see above). In the *Western Sahara Campaign,* the rules of international customary law and general international law are invoked. As it was stated above, in *Air Transport Association of America* CJ EU stated that the rules of customary law can be invoked only when they are capable of *calling to question competence of the EU* to adopt certain act. Should this approach be adopted it *would automatically preclude the possibility for individuals to rely on rules, however essential, of international law, such as the peremptory norms of general international law or the obligations erga omnes of international law* as

[33] Opinion of Advocate General Wathelet, 10 January 2018, Case C-266/16 Western Sahara Campaign UK, op. cit., paragraph 69.

[34] Overall financial contribution is set to 30 million €/year: 16 million € as access payment to the resource and 14 million € earmarked for the support of Moroccan sectoral fisheries policy in order to promote sustainability in its waters. In addition, the fleet is expected to contribute for 10 million €. See online:<https://ec.europa.eu/fisheries/cfp/international/agreements/morocco_en>.

[35] "*As the Commission observes, the origin of the Fisheries Partnership Agreement lies in the Fisheries Partnership Agreements concluded with the Kingdom of Morocco by the Kingdom of Spain before the latter acceded to the Union, which covered the waters adjacent to Western Sahara as waters under Moroccan jurisdiction*." Ibid. paragraph 72.

[36] Peremptory norm of international law is defined in the Article 53 of the Vienna Convention on Law of Treaties (1969) and Article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 – not yet in force) as follows: *For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.* Article 53, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986. op. cit.

Advocate General observes.[37] However, in the *Western Sahara Campaign* the competence of the EU to conclude *Fisheries Partnership Agreement*, subsequent Protocol and to adopt certain acts is not question. The issue is the compatibility of the concluded agreement with the primary law of the EU.[38]

The question on what grounds the CJ EU may adjudge that the *Fisheries Partnership Agreement* infringes general international law, namely the right to self-determination may be raised. As the Court held in paragraphs 284 and 285 of the judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, respect for human rights is a condition of the lawfulness of EU acts and measures incompatible with respect for human rights are not acceptable in the EU legal order.[39] International agreement cannot lead to infringement of the constitutional principles of the Treaties, such as those in Article 3 par. 5 TEU and Article 21 TEU, that provide rather clearly that the Union's external action must respect human rights.[40] CJ EU´s competence is to adjudge the case as *Western Sahara Campaign* can be based on human rights and subsequently on the constitutional principles established in the Treaties. It thus might be expected of the CJ EU to ensure that constitutional principles – respect of international law and human rights in particular shall be respected. For that matter, it must be established, which legal rule from which the right to self-determination stem, is binding upon EU and Morocco. Advocate General Wathelet observes that the Kingdom of Morocco as well as all EU member states are parties to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant of Economic, Social and Cultural Rights (ICESCR), both of which confirms the existence of the right to self-determination. Furthermore, all EU member states signed (or they are somehow linked to signature) Helsinki Final Act of 1975, that again confirmed that the signatories recognize the right to self-determination. Therefore, the self-determination must be considered as human right beneficiaries of which are the peoples of non-self-governing territories subject to alien subjugation, domination and/or exploitation. Furthermore, the right to self-determination is not only the human right but it is also established as a rule of international law and forms obligation *erga omnes* and as such, the principle is binding upon European Union.

As the Advocate General further observes, the nature and broad logic of the right to self-determination does not preclude judicial review of the acts of the Union. The territory of Western Sahara was not incorporated into Morocco based on the will of its people. It was unilateral act not considering free will of people living there and therefore the people of Western Sahara have not freely disposed of its natural resources, as it is required by general international law. The exploitation of natural resources by the dominating power without free decision of the people of non-self-governing territory constitutes the breach of *erga omnes* obligation to respect the self-determination. It is also established that states or other subjects of international law are obliged not to recognise the illegal situation resulting from the breach of the rule such as right to self-determination and are obliged not to render aid or assistance in maintaining that illegal situation.

The situation established by the *Fisheries Partnership Agreement* also constitutes the infringement of the rules of international humanitarian law applicable on Western Sahara. The legal

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[37] Opinion of Advocate General Wathelet, 10 January 2018, Case C-266/16 Western Sahara Campaign UK, op. cit., paragraph 90.

[38] As Advocate General states: *"It would be absurd to limit review of the contested acts solely to the question of the competence of the Union and automatically to preclude substantive review of those acts by reference to the most fundamental norms of international law which are relied on in the present case."* Ibid. paragraph

[39] *"It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."* Judgement of the Court (Grand Chamber), 3 September 2008, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al-Barakaat International Foundation*, EU:C:2008:461, paragraph 285.

[40] See: KUBE Vivian: The Polisario case: Do EU fundamental rights matter for EU trade policies? EJILTalk!, 3 February 2017. Online:www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-polices/.

basis for such claim is the provisions of the Geneva Conventions, I Protocol Additional to the Geneva Conventions and The Hague Convention on Respecting the Laws and Customs of War on Land of 1907.[41] Based on the mentioned sources, the conflict between Polisario and the Kingdom of Morocco is international armed conflict. The presence of Morocco on the territory of Western Sahara thus constitutes military occupation and as such, the rights of occupant to utilize and exploit the natural resources of occupied territory are limited. The Hague Convention states in Article 55 that the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct. It holds that the occupying power may exploit the natural resources only under the condition that exploitation is carried out for the benefit of the people of that territory. Also in respect of the possibility to enter international agreement in respect of occupied territory it holds that the *occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.*

4 CONCLUSION

The rules of international law that are invoked in the case of *Western Sahara Campaign* are not novel ones. They are mostly rules of general international law, international humanitarian law or they form the part of general principles of international public law. At the end of his Opinion Advocate General Wathelet stated that the *Fisheries Partnership Agreement* is incompatible with Article 3 par. 5 of the TEU and the acts related to that agreement are invalid.

It is hard now (Feb. 2018) to preclude how CJ EU will eventually decide and in what extent it will agree and adopt the General Advocates argumentation. It has potential to become second important decision related to Western Sahara with serious implications for international legal order. In general terms, the regional court which is the primary judicial body tasked with interpretation of the law of specific internal legal order created by the legislature of the regional supranational organization is about to adjudge on compatibility of concluded international agreement with the founding Treaties. Negative judgment, i.e. judgment that would render international agreement not compatible with the Treaties based on international law, shall for sure have potential to cease the application of such treaty. For that matter it is interesting the role that according to Advocate General the CJ EU as the regional court may play. In the Advocate´s General opinion, Advocate General states that no other international court has jurisdiction to adjudge this particular case regarding the agreement in respect of fishing in waters of Morocco. Therefore, the CJ EU shall take role of "proper" international tribunal and adjudge on the basis of the general international law and that holds regardless the outcome.

It must be mentioned that the Treaties themselves offer legal grounds for CJ EU to assume such role due to fact that the respect to the UN Charter, Helsinki Final Act or international law in general is enshrined in the constitutional principles of the TEU and there it presents the foundation of the operation of the EU with the rest of the world (external action). Should the CJ EU declare and the *Fisheries Partnership Agreement* incompatible with the Treaties and related acts invalid on the grounds of principle that requires respect to international law it may have significant impact on the enforcement of international law. For example, with Fisheries Partnership Agreement the material and financial help is related and economic considerations are significant. Should the application of such agreement be interrupted or even ceased based on Treaties and international law, it may influence states that are entering into international legal relations to take care for respect of general

[41] *"The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."* Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Article 55. Online:< https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0C16200ECC1B0C3EC12563CD00516954>.

international law. The mentioned will inevitably work other way around as well and it will strengthen the obligation of the Union to ensure that the other parties of the international agreements are acting in compliance with international law. Thus, the CJ EU shall project its influence and gravitas not only within the EU law but in the field of international law as well. In *Kadi* CJ EU defied UN Security Council for the sake of respect to human rights. In *Western Sahara Campaign,* it may show its capabilities to enforce behaviour of EU institutions that would be compatible with general international law and indirectly it may influence the action of other subjects on international scene.[42] It is also notable that the Advocate General adopted very rational approach, when fully aware of nature of international legal order he stressed incompatibility of the international agreement and not its invalidity. If the CJ EU declares *Fisheries Partnership Agreement* incompatible, it will be up to the parties of agreement to find a legal solution how to make that agreement compatible with the Treaties and international law.

Finally yet importantly, we must remind that the commented proceedings commenced upon the reference of preliminary ruling delivered by the domestic court. The decision of CJ EU may be landmark in respect of possibility of subjects that would affected negatively by the international agreements concluded by the EU with other subjects of international law.

Bibliography:

BING B. J.: The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges. In: German Yearbook of International Law, 2014, p. 6 – 9. Online:<http://www.iilj.org/wp-content/uploads/2016/09/JiaIILJColloq2015.pdf>;
ELBERT Ľ.: Regionalizmus ako nástroj zmeny vo vzťahu medzinárodného a vnútroštátneho práva (Pluralizmus na obzore) – Regionalism as a Tool for Change of the Relationship between International and Municipal Law (Pluralism on the Horizon).. In: Právny obzor, vol. 95, no. 6, 2015, pp.: 560 – 570;
KUBE Vivian: The Polisario case: Do EU fundamental rights matter for EU trade policies? EJILTalk!, 3 February 2017. Online:www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-polices/;
United Nations Convention on Law of Sea, 10 December 1982, Montego Bay. Online:<http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>;
United Nations Charter, 1945;
International Covenant on Civil and Political Rights, 1966;
International Covenant on Economic, Social and Cultural Rights, 1966;
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet in force);
Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907;
Treaty on European Union, Official Journal of the European Union, 26.10.2012, C 326/13;
Treaty on Functioning of the European Union, Official Journal of the European Union, 26.10.2012, C 326/47;
Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Official Journal of the EU, 29.05.2006 L 141/4;
Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, Official Journal of the European Union 7.12.2013, L 328/2;
Opinion of Advocate General Wathelet, 10 January 2018, Case C-266/16 Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, EU:C:2018:1;

[42] For more detailed analysis of impact of *Kadi* decision on relationship of international law and Law of European Union read: De BÚRCA Grainne: The EU, the European Court of Justice and the International Legal Order after Kadi. In: Harvard International Law Journal, Vol. 1, No. 51, 2009, Fordham Law Legal Studies Research Paper No. 1321313. Online:< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321313>.

Judgement of the Court (Grand Chamber) 21 December 2011, Case *Air Transport Association of America*, C-366/10, EU:C:2011:864;
Judgement of the Court (Grand Chamber) of 21 December 2016, Front Polisario v Council of the European Union, Appeal, C-104/16P, EU:C:2016:973;
Judgement of the Court (Grand Chamber), 3 September 2008, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al-Barakaat International Foundation*, EU:C:2008:461.

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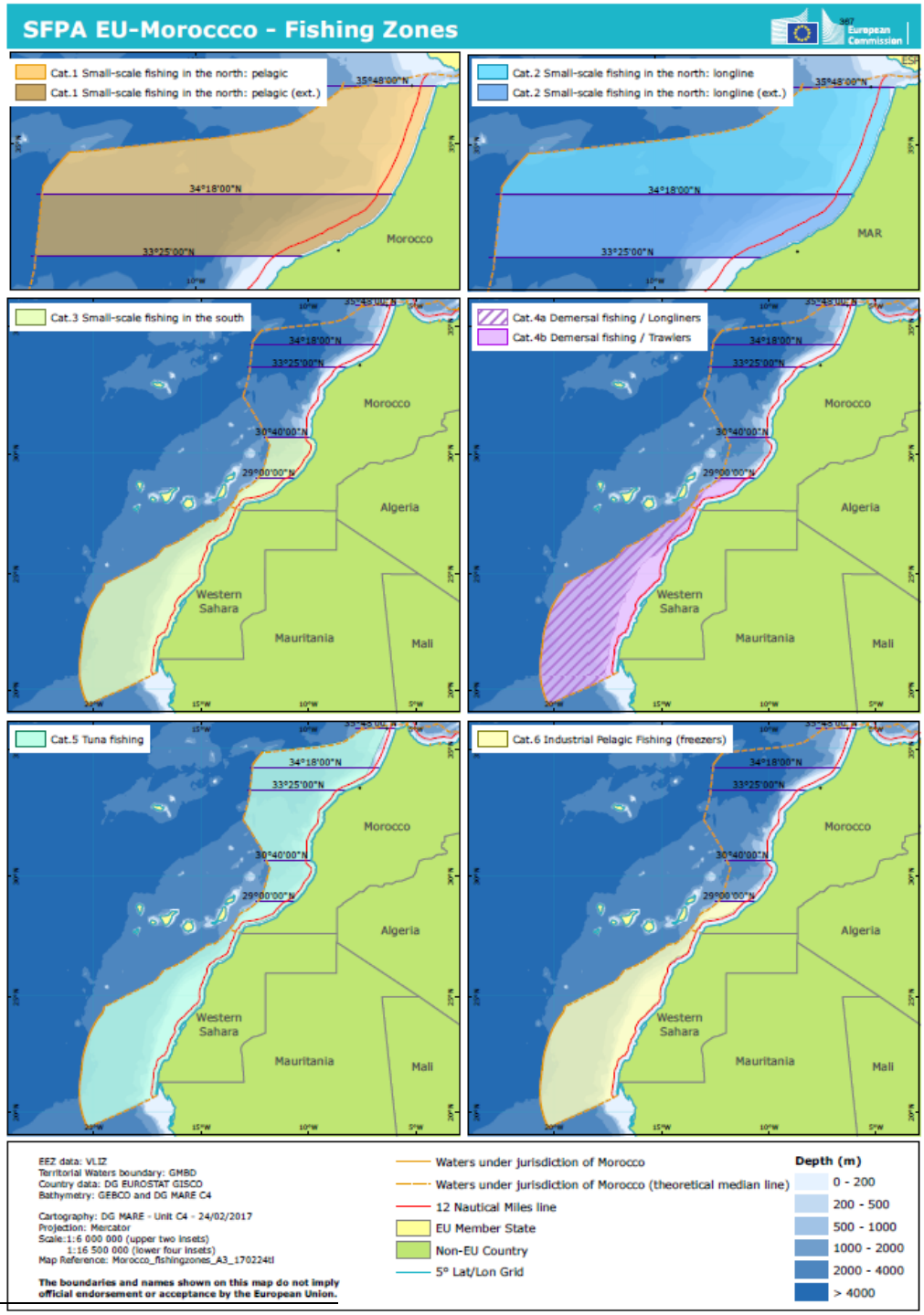
Chart no 1: Fishing zone according to EU-Morocco Fisheries Partnership Agreement as defined in 2013 Protocol[43]



[43] See: Opinion of Advocate General, Case C-266/16 Western Sahara Campaign, paragraph 66, op. cit.

APPLYING THE PRINCIPLE OF LOYALTY IN COMMON FOREIGN AND SECURITY POLICY OF THE EU

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Abstract: Principle of loyalty is a leading principle applied in common foreign and security policy of the European Union. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. This article is focused on a conflict between national interests of the Member States and interests of European Union in area of external relations.

Key words: principle of loyalty, external relations, Common Foreign and Security Policy, Member State, European Union, interests, conflict

1 INTRODUCTION[1]

It is well-known that European Union has the ambition to become a global security actor. The Union´s action on the international scene shall be guided by the principles such are democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the UN Charter and international law.[2] This action shall also pursue safeguarding Union´s values, security, preserving peace, prevention of conflicts and other objectives set in Article 21(2) of the Treaty on European Union[3] (hereinafter only "TEU"). The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security[4]. European Union has recently reacted to many known international crisis – for example to Ukraine-Russian crisis (e.g. by imposing restrictive measure on Russia), Syrian conflict (e.g. by providing humanitarian help and financial support), to crisis in Central African Republic (e.g. by launching a military operation EUROFOR RCA) and others.

In 2016, High Representative of the Union for Foreign and Security Policy introduced a Global Strategy for EU´s foreign and security policy[5] with five priorities: (1) the security of Union[6]; (2) state and societal resilience[7]; (3) an integrated approach to the Conflicts[8]; (4) cooperative regional orders[9] and (5) global governance for the 21st century[10].

[1] The paper was prepared within the project VEGA 2/0109/16 Institutional competitiveness in the light of changes of external environment.

[2] See an Article 21(1) of the Treaty on European Union

[3] E.g. to safeguard its values, fundamental interests, security, independence and integrity, preserve peace, prevent conflicts and strengthen international security, etc.

[4] Article 24(1) TEU.

[5] European External Action Service: Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union´s Foreign and Security Policy. ISBN 978-92-9238-408-1

[6] This priority includes a fight against the terrorism, hybrid threats, economic volatility, climate change and energy insecurity endanger our people and territory.

[7] The EU will support resilience by targeting the most acute cases of governmental, economic, societal and climate/energy fragility, as well as develop more effective migration policies for Europe and its partners to the east stretching into Central Asia, and to the south down to Central Africa.

[8] The EU will engage in a practical and principled way in peacebuilding and foster human security through an integrated approach. The EU will act at all stages of the conflict cycle, acting promptly on

Uniform approach of the Member States and the Union to this Strategy is the essential precondition of achieving its goals in Common Foreign and Security Policy (hereinafter only "CFSP"). Presumed uniform approach of the Member States shall be guaranteed by applying the principle of loyalty.

2 PRINCIPLE OF LOYALTY

Principle of loyalty or sincere cooperation is one of the oldest and most important principles of the EU law. It was outlined in Article 5 of the Treaty of Rome[11] and later developed through the case law of the European Court of Justice (hereinafter only the "ECJ"). Considering the external relations, the crucial was the decision of the ECJ in case AETR[12]. In this decision the ECJ stated that "*each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the rights, acting individually or even collectively, to undertake obligations with third countries which affect those rules. If Community rules are promulgated for attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope*". This can be interpreted also as prohibition for Member States to exercise their external competences (and interests) when such action is capable to affect the internal rules of the Community or alter their scope.

In its Opinion 2/91[13] the ECJ precised that the Community's tasks and the objectives of the Treaty would also be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or of altering their scope.

The 1992 Maastricht Treaty[14] then officially established the Union´s common foreign and security policy and in Article J.1 (4) TEU explicitly introduced the obligation of Member States to support the Union´s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The Member States were bound to refrain from any action which was contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The 1997 Amsterdam Treaty[15] amended[16] above mentioned J.1 Article by adding the obligation of Member States to "*work together to enhance and develop their mutual political solidarity"* in external and security policy*.*

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prevention, responding responsibly and decisively to crises, investing in stabilisation, and avoiding premature disengagement when a new crisis erupts.

[9] The EU will support cooperative regional orders worldwide, because voluntary forms of regional governance offer states and peoples the opportunity to better manage security concerns, reap the economic gains of globalisation, express more fully cultures and identities, and project influence in world affairs.

[10] The EU is committed to a global order based on international law, which ensures human rights, sustainable development and lasting access to the global commons. The EU will strive for a strong UN as the bedrock of the multilateral rules-based order and develop globally coordinated responses with international and regional organisations, states and non-state actors.

[11] Article 5 of the Treaty establishing the European Economic Community (hereinafter only the "TEEC") stipulates: „Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims. They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty. "

[12] Judgment of the Court of Justice of 31 March 1971 No. 22/70 - Commission of the European Communities v Council of the European Communities, para. 17 and 22.

[13] Opinion of the Court of Justice of 19 March 1993 No. 2/91, para. 11

[14] Treaty on European Union as signed in Maastricht on 7 February 1992.

[15] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related act as signed in Amsterdam on 2 October 1997.

At that time, the AETR formula was still applicable. Moreover, the ECJ extended it in Commission v. Denmark judgement[17] by decision, that "*Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules* ". ECJ then emphasized[18] that it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.

The 2001 Treaty of Nice[19] didn´t amend the Article 11 TEU nor the Article 10 TEC (1997).

Finally, the Lisbon Treaty[20] has brought us the recent legislation.[21] Both, the general principle of sincere cooperation and principle of loyalty in CFSP, were established and developed in TEU. Article 4(3) TEU stipulates that the Member States shall take any appropriate measures to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

Pursuant the Article 29 TEU Member States shall ensure that their national policies conform to the Union positions in particular matter of geographical or thematic nature.

Member States are obliged even to adopt any appropriate measures to eliminate incompatibilities arising from (international) agreements concluded before 1958 or before accessing the Union.[22] For effective implementation of Union´s common foreign and security policy, crucial settlement is established in Article 24 (3) TEU: *"The Member States shall support the Union´s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union´s action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations."*

In addition, the Court of Justice of the EU (hereinafter only "CJEU") even decided that the mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty. Moreover, the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Union's interest.[23] That means, that Member state has always duty to take into consideration its commitments within the Union and Union´s interests. This includes the obligation of Member State to consult and coordinate all its positions with the Union before adopting its position within the organization, where the Member State, nor the Union is a member.

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[16] Previous Article J.1 TEU (1992) became an Article 11 TEU (1997) and established: „*The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council shall ensure that these principles are complied with*". Article 5 of the TEEC became an Article 10 of TEC without amendment of its content.

[17] Judgement of the Court of Justice of 5 November 2002 No. C-46798 - **Commission v Kingdom of the European Communities of Denmark, para. 82**

[18] Opinion of the Court of Justice of 7 February 2006 No. 1/03, para. 128

[19] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts as signed in Nice on 10 March 2001 (2001/C 80/01)

[20] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community as signed in Lisbon on 17 December 2007 (2007/C 306/01)

[21] Article 10 TEC (2001) was replaced by an Article 4 TEU and Article 11 TEU (2001) was replaced by an Article 24 TEU.

[22] See an Article 351 of the Treaty on Functioning of the European Union

[23] Judgement of the Court of Justice of the EU of 12 February 2009 No. C-45/09 – Commission **of the European Communities** v Hellenic Republic, para. 30-31.

Do all these rules really mean that Member State must just obey, and in worse case act against its own interests?

3 IMPOSING THE RESTRICTIVE MEASURES AND PRINCIPLE OF LOYALTY

Restrictive measures are an essential tool of the Union´s CFSP. They are used by the Union as part of an integrated and comprehensive policy approach, involving political dialogue, complementary efforts and the use of other instruments at its disposal. Restrictive measures are imposed by the Union to bring about a change in policy or activity by the target country, part of country, government, entities or individuals, in line with the objectives set out in the CFSP Council Decision.

The Council imposes restrictive measures within the framework of the CFSP. The Council first adopts a CFSP Decision under Article 29 of the TEU. The measures foreseen in that Council Decision are either implemented at EU or at national level. Measures such as arms embargoes or restrictions on admission are implemented directly by the Member States, which are legally bound to act in conformity with CFSP Council Decisions. Other measures interrupting or reducing, in part or completely, economic relations with a third country, including measures freezing funds and economic resources, are implemented by means of a Regulation, adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, under Article 215 of Treaty on the Functioning of the European Union[24]. The European Parliament has to be informed. Such Regulations are binding and directly applicable throughout the EU, and they are subject to judicial review by the Court of Justice and the General Court in Luxembourg. CFSP Council Decisions providing for restrictive measures against natural and legal persons are also subject to judicial review[25].

At this point, we need to briefly explain an application of Article 275 TFEU, which excludes *the jurisdiction of the Court of Justice of the European Union in area of CFSP nor with respect to acts adopted on the basis of those provisions.*" The exemption which breaks the rule of article 275 TFEU is set in decision of CJEU Rosneft[26], where the Court held, that "*Articles 19, 24 and 40 TEU, Article 275 TFEU, and Article 47 of the Charter must be interpreted as meaning that the Court has jurisdiction to give preliminary rulings, under Article 267 TFEU, on the validity of an act adopted on the basis of provisions relating to the CFSP, (…), provided that the request for a preliminary ruling relates either to the monitoring of that decision's compliance with Article 40 TEU, or to reviewing the legality of restrictive measures against natural or legal persons."*

But let´s get back to the application of principle of loyalty in imposing of sanctions. As it´s mentioned earlier, the decision on imposing of restrictive measures is adopted by the Council under Article 29 TEU in connection with the Article 31(2) TEU. The quorum for adoption such decision shall be qualified majority. If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.

Lately, hot discussions on imposing sanctions on Russian federation were held. On 3 March 2014, the Council adopted conclusions[27], where the EU strongly condemned "*the clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression by the Russian armed forces".* Due to the illegal annexation of Crimea and the deliberate destabilisation of Ukraine, Union has been progressively imposing variety types of restrictive measures against the Russian federation.

[24] Regulations adopted according the Article 215 TFEU meets the requirement of Article 31(1) TEU (the adoption of legislative acts in CFSP shall be excluded).

[25] Section II.B.7 of Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, No 11205/12

[26] Judgement of the Court of Justice of the EU of 28 March 2017 No. C-72/15 – PJSC Rosneft Oil Company v Her Majesty's Treasury and Others, point 81.

[27] Council conclusions on Ukraine, Foreign Affairs Council meeting, Brussels, 3 March 2014, available at: http://www.consilium.europa.eu/media/28853/141291.pdf

The used sanctions include diplomatic measures[28], individual restrictive measures[29], economic and financial sanctions[30]. All measures against the Russia were imposed promptly in 2014 and have been repeatedly extended in 2015, 2016, 2017 and in 2018, too. At least two countries, respectively their officials publicly presented their dissent with the intention of the EU to impose these sanctions on Russia.[31] Despite the fact that decision on sanctions can be blocked by veto from Member State, or when at least one third of the Member States comprising at least one third of the population of the Union qualify their abstention my making formal declaration and despite the different unofficial statements by the officials of the particular Member States, all restrictive measures were adopted unanimously in first round. Therefore, we can say the loyalty principle was successfully fully applied by all Member States.

4 CONCLUSION

The European Union´s principle of loyalty is developed to such extent, that the Member States´ space for own international action, even in situation, where EU doesn´t take part, is almost not existing.

Following the AETR doctrine, any international action with real or potential implications for the EU´s internal legislation requires the involvement of the Union´s institutions. The consequences may be rather paradoxical. As observed by Van Elsuwege, "without a clear EU mandate, Member States are severely restricted in their possibilities to intervene internationally whereas they remain responsible under public international law. Moreover, the decision-making at the international level may be paralysed as a result of the EU´s inaction".[32]

The motivation of the EU is to protect the unity of Union´s international representation. Unity of EU´s international representation is, as expressed in Article 21 TEU, an instrument to achieve the objectives of the Union external action. Therefore, and in compliance with CJEU case law it appears, that in common foreign and security policy, Member State following the position of the Union, in a spirit of mutual solidarity and loyalty, shall refrain not only from the action in his own interest, but even abide the action against its own interests.

Bibliography:

SCHMIDT, J.: Common foreign and security policy and European security and defence policy after the Lisbon Treaty: Old problems solved? In: Croatian Yearbook of European Law and Policy, 2009 Vol 5, p. 239-259.

VAN ELSUWEGE, P.: The duty of sincere cooperation (Art. 4(3) TFEU and its implications for the national interest of EU Member States in the field of external relations. In: UACES 45th Annual Conference, Bilbao 2015. 13 pages. Available at: https://www.uaces.org/documents/papers/1501/Van%20Elsuwege.pdf

[28] E.g. excluding the Russia from G8 summits, cancellation the EU-Russia summit in 2014, support for suspension of negotiations over Russia´s joining the OECD, etc.

[29] E.g. freeze of the assets and travel ban to natural and legal persons due to their actions which undermined Ukraine´s sovereignty, territorial integrity and independence

[30] E. g. certain Russian banks and companies have limited access to EU capital markets, imposing a ban on trade in arms, suspension of financing operation in Russia from EIB or EBRD.

[31] In connection with adoption of sanctions against Russia, we can review, how Slovak republic (represented by official authorities) complied with the Union action. Slovak republic has been having good relations with the Russian federation for a long time. Therefore, when the discussion on sanctions started, Slovak officials (e.g. prime minister, president of the parliament) continuously had presented their negative standpoints against the sanctions, e.g. https://spravy.pravda.sk/domace/clanok/448573-danko-zamyslam-sa-ci-sankcie-proti-rusku-funguju/ https://www.aktuality.sk/clanok/412668/robert-fico-by-dalsie-sankcie-voci-rusku-uz-nikdy-nepodporil/, https://www.webnoviny.sk/fico-nesuhlasi-sankciami-proti-rusku-ale-nechce-ist-proti-jednote-eu/; https://domov.sme.sk/c/20390225/sankcie-voci-rusku-su-nezmysel-mysli-si-fico.html.

[32] VAN ELSUWEGE, P.: The duty of sincere cooperation (Art. 4(3) TFEU and its implications for the national interest of EU Member States in the field of external relations. In: UACES 45th Annual Conference, Bilbao 2015.p. 13

EUROPEAN EXTERNAL ACTION SERVICE: Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union´s Foreign and Security Policy. Luxembourg, Publication Office of the European Union, 2016. 62 pages. ISBN 978-92-9238-408-1
EUROPEAN COMMISSION: Report from the Commission to the European Parliament, the European Council and the Council. 15th report on relocation and resettlement, COM(2017) 465 final. available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_fifteenth_report_on_relocation_and_resettlement_en.pdf
Treaty establishing the European Economic Community
Treaty on European Union as signed in Maastricht on 7 February 1992.
Treaty on European Union
Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related act as signed in Amsterdam on 2 October 1997.
Treaty on Functioning of the European Union
Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts as signed in Nice on 10 March 2001 (2001/C 80/01)
Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, No 11205/12
Judgment of the Court of Justice of 31 March 1971, No. 22/70. - Commission of the European Communities v Council of the European Communities.
Opinion of the Court of Justice of 19 March 1993 No. 2/91
Judgement of the Court of Justice of 5 November 2002 No. C-46798 - **Commission of the European Communities v Kingdom of Denmark**
Judgement of the Court of Justice of the EU of 28 March 2017 No. C-72/15 – PJSC Rosneft Oil Company v Her Majesty's Treasury and Others

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NATIONAL PARTICULARITIES IN THE ANALYSIS OF ABUSE OF DOMINANT POSITION

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Abstract: Competition law is one of the fields of law which are applied throughout the European Union. Abuse of dominant position, as one of the practices under European competition law, can be applied by national competition authorities of Member States. These authorities can apply national competition law by which the prohibition of abuse of dominant position may be regulated differently. However, in general, both laws are converging which might lead to the opinion that there is no room for taking into account the particularities of Member States. This contribution assumes that this is not the case and that national particularities are relevant for the correct assessment of abuse of dominant position. In this regard, the judgement of the CJEU in the case C-177/16 *AKKA* is considered as well. The aim of this contribution is to show that there is a possibility of considering the particularities of Member States when assessing cases of abuse of dominant positions; and to analyse consequences arising from this fact.

Key words: competition law, abuse of dominant position, copyright management organisation, C-177/16 AKKA

1 INTRODUCTION

A competition law analysis is always complex. Even hard-core restrictions are not applied automatically and certain assessment of elements of market, undertaking at stake, its competitors, prohibited practice and undertaking's defence is, as a rule, required. Abuse of dominant position cases, especially those dealing with excessive pricing, require deep economic analysis with various issues to be taken into account. This paper deals with the question to what extent are these issues country-specific.

The paper presents European competition law as law applied by national and supra-national institutions. It is seen in practice quite often that law applied by various institutions, e.g. various courts within one State, is applied differently. One may wonder how the unified application of European competition law is guaranteed within as many as (for the time being) 28 Member States of the EU. Naturally, the European Commission and the CJEU play vital role within the process of coordination. European competition law and national competition law converge towards each other, resulting in similar application of both laws. However, what if the European position is not so clearly stated? Moreover, what if the field in question is highly specific?

Abuse of dominant position is not the most prominent field of competition law, especially when it comes to excessive pricing. Excessive pricing of copyright management organisations is even more particular and it is quite problematic to establish whether fees charged by copyright management organisations are excessive. Should the analysis also take into consideration national particularities of a Member State where the abuse takes place? And if so, to which extent and with what kind of practical consequences?

In order to answer the questions, the paper is divided into two parts. The first part of the paper presents European competition law, institutions which are entitled to apply this law, as well as the prohibition on abuse of dominant position. The second part focuses on to what extent are national particularities taken into account within competition law analysis in general. Following on that, the paper briefs on copyright management organisations in order to show issues connected with the method of comparison as the prominent method on establishment on excessiveness of fees charged by copyright management organisations. Finally, the paper analyses a recent case C-

177/16 *AKKA*[1] which brought a development on importance of national particularities within the analysis of abuse of dominant position.

2 EUROPEAN COMPETITION LAW

The EU's possibility to act depends on the type of competence it possesses within the relevant field. There are only few fields within which the EU has the exclusive competence, one of them being competition within the internal market. This mere fact presumes the importance of the unified application of competition law for a proper functioning of the internal market. In general, deformations of competition cause problems in economy.[2] Comparing to the situation under perfect competition, in which social welfare is maximised, the situation of monopoly is different, as allocative efficiency is low, meaning that resources in society are in distributed in efficient way.[3] Someone is in lack of widgets, whereas someone else is in surplus of them, and the distribution between the two of them does not take place, or not as efficiently as it could. So called productive efficiency is at low level as well, since the monopolist is not forced to produce the product efficiently.[4]

Thus, the aim of competition authorities is to guard the market and to protect it from competition's deformations. In that way, the market and the *invisible hand* may serve its duty and fulfils the goals of market economy.

As the internal market is supposed to be *internal* indeed, it is natural that deformations in competition cross the borders of individual Member States and they may be spread around the EU. That is one of the reason why the protection of competition is better off when it is governed by more or less identical rules throughout the internal market. Nevertheless, national law as well as national competition authorities play vital role in the application of European competition law.

2.1 Application of European Competition Law

Several important issues should be borne in mind in relation to the application of competition law in the EU. The first one deals with the question: when does EU competition law applies?

In general, EU competition law is directly applicable and it has direct effect.[5] However, the existence of common competition rules does not preclude the existence of national competition rules. Recital 9 of Regulation 1/2003 states, that implementing of national legislation on the territory of a Member State is not precluded which protects legitimate interests other that the protection of competition on the market, if, however, this national legislation is in line with provisions of EU law.

Recital 8 explains the need to apply EU competition law together with national law in cases where trade between Member States may be affected. In this manner, the effective enforcement of the European competition rules should be ensured. Further rules on coexistence of national competition law with the European one is captured in Article 3. The compulsory application of Article 102 prohibiting abuse of dominant position with national law is expressed in para 1 of the Article. Certain leeway is given to Member states as regards unilateral conducts, their prohibition and sanctioning. Member States are not precluded from adopting and applying national laws more restrictive than European laws.

Hence, once the requirement of effect on trade between Member States is fulfilled, European competition law shall be applied.[6] National law may be applied simultaneously, but it cannot be stricter, i.e. prohibiting practices which are not prohibited by European competition law, unless unilateral practices are at stake.

The second issue is related to the question: which authority is competent for the application of EU competition law? The answer differs depending on which area of competition law is at stake. As this contribution deals with abuses of dominant position, it is appropriate to focus on this practice.

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[1] Case C-177/16 *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome* [2017]

[2] See, e.g. TOKÁROVÁ M. Protimonopolná politika, p. 82-105.

[3] WHISH R., BAILEY D., p. 3-7.

[4] NIELS G., JENKINS H., KAVANAGH J. Economics for Competition Lawyers, p. 13, 14.

[5] CHALMERS D., DAVIES G., MONTI G. European Union Law, p. 989.

[6] KALESNÁ K., BLAŽO O. Zákon o ochrane hospodárskej súťaže. Komentár, p. 7-10.

It flows from Regulation 1/2003[7] that the exact distribution of cases between national competition authorities[8] on the one hand and the European Commission on the other is not a clear cut. The core part of the distribution system is captured in Article 11 para 6 of Regulation 1/2003. If the Commission commence a proceeding in a case, national competition authorities are deprived of their competence to apply the EU rules on abuse of dominant position regarding that case. If a national competition authority already started the proceeding, the Commission would start its proceedings only after consulting the national competition authority.

Moreover, it is stated in Regulation 1/2003 that national competition authorities shall cooperate with the Commission when the application of abuse of dominant position is at stake;[9] and that they shall consult with the Commission every case concerned with the EU law.

EU competition law may also be applied by the national courts. This situation is explicitly regulated by Article 6 of the Regulation 1/2003. When in doubt, national courts are entitled to ask a preliminary question to the Court of Justice of the EU under Article 267 TFEU, as well as to ask the Commission to given its opinion on questions concerning the application of competition rules under Article 15 of Regulation 1/2003.

2.2 Abuse of dominant position

Competition law is dealing with four basic practices: abuse of dominant position; agreements restricting competition; mergers; state aid. The legal basis for the first mentioned is Article 102 TFEU. Even though it does not provide a definition for the term *dominant position*, it does make clear that mere dominant position is not illegal; what is illegal is its abuse.

Conditions, which subsume an undertaking under the term of *dominant position,* were provided by case law of the Court of Justice of the EU. The Court ruled in the notoriously known case 27/76 *United Brands*[10] that the dominant position "*relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*." Basically, dominant position can be related to the market power of an undertaking.[11] To establish a dominant position may be a tricky task to do, as it is depending on defining of relevant market, market share of the undertaking on that market, as well as various other factors which should be taken into account.

Moving on, once the dominant position is established, it is necessary to find out whether the practice committed by the undertaking is abusive or not. To be a dominant undertaking is not an abuse in itself. However, dominant undertakings have special responsibility not to disturb the competition on the market.[12] Article 102 TFEU provides an exemplificative list of abuses, however, many possible abuses are not there.

In theory, abuses of dominant position are divided into two groups: exclusionary practices and exploitative practices. The former refers to situations when a dominant undertaking may exclude competitors or other undertakings from the market; it prevents the development of competition. The latter covers situations where a dominant undertaking abuses its position in such a way that it charges price above competition level. Hence, the customers need to pay more for the product than they would pay in a competitive environment. This type of abusive practice is usually at the bottom of competition authorities' enforcement priority lists, as it is assumed that when there is no foreclosure on the market, possibility to earn above-competition profits attracts new undertakings to the market.[13] However, there are still markets vulnerable for exploitative abuses, as will be presented later in this contribution.

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[7] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002].

[8] National competition authorities shall have power to take decisions requiring that an infringement is brought to an end; ordering interim measures; accepting commitments; imposing fines and other penalties. See: Article 5 of Regulation 1/2003.

[9] Article 11, para 1 of Regulation 1/2003.

[10] Case 27/76 United Brands Company and United Brands Continentaal BV v Commission [1978].

[11] WHISH R., BAILEY D. Competition Law, p. 180.

[12] Case 322/81 NV Nederlandsche Banden Industrie Michelin v Commission [1983], para.

[13] WHISH R., BAILEY D. Competition Law, p. 201.

3 NATIONAL PARTICULARITIES UNDER EUROPEAN COMPETITION LAW

As it flows from the system of protection of competition on the internal market presented above, European and national competition law tend to converge towards each other. Although there is a possibility for national law to prosecute unilateral behaviour unprosecuted by European law, the question remains how much room is left for considering national particularities under European competition law analysis.

First, it is clear that national particularities are to be analysed when defining and describing the relevant market. Once the borderlines of the relevant product and geographical market are settled, it is necessary to analyse the market as to market players present on the market, their market shares, barriers to entry and other relevant factors which need to be taken into account in the competition law analysis.

Second, apart from the relevant market considerations above, the competition law analysis should, in general, be applied in the same manner throughout the EU. Under the same condition, an abusive conduct should be considered as abusive, no matter where, within the EU, it takes place. This should be safeguarded by

None the less, this statement is a little bit more problematic when it comes to exploitative practices. As a rule, competition authorities use cost-based analysis in order to establish that the prices of a dominant undertaking are excessive.[14] Although such analysis is not an easy task to do, the situation is even more difficult when the cost-based analysis cannot be done at all. This might be the case when intellectual property rights are at stake. Quite a number of articles have been dedicated to answering a question on how to establish that the fee for licencing of a patent is excessive.[15] As we presented on another forum,[16] the situation is even more difficult when it comes to exploitative practices of copyright management organisations.

This contribution zooms in on national particularities in the analysis of abuse of dominant position. For this aim to be fulfilled, it is apt to choose one particular area of competition law which serves as an example. As will flow from the text below, area of copyright management organisations is particularly suitable for this purpose, especially in the light of the recent case-law of the CJEU.

2.1 Copyright Management Organisations

Intellectual property rights may be divided into several categories. Industrial property rights, trademarks, trade secrets and copyrights are the ones most prominent. The last mentioned differs from the rest of the group in various aspects. For example, there are organisations, partially empowered by States, which govern and manage copyrights from almost all copyright holders and give licence to users of the works. In such manner, users do not have to negotiate separately with each copyright holder, which would be impossible when we consider how many copyright works are used during an hour of a television program.

Copyright management organisations are appointed by copyright holders in order to manage their copyrights. They licence copyright works, collect licence fees (royalties), distribute the royalties to copyright holders, monitor the use of works etc.[17]

As a rule, there is one copyright management organisation per State per type of copyright work. For instance, SOZA will manage copyright works related to music works;[18] LITA will manage

[14] See, for instance Case 27/76 United Brands Company and United Brands Continentaal BV v Commission [1978], para 251.

[15] See, for instance: BELLIS J.-F. IP and Competition, p. 113-121; MARINIELLO M. Fair, Reasonable and Non-discriminatory (FRAND) Terms: a Challenge for Competition Authorities, p. 523-541; SIDAK J. G. The Meaning of FRAND, Part I: Royalties, p. 931-1055.

[16] 20th International Scientific Conference *Enterprise and Competitive Environment* 2017, 9th – 10th March 2017, Mendel University in Brno, Czech Republic. I gave a lecture on topic *Application of FRAND terms to the Collecting Societies*. The lecture given on the conference was, after substantive amendments, published in article PATAKYOVÁ M.: How to Assess the Expoitative Practices of Collecting Societies? Taking Inspiration from FRAND Terms. IN: European Competition and Regulatory Law Review. 2017 1(4), p. 306-319.

[17] LITA: Aké služby LITA poskytuje autorom a používateľom? [online, 2018-02-18]. Dostupné na: http://www.lita.sk/co-robi-lita/

copyright works related to literal, dramatic, visual and audio-visual works.[19] In such a manner, a copyright management organisation holds a dominant position on the particular market. In this environment, copyright management organisations may dictate the conditions under which copyright users will need to licence copyright works; which may result into abusive behaviour of copyright management organisations by charging of excessive prices. As suggested above, it is difficult to establish when the licence fees charged by copyright management organisations are abusive, a fact to certain extent caused by the national particularities on relevant market of each Member State.

2.2 Comparison between Member States

As to the question on how to establish whether the licence fees charged by copyright management organisations are excessive or not, the CJEU suggested in various cases that a method of comparison between the Member States is the prominent one. To name but a few, this method was used or suggested in *Basset*,[20] *Lucazeau*[21] and more recently in *OSA*[22]. However, what appears to be problematic is the likeliness to overlook the particularities of each Member State. If the numeric value of rates, let us say a percentage of turnover of a company, was compared between the Member States, the rate x from a company's turnover might be appropriate in the Member State A, whereas the same rate x from a company's turnover might be inappropriate, even excessive, in the Member State B. Reasons for that might be various. First, the particular segment in the Member State A might be well developing which results in higher profitability of companies in this Member State. This would mean that companies have more resources from which they might pay licence fees. Second, other fees, such as taxes and local fees might be low-level which results, again, in higher profits. Third, general costs of operation should be taken into account, as them being low-level, companies may be more profitable while having the same turnover.

Thus, it is clear that national particularities should be borne on mind while conducting a competition law analysis of a potential abuse of dominant position of a copyright management organisation. To what extent it shall be done so was clarified in the case *AKKA* presented below.

2.3 C-177/16 *AKKA* – Facts of the Case

The Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība (hereinafter referred as "*the AKKA*") was the only collective management organisation handling copyright for musical works. In 2008, the Competition Council, the Latvian competition authority, imposed a fine on AKKA for charging excessive license fees and thus abusing its dominant position. After adopting new tariffs in 2011, the AKKA commenced a new procedure for abuse of dominant position. To establish the excessiveness of the rates, the Competition Council compared the rates with other two Baltic States, Estonia and Lithuania. It flows from the case that the Latvian rates were not higher in general, but for particular criteria there were two to three times higher than those applied in the other two Baltic States.[23]

Moreover, the Competition Council compared the rates in approximately 20 other Member States by using the purchasing power parity index ("PPP index"). Latvian AKKA exceeded the average level of the rates charged in those other Member States by 50% to 100%.[24]

2.4 C-177/16 *AKKA* – Ruling of the CJEU

The Latvian Supreme Court, Administrative Cases Division, was hearing the case when it asked a preliminary ruling question to the CJEU. Various interesting points may be found in the

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[18] SOZA: Čo je SOZA. [online, 2018-02-18]. Dostupné na: http://www.soza.sk/stranka/co-je-soza

[19] LITA: Základné dokumenty. [online, 2018-02-18]. Dostupné na: http://www.lita.sk/zakladne-dokumenty/

[20] 402/85 *G. Basset v Société des auteurs, compositeurs et éditeurs de musique (SACEM)* [1987]

[21] Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989]

[22] C-351/12 *Ochranný svaz autorský pro práva k dílum hudebním o.s. v Léčebné lázně Mariánské Lázně a.s* [2014]

[23] C-177/16 AKKA, para 9.

[24] C-177/16 AKKA, para 10.

answer of the Luxembourg court. We will focus on the ones relevant for our discussion on assessment of national particularities.

By its second and third question, the Latvian court asked whether it was appropriate to compare its rates with those applicable in the neighbouring States as well as with those applicable in other Member States, adjusted in accordance with the PPP index. After ensuring that AKKA is an undertaking within the concept of European competition law and that it holds a dominant position on market, the Court rules that "*according to the case-law of the Court, a method based on a comparison of prices applied in the Member State concerned with those applied in other Member States must be considered valid*".[25] Imposing scales of fees appreciably higher than the fees charged in other Member States is an indication of an abuse of a dominant position. However, this comparison must be done on a consistent basis, which is left for national courts to be verified.[26]

As to the number of Member States which are to be compared, the CJEU rules that "*a comparison cannot be considered to be insufficiently representative merely because it takes a limited number of Member States into account*".[27] Once again, the choice of Member States should not be done arbitrarily; they should be selected in accordance with objective, appropriate and verifiable criteria.[28] The Court goes further as it states that these criteria might include e.g. "*consumption habits and other economic and sociocultural factors, such as gross domestic product per capita and cultural and historical heritage*".[29] Once again, the CJEU leaves the assessment of the fulfilment of the criteria for national courts.[30]

In relation to the PPP index, it was stated by AG Wahl and confirmed by the Court that, due to significant differences in price levels between Member States, the ability of a copyright user to pay a fee is influenced by living standards and purchasing power. Hence, it is necessary to bear in mind the PPP index.[31]

2.5 C-177/16 *AKKA* – Good News or Bad News?

It flows from the ruling described above that the CJEU stressed the importance of national conditions for the analysis of abuse of dominant position of copyright management organisations. Therefore, national competition authorities and national courts should, first, choose Member States suitable for comparison based on objective criteria. This inherently means that they will need to consider the national particularities of the selected Member States.

Second, once the selection is done, it is necessary to compare fees while considering differences in living standards and purchasing power between the selected Member States.

Third, while comparing the fees within various Member States, one cannot omit that there are substantial differences not only in the purchasing power and living standards, but also in more prosaic matters. The method of calculation of fees divers throughout the Member States. It is also uneasy to identify the scope of a fee, as it is possible that one copyright management organisation charges fees also on behalf of another copyright management organisation. Moreover, the type of copyright protected by a particular copyright management organisation varies substantially, especially when it comes to copyright works other than music works.

Thus, is the ruling of the CJEU a good move? The answer is not a clear cut. It should be highly appreciated that the Court shed more light on the method of comparison between Member States. The comparison of fees between Member States shall not be done automatically and without consideration. It is sensible to take into account all relevant aspects, national particularities of Member States included. However, there is a real threat that the selection of Member States and the comparison of fees between them may be impossible in practice, as there are always arguments why a State is or is not similar with another State. It is easy to say that the selection of Member States should be done in accordance with *objective, appropriate and verifiable criteria*, however,

[25] C-177/16 AKKA, para 38.
[26] C-177/16 AKKA, paras 44, 45.
[27] C-177/16 AKKA, para 40.
[28] C-177/16 AKKA, para 41; Opinion of Advocate General Wahl delivered on 6 April 2017, point 61.
[29] C-177/16 AKKA, para 42.
[30] C-177/16 AKKA, para 43; Opinion of Advocate General Wahl delivered on 6 April 2017, point 64.
[31] C-177/16 AKKA, paras 45, 46, Opinion of Advocate General Wahl delivered on 6 April 2017, point 85.

what does this mean in practice is left for national institutions to establish. Plus, to establish the PPP index and to compare fees on a consistent basis, all these aspects require sophisticated analyses which may hardly be conducting without questions. Economic analyses differ one from another, left alone the evolution in economics and problem of gathering of correct data.[32] All in all, it is possible that the requirement to take into account national particularities in too much of detail and without a further guidance may result in significant problems with practical use of the method of comparison.

3 CONCLUSION

The assessment of a competition law case is always a one-time activity. From the definition of a relevant market to the assessment of defences of an undertaking, everything in the assessment of a competition law case is highly case-specific. However, as to the question on whether these particularities are also related to Member States per se, one would assume that this is not the case due to the existence of internal market.

Yet, there is an area of competition law where national conditions are more relevant than elsewhere. Case C-177/16 *AKKA* proves how important is to take into account national particularities of Member States while establishing excessive royalties of copyright management organisations by a method of comparison between Member States. Not to turn a blind eye on differences between Member States is a sensible thing to do, however, one should be aware of taking into account too many aspects as it can result in calculation being unpractical and even impossible. Hence, consequences streaming from analysing national particularities within abuse of dominant position analyses are double-edged. On the one hand, the more aspects are considered, the more accurate the analysis is. On the other hand, the more aspects are considered, the more complex (and unclear) the analysis is. A balance between these two should be established. Because of this, a further clarification from the CJEU may be expected.

Bibliography:

BELLIS J.-F.: IP and Competition. In: Journal of European Competition Law & Practice, 2014, vol. 5, No. 2, p. 113-121.
CHALMERS D., DAVIES G., MONTI G.: European Union Law. 3.th edition, reprinted. Cambridge: Cambridge University Press, 2015. 1114 pages. ISBN 978-1-107-66434-0.
KALESNÁ K., BLAŽO O.: Zákon o ochrane hospodárskej súťaže. Komentár. 1st edition. Praha: C. H. Beck, 2012. 424 pages. ISBN: 978-80-7400-257-1.
LITA: Aké služby LITA poskytuje autorom a používateľom? [online, 2018-02-18]. Dostupné na: http://www.lita.sk/co-robi-lita/.
LITA: Základné dokumenty. [online, 2018-02-18]. Dostupné na: http://www.lita.sk/zakladne-dokumenty/.
MARINIELLO M.: Fair, Reasonable and Non-discriminatory (FRAND) Terms: a Challenge for Competition Authorities. In: Journal of Competition Law & Economics, 2011, vol. 7, No. 3, p. 523-541.
NIELS G., JENKINS H., KAVANAGH J.: Economics for Competition Lawyers. 2nd edition. Oxfrord: Oxford University Press, 2016. 508 pages. ISBN 978-0-19-871765-2.
PATAKYOVÁ M.: How to Assess the Expoitative Practices of Collecting Societies? Taking Inspiration from FRAND Terms. In: European Competition and Regulatory Law Review, 2017, vol 1, No. 4, p. 306-319.
SIDAK J. G.: The Meaning of FRAND, Part I: Royalties. In: *Journal of Competition Law & Economics*, 2013, vol. 9, No. 4, p. 931-1055.
SOZA: Čo je SOZA. [online, 2018-02-18]. Dostupné na: http://www.soza.sk/stranka/co-je-soza
TOKÁROVÁ M.: Protimonopolná politika. 2nd edition. Bratislava: SPRINT, 2008. 123 pages. ISBN 978-80-89085-98-9.

[32] "[W]*hen competition economists disagree it is mostly about how a particular theory has been applied to the particular facts of the case, and how case-specific data has been analysed*". See NIELS G., JENKINS H., KAVANAGH J.: Economics for Competition Lawyers. 2nd edition. Oxfrord: Oxford University Press, 2016. 508 pages. ISBN 978-0-19-871765-2, p. 5.

WHISH R., BAILEY D.: Competition Law. 7th edition. Oxford: Oxford University Press, 2011. 1015 pages. ISBN 978-0-19-958655-4.

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EUROPEAN SOLIDARITY WITH CONNECTION TO MIGRATION CRISIS – POLISH LEGAL MEASURES VS POPULIST MORALITY

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Abstract: In this paper we would like to show how the main issues (asylum and refugee status) connected to migration are constitutionalize. The constitutional provisions and implemented international agreements as well as binding statutes give the broad scope of guarantees to people in special circumstances. However, since 2015 the attitude of Polish government has become strict and non-friendly for people seeking a shelter abroad in peaceful space of EU. Such populist morality is in sharp contrast with solidarity value and brings obvious European reaction. Nevertheless, European Union as whole safer from crisis. In consequence, its opinion is not a monolith. One can say that European countries speak different languages (e.g. Donald Tusk opinion on relocation of refugees).

Key words: migration crisis**,** European solidarity**,** asylum in Poland**,** refugee status in Poland.

1. INTRODUCTION

An increased influx of refugees and immigrants to the Mediterranean countries and their uncontrolled flows into the continent has led to the thus far largest migration crisis in the European Union. Its first phase began in 2011 directly following the events of the so-called Arab Spring. The next stage, and at the same time the peak, was observed in 2015 due to the escalation of the war conflict in Syria, the growing expansion of the so-called Islamic State in the Middle East and the intensification of the armed conflict in Ukraine[1]. The migration crisis is also accompanied by a significant rise in anti-immigrant attitudes in European societies and slogans calling for attempts to reduce immigration by the Member States. Proponents of such views invoke an increase in the terrorist threat which, in their opinion, accompanies the significant influx of immigrants, as well as the negative impact of foreigners on the labour market and the availability of social benefits in destination countries[2]. In this paper we would like to show how the main issues (asylum and refugee status) connected to migration are constitutionalize. The constitutional provisions and implemented international agreements as well as binding statutes give the broad scope of guarantees to people in special circumstances. However, since 2015 the attitude of Polish government has become strict and non-friendly for people seeking a shelter abroad in peaceful space of EU. Such populist morality is in sharp contrast with solidarity value and brings obvious European reaction. Nevertheless, European Union as whole safer from crisis. In consequence, its opinion is not a monolith. One can say that European countries speak different languages (e.g. Donald Tusk opinion on relocation of refugees).

This paper is structured as follows: firstly, special attitude towards EU migration crisis, EU reaction and its effectiveness will be elaborated (II). Next to it, Polish legal (constitutional) measures

[1] DIMITRIADI A., Deals without borders: Europe's foreign policy on migration, „Policy Brief", European Council on Foreign Relations, 04.04.2016, pp. 2-4.

[2] SADOWSKI P., Kryzys migracyjny [Migration crisis], [in:] Sytuacja demograficzna Polski: raport 2015-2016 [Poland's demographic situation: report 2015-2016], eds. A. Potrykowska, M. Budziński, Warszawa 2016, p. 213-215.

in the scope of migration will be presented (III). Than the populist morality as a background of reluctance will be described (IV). Finally, the findings will be summarized in a brief manner (V).

2. MIGRATION CRISIS WITHIN THE EU AND THE EU REACTION

The development of the migration situation has forced the Union to take urgent anti-crisis measures. The first impulse for action is the reform of the Common European Asylum System. In December 2011, a directive specifying the standards for qualifying foreigners as beneficiaries of international protection, granting a refugee status and subsidiary protection was adopted [3]. In turn, in June 2013, a package of three documents was adopted[4]. Those documents clarify the rules for the determination of the Member State responsible for examining asylum applications, and establish at the same time early warning mechanisms and management of asylum crises[5]. However, the reform did not change the principle of the system itself, leaving the greatest responsibility for the processing of asylum applications in the hands of states whose borders constitute the external EU border. The launch of the European Asylum Support Office (EASO) has also strengthened the Common European Asylum System[6]. Among anti-crisis initiatives, the one instigating most excitement and controversy was the reform related to the governance of the Schengen area. The debate on the shape of the project revealed discrepancies between the Member States, and also strengthened the tensions between the intergovernmental and the EU institutions[7]. While the European Commission promoted the European approach, ensuring reinforcement of the integrity of the Schengen area as a whole and reduction in state arbitrariness when deciding to temporarily reintroduce border controls within the zone, many countries (headed by Germany and France) advocated the loosening of the agreement. As a result, after a two-year battle, a new mechanism was established to assess and monitor the application of the Schengen acquis in the Member States[8].

One of the first initiatives of the European Commission under the anti-crisis strategy was also the proposal to relocate some of the refugees arriving to the Member States in the south of Europe. The Commission decided to apply an extraordinary procedure provided for in Article 78

[3] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, p. 9–26).

[4] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L 180, 29.6.2013, p. 31–59); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60–95); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29.6.2013, p. 96–116).

[5] POTYRAŁA A., Kryzys uchodźczy a przyszłość unijnego systemu azylowego [Refugee crisis and the future of the EU asylum system], [in:] Uchodźcy w Europie. Uwarunkowania, istota, następstwa [Refugees in Europe. Conditions, essence, consequences], eds. K.A. Wojtaszczyk, J. Szymańska, Warszawa 2016, pp. 159–164.

[6] The government office was to grant support and coordinate the countries whose asylum and reception systems were under particular pressure. See IVANOV D., Towards a reform of the Common European Asylum System, „At a glance", European Parliamentary Research Service, May 2016.

[7] KACA E., Schengen's Future in Light of the Refugee Crisis, PISM Strategic File 2(84)/2016, Polski Instytut Spraw Międzynarodowych, 12.02.2016.

[8] They made it possible to restore border controls within the zone – in the case when one of the states does not fulfil the obligation to protect the external Schengen border and thus puts the safety of the entire zone at risk – for the period of up to six months with the possibility of extension to a maximum of two years. See GHIMIS A., Migration Panorama. Schengen in the spotlight: a Europe with or without borders?, European Policy Centre, 12.04.2016.

Sec. 3 TFEU[9] to launch the programme of distribution of 40,000 asylum seekers coming to Greece and Italy among the other Member States. The admission of migrants under the programme was to be compulsory, and their number depended on the country's population (40% weight), GDP (40% weight), unemployment rate (10% weight) and the number of previously processed asylum applications (10% weight)[10]. The draft of the compulsory relocation programme was strongly criticised by many countries. The countries of the Visegrad Group were the most articulate in this regard[11]. As a result, at the 2015 European Council summit in Brussels, the leaders did not agree to the introduction of mandatory quotas in the relocation programme[12]. Due to the deepening migratory pressures and problems in reaching an agreement on the distribution of refugees based on voluntary declarations, in September 2015 the Commission returned to the concept of an obligatory system refugee allocation, proposing the second extraordinary refugee relocation programme[13]. Ultimately, despite the opposition of the Visegrad Group countries, on 22 September 2015, a decision on this matter was passed[14]. In the first half of 2016, the European Commission presented a comprehensive draft reform of the Common European Asylum System[15]. The most controversy was raised by the proposal to reform the Dublin system. The so-called Dublin+ project assumed an automatic relocation of persons applying for protection in the EU in the situation of an increased migratory pressure. Pursuant to it, objective data regarding the size of countries and the level of their well-being were to determine the overload of asylum systems[16]. The idea of the European Commission met with open criticism of the Visegrad Group countries, which in the autumn of 2016 proposed an alternative concept of the so-called effective solidarity[17]. According to the draft, the EU member states would themselves decide on the form of their support – apart from relocations from the most heavily burdened countries, these could include financial contributions, an increased involvement in the work of EU agencies, taking responsibility for organising the return of illegal immigrants or the joint carrying out of asylum procedures[18].

Representatives of the European Commission and countries advocating the admission of immigrants emphasise the need to fulfil international obligations. This concerns in particular the implementation of the provisions of the Convention on the Status of Refugees of 1951 and the Complementary Protocol of 1967, to which all European Union Member States are party[19]. The position presented by the European Commission and the states advocating a solidarity approach to

[9] DENNISON S., JANNING J., Bear any burden: How EU governments can manage the refugee crisis, „Policy Brief", European Council on Foreign Relations, 28.04.2016.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, C0M(2015) 240 final, 13.05.2015, Brussels. See also SZYMAŃSKA J., Strategia Unii Europejskiej wobec kryzysu migracyjnego: priorytety, bariery, efekty [EU strategy to tackle the migration crisis – priorities, barriers and outcomes], Studia BAS 3(51)/2017, pp. 166-167.

[11] ANGENENDT S., Border Security, Camps, Quotas: The Future of European Refugee Policy?, „SWP Comment" 2016/C 32, Stiftung Wissenschaft und Politik, June 2016.

[12] ORAV A., First measures of the European Agenda on Migration, „Briefing", European Parliament - European Parliamentary Research Service, 17.06.2015.

[13] SZYMAŃSKA J., op.cit., pp. 164–167.

[14] Communication to the European Parliament, the European Council and the Council. Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, C0M(2015) 490 final, 23.09.2015, Brussels.

[15] See Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Brussels, 13.7.2016 COM(2016) 467 final 2016/0224 (COD).

[16] SZYMAŃSKA J., op.cit., pp. 168-169.

[17] MALMERSJO G., REMÁČ M., Regulation 604/2013 (Dublin Regulation) and asylum procedures in Europe, „Briefing", European Parliamentary Research Service, April 2016.

[18] Effective solidarity: a way forward on Dublin revision, http://statewatch.org/news/2016/nov/eu-council-slovak-pres-non-paper-dublin-effective-solidarity-11-16.pdf.

[19] POTYRAŁA A., W poszukiwaniu solidarności. Unia Europejska wobec kryzysu migracyjnego 2015 [In search of solidarity. The European Union on the migration crisis of 2015], Przegląd Politologiczny 4/2015, pp. 44-45.

the crisis can be justified by recalling the concepts of responsibility, solidarity and morality. The concept of responsibility is based on the conviction that fulfilling legal and international provisions adopted for the purpose of regulation of relations between members of an international community is the subject of common concern for states, international organisations and other participants in international relations. In their activities they should not be guided only by their own particular interests but strive to implement the principles of international cooperation, as well as protect human rights. Solidarity, on the other hand, is the basic value on the grounds of which the international community should deal with the challenges and problems of the modern world. Solidarity refers to shared responsibility based on the principles of equality and social justice. The concept of morality (ethical action in international relations) is equally important. Indeed, the European order is founded on moral standards and ethical values. Therefore, the aim of the European Union and the Member States cannot only be to strive to guarantee our own security but to seek to strengthen the security while respecting the legal norms regarding asylum and the value of respect for human life.

However, Polish and other V4 countries approach towards solidarity is rather distinct. In combination with populist morality (point IV) such approach not only breaches EU law but ruins common values as well.

3. POLISH MIGRATION MEASURES

Since the beginning of the 1990s we have observed a significant inflow of foreigners into the territory of the Republic of Poland. Because of this process, Poland has transitioned from an emigration state into an emigration-immigration state. Among foreigners arriving in Poland there are also those who seek permanent protection in the form of the refugee status or asylum. The migration situation in Poland is still characterised by an increased inflow of citizens of Ukraine, as well as an increase in the number of applications for granting international protection submitted by citizens of Russia (90% of them declare the Chechen nationality), Georgia, Tajikistan and Armenia[20]. In concord with the effective constitutional regulation, foreigners are allowed to take advantage of the right to asylum in the Republic of Poland on the conditions set out in the act. A foreigner seeking protection against persecution, on the other hand, may be granted the status of a refugee pursuant to effective international agreements to which the Republic of Poland is a party. For the above reasons, there was a need to create efficient mechanisms for the prevention of illegal immigration, and at the same time ensure proper protection for persons who found themselves in a particularly difficult position due to the situation prevailing in the countries of their origin.

The Polish Constitution does not define "the right of asylum." The principle of defining this term is also absent in regulations of statutory ranking. Although art. 90(1) of the June 13, 2003 Act on granting protection to foreigners within the territory of the Republic of Poland does not specify the principle of the right of asylum, it indicates that a foreigner may be granted asylum in the Republic of Poland at his/her application when it is necessary to provide them with protection and when the vital interest of the Polish state so requires. The above provision indicates two conditions whose simultaneous fulfilment enables granting a foreigner asylum in the territory of Poland[21].

In relation to the subjects who may take advantage of the right of asylum the term "foreigners" is applied in art. 56(1) of the Polish Constitution. However, the legislator failed to include in the Constitution its own definition of the term "foreigners", which makes it legitimate to refer to the understanding of the analogous term used in the act on foreigners. Pursuant to art. 3(2) of the act on foreigners[22] this term refers to all persons who do not possess Polish citizenship. Thus, the right of asylum applies both to citizens of foreign countries as well as stateless persons. Such a definition of the personal scope of the analysed guarantee is compatible with the international commitments of the RP. A person interested in obtaining asylum should personally file a suitable application to initiate proceedings in this matter. Moreover, foreigners may also apply for asylum for their minor

[20] See Lists of proceedings conducted against foreigners in 2010-2015 - http://udsc.gov.pl/statystyki/raporty-okresowe/zestawienia-roczne/ (16.12.2016).

[21] SKRZYDŁO W., Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], Warszawa 2013, p. 67.

[22] Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach, Dz. U. z 2017 r. Poz. 2206, 2282.

children dependent on them and unmarried, as well as spouses being their dependants and their unmarried children[23].

In comment to art. 56(1) of the Polish Constitution we may assume that the right of asylum involves providing shelter in the territory of the Republic of Poland to a person who is not in possession of the Polish citizenship, consisting in the right of entry and permanent residence in this territory on conditions laid down in the act whilst respecting regulations of the binding international agreements. The thus understood asylum is sometimes referred to in the literature of the subject matter as a territorial asylum (as opposed to diplomatic asylum)[24]. By granting asylum to a foreigner, the Republic of Poland assumes sovereign power over the applicant and obligates itself to grant him/her a broader scope of protection than that guaranteed to other foreigners remaining in the territory of Poland. The manifestation of a special protection connected with obtaining the right of asylum consists in the limitations regarding surrender under extradition, surrender on the basis of a European arrest warrant and administrative regulations. A foreigner who had been granted the right of asylum in the Republic of Poland may settle in Poland permanently, has the right of entry and the right of legal residence in the territory of the Republic of Poland. What needs to be emphasised is the fact that a person with asylum obtains the right to settle in Poland, whereas that with the status of a refugee obtains only an authorisation to reside in Poland over a defined period of time.

Moreover, from art. 56(1) of the Polish Constitution it also stems that granting of asylum belongs to the prerogatives of the state, which means it remains facultative even when the conditions formulated in that provision are met. Such a standpoint was presented also by the District Administrative Court in Warsaw in the judgement of January 29, 2008 stating that the decision to grant asylum is arbitrary and belongs to the exclusive competence of the state[25]. Decisions in the matters of asylum are issued by the Head of the Office for Foreigners with the approval of the minister responsible for foreign affairs. The person whom the decision concerns may appeal it to the Refugee Board. Its decisions, on the other hand, may be brought before the administrative court.

Whereas the status of a refugee, according with the international agreements to which the Republic of Poland is a party, may be granted to a foreigner seeking protection from persecution. The basic law does not define the term "refugee", therefore it is necessary to refer to the statutory definition. Pursuant to the provisions of art. 13 of the act on granting protection to foreigners within the territory of the Republic of Poland[26] the status of a refugee is granted if, as a result of a justified threat of persecution in the country of origin due to race, religion, nationality, political opinion or membership of a particular social group he/she is unable or unwilling to avail himself/herself of the protection of that country, however the said persecution must: (1) due to its nature and repeated character constitute a gross violation of human rights, in particular the rights from which derogation cannot be made under art. 15(2) of the ECHR; or (2) constitute an accumulation of various measures, including violations of human rights which are equally acute as the persecution specified in art. 13(3)(1).

In the light of the analysed statutory regulation, persecution may in particular consist in: the use of physical or psychological violence, including sexual violence; the use of legal, administrative, police or judicial measures in a discriminatory manner or with a discriminatory character; initiation or conducting penal proceedings or penalisation in a manner that is disproportionate or discriminatory; lack of the right to appeal to a court a punishment of a disproportionate or discriminatory character; initiation or conducting penal proceedings or a punishment for refusal to perform military service in a conflict, where performing military service would include crimes; measures directed against persons due to their gender or minority. The provisions of the act on granting protection to foreigners within the territory of the Republic of Poland and the regulations resulting from the act must not introduce additional requirements for granting the refugee status beyond those provided for in the Geneva

[23] See also BIAŁOCERKIEWICZ J., Status prawny cudzoziemca w świetle standardów międzynarodowych [The legal status of a foreigner in the light of international standards], Toruń 1999, pp. 151-155.

[24] BANASZAK B., Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], Warszawa 2012, p. 339.

[25] District Administrative Court in Warsaw judgment of 29 January 2008, no. V SA/WA 2289/07.

[26] Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej, Dz. U. z 2018 r. poz. 51, 107.

Convention. In this place we should note the judgement issued by Supreme Administrative Court on February 2, 2000, which in the context of the act on refugees states that in the determination of the substantive conditions justifying a refusal to grant the refugee status to a foreigner, the acts refers to the Geneva Convention and the New York Protocol and does not allow for the imposition of additional requirements. Article 56(2) of the Polish Constitution, on the other hand, stipulates that applying for the refugee status is conducted in concord with international agreements to which the Republic of Poland is a party. Such an interpretation applied to regulations of a statutory character would be unacceptable, including in particular the provisions of the act on foreigners, as it would contradict the provisions of art. 9 and 91(2) of the Polish Constitution prioritising international law over internal law, as well as art. 56(2) of the Polish Constitution, which provides for the granting of the refugee status "in accordance with international agreements to which the Republic of Poland is a party"[27]. It is worth pointing out the standpoint of Supreme Administrative Court, which noted that the right to obtain the refugee status "to the extent provided for in the Geneva Convention takes on a character of a constitutional right, which may be subject to limitation solely by statute and exclusively due to reasons specified in art.31(3)"[28].

As it is the case with the right of asylum, the burden to prove the existence of circumstances justifying granting of the refugee status rests on the foreigner applying for such a protection. What needs to be stressed is the fact that the Geneva Convention within this scope is confined to the requirement for a foreigner applying for the refugee status to present a rational justification of his/her fear from persecution, and the arguments put forward by that person are subject to verification on the basis of an objective assessment of the situation in the country of his/her origin. Thus, the fear of persecution as a category that determines the decision concerned with granting of the refugee status contains a subjective component. The said assessment is that performed by the foreigner who applies for the refugee status. However, this subjective category is verified by an objective element – the fear needs to be rational. The subjective conviction does not have to result from a personal experience of the person applying for the refugee status. Decisions in the matters of obtaining the status of a refugee are issued by the Head of the Office for Foreigners with the approval of the minister responsible for foreign affairs. An appeal to that decision the applicant may direct to the Refugee Board. Its decisions, on the other hand, may be brought before the administrative court.

In the course of the last six years, nearly 61 thousand foreigners have submitted applications requesting international protection. In comparison with other EU states, Poland occupies the 10th-13th position in Europe with respect to the number of applicants. Nonetheless, the vast majority of immigrants treat Poland only as a transit country on the way to Western Europe guaranteeing better social and existential conditions.

4. POPULIST MORALITY

In the context of migration crisis within the EU and quota arrangements, we should refer to Jan-Werner Muller's[29] observations on the worldwide wave of populism. He argues that populism cannot be perceived as an authentic part of modern democratic politics or a kind of pathology caused by irrational citizens. For him, the populism is a permanent shadow of representative politics. According to populists, only they themselves are legitimate representatives of the society. At the same time, populists are antipluralist. Referring to J.W. Muller's thesis, the populists claim that they alone represent the people perceived as moral and homogeneous entity. Other political options and competitors (opposition or government dependent on the election results, even international or supranational organizations and their officials, or people who do not share the populist political ideas) are illegitimate, immoral and outside the margin of society (they are not an appropriate category of citizens). Various and different opinions are clearly discarded and refused. This observations extrapolates on people from different regions of the world, especially in this case – immigrants. They do not suit to the homogeneously perceived Nation.

[27] Supreme Administrative Court judgment of 1 February 2000, no. V SA 859/99.
[28] Supreme Administrative Court judgment of 26 August 1999, no. V SA 708/99.
[29] MULLER J.W., What is populism?, Pennsylvania 2016.

One should agree with J.W.Muller's observation that the populists intend to appropriate all state organs with the misusage of legal means (in relation to this, the hasty and bogus legislative process is the most visible). For them, these practices are moral as openly declared. In effect, such populist's morality can be reflected in a constitution as well as in the constitutional practice, especially when they did not gain the constitutional majority in Parliament.

As long as the populism constitutes merely an indication in pointing out that parts of the population remain unrepresented, this approach could be acceptable. But, in case of building the new reality by misusing the constitutional norms and the constitution-making process, the idea of populism should be assessed as a threat to liberal democracy[30]. The reason is simple and clear. Populism is rooted in certain intention that from the very beginning, is the weakening of liberal and democratic values. In practice, the populist morality leads to the point that the state becomes a place only for the "real people" clearly excluding the plurality. The "real people" and the populist state are in sharp contrast with others, such as foreigners, especially looking differently, the political opponents, the parliamentary opposition and eventually the European Union[31]. In consequence, one of the core values of the European Union – solidarity - is relativized. Poland, following Hungary[32] and next to Slovakia and the Czech Republic, constitutes an evident example of the populist approach.

Countries concentrated in the so-called coalition of the reluctant (Poland, Hungary, Slovakia and the Czech Republic) when justifying their critical attitude towards the proposed ways of solving the migration problem within EU, indicate, inter alia, the need to protect the security of the European Union, Member States and EU citizens[33]. While emphasising that the European Union is to be a space of freedom, security and justice, they strive to guarantee these values primarily to their own citizens. In doing so they refer to the obligation to fulfil the provisions of the Treaties[34]. In addition, states opposed to the relocation system emphasise that the automatic mechanism of distribution of immigrants between Member States infringes the freedom of choice guaranteed in the international law of the state in which the person concerned submits the application for asylum. The concept of security also serves as a justification for the position of the coalition states[35]. The European Union's primary objective is to create an area in which citizens of the Member States will be able to enjoy freedom, security and justice. This goal is implemented using all instruments available under the Treaties. These include those listed in Title V of the Treaty on the Functioning of the European Union. Security is therefore a superior value for states that strive to ensure it by respecting the principle of inviolability of borders, territorial integrity and, hence, sovereignty. In this situation,

[30] DRINÓCZI T., BIEŃ-KACAŁA A., Constitutions and constitutionalism captured: shaping illiberal democracies in Hungary and Poland (in publication) and BIEŃ-KACAŁA A., Poland within the UE: Dealing with populist agenda, Osteuropa Recht (in publication).

[31] It is visible when we consider the 27:1 voting on candidature of Donald Tusk for the President of the European Council or the statement of the Bureau of the Constitutional Tribunal in relation to the opinion of the First Vice-President of the European Commission, Frans Timmermans on 15 November 2017 (according to the statement: none of the legal act does authorize the European Commission to shape the legal order of a sovereign state), http://trybunal.gov.pl/wiadomosci/uroczystosci-spotkania-wyklady/art/9934-oswiadczenie-biura-trybunalu-konstytucyjnego-w-zwiazku-z-wypowiedzia-wiceprzewodniczacego-komis/.

[32] One should pointed out here the decision of Hungarian Constitutional Court on national identity and migration quota, DRINÓCZI T., Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System, Vienna Journal on International Constitutional Law 1/2017, pp. 139-151; PIERDOMINICI L., The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?, Perspectives on Federalism, Vol. 9, issue 2, 2017, pp. 119-153; KELEMEN K., The Hungarian Constitutional Court and the Concept of National Constitutional Identity, IANUS - Diritto e finanza, 15-16/2017, pp. 23-33.

[33] WITKOWSKA-CHRZCZONOWICZ K.M., Kategoria bezpieczeństwa w prawie i praktyce funkcjonowania UE, [in] Kategoria bezpieczeństwa w regulacjach konstytucyjnych i praktyce ustrojowej państw Grupy Wyszehradzkiej, eds. A. Bień-Kacała et al., Toruń 2016, pp. 41-57.

[34] POTYRAŁA A., W poszukiwaniu solidarności…, pp. 42-44.

[35] See more WITKOWSKA-CHRZCZONOWICZ K., SEROWANIEC M., The Security of the Visegrad Group Countries in the light of interests of the European Union and the remaining Member States, Kultura i Edukacja 2/2017, pp. 82-94, DOI: 10.15804/kie.2017.02.05.

immigrants are often perceived by the host community as "aliens" competing for jobs, food or medical care. Therefore, in social reception there is no room for perceiving immigrants as people who require international protection[36].

5. CONCLUSION

The current course of the debate on the migration crisis has revealed a tendency to deepen the divisions between Member States. The Commission's approach combining "European openness" (e.g. relocation and resettlement programmes, draft reform of the Common European Asylum System) with "European security" (including the fight against human smugglers or the European Border Guard project) has met with reluctance from many Member States. Due to the development of the migration situation and rising threats, including the terrorist threat, security has become the priority element, which has clearly determined the development of the EU anti-crisis strategy, weakened the willingness to help victims of wars and persecution, thus pushing further into the background the programmes for receiving refugees or providing development aid. Therefore, in the light of the said challenges and threats the myth of European unity and solidarity has quickly been refuted.

Bibliiography:

ANGENENDT S., Border Security, Camps, Quotas: The Future of European Refugee Policy?, „SWP Comment" 2016/C 32, Stiftung Wissenschaft und Politik, June 2016.
BANASZAK B., Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], Warszawa 2012, p. 339.
BIAŁOCERKIEWICZ J., Status prawny cudzoziemca w świetle standardów międzynarodowych [The legal status of a foreigner in the light of international standards], Toruń 1999, pp. 151-155.
DENNISON S., JANNING J., Bear any burden: How EU governments can manage the refugee crisis, „Policy Brief", European Council on Foreign Relations, 28.04.2016.
DIMITRIADI A., Deals without borders: Europe's foreign policy on migration, „Policy Brief", European Council on Foreign Relations, 04.04.2016, pp. 2-4.
DRINÓCZI T., BIEŃ-KACAŁA A., Constitutions and constitutionalism captured: shaping illiberal democracies in Hungary and Poland (in publication) and BIEŃ-KACAŁA A., Poland within the UE: Dealing with populist agenda, Osteuropa Recht (in publication).
DRINÓCZI T., Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System, Vienna Journal on International Constitutional Law 1/2017, pp. 139-151.
GHIMIS A., Migration Panorama. Schengen in the spotlight: a Europe with or without borders?, European Policy Centre, 12.04.2016.
IVANOV D., Towards a reform of the Common European Asylum System, „At a glance", European Parliamentary Research Service, May 2016.
KACA E., Schengen's Future in Light of the Refugee Crisis, PISM Strategic File 2(84)/2016, Polski Instytut Spraw Międzynarodowych, 12.02.2016.
KELEMEN K., The Hungarian Constitutional Court and the Concept of National Constitutional Identity, IANUS - Diritto e finanza, 15-16/2017, pp. 23-33.
MALMERSJO G., REMÁČ M., Regulation 604/2013 (Dublin Regulation) and asylum procedures in Europe, „Briefing", European Parliamentary Research Service, April 2016.
MULLER J.W., What is populism?, Pennsylvania 2016.
ORAV A., First measures of the European Agenda on Migration, „Briefing", European Parliament - European Parliamentary Research Service, 17.06.2015.
PIERDOMINICI L., The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?, Perspectives on Federalism, Vol. 9, issue 2, 2017, pp. 119-153.
POTYRAŁA A., Kryzys uchodźczy a przyszłość unijnego systemu azylowego [Refugee crisis and the future of the EU asylum system], [in:] Uchodźcy w Europie. Uwarunkowania, istota, następstwa [Refugees in Europe. Conditions, essence, consequences], eds. K.A. Wojtaszczyk, J. Szymańska, Warszawa 2016, pp. 159–164.

[36] POTYRAŁA A., W poszukiwaniu solidarności…, pp. 42-44.

POTYRAŁA A., W poszukiwaniu solidarności. Unia Europejska wobec kryzysu migracyjnego 2015 [In search of solidarity. The European Union on the migration crisis of 2015], Przegląd Politologiczny 4/2015, pp. 44-45.
SADOWSKI P., Kryzys migracyjny [Migration crisis], [in:] Sytuacja demograficzna Polski: raport 2015-2016 [Poland's demographic situation: report 2015-2016], eds. A. Potrykowska, M. Budziński, Warszawa 2016, p. 213-215.
SKRZYDŁO W., Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], Warszawa 2013, p. 67.
SZYMAŃSKA J., Strategia Unii Europejskiej wobec kryzysu migracyjnego: priorytety, bariery, efekty [EU strategy to tackle the migration crisis – priorities, barriers and outcomes], Studia BAS 3(51)/2017, pp. 166-167.
WITKOWSKA-CHRZCZONOWICZ K., SEROWANIEC M., The Security of the Visegrad Group Countries in the light of interests of the European Union and the remaining Member States, Kultura i Edukacja 2/2017, pp. 82-94, DOI: 10.15804/kie.2017.02.05.
WITKOWSKA-CHRZCZONOWICZ K.M., Kategoria bezpieczeństwa w prawie i praktyce funkcjonowania UE, [in] Kategoria bezpieczeństwa w regulacjach konstytucyjnych i praktyce ustrojowej państw Grupy Wyszehradzkiej, eds. A. Bień-Kacała et al., Toruń 2016, pp. 41-57.

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RESPECT FOR NATIONAL IDENTITY AND THE LOYALITY PRINCIPLE IN EU LAW. REMARKS CONCERNING THE FUTURE DEVELOPMENT OF THE UNION

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Abstract: The present study gives the survey of instruments for the overcoming of eventual conflicts and suggests a radical supplementary solution. Member States not willing to be subordinated to the general regulation of EU law, may benefit from an exemption on the level of primary or secondary law (opt-out) or tolerate the enhanced cooperation of remaining Member States (differentiated integration). Unfortunately, problems can be generated also subsequently - through the qualified majority voting in the Council. Another problem is be the so-called democratic deficit - especially the absence of national parliaments in the EU legislation procedure. As a remedy we could suggest, at least for political matters, a partial retreat from the supranational method in favour of returning to the traditional intergovernmental method. This would resolve the problem of the disproportional limitation of the sovereignty of Member States and of the democratic deficit. It seems to be better to build the Union gradually, slowly, little by little, a firm Union with all Member States and citizens content and satisfied, than a Union fragile, falling out, with no popular support, rushing big speed not knowing where.

Key words: Supranationality, loyality, national identity, qualified majority, opt-outs, enhanced cooperation, democratic deficit, international treaty, federation

1 DIVERSITY

The European Union represents an integrating tool for European countries. Its aim is to provide to participating countries and their citizens a successfull economic, social and political development. The integration is supposed to bring the economic stability and development and to allow appropriate solutions to the follow-up complementary issues such as the creation and functioning of the area of freedom, security and justice. All Member States are supposed to share Union's values, aims and general objectives of the European integration. At the same time the integration should correspond to the interests of all Member States.

However, this does not automatically mean, that when adopting European legislation or decisions aimed at achievement of those objectives and aims, the Member States will always easily reach consensus. We can ascertain different positions of particular Member States when deciding particular matters or adopting legislation governing different aspects and details of integration.

Gradual enlargments are making the European Union more and more heterogeneous and the deepening of the integration (increasing EU powers by conferring additional ones) deepens the heterogeneity as well. Now, with still 28 Members, it is sometimes very difficult or even impossible to reach a generally acceptable solutions to particular matters.

Aims, objectives and values of the Union are expressed in EU Treaty preamble and in its introductory provisions with no possibility of any exemption. The state not sharing them would not be qualified for the membership. Nevertheless, there could be, and in the reality are, diverse attitudes concerning the ways how to reach them. Diverse positions of Member States are due to differencies in size and economic strength of states, degree of their economic development, national traditions, historical experience, culture or mentality of the population.

The diversity of Members makes the integration more difficult and more challenging. In the same time, the diversity is something natural and inevitable. It must be respected, at least to a certain extent. The purpose of this study is to suggest, how the diversity in the European Union

should be treated so that the integration could develop further and the specific characteristics of Member States should be respected.

2 THE LOYALTY PRINCIPLE AND NATIONAL IDENTITY OF MEMBER STATES

Art. 4 of the Treaty on the EU brings together two principles corresponding to the potential unity of integrating Member States on one side and their specific features on the other side.

The loyalty principle is governed by Art. 4 paragraph 3 of the Treaty on the EU (TEU) under the denomination of "principle of sincere cooperation". Its active part denotes the duty of Member States to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union by taking **any appropriate measure**. Its passive part means that Member States shall facilitate the achievement of the Union's tasks and **refrain from any measure which could jeopardise the attainment of the Union's objectives. In addition to that** the Union and the Member States are supposed, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.

The **loyalty** of Member States means in principle their absolute compliance with EU law, both primary and secondary, including the European Court of Justice case law. Nevertheless, in particular situations, Member States are not suitable to fulfill their certain obligations because of their strong specific national characteristics. The account must be taken of all legitimate **national interests** as natural expressions of Member States' national identities.

National identities prevail over the loyalty principle in the sense that they „have the value of the derogation to provisions of EU law, especially in relation to freedoms provided by Treaties."[1] They are governed by Art. 4 paragraph 2 of the TEU. It says, that „the Union shall respect **national identities** of Member States **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.** In particular, national security remains the sole responsibility of each Member State." In fact national identities comprise, in the sense of that "definition", mainly constitutional identities and fundamental rights protection.

Selected case law of the EU Court of Justice concerns essentially fundamental rights protection:

- Case 261/78 **Cassis de Dijon** [1979] (categorical/mandatory requirements of the Member State generally prevail over the free movement of goods).
- Case C-112/00 Eugen **Schmidberger,** Internationale Transporte und Planzüge v. Republik Österreich.[2003] (right of assembly prevails over the free movement of goods).
- Case C-36/02 **Omega** Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn [2004] (human dignity protection prevails over the free movement of services – killer games).
- Case C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen **Grogan** and others [1991] (right to life – not protected against internal market freedoms).

The provision on the protection of national identities was introduced into the primary law by the Maastricht Treaty in connection with the expanding of the European integration to the political sphere as an instrument protecting important national interests. National identity constitutes automatically the reason for different treatment. The European Union has an obligation to respect it and the Member State has the right to invoke it for acquiring a diferent approach from the EU.

That narrow "definition" of national identities requires to deal with additional cases of national specific characteristics that do not fall into the scope of Art. 4 paragraph 2, but are also of major importance for particular Member States.

3 NATIONAL SPECIFIC CHARACTERISTICS OTHER THAN NATIONAL IDENTITIES

In addition to national identities recognized by the TEU, some Member States demand other exemptions, sometimes very important ones, because they are not ready, for different

[1] MARTIN, Sébastien. ***L'identité de l'État dans l'Union européenne : entre « identité nationale » et « identité constitutionnelle ».*** *Revue française de droit constitutionnel,* 2012/3, n°91, page 37. Available at https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2012-3-page-13.htm, cited 10 February 2018.

reasons, to accept a general trend or regulation. Unlike national identities, those additional exemptions are not automatically afforded by the TEU. They are subject of a special procedure that may take different shapes.

3.1 Opt-outs

Very significant specific requirements can be overcome by **opt-outs** on the level of Treaties: In fact we are talking about the reservations to the Treaties which have never been called by this international law term. Opt-outs are in fact important exemptions that prohibit, in a determined area, the exercise of EU competences with respect to the concerned Member State. Examples are well known: common currency for the UK or Denmark, Schengen regime for the UK and Ireland, the Area of Freedom, Security and Justice for Denmark etc.

Let us specify in detail the Danish case - consequences of the referendum that in 1992 rejected the Maastricht Treaty on EU. Concessions to Denmark were specified in the "Edinburgh Agreement" - Conclusions of the Presidency, European Council, Edinburgh, 1992.[2] It included, among others, as the most important items:

- Defence policy dimension: Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications.
- Third stage of Economic and Monetary Union: Danemark will not participate in single currency and will retain its existing powers in the field of monetary policy.

Those opt-outs have been annexed to Treaties as Protocols after their approval by Member States. Same method was applied for other countries, namely the United Kingdom and Ireland.

Opt-outs are possible also on the level of secondary law (directives).

3.2 Enhanced cooperation

Other cases of the diversity of interests may be resolved by the way introduced by the Amsterdam Treaty: the **enhanced cooperation** method.

A very special instrument for overpassing the diversity of positions in cases where the unanimity is required, is the **enhanced cooperation** system introduced by the Amsterdam treaty in 1997 and developed later. It means that only States willing to accept the proposed solution will participate. The other ones (not interested in the proposed solution) will not take part in the adoption of the corresponding act and consequently will not be bound by it. They are completely excluded from the legislation. Unlike the majority voting system, the enhanced cooperation does not force disagreeing States to comply with the will of majority, but leaves them aside. Those States are interested in the solution of a problem, but in another way than the Commission proposed and the majority of Member States shared.

Some ideas taken from the judgment C-274/11 and C-295/11 (Spain and Italy v. Council): States do not play a part in this enhanced cooperation, because they refuse to do so, not because they are excluded from it. Moreover, overcoming rejection of an essential measure by the enhanced cooperation method promotes the objectives of the Union and strengthen the process of integration. It is also a procedure that makes it possible to overcome the problems relating to blocking minorities.

The right to resort to enhanced cooperation is not limited solely to the case in which at least one Member State declares that it is not yet ready to take part in a legislative action of the Union in its entirety. As provided in Article 20 para. 2 TEU, the situation that may lawfully lead to enhanced cooperation is that in which „the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole“. The impossibility referred to in that provision may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement.

The Council's decision to authorise enhanced cooperation, having found that the necessary measure could not be adopted unanimously, as required by the Treaty, as a whole within a reasonable period, by no means constitutes circumvention of the requirement of unanimity, but

[2] Official Journal C 348, 31/12/1992 P. 0001 - 0001

rather, having regard to its being impossible to reach common arrangements for the whole Union within a reasonable period, contributes to the process of integration.

The expression 'as a last resort' highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.

3.3 Specialized cooperation

This is a general term for both opt-outs and enhanced cooperation. It icludes

1) matters regulated by the Treaties – primary law opt-outs. Integration measures can work only when potentially blocking Members obtain an opt-out (monetary union).
2) matters outside Treaties – outside of EU competences (formerly Schengen agreements, now Prüm agreement)
3) standard enhanced cooperation.[3]

Specialized cooperations cannot be considered as something unvalued and undesirable. States using them have simply different opinions how to reach aims and objectives of the EU. They cannot be considered as Members of second category.

Remarks on the terminology:

1) "Multi-speed Europe" (original concept of the Amsterdam Treaty). Suitable for cases, where an objective has been accepted by a particular country, but it will reach it later than others (for instance EURO and Czech Republic).
2) If an objective has been totally disclaimed at all by some country, it s no more the question of time or of a speed, but of a different approach to integration (Danemark and EURO). **States sharing such a different approach would not be considered as outsiders, but as states that have simply decided for a different way, not for a worse way. It is inacceptable to divide Member States into categories, where first equals better and second equals worse.**

4 CURRENT PLIGHT OF THE EU

In some member countries EU **is loosing sympathies among their population.** At the very beginning of the EEC Single Market the situation was different. EEC had relatively little power and the introduction and functioning of the single market was welcomed by the population. Especially the free movement of goods and of workers was advantageous practically for everybody.

Nowadays, many people think, that the current EU is not able to manage current complexe problems, such as the unique currency, the migration crisis and especially the overregulation of practically everything. Extreme large conferred powers of the Union impose to member countries unpopular, unnecessary and therefore unconvincing obligations. EU is simply too interfering, is considered to dispose of too many competences to the detriment of Member States. In the same time many people feel that the Union is a centralistic, bureaucratic and non-democratic body influenced by lobbies and big companies. The legitimacy of the Union is called into question because its democratic deficit.

A regrettable result of this tendency is, apart from the Brexit, the rising of populist and anti European parties and movements in several countries.[4] Unfortunately, many people have a simplified thinking and emphasize negative aspects of the membership without taking into account positive aspects, which are predominant. The trust in political elites at the Union level is very low. The national authority of the European Commission as a governing body is also deficient. The European Parliament is considered by many people as a too distant institution. Voter turnout during the European Parliament elections in the whole European Union had experienced a substantial decrease from 61,99 percent in 1979 to 42,61 in 2014.

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[3] SÉNAT, Session ordinaire de 2008-2009, Les coopérations spécialisées : une voie de progrès de la construction européenne, Rapport d'information de M. Pierre FAUCHON, fait au nom de la commission des affaires européennes n° 237 (2008-2009) - 3 mars 2009. Available at http://www.senat.fr/notice-rapport/2008/r08-237-notice.html. Cited 20 February 2018.

[4] EDITORIAL COMMENTS. A way to win back support for the European project? *Common Market Law Review,* 2017, vol. 54, p. 1 s.

EU was established and so far it operates „from above". It is the product of governments of European countries, not of a popular iniciative. It is being legitimized in its relation to the population only subsequently.

The EU motto is „United in diversity" --- *In varietate concordia* or *In varietate unitas.* In fact there is no diversity in the sense of plurality (more solutions), but only the variety (varieties of a unique solution).[5]

According to the European Commission, the motto „signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages.[6] Art. 3, para. 3 of the TEU provides: EU „shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced." In the context of those provisions the „respect of diversity" concerns only different cultures and languages, nothing else.

EU does not tolerate any calling into question of its **manner of functioning** and precludes any different political project or any alternative solution.

There is **no pluralism for the general integration concept, nor for partial concepts.** Let us show three examples:

- single currency: States not wishing to accept it are not „normal", are considered as retarded and finally they will accept it after being pushed strongly to do so,
- to settle the problem of migrants in another way than through compulsory quotas is inacceptable and means the lack of solidarity.
- Member States were calling for the liberalization of the VAT. It is coming, not because it is really needed, but because the Commission so decided.

Referendums serve only for the approval or disapproval of an already decided matter, not for a decision on the substance. When the referendum rejects the object, next time will not be held (Constitutional Treaty – Lisbon Treaty).

There is **no discussion on the future development of European integration -** do all Member States agree with the federalization? Apparently not. Moving to the European federation – who really wants that? Some governments, but certainly not the majority of citizens.

An extremely serious problem is the **absence of a general agreement on the final destination of European integration.** Is it the political integration? Or a European federal state? Every Member State must clearly know what is supposed to be the final destination of the Union to which it conferred its sovereign powers and consequently became subordinated. There are many questions without answers.[7]

What is supposed to be the ultimate shape of the European integration? To which final objective is the integration directed? By which stage is the European integration supposed to be completed? **Can really the EU function satisfactorily without any explicit consent on the general final objective of the integration?**

Of course, it may be argued that ideas and concepts of the future arrangement of Europe are subject to evolution. The final objective of the European integration is not a static value, but a variable one. For instance nobody could, during the pre-Maastricht period, imagine a functional monetary union including the banking union.

Integration objectives are clearly indicated in the preamble and Art. 3 of the EU Treaty. There is no mention on the political integration or a federal arrangement.

A connecting source of problems could be the **political integration.** It is not mentioned at all in the EU Treaty among the EU objectives, but sometimes is evoked as a possible base for the future arrangement of the EU. Let us remind very avid ideas of the former German minister of foreign affairs Joschka Fischer about the future European "federation" or "union of sovereign

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[5] DE LA HOSSERAYE, Thibaud. "Unie dans la diversité" : l'Union confrontée à sa propre devise. L'Observatiore de l'Europe, Mardi 13 Novembre 2012 (not paginated). Available at https://www.observatoiredeleurope.com/Unie-dans-la-diversite-l-Union-confrontee-a-sa-propre-devise_a1793.html, cited 11 January 2018.

[6] See Europa.eu, available on https://europa.eu/european-union/about-eu/symbols/motto_en

[7] A similar anxiety is shared by MAJONE Giandomenico. European Integration and Its Modes: Function vs. Territory (April 27, 2016). *TARN Working Paper No. 2/2016.* Available at SSRN: https://ssrn.com/abstract=2778612

states". The Constitutional Treaty of 2004 was based on a similar concept and although it failed, the idea of federalization of the EU is remained alive. And it was one of the reasons why the UK is leaving the EU. [8]

By the way, many politicians and journalists use the term „federation" or „federal" in a wrong way. In fact „federation" means the federal state, i.e. a state composed of segments (former Czechoslovakia – Republics, Germany – Länder, Switzerland – Cantons, United States – States). It is really impossible to imagine the **European Union as a federal state** composed of former Member States as its elements.

The lack of clarity in terms of the Union's future development and the unpopularity of the European idea among the population of member states were reasons that pushed the President of the European Commission Jean-Claude Juncker on 1 March 2017 to submit the White Paper on the Future of Europe.

Five alternative solutions for the future development of the Union have been proposed in the Paper.

a) Two of them are more or less maintaining the status quo: No. 1 - *"Carrying on"* and No. 4 - *"Doing less more efficiently".*

b) One of them represents a step back: No. 2 - *"Nothing but the single market".*

c) Other two constitute a radical progress forward: No. 3 - *"Those who want more do more"* and especially No. 5 - *"Doing much more together".* Let us now briefly examine these solutions from the point of view of their admissibility by Member States.

The White Paper was meant to be discussed by governments and encourage reflection on the role of the European Union and on the shape of its further development. After one year, it is clear that no discussion by governments took place. They are apparently not interested in it.

Member States do not mind this condition. Why? Often they decide politically not taking sufficiently into account the substance of different matters. Their representatives in the Council vote automatically favourably, because they want to keep their position as a part of the hard-core of the Union and as a disciplined Member not creating problems. Inevitable consequence of this short-sighted approach is the ignorance and later the aversion of the citizens of those Member States against the EU and their support for political parties promoting the exit from EU.

For the centuries nations were struggling for their independence – nowadays they do not hesitate to loose it.[9]

5 DEMOCRATIC DEFICIT

The initiative for further important integration steps comes from the European Commission and Member States' governements, not from citizens. Citizens are only informed subsequently about the „fait accompli" (accomplished fact).

EU democratic deficit is a crucial problem of the functioning of the EU. With a certain simplification we can ascertain, that in Member States, the laws (acts of Parliament) are being adopted precisely by the Parliament, that is a body representing citizens, since it is elected by citizens who follow its activities. On the contrary, in the EU, secondary law acts are being adopted by the Council and European Parliament. The Council is a non-elected executive body. Although the European Parliament is an organ elected by the EU citizens, its authority is too far from that of national Parliaments. Citizens are not familiar nor interested by its activities. It is "too distant", most of people have no idea about what is it really doing. The interrelationship between citizens and the European Parliament is very weak, in some member countries almost inexisting.

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[8] The existence of very divergent positions of different national Parliaments were detected also by the **Conference of the committees of the national Parliaments of the European Union Member States in 2014 in the following document:** Contribution of the LII COSAC (Rome, 30 November - 2 December 2014), doc. 2015/C 181/01:

„2.8. COSAC notes that there is no debate on further development of the European integration process on the agenda of most Parliaments/Chambers; COSAC however notes that some Parliaments/Chambers take a positive view thereon, including in a federal perspective, and that others oppose such a process."

[9] DE LA HOSSERAYE, Thibaud. Op. cit.(not paginated).

EU regulations have to be applied in Member States in the same manner as national laws. And national laws adopted on the basis of directives must take over their contents regardless of the opinion of the national Parliament. The result of this system is the legislation applicable in Member States, the contents of which has been determined in Brussels in a non-democratic way.

The involvement in the EU legislative procedure of national Parliaments would be certainly a hypothetical solution, but in practice it is not feasable.

6 QUALIFIED MAJORITY VOTING

Direct consequence of the supranationality is the substitution of the unanimity principle by the qualified majority voting in the Council. This is a principle which is inacceptable in international law based on principle of sovereign equality. Unanimity is a "standard" method emergent from international law, not eroding the sovereignty of participating states.

The disadvantage of the qualified majority method is the imposing of inacceptable decisions or legislative acts to States that voted against them. Prevailing idea is the overcoming the "impotence" of the unanimity in order to move forward as fast as possible. The condition is the willingness of the Member States to abandon the notion of sovereignty in favour of the principle of qualified majority voting in the Council. Otherwise the decision-making process could be slowed. This is a very dangerous philosophy!

Nevertheless, the majority of decisions and legislative acts was, between 1958 and 1966, adopted by unanimity. A first objection against the qualified majority voting was raised in 1965 by De Gaulle not willing to subordinate his country to majority decisions where France would be outvoted („empty chair crisis“). This crisis was resolved by a political agreement between Members called Luxembourg compromise (1966).[10] Qualified majority voting in the council was reintroduced for the Single Market by Single European Act.[11]

Unanimity method should be kept in cases which bear heavily upon national sovereignty. Highly sensitive matters should remain subject to unanimous voting. In economic fields, it is certainly the taxation. In political and administrative matters it is almost everything, because the influence of the Union's decisions is enormous (for instance defence, border controls, revision of primary law treaties).

This method, called „communitary“ or „supranational“ is perhaps very well suitable for partial issues related to the functioning of the internal market and especially the harmonization of different aspects of the free movement of goods, persons and services. Incidentally, this method was „invented“ for the original Communities having exclusively economic character.[12]

However, the use of this method for „resolving“ important problems having political character can become very problematic and counterproductive, because of the pressure on outvoted Members to accept a decision which is for them for some reason inacceptable. Sanctions imposed on those Member States do not bring any effect. Their consequence will be a serious political dispute and the increase of anti-European sentiments among the population.

A similar problem emerges now when several Member States strongly rejected the acceptance of compulsory migrant quotas prescribed by the majority in the Council. The decision of the Court of Justice obviously will be not helpful in reaching any reasonable solution at all.[13]

Qualified majority voting system (limitation of sovereign powers) was suitable for economic decisions and legislation relating to the Single Market and connexed policies. On the contrary, for non-economic and especially political matters unanimity method must be kept, since the abandonment of sovereignty in those matters is, for certain countries, inappropriate and inacceptable.

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[10] DEVUYST, Youri. The European Union Transformed. Revised and updated edition, Brussels: P.I.E. Peter Lang, 2006. ISBN 90-5201-051-X, p. 27-28.

[11] TEASDALE, Anthony L. The Life and Death of the Luxembourg Compromise. *Journal of Common Market Studies,* 1993, vol. 31, p. 567-579

[12] DEVUYST, Youri. Op. cit., p. 23 s.

[13] See joined cases C-715, 718 and 719/17 (concerns the Czech Republic, Poland and Hungary).

7 SUGGESTED REMEDIES

As a remedy we could suggest, at least in political matters, the **retreat from the supranational method** in favour of returning to the **traditional method of international law,** i.e. use of international treaties concluded among EU Members and approved by their national Parliaments.

The treaty method should be used not only for matters outside the EU competences (Fiscal Compact, Agreement on the Unitary Patent Court), but also, in appropriate cases, **in matters falling within EU competences, but hitting significantly States' sovereignty (for instance migration quotas).**

This would be the best way to **respect national identity** of Member States – a way relatively slow but reliable and credible. International treaties have to be approved by national Parliaments – **the democratic deficit disappears!**

Proof of the suitability and desirability of this solution: EU unitary patent regulations and Unitary Patent Court (UPC).

1. Unitary patent **regulations were adopted in 2012 very quickly and hastily** (by ministers of the whole group of enhanced cooperation - 25 members).
2. **Both regulations have no effect without the UPC Agreement in force.**
3. Unified Patent Court **Agreement** adopted (signed) in 2012. In 2017, there were **only 12 ratifications** (from 25 - **not enough for the entry into force** of the Agreement and of the whole system).

Thanks to the Patent Court Agreement, States have now the possibility to consider and evaluate the whole system of EU unitary patent **very carefully** (what they did not do when they were adopting the two regulations). Poland, which approved both regulations very quickly and enthusiastically, only now discovered that the system of EU unitary patent is for it very disadvantageous and refuses to ratify (and even sign) the Agreement, and consequently accept both formerly approved unitary patent regulations.

Partial return to the intergovernemental method would resolve the problem of the disproportional limitation of the sovereignty of Member States and of the democratic deficit.

Wouldn't it be better to build the Union gradually, slowly, little by little, a firm Union with all Member States and citizens content and satisfied, than a Union fragile, falling out, with no popular support, rushing big speed not knowing where?

Bibliography:

DE LA HOSSERAYE, Thibaud. "Unie dans la diversité" : l'Union confrontée à sa propre devise. L'Observatiore de l'Europe, Mardi 13 Novembre 2012. Available at https://www.observatoiredeleurope.com/Unie-dans-la-diversite-l-Union-confrontee-a-sa-propre-devise_a1793.html, cited 11 January 2018.

DEVUYST, Youri. The European Union Transformed. Revised and updated edition, Brussels: P.I.E. Peter Lang, 2006. 213 p. ISBN 90-5201-051-X

EDITORIAL COMMENTS. A way to win back support for the European project? *Common Market Law Review,* 2017, vol. 54, p. 1 s.

MAJONE Giandomenico. European Integration and Its Modes: Function vs. Territory (April 27, 2016). *TARN Working Paper No. 2/2016.* Available at SSRN: https://ssrn.com/abstract=2778612

MARTIN, Sébastien. L'identité de l'État dans l'Union européenne : entre « identité nationale » et « identité constitutionnelle ». *Revue française de droit constitutionnel,* 2012/3, n°91, page 37. Available at https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2012-3-page-13.htm, cited 10 February 2018.

SEHNÁLEK, David et TÝČ, Vladimír. Mezinárodní smlouva jako možný perspektivní nástroj další evropské integrace (International Treaty as a Potential and Perspective Mechanism of European Integration). *Právník*, AV ČR, Ústav státu a práva, 2017, No. 3, p. 192-212

SÉNAT, Session ordinaire de 2008-2009, Les coopérations spécialisées : une voie de progrès de la construction européenne, Rapport d'information de M. Pierre FAUCHON, fait au nom de la commission des affaires européennes n° 237 (2008-2009) - 3 mars 2009. Available at http://www.senat.fr/notice-rapport/2008/r08-237-notice.html. Cited 20 February 2018

TEASDALE, Anthony L. The Life and Death of the Luxembourg Compromise. *Journal of Common Market Studies,* 1993, vol. 31

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