Sympóziá, kolokviá, konferencie

BRATISLAVSKÉ PRÁVNICKÉ FÓRUM 2020

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Zborník z vedeckej konferencie organizovanej Univerzitou Komenského v Bratislave, Právnickou fakultou dňa 6 a 7. februára 2020 v priestoroch Univerzity Komenského v Bratislave

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V BRATISLAVE
PRÁVNICKÁ FAKULTA
VYDAVATEĽSKÉ ODDELENIE

Univerzita Komenského v Bratislave
Právnická fakulta
2020

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doc. JUDr. Ing. Ondrej Blažo, PhD.
doc. JUDr. PhDr. Lucia Mokrá, PhD.
Mgr. Adam Máčaj

Recenzenti:
prof. JUDr. PhDr. Ing. Michael Siman, PhD., DEA
doc. JUDr. Peter Varga, PhD.

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Programme of the conference

Session 17: Legal Challenges for the new European Commission

7th February 2019

Guarantees/Garanti: doc. JUDr. Ing. Ondrej Blažo, PhD.
doc. JUDr. PhDr. Lucia Mokrá, PhD.
Room/Miestnosť: Dean´s Club (3th floor Old Building)
Language/Jazyk: English

This panel is organized within the project VEGA 2/0167/19 Real Convergence in the European Union: Empirical Evidence and Implications.

9.00	Keynote speaker Univ.-Professor Dr.habil. Dr.h.c.mult. Peter-Christian Müller-Graff, Ph.D.h.c., MAE. (Ruprecht Karl University of Heidelberg, Germany)
9.15	Defining the Concept of State Aid as a Political Choice Prof. Dr. Bernardo Cortese (University of Padua, Department of Public, International and Communitarian Law, Italy)
9.30	A New European Asylum Law Is Urgently Needed Ao. Univ.-Prof. Dr. Michael Geistlinger (Paris Lodron University of Salzburg, Faculty of Jurisprudence, Austria)
9.45	The Challenges Regarding the Right of Free Movement of Person Dr. jur. Réka Friedery, PhD (Centre for Social Sciences, Institute for Legal Studies, Hungarian Academy of Sciences Centre of Excellence, Budapest, Hungary)
10.00	Liberalization of the Public Transport Market: Are We There Yet? Mgr. Ing. Jaroslav Menčík, LL.M. (Charles University, Faculty of Law, Prague, Czech Republic)
10.15	Discussion
10.30 – 10.45	Coffee Break
10.45	Fighting Bid Rigging in the European Union doc. JUDr. Katarína Kalesná, CSc. (Comenius University in Bratislava, Faculty of Law, Slovakia)
11.00	The Concept of Leniency in European Competition Law Borka Tushevska Gavrilovikj, PhD (University Goce Delchev in Shtip, Shtip, Macedonia)

11.15	**Digitalisation of the Market – A Case of Competition Law** JUDr. Hana Kováčiková, PhD. (Comenius University in Bratislava, Faculty of Law, Slovakia)
11.30	**Digital Single Market as a Legal Challenge** JUDr. Daniela Ježová, PhD., LL.M. (Comenius University in Bratislava, Faculty of Law, Slovakia)
11.45	Discussion / Diskusia
12.00 – 13.00	Lunch
13.00	**Harmonization vs. Real Convergence – Case of Public Procurement** doc. JUDr. Ing. Ondrej Blažo, PhD. (Comenius University in Bratislava, Faculty of Law, Slovakia)
13.15	**What If a New Crisis Comes? – In Other Words, Is the EMU Prepared for Another Possible Financial Crisis?** Dr.jur. György Marinkás, PhD. (Ferenc Mádl Institute of Comperative Law, Budapest, Hungary)
13.30	**The Most Recent ECJ Rulings about the Banking Union: the Crédit Mutuel Arkéa Case** Dr. Raffaele Caroccia, (Comenius University, Faculty of Social and Economic Sciences, Bratislava, Slovakia)
13.45	**Recent and New Challenges of the European Commission in Consumer Protection** Mgr. Martin Hamřik, PhD. (Comenius University in Bratislava, Faculty of Law, Slovakia)
14.00	Discussion/ Diskusia
14.15	**Efficiency of Justice System as the Principle Applied in the Rule of Law Framework in the European Union** doc. JUDr. PhDr. Lucia Mokrá, PhD. (Comenius University in Bratislava, Faculty of Law, Faculty of Social and Economic Sciences, Bratislava, Slovakia)
14.30	**How to Build Common Features of the Justice Systems in Candidate Countries and EU Member States** Jelena Kostić, PhD., Marina Matić Bošković, PhD. (Institute of Comparative Law, Institute for Criminological and Sociological Research, Belgrade, Belgrade, Serbia)
14.45	**Speed-up Infringement Procedure** JUDr. Mária Patakyová, PhD. (Comenius University in Bratislava, Faculty of Law, Slovakia)

15.00 Discussion

15.15 – 15.30 Coffee Break

15.30 **Digital Sovereignty and the e-Evidence Proposal of the EU**
Dr. László Dornfeld (Ferenc Mádl Institute of Comparative Law, Budapest, Hungary)

15.45 **One of the Key Challenges to the European Commission - the European Public Prosecutor's Office as an Effective Tool against Crimes Affecting the Union Budget**
JUDr. Bc. Dominika Becková, PhD. (Pavol Jozef Šafárik University in Košice, Faculty of Law, Košice, Slovakia)

16.00 **The Role of the CJ EU and the ECtHR in Enhancing Human Rights as a Challenge for the European Commission and the Principle of Human Rights Protection**
Vesna Ćorić, Ph.D, Ana Knežević Bojović, Ph.D (Institute of Comparative Law, Institute for Criminological and Sociological Research, Belgrade, Belgrade, Serbia)

16.15 **Comprehensive European Rule of Law Mechanism**
Mgr. et Mgr. Stela Kovaľová (Comenius University in Bratislava, Faculty of Law, Slovakia)

16.30 **Jurisdiction under the Recent Developments of Jurisprudence on Rule of Law and Judicial Independence**
Mgr. Adam Máčaj (Comenius University in Bratislava, Faculty of Law, Slovakia)

16.45 Discussion

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THE CHALLENGES REGARDING THE RIGHT OF FREE MOVEMENT OF PERSONS / Réka Friedery

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The paper was written under the aegis of the Bolyai Research Grant of the Hungarian Academy of Sciences.

Abstract: *European citizenship as an additional citizenship next to the national citizenship contains several important rights that are laid down in Article 20 TFEU. The centre point of the paper is the right to free movement in terms of its development. The structure of the EU legislation and the interpretation of this fundamental right by the Court of Justice of the European Union gives an overview about the development of this citizenship right and offers a clear view about the EU policy's challenges in reality regarding free movement of persons. The challenges facing the EU right of free movement of persons will be analysed from three different perspectives: the infringement proceedings of the EU Commission, the jurisdiction of the CJEU and the right to petition of the EU citizens.*

Key words: *free movement of persons, free movement of workers, European Commission, Court of Justice of the European Union, petitions.*

1 INTRODUCTION

Already the Rome Treaty contained several provisions to ensure the free movement of workers.[1] According to the TFEU, Union citizens are entitled to move and reside freely in the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and measures adopted to give them effect.[2] The European Commission has on a number of occasions reported that the expectations of the mid-eighties about mobility in Europe have not been realised, and the Commission at the same time has acknowledged that the opening up of the markets in Europe brought some unexpected side effects.[3]

Free movement had important impacts on several extent in people's life. A good example is family life, beyond this family reunification. It has been one of the main reasons of immigration to the EU and in 2017 472,994 persons were admitted to the EU-25 on grounds of family reunification. These amounts to 28% of all first permits issued to third-country nationals in the EU-25.[4] Moreover, individuals who join their family and also obtain the permission to work are recorded in the family category. The channel of occupation is broad and consists of permits issued to highly skilled workers, holders of EU-Blue Card, researchers[5], seasonal and other migrant workers who have obtained an authorization to work in a given European country.[6] Also free movement of persons led to the modification

[1] Articles 48–51, Treaty of Rome
[2] Articles 20(2)(a) and 21 TFEU
[3] Employment in Europe, chapter 3: Geographical labour mobility in the context of EU enlargement, Brussels 2008
[4] In 2018, some 3.2 million residence permits were issued across the EU to people from non-member countries. See: Residence permits - statistics on first permits issued during the year https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_-_statistics_on_first_permits_issued_during_the_year&oldid=456573
[5] The categories of high-skilled workers and EU-Blue Card holders are defined in Directive 2009/50/EC, while researchers in Directive 2005/71/EC.
[6] Migali, S., Natale, F.: The determinants of migration to the EU: evidence from residence permits data, European Commission, JRC Technical Reports, 2017, 6.

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of the rules for coordination of national social security systems and the application of mandatory national rules on working conditions has led to a series of debates with the legislator about the home versus the host country.[7] In this study, the challenges facing the EU right of free movement of persons will be analysed from three different perspectives: the infringement proceedings of the EU Commission, the jurisdiction of the CJEU and the right to petition of the EU citizens.

2 LEGISATION OF FREE MOVEMENT OF PERSONS

Freedom of movement and residence for persons is a vital element of Union citizenship, and enshrined in Article 3(2) of the Treaty on European Union (TEU); Article 21 of the Treaty on the Functioning of the European Union (TFEU); and Article 45 of the Charter of Fundamental Rights of the European Union. There were several legislations and a large body of case-law linked to the free movement of persons, when a comprehensive directive was adopted in 2004. Directive 2004/38/EC was meant to create a coherent legal system and unite the disparate pieces of legislation that dealt with workers and economically inactive EU migrants.[8] Free movement of workers is enshrined in Article 45 of the TFEU and is developed by EU secondary legislation and the case-law. According to the Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, EU citizens are entitled to look for a job in another EU country, work without needing a work permit, reside for that purpose to stay there even after the employment has finished. They enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages. Directive 2004/38/EC had the view to encourage Union citizens to exercise their right to move and reside freely within the Member States, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, and to limit the scope for refusing entry or terminating the right of residence.

3 INFRINGEMENT PROCEEDINGS

Infringements proceedings can give us information about the state of implementation in different Member States. The directive's implementation resulted in several problematic issues where the main ones concerned the rights of entry and residence for non-EU family members of Union citizens, including same-sex spouses or partners, conditions for issuing visas and residence cards to non-EU family members, the material and procedural safeguards against the expulsion of EU citizens. Following bilateral discussions with the Member States, the Commission successfully resolved 90% of outstanding issues in national implementation, but certain obstacles remained. The Commission therefore launched infringement proceedings against Austria, Belgium, Cyprus, the Czech Republic, Germany, Italy, Malta, Lithuania, Spain, Sweden, Poland and the United Kingdom over the period from March to October 2011 (IP/11/981).[9] [10] Austria does

[7] Cremers, J.: Free movement of workers and rights that can be derived. FMW: Online Journal on Free Movement of Workers within the European Union, 2012/4, 26-32.

[8] Mantu, S.: Concepts of time and European citizenship. European Journal of Migration and Law, 2013/4, 454. Heinonline

[9] EUROPEAN COMMISSION, Free movement: Commission upholds EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012
https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_75

[10] EUROPEAN COMMISSION, Free movement: Commission ask the UK to uphold EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012
https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_417

not grant so-called "extended" family members of EU nationals who have moved to another Member State the rights granted by the Directive. In Germany, there are three issues of incorrect transposition of the Directive. The state has not – as is required by the Directive – set up a procedure designed to facilitate entry and residence for "extended" family members of EU citizens, has not adopted any measure in its legislation to ensure that "extended" family members are granted the full set of rights granted by the Directive, decisions to expel EU citizens and their family members are, by law and as a rule, combined with an exclusion order which is unlimited in time.[11]

Table 1 Active and not active infringement decisions of the European Commission

Infringement number	Decision date	Decision type	Press release	Memo	Member state	Policy area Department in charge	Title	Active infringement cases	Non communication
20112034	2012/06/21	Reasoned opinion Art. 258 TFEU	IP-12-646_EN		Austria	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in Austria	Yes	No
20112054	2012/04/26	Reasoned opinion Art. 258 TFEU	IP-12-417_EN		United Kingdom	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in the UK	Yes	No
20112060	2012/06/21	Reasoned opinion Art. 258 TFEU	IP-12-646_EN		Sweden	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC	No	No
20112077	2012/01/26	Reasoned opinion Art. 258 TFEU	IP-12-75_EN		Czech Republic	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in the Czech Republic	Yes	No
20112083	2012/01/26	Reasoned opinion Art. 258 TFEU	IP-12-75_EN		Lithuania	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in Lithuania	Yes	No
20112086	2012/06/21	Reasoned opinion Art. 258 TFEU	IP-12-646_EN		Germany	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC and violation of Article 21(1) TFEU in Germany	Yes	No

Source: European Commission
https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&PressRelease=true&DG=JUST&title=Directive+2004%2F38%2FEC&submit=Search

4 CASE-LAW DEVELOPMENTS

The Court's case-law shows the extensive nature of the right to free movement. From family reunification of EU citizens and their non-EU citizen family members to economically active or inactive EU citizen there are a wide range of cases.

In Case C-140/12 Brey, the preliminary ruling request has been made in proceedings between Mr Brey and the Pensions Insurance Institution concerning the latter's refusal to grant him the compensatory supplement provided for in Austrian legislation to augment his German retirement pension. The Court made a clear distinction between the economic and social context of free movement of persons, the former arising from the movement of workers, the latter arising from the conferral of citizenship rights and all the ancillary

[11] EUROPEAN COMMISSION, Free movement: Commission asks Austria, Germany and Sweden to uphold EU citizens' rights, PRESS RELEASE, Brussels, 21 June 2012 https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_646

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benefits stemming from that status.[12] The Court stressed the importance of citizenship rights as a way to facilitate and strengthen the exercise of the primary and individual rights – conferred directly on all Union citizens by the Treaty – to move and reside freely within the territory of the Member States. Thirdly, the principle of equal treatment – highlighted because citizenship rights are fundamental – was expounded upon, with detailed analysis of the situations in which derogations would be justified. Fourthly, due to the important competing values requiring adjudication, the Court in Brey insisted on a thorough and independent review of the proportionality of the national provisions. What was needed in this respect was an overall assessment of the specific burden which granting the benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned. As such, EU law would work to preclude national legislation which would bar the grant of a benefit to a national of another Member State who was not economically active, on the basis that he did not meet the criteria for obtaining the legal right to reside longer than 3 months in the host Member State just because that national law required applicants for the benefit to have sufficient resources.[13]

Regarding jobseekers from another Member State who worked in another Member State for less than a year and then looked unsuccessfully for work for the following six months, would retain their worker status for no less than six months –during which, they benefit from equal treatment and entitlement to social assistance benefits. After that period, the host Member State may withdraw such benefits, without individual examination.[14]
But job-seeker family members from other Member States can be excluded from social assistance during the first three months of their job search, without individual examination unless they have previously worked in the host Member State (first-time jobseekers). [15] The Court instead to give a more substantial meaning to the unity of the family, allowed the discrimination towards the migrant workers.

In Case C-127/08 Metock and others the Court stated that Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directiveArticle 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.[16] On family matters, namely cases of divorce between an EU citizen and a non-EU national, an EU citizen left the host Member State before commencing divorce proceedings, while the non-EU national spouse stayed behind, and the latter retains a right of residence only where this existed at the time the divorce proceedings were launched.[17]

[12]http://curia.europa.eu/juris/document/document.jsf?text=&docid=141762&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=319808
[13] http://www.europeanmigrationlaw.eu/en/caselaw/peter-brey.html
https://www.schutze.eu/download-file/1721/
[14] Case C-67/14 Alimanovic.
[15] Case C-299/14 García-Nieto and Others.
[16] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/08
[17] Case C-218/14 Singh.

The Court stated that non-EU citizens who are the primary carers of an EU citizen child can reside with their child in the host Member State by virtue of Article 20TFEU if such a refusal would deprive that EU citizen of effective enjoyment of the substance of the rights conferred by virtue of the status of EU citizenship.[18]

Regarding non-EU family members' right of residence, EU citizens who reside in the Member State of their nationality but commute regularly for work reasons to another Member State fall within the scope of Article 45 TFEU, thus exercise their right to free movement as workers. A non-EU family member derives a right of residence in the home Member State of an EU citizen who is resident in that Member State but regularly travels to another Member State to work, if refusal to grant such a right would discourage the commuting EU citizen from effectively exercising his right to free movement as a worker.[19]

The rights enjoyed by citizens can be restricted for reasons of public interest. Nevertheless, if the rights of workers have to be curtailed then the court must consider whether such obstruction would likely impact the freedom of movement of workers.[20] It was established that workers are favoured citizens because their rights cannot be restricted even under public interest unless such measure is proportionate to the aim pursued, and compatible with the fundamental rights enjoyed by the workers.[21]

In Joined Cases C-331/16 K. and C-366/16 H.F. the Court stated that the Directive 2004/38 must be interpreted as meaning that the fact that a Union citizen or a third-country national family member of such a citizen, who applies for a right of residence in the territory of a Member State, has been refused refugee status that does not enable the competent authorities of that Member State to consider automatically that the mere presence of that person in its territory constitutes, whether or not there is any risk of re-offending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, capable of justifying the adoption of measures taken on grounds of public policy or public security. The finding that there is such a threat must be based on an assessment, by the competent authorities of the host Member State. During this, the principle of proportionality, and account must be taken of, inter alia, the nature and gravity of the alleged conduct of the individual concerned, the duration and, when appropriate, the legality of his residence in the host Member State, the period of time that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and family links with the host Member State[22]

As we can see in the above cases, the particular political contentiousness, and fundamental rights-sensitivity of family reunification legislation is likely to provide the CJEU with both 'incentives', as well as 'tools' to curate precedent in its jurisprudence on family reunification immigration.[23]

[18] Case C-86/12 Alopka and others.
[19] Case C-457/12 S and G.
[20] C-482/01 Orfanopoulos.
[21] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Directive 2003/86/EC on the right to family reunification.
[22] http://www.europeanmigrationlaw.eu/en/caselaw/k-hf-case-c-331-16-c-366-16.html
[23] De Somer, Marie and Maarten P. Vink (2015): "Precedent' and fundamental rights in the CJEU's case law on family reunification immigration', in: Christine Neuhold and Sophie Vanhoonacker (eds):'Dynamics of institutional cooperation in the European Union: Dimensions and effects' European Integration online Papers(EIoP), Special issue 1, Vol. 19, Article 6, http://eiop.or.at/eiop/texte/2015-006a.htm,pp. 6.

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4 PETITIONS

The European Parliament can be petitioned on matters belonging to the fields of the European Union,[24] and it is possible to address a petition to the European Parliament in connection with Member States' authorities. The right to petition is of a general nature. The Committee on Petitions has the task to give adequate answer to complaints or opinion of natural or legal person in connection with the Parliament's resolution or decision of institutions and bodies. The large amount of petitions submitted to the EP is clear signs of citizens' activity in EU issues. Several petitions raise concerns about the different obstacles encountered by EU citizens in exercising their freedom of movement with issues that freedom of movement for workers has been violated by several Member States or issues of mobile EU citizens who sometimes avoid accessing health services for fear of expulsion, which effectively limits their fundamental right of access to healthcare.

Petitioners are concerned about the lack of broadband connectivity, especially in remote, rural and mountainous areas, and the mismatches between advertised and actual broadband speeds, which impinges on the level of consumer protection in the internal market and creates obstacles to the access of information and services. Interestingly there was a particular petitioner who expressed his concerns about the loss of EU citizenship of British citizens, and their right of free movement within the EU as he claimed that the EU has a duty of care towards all EU citizens. The petitioner called for a transitional arrangement allowing British citizens to opt for residence in an EU Member State during a transitional period of 5 years, with support by Member States to these citizens, in order to allow them in particular to apply for citizenship in that Member State. The petitioner also invited the European Parliament to support the European Citizens' Initiative on Permanent European Union Citizenship.[25]

4 CONCLUSION

Migration, mobility can have different faces. Free movement is not free yet; evidence are the large amount and growing case-law, the active infringement cases, the ever active citizens' petitions and the reports of the EU institutions on the aspects of free movement. The European Commission faces challenges which were present in the past but not resolved and now faces newly formed challenges. Migration of EU citizens, their EU citizen family members or third-country family members inside the European Union generate new circumstances with new questions to answer. This challenge is further enlarged with the migration of third-country nationals with more newly generated issues.

Bibliography:

De Somer, M. and Maarten, P. V.: Precedent' and fundamental rights in the CJEU's case law on family reunification immigration. In: Christine Neuhold and Sophie Vanhoonacker (eds):'Dynamics of institutional cooperation in the European Union: Dimensions and effects' European Integration online Papers (EIoP), 2015, Special issue 1, Vol. 19, Article 6, http://eiop.or.at/eiop/texte/2015-006a.htm,pp. 1-33.

CREMERS, J.: Free movement of workers and rights that can be derived. FMW: Online Journal on Free Movement of Workers within the European Union, 2012/4, 26-32.

[24] According to Art. 227 TFEU (ex Art. 194 TEC) "…have the right to address..a petition to the European Parliament on a matter which comes within the Union's fields of activity".

[25] https://www.europarl.europa.eu/doceo/document/TA-8-2017-0083_EN.html?redirect

Migali, S., Natale, F.: The determinants of migration to the EU: evidence from residence permits data, European Commission, JRC Technical Reports, 2017, 6.
Mantu, S.: Concepts of time and european citizenship. European Journal of Migration and Law, 2013/4, 447-464. Heinonline
Treaty establishing the European Economic Community
Consolidated version of the Treaty on the Functioning of the European Union
http://data.europa.eu/eli/treaty/tfeu_2012/oj
Employment in Europe, chapter 3: Geographical labour mobility in the context of EU enlargement, Brussels 2008
REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Directive 2003/86/EC on the right to family reunification
EUROPEAN COMMISSION, Free movement: Commission upholds EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012
https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_75
EUROPEAN COMMISSION, Free movement: Commission ask the UK to uphold EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012
https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_417
EUROPEAN COMMISSION, Free movement: Commission asks Austria, Germany and Sweden to uphold EU citizens' rights, PRESS RELEASE, Brussels, 21 June 2012
https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_646
European Commission
https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&PressRelease=true&DG=JUST&title=Directive+2004%2F38%2FEC&submit=Searc
EUROSTAT https://ec.europa.eu/eurostat/home?
Case C-140/12 Brey
Case C-333/13 Dano
Case C-67/14 Alimanovic
Case C-299/14 García-Nieto and Others
Case C-86/12 Alopka and others
Case C-457/12 S and G.
Case C-218/14 Singh
Case C-127/08 Metock and others

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LIBERALIZATION OF THE PUBLIC TRANSPORT MARKET: ARE WE THERE YET? / Jaroslav Menčík

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Abstract: *The EU has been pushing through its legal regulation a gradual liberalization of the market with public transport for a long time. In the first stage, the market with public transport services by bus was opened. The market with railway transport controlled by national incumbents has evaded liberalization for a long time but now, after the adoption of the fourth railway package in 2016, it will experience a revolution in the form of opening to broad competition as of December 2023. At first glance, it would seem that the legal regulation has achieved its goal and the market with public bus and railway transport will be liberalized soon. However, did we really achieve this goal? It appears that the current legal regulation motivates public authorities to avoid public tenders when looking for providers of transportation services. Notably, some regions in the Czech Republic decided to give up public tenders and to ensure the provision of public services in bus transport by their subordinate organizations. The new European Commission will face a challenge to analyze these tendencies and to tackle them in order to ensure a truly liberalized market with public transportation.*

Key words: *public transport services, liberalization, economic competition, European Union, public tender, transparency*

1 INTRODUCTION

One of the fundamental tasks of the government as well as regional authorities is to ensure transport services in their territories through public passenger transport services, especially by public rail and bus transport. The purpose of public passenger transport services is primarily to ensure the transport of population to schools and educational organizations, to public authorities, to employment, to hospitals and other providers of health care as well as to meet the cultural, recreational and social needs of population.

However, the provision of passenger transport is generally associated with significant costs on the part of the service providers, and it is not always possible to cover all costs of public transportation with revenues. For example, transportation to geographically remote places with small population or transportation during off-peak hours can both be expected to mean lower passenger demand for the transport services and thus lower revenues. In view of the above, it is understandable that it does not make economic sense for the providers to voluntarily carry passengers in a way that would be loss-making and that they focus primarily on profitable lines with a large number of passengers.

Public authorities that are expected to ensure the provision of public transport services in a given area often have an interest in ensuring that public passenger transport is provided even if it is loss-making. For this reason, public service contracts for the transport of passengers are concluded between public authorities and public transport companies and play a key role in the public passenger transport system. The subject of these contracts is, on the one hand, the provider's obligation to operate public transport according to the requirements of the public authority and, on the other hand, the public authority's obligation to pay the provider financial remuneration in the form of so-called compensation.

Public contracts for provision of public transport services place a huge burden on public budgets and, at the same time, they can be very lucrative for the transportation providers. Based on the fact that the national markets with public transport services have been closed and controlled by national incumbents for a long time, it is no surprise that the European Union has been pushing through its legal regulation a gradual liberalization of the market with public transport as part of the policy of establishing the common market and supporting economic competition.

But did the European Union succeed in its mission? Has the market with public transport services become open to competition and fully liberalized? This paper points out to certain tendencies which, even though they formally comply with the European Union law, actually contradict the primary idea of open market and competition and will need to be addressed by the new European Commission.

2 LIBERALIZATION OF THE PUBLIC TRANSPORT MARKET

In the past two decades, the European Union has been systematically working on the liberalization of the markets with public transport of passengers. Experience of some member states showed that if adequate rules and legal mechanisms are in place, the opening of competition among providers of transport services results in more attractive and innovative services at lower cost. Notably, the European Council adopted the vision of open and competitive market with public transport services during the so-called Lisbon Process of March 28, 2000 when the European Council called on the Commission, the Council and the Member States to *"to speed up liberalization in areas such as gas, electricity, postal services and transport"*.[1]

It should be noted that the market with public transport of passengers by bus has become open to competition much faster than the market with public transport of passengers by rail. Although proposals for the introduction of common passenger transport rules date back to 1960s, the first liberalization step occurred in 1992 and concerned international bus transport. In particular, on the basis of Council Regulation (EEC) No 684/92 of 16 March 1992 on Common Rules for the International Carriage of Passengers by Coach and Bus, transportation companies from the European Union were authorized to operate regular services or occasional services.

Since 2009, the process of awarding public contracts for provision of public transport services by bus is regulated primarily by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on Public Passenger Transport Services by Rail and by Road and Repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (the "Regulation 1370/2007"). With respect to passenger transport by bus, open competitive tendering procedures are, as a rule, the primary and mandatory method of awarding public services contracts to transportation companies. Unlike public transport services by rail, public authorities have been prohibited from awarding public service contracts concerning bus transport directly without competition (except for specific exceptional cases).

Unlike the market with bus transport, the market with railway transport was controlled by national incumbents and has evaded liberalization for a longer time, despite the efforts on the side of the European Union. However, in the past years, the European Union has step up its activities aimed at liberalization of rail transport.

[1] EUROPEAN PARLIAMENT. Lisbon European Council 23 and 24 March 2000. Presidency Conclusions. Available at: https://www.europarl.europa.eu/summits/lis1_en.htm.

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In its White Paper on Transport Policy adopted on 28 March 2011[2], the European Commission proposed a new form of the Single European Railway Area with an internal railway market where European companies providing transportation services by rail could provide services without unnecessary technical and administrative barriers.

Since 2001, four so-called railway packages aimed at opening up national markets and making the railway sector more competitive have been adopted by the European Union. Because these railway packages played a critical role in liberalizing the market with public transport of passengers by rail, we shall look at them more closely.

The first railway package elaborated and expanded the principle of independence of management of railway companies, the principle of separation of railway infrastructure management from the provision of transport services and the principle of non-discrimination between railway undertakings. The legislation also ensured the right to access railway infrastructure international railway undertakings engaging in international transport.

The purpose of the second railway package was to overcome the fragmentation of the European railway market, in particularly taking into account the technical and operational differences between the rail systems of the individual Member States. A specialized agency has been set up to provide technical support to the European Commission on rail interoperability and harmonization of safety certification and to maintain public lists of related data and documents.

The third railway package opened the market for international rail passenger services within the European Union. To that end, transportation companies providing international service were entitled to embark and disembark passengers, but only on the condition that international services would not compete with national services because the domestic passenger transport market was supposed to remain closed. The third railway package included notably the above-mentioned Regulation 1370/2007 which is of major importance for the organization and financing of public transport services by across the Member States. Its goal was to create an internal market for public passenger transport services while confirming the Member States' competence to providing for a definition of public transport services with respect to the needs of their population. The Regulation 1370/2007 achieves this goal by complementing the general rules on public procurement and setting forth specific rules for the awarding of public services contracts concerning public transport of passengers. It also lays down the conditions under which compensation paid by the public authorities to the transportation companies can be deemed compatible with the rules of the internal market in the European Union and exempt from the general rule to notify any state aid to the European Commission.

The announced goal of the last, fourth railway package, was the ultimate completion of the single European Railway Area, full liberalization of the rail market and increase in the competitiveness of rail transport. This package most importantly introduced the market pillar of the liberalization by amending the Regulation 1370/2007. After the amendment, Regulation 1370/2007 places a limit on the possibility to award public contracts for public transport services by rail. In particular, such possibility will end on December 25, 2023. Based on the fact that newly concluded contracts can last for a maximum of 10 years, railway transportation companies that have not been selected in a public tender can, theoretically, provide their services until December 2033.

[2] EUROPEAN COMMISSION. WHITE PAPER Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system /* COM/2011/0144 final */ Available at: https://ec.europa.eu/transport/themes/strategies/2011_white_paper_en.

After December 25, 2023, it will be possible to award public contracts for public transport services by rail directly only in exceptional case, i.e. providers of public transportation by rail will, as a rule, have to be selected in competitive procedures similarly to providers of public transportation by bus.

In light of the above, it can be stated that the legislation of the European Union has fully liberalized both market with public transport by bus and market with public transport by rail because public authorities have, as a rule, to choose the providers of public transport services in transparent and competitive processes.

3 COUNTER-LIBERALIZATION TENDENCIES

At first glance, it would seem that the legal regulation has achieved its goal and the market with public bus and railway transport will really be liberalized soon. However, did we really achieve this goal? It appears that the current legal regulation motivates some public authorities to avoid public tenders when looking for providers of transportation services.

Experience shows that the legal regulation of procedures for the award of public passenger transport contracts is not perfect. This can be illustrated in particular by the intention of certain regional governments in the Czech Republic to refrain from awarding public service contracts for public passenger transport on the basis of open tenders and to provide these services through their subordinate organizations (the so-called internal operators).

This is for example the case of Ustecky Region, which has established a subordinate organization (Transport Company of the Ustecky Region) that now serves as the provider of public transport services in the territory of the Ustecky Region. Notably, the Transport Company of the Ustecky Region is wholly controlled by the regional government which can therefore easily influence the price, quality and scope of public transport services it ensures. The representatives of the Ustecky Region explained that their reasons for abandoning public tenders and establishing an internal provider were the legal and economic inflexibility of the system of contracts awarded by public contracts, the impossibility of increasing the price for the performance of carriers (for example in the event of wage increases), and the fact that new technologies are difficult to introduce if they were not anticipated in the original tender documentation.[3]

Apparently inspired by the Ustecky Region, the Liberecky Region also decided to establish its own subordinate transportation company, Autobusy LK. Unlike the Ustecky Region, however, the Liberecky Region intends to follow a hybrid solution whereby certain parts of its territory will be served by the internal provider and other parts will be offered to private companies through public tenders. Again, the motivation of the Liberecky Region for this move included the considerable funds invested in compensation, concerns about transparency of costs, efforts for more operational change management and greater control over operations and integration.[4]

It should be noted that both regions mentioned above had problems with the relatively complex and formalistic legal regulation because, as in case of Ustecky Region, it did not allow them to flexibly change parameters of the public service contracts concluded in the past in order to react to global increase in costs of the transportation companies or,

[3] ŠINDELÁŘ, J. Autobusový sever proti jihu: Je lepší dopravce ovládaný krajem nebo soukromník? Available at: https://zdopravy.cz/sever-proti-jihu-na-konferenci-se-stretly-dve-koncepce-zajisteni-autobusove-dopravy-12804.

[4] ŠINDELÁŘ, J. Autobusový sever proti jihu: Je lepší dopravce ovládaný krajem nebo soukromník? Available at: https://zdopravy.cz/sever-proti-jihu-na-konferenci-se-stretly-dve-koncepce-zajisteni-autobusove-dopravy-12804.

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in case of Liberecky Region, the region was not able to comply with all legal requirements during competitive tenders and subsequent sanctions of the Czech Antitrust Office practically paralyzed the region and its ability to award new public services contracts.

Although the above-mentioned examples of two regional governments in the Czech Republic to establish their own internal providers of public transport services apparently reduce the level of competition and foreclose the market with public transport services by bus, they are actually in conformity with the law of the European Union.

In particular, Article 5(2) of Regulation 1370/2007 states: *"Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or, in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. In the case of public passenger transport services by rail, the group of authorities referred to in the first subparagraph may be composed only of local competent authorities whose geographical area of competence is not national. The public passenger transport service or the public service contract referred to in the first subparagraph may only cover the transport needs of urban agglomerations or rural areas, or both."*

Regulation 1370/2007 sets forth some additional conditions that have to be fulfilled if a public authority wishes to proceed in accordance with the above provision. What is remarkable in this context is that the additional conditions also require that the internal provider does not take part in competitive tenders concerning the provision of public passenger transport services organized outside the territory of the competent local authority.[5]

So what can be inferred from the above? The European Union has made a lot of effort to liberalize the market with public transport services across the member states and to open the market to competition. At the same time, however, the laws of the European Union contain a relatively simple way out of the duty to choose service providers in competitive tenders – the establishment of an internal provider to which the public authority will award public contracts directly without the necessity of organizing public tenders. And what's more, the establishment of an internal provider does not only foreclose the market with public transport services in the territory of the respective public authority, but it also prohibits the internal provider from competing with other transportation providers in other territories.

4 CONCLUSIONS

This possibility to establish an internal provider of transport services and thus evade the duty to select providers of public transport services in open competitive procedures has been already chosen by some regions in the Czech Republic with respect to public transportation by bus. In my opinion, it cannot be excluded that more public authorities across the Member States of the European Union will follow their example and set up their own internal providers, whether for transport by bus or by rail.

[5] Article 5(2)(c) of Regulation 1370/2007 contains an exception to this rule according to which an internal operator may participate in fair competitive tenders two years before the end of its directly awarded public service contract on the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract.

Such a consequence of the existing European Union legislation apparently is not desirable in light of the originally declared objective of the legislation, i.e. full liberalization of the public transport market and enhancement of competition on the market.

Therefore, I am of the view that the new European Commission will face a challenge to analyze these tendencies and to tackle them in order to ensure a truly liberalized market with public transportation across the European Union. In particular, it should be considered whether the possibility to award public service contracts to internal operators could be limited in a way which would increase competition on the market.

Bibliography:

EUROPEAN COMMISSION. White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system /* COM/2011/0144 final */ Available at: https://ec.europa.eu/transport/themes/strategies/2011_white_paper_en.

EUROPEAN PARLIAMENT. Lisbon European Council 23 and 24 March 2000. Presidency Conclusions. Available at: https://www.europarl.europa.eu/summits/lis1_en.htm.

KOVALČÍKOVÁ, D., ŠTANDERA, J. Zákon o veřejných službách v přepravě cestujících. Komentář. Prague: Wolters Kluwer, 2011, 236 pages.

Regulation (EEC) No 684/92 of 16 March 1992 on Common Rules for the International Carriage of Passengers by Coach and Bus.

Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on Public Passenger Transport Services by Rail and by Road and Repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 Concerning the Opening of the Market for Domestic Passenger Transport Services by Rail.

ŠINDELÁŘ, J. Autobusový sever proti jihu: Je lepší dopravce ovládaný krajem nebo soukromník? Available at: https://zdopravy.cz/sever-proti-jihu-na-konferenci-se-stretly-dve-koncepce-zajisteni-autobusove-dopravy-12804.

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FIGHTING BID RIGGING IN THE EUROPEAN UNION /

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Abstract: *Bid rigging is considered to be a very serious competition law infringement (hard-core restriction) having impact not only on ineffective use of public funds but at the same time deforming the whole relevant market. Therefore it is necessary to fight bid rigging in each stage of the tendering procedure. The article reviews different tools used for fighting bid rigging from initial stage of public procurement to imposing remedies for this kind of collusive behaviour. Based on analysis it offers menas of improving the legal regulation and efficacy of sanctions imposed for bid rigging.*

Key words: *competition, public procurement, bid rigging, public markets, prosecution, leniency, remedies, fines.*

1 INTRODUCTION

Fighting bid rigging in the European Union belongs to the very important tasks of the Commission and the European Courts as public procurement forms a significant part of the internal market. Therefore, public contracts have to comply with the principles of the Treaty on Functioning of the European Union („TFEU"), especially those related to the internal market regulation, and have to be opened up to competition.[1]

Competition could be described as one of the leading principles of public procurement, because „only well operated competitive tender shall guarantee the effective spending of public finances."[2] Besides negative influence on public procurement process itself, collusive tendering has many side effects, first of all deformation of the whole relevant market. It can cause „umbrella effect" affecting prices of relevant goods also offered by the third parties not participating on cartel agreement in form of bid rigging. So, besides fines imposed for collusive behaviour, bid rigging can also lead to damages claim with regard to the fact, that cartel raises prices compared with those applied in absence of collusive behaviour.[3]

On the other hand, public procurement is described as „a market-like regulatory instrument capable of generating market distortions."[4] Therefore importance of competition is stressed as a means contributing „to the efficient functioning of publicly

[1] Directive 2014/24/EU of the European Parliamentand of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, Recital, N. 1.

[2] KOVÁČIKOVÁ, H.: Uncompetitive Practices in Public Procurement in EU/Slovak Context. In: European Studies, The Review of European Law, Economics and Politics, Vol. 5, 2018, CAES, Palacky University Olomouc, Wolters Kluwer, 2018, p. 284.

[3] E. g. KONE: ECJ judgement in case C- 557/1ľ of 5 June 2014. In ŠMELKAL,V. DUFKOVÁ, B. Průvodce aktuální judikaturou Soudního dvora EU k ochraně hospodářské soutěže, UK v Prahe, Právnická fakulta, 2015, p. 130.

[4] SÁNCHEZ GRAELLS, A.(2015) Public Procurement and the EU Competition Rules,(2 ed.) Oxford: Hart Publishing, p. 61.

dominated...markets, where ...the public buyer holds significant (buying) market power and, consequently, can influence market dynamics."[5]

2 BID RIGGING – CONCEPT AND ITS FORMS

Collusive tendering or bid rigging „is a practice whereby firms agree among themselves to collaborate over their response to invitation to tender."[6] In other words, „collusion in public procurement is an agreement between/among tenderers, determining the winning bid in advance."[7] This kind of agreement restricts, of course, competition between/among parties and belongs therefore to horizontal cartels between/among direct competitors, so called hard core restrictions. Agreement replacing genuine competition between/among tenderers negates the substance and the sense of the whole public procurement process and brings about many negative effects – artificial growth of prices, ineffective use of public funds, negative influence on business background.[8] Bid rigging is understood as a very dangerous form of competition restriction with regard to the ammount of contracts depending on results of public procurement.[9] Bid rigging can have a special legal regulation[10] or is caught by Art. 101 (1) TFEU.

Collusive tendering may take many forms. Tenderers can agree to quote identical prices or at least to notify intended quotas to each other[11], others may use the rotation system „in which case the firm whose turn it is to receive an order will ensure that its quote is lower than everyone´s else´s".[12] Also other forms can be applied. Besides rotation system, market segmentation principle, supplementary bids and controlled bids are usually mentioned.[13]

3 PUBLIC MARKETS

To reduce the risk of bid rigging it is first of all necessary to know the characteristics of the corresponding market. In order to determine market correctly it is unevitable to collect all needed information concerning goods/services to be procured, the potential suppliers, prices included.[14]

It has to be stressed that particular market characteristics make markets prone to collusion. High concentration of the market or limited number of subjects operating on the market enables to identify competitors easily.[15] The same is characteristic for the market with a limited number of important players, where the other participants are only marginal

[5] Ibid., p. 65.
[6] WHISH, R., BAILEY, D. Competition Law. Oxford University Press 2015, p. 571.
[7] Kartelové dohody vo verejnom obstarávaní. https: //www.antimon.gov.sk/data/files/96 kartelove-dohody-vo-vo. pdf.. p. 4
[8] Ibid., p. 5
[9] According to OECD materials public contracts represent up to 15 % GDP. In: Kartelové dohody vo verejnom obstarávaní, p. 4).
[10] E. g. Section 4, para 4, lit. f) of the Slovak Act No. 136/2001 Coll. On Protection of Competition as amended.
[11] WHISH, R. , BAILEY, D. Competition Law, Oxford University Press 2015, p.572.
[12] Ibid., p. 572.
[13] RAUS, D., ORŠULOVÁ, A. Kartelové dohody. 1st Ed. Prague, C. H. Beck, 2009, p. 122-123.
[14] Reccommendation of the OECD Council on Fighting Bid Rigging in Public Procurement, approved by Council on 17 July 2012, C (2012) 115-C(2012)115/CORR1- C/M (2012) 9, p. 5. (https://www.oecd.org/competition/cartels/fighting bidrigginginpublic procurement.htm).
[15] Kartelové dohody vo verejnom obstarávaní, ...p. 9

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competitors.[16] Also symmetry among undertakings on the market, including their size and market share can lead to collusion instead of competition.[17]

So, it is perhaps not surprising, that collusive tendering „is particularly likely to be encountered in the engineering and construction industries where firms compete for very large contracts; often the tenderee will have a powerful bargaining position and the contractors feel the need to concert their bargaining power.“[18]

As „the efficiency of the procurement process will depend upon the bidding model adopted...“[19]it is equally important to design the procurement scheme carefully. Although an universal model of public procurement is not to be suggested, the OECD Reccomendation offers a number of means to prevent collusion both in the design stage as well as in the stage when tender is carried out. To mention is first of all maximising the potential participation of the bidders[20], defining what is to be achieved by tendering procedure, rather than how it is to be done[21], carefully chosing criteria for evaluating and awarding the teder[22], not favouring the incumbents[23], giving chance to smaller and medium sized firms and participants from abroad.[24]

OECD reccomends to look for warning signs in tendering procedure that is prone to bid rigging, e. g. geographical allocation of the tenders[25], unexpected withdrawing from the tender[26], repeated submitting of the lowest price in bidding procedure by the same tenderer[27], submitting a joint bid even when an own, separated bid of the undertaking could be presented[28]etc. All the time it is necessary to pay attention to signs of collusion in bidding procedure; it can be very useful to collect „the historical experience “from the past tenders[29], as collusion in certain cases, e. g. in case of rotation of bids, cannot be revealed based on a single tender.[30]

As the main responsibility and burden for success of public procurement procedure obviously lies on procuring staff, the professional training is also very important.[31]In this connection it has to be stressed that the procuring staff taking decisions on public resources, not own money, can lack natural motivation to get the best outcome of the procuring procedure. It can also be less sensitive on revealing a collusion scheme what makes collusion more likely to appear.[32]

With regard to these signs that might occur in public procurement process it is important not only to warn the participants/bidders against sanctions for bid rigging,

[16] Ibid.
[17] Ibid.
[18] WHISH, R. , BAILEY, D. Competition Law, Oxford University Press 2015, p.571.
[19] Reccommendation of the OECD Council on fighting bid rigging in public procurement, approved by Council on 17 July 2012, C (2012) 115/COR R1- C/M (2012) 9, p. 7.
[20] Ibid., p.6.
[21] Ibid., p.2
[22] Ibid., p.9
[23] Ibid., p. 9.
[24] Ibid. p. 6
[25] Ibid., p. 12.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid, p.10.
[30] Ibid.
[31] Ibid.
[32] Kartelové dohody vo verejnom obstarávaní, p. 4

suspension from participating in public tenders for certain period of time included,[33] but also, on the other hand to comprise respective tasks of the staff among its statutory duties.[34]

Among factors contributing to the likelihood of collusion on public dominated markets the role of formal rules governing the public procurement has to be addressed. As already mentioned „public procurement is a mechanism of government economic intervention"[35] and the public procurement rules „constitute a potential source of market imperfection or market failure – in the sense that they will force the market equilibrium to depart from the optimal equilibrium in the absence of regulation."[36] At the same time Sanchez Graells stresses that „formal rules governing public procurement can make communication among rivals easier promoting collusion among bidders. While collusion can emerge in both procurement and «ordinary» markets procurement regulations may facilitate collusive arrangements."[37]

According to his opinion, „it is out of question that,...procurement regulations significantly increase the transparency of the market and facilitate collusion among bidders through repeated interaction."[38] Among the statutory provisions contributing to transparency and collusion he mentions rules of bid disclosure, pre-bid meetings, pre-defined or stable groups of firms invited to public procurement process.[39] He concludes that under these circumstances „it is not surprising that a large number of cartel cases prosecuted in recent years have taken place in public procurement settings..."[40]

4 PROSECUTION OF BID-RIGGING

Bid rigging in public procurement belongs undouptedly to very serious infringements of the competition rules and regarding its impact on the ineffective use of public sources its prosecution and sanctioning is in public interest.[41] Due to secret character of bid rigging agreements their disclosing is a very complicated and demanding matter.[42] Therefore a competition authority, Commission and the Slovak Antimonopoly Office included, depend in their investigation on information or evidence leading to disclosing of these anticompetitive practices. Of great importance in this regard is the leniency programme applied by the Commission[43] and the national competition authorities as well.[44] Delivering substantial information and evidence leading to detection of cartel agreements especially in public procurement in exchange of general or partial imunity from sanctions

[33] OECD Reccommendation, p. 9.
[34] Ibid., p. 3.
[35] SÁNCHEZ GRAELLS, A.(2015) Public Procurement and the EU Competition Rules,(2 ed.) Oxford: Hart Publishing, p.62.
[36] Ibid., p. 63.
[37] Ibid., p. 73.
[38] Ibid., p. 73.
[39] Ibid., p74.
[40] Ibid., p. 74.
[41] Kartelové dohody vo verejnom obstarávaní, ...p. 12.
[42] Ibid. Mária T. Patakyová compares digitalised markets to the ordinary markets pointing out their increased transparency and effectivity. She also stresses the importance of artificial intelligence and algorithms as new tools for detection of the maket abnormalities possibly indicating a cartel. (PATAKYOVÁ, M. T. Initial Thoughts on Influence of Artificial Intelligence on Bid Rigging. EU Business Law Working Papers 1/2019. Széchenyi István University/Faculty of Law and Political Sciences, Györ.)
[43] Leniency programe (2006/C 298/11).
[44] BICKOVÁ, D. Jaká bude budoucnost leniency programu? Antitrust 3/2011, p. 121.

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imposed for participation on cartel agreement is the main objective of the leniency programe. It is often the only means leading to bid rigging prosecution.[45] Many famous bid rigging agreements were disclosed and prosecuted based on leniency programe.[46]

Information or evidence delivered by companies based on leniency programe is often not sufficient for further prosecution and the competition authority has to use other means to verify certain facts or suspicion. To the most effective tools belong inspections in undertakings. Inspections are used for purposes of detection of different kinds of competition rules infringements, bid rigging included. Generally, in order to carry out inspection in compliance with the respective legal regulation, there must be a proportional relationship among scope of suspicion, scope of charging a person with carrying out inspection and the scope of investigation itself. But there are some specific features of bid rigging agreements that have to be taken into account. There are some examples of case law, where it was unsufficient to determine the objective of the inspection only in general – „coordination of participation and bids in public procurement in sphere of engineering"[47] without specifying concrete bid precisely.[48]

In other words, scope of investigation has to correspond to the scope of suspicion, otherwise inspection has to be cosidered illegal having character of „fishing expedition"[49] This approach is in harmony with the requirements laid down on Commission´s inspections. Commission has to specify „essential characteristics of the suspected ingringement"[50] by defining relevant market, character of the assumed infringement and the way the infringement was commited.[51] Inspection is then limited only to the sector that has been specified.[52]

This approach, restricting legality of inspection only to the individual case, is fully justified by respect of the right of privacy of undertakings and their right of defence. On the other hand it is not always consistent with the character of bid rigging agreements. This kind of agreement is often a part of broader strategy covering „coordination and assignment of bids in the whole economic sectors ...and can last a long period of time."[53] This is quite evident e. g. in case of rotation of bids concerning a series of agreements, not only one case of the specific public procurement.

5 REMEDIES

5.1 Fines

It is, of course, not enough to disclose anticompetitive behaviour in public procurement, when a suitable remedy is not designed. Compared to „identification and analysis of competition problems"[54] in general „much less attention has been paid to the

[45] Ibid., p. 121.
[46] E. g. Decision of AMO No. 2007/KH/1/1/109 and decision of the AMO Council N. 2009/KH/R/2/035.
[47] PETR, M. K určitosti vymezení předmětu šetření na místě ve věcech bir riggingu. Antitrust 3/2017, p. 74.
[48] Ibid.
[49] Ibid., p. 76.
[50] Ibid., p. 76.
[51] Ibid.
[52] Ibid.
[53] Ibid., p. 78.
[54] NIELS, G., JENKINS, H. KAVANAGH,J. Economics for Competition Lawyers, 2. ed. Oxford University Press, 2016, p. 359.

design of remedies for these problems."[55] At the same time it has to be admitted that „remedies matter a great deal for the effectiveness of competition law enforcement. Spending a substantial ammount of resources on an investigation and concluding that there is a competition problem is of little value if suitable remedy cannot be found."[56]

Fines imposed for bid rigging belong to the prevailing remedies for this kind of competition law infringement. Similarly as in case of other agreements restricting competition the fine is being calculated based on turnover of the undertaking concerned reflecting thus its size and economic strength.[57] Calculation of the fine is based on two main criteria gravity and duration of the infringement.[58] Except for punishing the fines have to fullfil preventive function simultaneously. In other words, they should deter undertakings from conduct restricting competition. To achieve this goal it is inevitable to secure that the infringement is not worth its commiting with regard to cost-profit relationship.[59]

Applying this general principle to antitrust means that fines have to exceed damages caused to the society due to the cartel existence[60]; damage is equivalent price increase caused by cartel agreement.[61]

Bid rigging agreements are fined equally as any other hard-core restrictions, both in the EU and its Member States, Slovakia included. The Competition authority has a broad discretion setting fines limited only by 10 % of the turnover.[62] T. Nováková argues that calculation of fines based on turnover, even in case of bid rigging, is based on sales volume instead of damage caused by cartel.[63] In her opinion optimal fine for bid rigging agreement with deterring effect should be calculated based on assumed profit of the public order, that means its final price. Usually, fines imposed for bid rigging do not correlate with the value of public order; fines imposed by the Czech Antimonopoly Office are lower than the optimal fine, but strong competitors with higher relevant turnover are fined higher than the optimal fine should be, although in tenders with lower price. Based on these arguments she suggests to change calculation of fines for bid rigging agreements. Therefore fine for bid rigging should be derived primary from value of the public tender rather than turnover of undertaking participating on this kind of agreement.[64]

5.2 Other Remedies

Fines are not the only remedies used for competition law violations in public procurement. Based on Slovak Public Procurement Act[65] the public operator can exclude

[55] Ibid.
[56] Ibid., p. 360.
[57] E. g. Judgement of the ECJ of 18 July 2013 in case C-501/11 P (Schindler), p. 14.
[58] Regulation No.1/2003, Art. 23/3.
[59] NOVÁKOVÁ, T. Plní pokuty ukládané účastníkům kartelové dohody preventivní funkci? Antitrust 2/2017, p. 51.
[60] LANDES, W. M. Optimal Sanctions for Antitrust Violations. University of Chicago Law Review 652 (1983). In NOVÁKOVÁ, T. Plní pokuty ukládané účastníkům kartelové dohody preventivní funkci? Antitrust 2/2017, p. 52.
[61] Price increase can only be estimated. E. g. Estimation of American Sentencing Commission supposes 10 % price increase caused by cartel agreement in comparison to the market price. In NOVÁKOVÁ, T. Plní pokuty ukládané účastníkům kartelové dohody preventivní funkci? Antitrust 2/2017, p. 55.
[62] The European Commission 2006 Guidelines on Antitrust Fines. (2006/C 210/02).
[63] NOVÁKOVÁ, T. Plní pokuty ukládané účastníkům kartelové dohody preventivní funkci? Antitrust 2/2017, p. 55.
[64] Ibid., p.57-58.
[65] Act on Public Procurement No. 343/2015 Coll.

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a bidder that participated on agreement restricting competition in the present case of public procurement.[66]
This provision „reflects situation when some public operators disposed of knowledge or as the case may be grounded suspicion that competing bids result of cartel agreement."[67]

This remedy applied in present case of public procurement has to be distinguished from the remedy applied by the Slovak Antimonopoly Office based on Art. 38h Act on Protection of Competition.[68] The Antimonopoly Office can impose to an undertaking fined for bid rigging agreement a ban to participate in public procurement for the period of three years, except for undertakings liberated from fines based on leniency programme[69]. If the fine is reduced on the same grounds or in a case of settlement[70], the period of ban to participate in public procurement is 1 year only.

Although the ban to participate in public procurement could be an efficient remedy deterring undertakings from collusion, the problem is a long time elapsing until final decision/judgement is adopted.

6 CONCLUSIONS

1. It is of great importance to pay attention to the risk of collusion in all stages of public procurement process. Public procurement regulation itself has to be designed in a way avoiding or restricting potential collusion.

2. As the main accontability for the successful public procurement lies on public operator, some of his duties in preparing and designing public procurement could be laid down as statutory duties in Public Procurement Act.

3. Specific character of bid rigging agreements being often a part of a complex strategy (e. g. rotation of bids) and lasting therefore a longer period of time has to be respected during their investigation, first of all in case of inspections in undertakings following often knowledge/suspicion acquired thanks to leniency programe.

4. Regarding fines imposed for bid rigging and their deterring effect it is to consider fixing their amount based on the value/price of a tender rather than the turnover of the undertakings concerned.

5. In order to apply other remedies under Public Procurement Act it is necessary to evaluate correctly all the information concerning potential collosion in present public procurement and to warn competitors in advance that collusion is another ground for exclusion from public procurement.

6. Efficiency of ban to participate on public procurement imposed under Competition Act can be lowered by a period of time taken to adopt a final decision/judgement. Therefore it is necessary to speed up corresponding procedures.

[66] Art. 40/6 g) Act N. 343/2015 Coll.
[67] KASENČÁKOVÁ, L. Hra o tendre alebo kartelové dohody vo verejnom obstarávaní (bid rigging), p.10. (https://www.antimon.gov.sk 13.3.2017).
[68] Act on Protection of Competition No. 136/2001 as amended.
[69] Art. 38d Act No. 136/2001 as amended.
[70] Art. 38c Act No. 136/2001 as amended.

Bibliography:

BICKOVÁ, D. Jaká bude budoucnost leniency programu? Antitrust 3/2011, p. 121-123.
KASENČÁKOVÁ, L.: Hra o tendre alebo kartelové dohody vo verejnom obstarávaní (bid rigging), https://www.antimon.gov.sk, 13.3.2017.
KOVÁČIKOVÁ, H. Uncompetitive Practices in Public Procurement in EU/Slovak Context. European Studies: The Review of European Law, Economics and Politics. Vol. 5/2018, Olomouc, Wolters Kluwer, 2018, p. 283-294.
NIELS, G., JENKINS, H., KAVANAGH, J. Economics for Competition Lawyers, 2 ed. Oxford University Press, 2016.
NOVÁKOVÁ,T. Plní pokuty ukládané účastníkům kartelové dohody preventivní funkci? Antitrust 2/2017, p. 51-58.
PATAKYOVÁ, M. T. Initial Thoughts on Influence of Artificial Intelligence on Bid Rigging. Business Law Working Papers 1/2019, Syéchenyi István University, Faculty of Law and Political Sciences, Centre for European Studies, Györ, p. 2-9.
PETR, M. K určitosti vymezení předmětu šetření na místě ve věcech bid riggingu. Antitrust 3/2017, p. 73-79.
RAUS, D., ORŠULOVÁ, A. Kartelové dohody. 1 ed. Prague: C. H. Beck, 2009.
SANCHEZ GRAELLS, A. (2015): Public Procurement and the EU Competition Rules (2 ed.) Oxford: Hart Publishing.
WHISH R., BAILEY, D. Competition Law, Oxford University Press, 2015.

OECD Reccommendation on Fighting Bid Rigging in Public Procurement of 17 July 2012, C (2012) 115-C(2012)115/CORR1-C/M (2012) 9.
Kartelové dohody vo verejnom obstarávaní. https: //www.antimon.gov.sk/data/files/96 kartelove-dohody-vo-vo. pdf.

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DIGITAL SINGLE MARKET AS LEGAL CHALLENGE/ Daniela Ježová

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Abstract: *A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. The idea of the Digital Single Market generally covers the European Union without any digital barriers.*

Key words: *Digital Single Market, Copyright, Artificial Intelligence*

1 INTRODUCTION

The creation of a Digital Single Market is a priority of the Union and aims liberties associated with the EU internal market to expand to the digital world, thereby promoting growth and employment in the EU. Following the Lisbon Strategy[1], the Strategy Europe 2020[2] has introduced the Digital Agenda for Europe as one of the seven major initiatives, while accepting the key role of the use of information and communication technologies, that the EU will succeed in its effort in 2020. The Digital Agenda for Europe has seven policy areas. European Union founds important to extend the current EU single market, which consist of free movement of goods, services, labour and capital. The single market makes the EU territory without any barriers. Currently four freedoms included in the internal market needs to reflect the development of the society and the digital era. After creating the Digital Single Market, the European Union can enjoy its full potential. The idea of the Digital Single Market generally covers the European Union without any digital barriers, which includes the option of the consumers to compare goods from all over the Europe, access the digital entertainment around the Europe, simple access to sources of information, no barriers when accessing digital banking and other financial products, possibility for small and medium businesses present themselves online and enjoy the opportunities given by the electronic world.[3]

2 DIGITALIZATION AND LEGAL CHALLENGES

Digitalization comes in one hand together with globalization. The ways of life have significantly changed over the past century[4] through the emergence of information and

[1] The aim of the Lisbon Strategy was to make the EU "the most competitive and dynamic knowledge-based economy in the world, capable of continuous economic growth with more and better jobs and greater social cohesion."

[2] Europe 2020 - A strategy for securing of a smart, sustainable and inclusive growth (COM (2010) 2020)

[3] JEŽOVÁ, D.: EU Digital Single Market – Are We There Yet?, In: AD ALTA, Year 7, Issue: 2 (2017), p. 99-102

[4] DÁVIDEKOVÁ, M., DÁVIDEKOVÁ, p. AND GREGUŠ, M. ml.: A Case, Study of the Application of Managerial Techniques of a Selected Team Manager in the Business Practice. Ad Alta: Journal of Interdisciplinary Research, 2015, vol. 5, no. 2, pp. 20-26

communication technology. The Internet that allowed the most accessible "transport" media for informational exchange enabled the globalization to evolve[5]. Globalization brings together people from various countries into one place building one team committed to a common goal and purpose creating an international and multicultural environment[6]. The virtual reality technology that represents interactive virtual environment with the most possible resemblance to physical reality[7]. In the information age there is a greater parallel that can be drawn between the networks in which firms are embedded and the networks in which territorial areas are engaged[8,9].

The idea of digital single market was created as after the digitalization got the significant impact in the world. The first basic step and a milestone of the digital single market is the data protection reform represented by General Data Protection Regulation[10] and the Directive[11]. General idea behind is that the consumer´s data will not be used without their consent or based on any other legal title, and operators must be able to develop innovative economic models. Behavioural advertising was getting more developed and the personal data was being misused for advertising purposes. In this article I will not deeper evaluate the data protection reform.[12]

After the data protection was ensured the digital single market can fasten its development. The secure digital environment was established, and the law can react on the major world digitalization trends. European Commission was carefully identifying areas of the digital world which shall be legally adjusted and where the legal rules, restrictions shall be specified on the level of the European Union. The roaming fees was regulated and rules

[5] BAUMAN, Z.: Globalizácia – Dôsledky pre ľudstvo. 1st ed. Bratislava: Kallingram, 2000. 124 p. ISBN 80-7149-335-X

[6] DÁVIDEKOVA, S., GREGUŠ, M. 2017 "Case Study: Impacts of Globalization on Socio-Economic Domain of Employees In The Area Of Czech And Slovak Republic" In: AD ALTA: journal of interdisciplinary research, year 7, vol. 2, p. 46-52

[7] DÁVIDEKOVÁ, M., MJARTAN, M., GREGUŠ, M. ml.: Implementing Virtual Reality into Employee Education in Production Sector of Automotive Industry: Creating Worker Training for Assembling Car Dashboard In Virtual Reality. Ad Alta: Journal of Interdisciplinary Research, 2017, vol. 7, no. 1, pp. 185-190

[8] ALCÁCER, J., CANTWELL, J., PISCITELLO L., 2016. Internationalization in the information age: A new era for places, firms, and international business networks? Journal of Intenrational Business Studies, vol 47, p. 499-512

[9] JEŽOVÁ, D.: GDPR – RESULT OF GLOBALIZATION?, In.: Globalization and its socio-economic consequences: proceedings. - Žilina : Žilinská univerzita, 2018. - p. 167-174. ISBN 978-80-8154-249-7.

[10] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data

[11] Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA

[12] For further details see: JEŽOVÁ, D.: Data protection reform in the EU as a part of the forming digital single market, In: European studies : the review of European law, economics and politics : Vol. 5. - Olomouc, 2018. - p. 295-302, or JEŽOVÁ, D.: Data protection in virtual world, In: Právní rozpravy 2017. - Hradec Králové : Magnanimitas, 2017. - p. 62-70

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with general idea using the phone and data service within European Union for traveling was enacted.[13] Geoblocking is another area adjusted by the legal rules by European Union[14].

The other important area in European Union digital world was the area of the copyrights. Significant copyright reform was enacted including two packages: First package including the regulation on cross-border portability of online content services [15]which is already valid and applicable and the second package includes two directives – general directive on copyright in Digital Single Market[16] and a directive on online transmissions of broadcasting [17]which will become applicable in June 2021. New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. The reform attracted attention of not only scientists and lawyers but mostly of consumers and public. Several manifestations were held based on the proposal of the legal instruments[18]. The result is the compromise, mostly focuses on exceptions from the main duty to obtain the license of the author with the release of the content. The shift of the responsibility is crucial in the reform. The reform shifts the responsibility for having the licence from the author from the consumer to the online platforms (online content sharing service providers). Most controversial articles are article 15 and article 17 of the directive on copyright in Digital Single Market. The articles are well known as "upload filter" or "meme ban" and "link tax". Those two articles were a real legal challenge. A group of 165 directors and screenwriters drew up a declaration in support of the directive, obtaining more than 18,700 signatories from over 100 countries worldwide[19]. The legal challenge was to provide enough protection and on the other hand do not stop the digital progress. Meme ban could mean sharing platforms such as Google, YouTube, and Facebook's Instagram would have to take more responsibility for copyrighted material being shared illegally on their platforms. The expert claimed that as a result, the variety of available online content, especially user-generated content will probably significantly be reduced. Online participation for private citizens will become more difficult.[20] The campaign, which has received about five million signatures for its online petition, also argues the filters would not just tackle large companies, but smaller platforms too. More than 200 European academics also joined forces in a series of open letters in which they stated, "Articles 11 (now 15) and 13 (now 17) will do more harm than good,"

[13] Regulation (EU) No. 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the union (recast)

[14] Regulation (EU) No. 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

[15] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market

[16] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

[17] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC

[18] Slovak and Czech Wikipedia was close down on 21.03.2019, Italian Wikipedia was closed down on July 2018, Cologne protests on 16. February 2019 and 16. March 2019, Berlin protest on 02.03.2019 and other

[19] Venice Declaration (Sept. 3, 2018), available on https://www.saa-authors.eu/file/475/download (02.02.2020).

[20] ex.: Bernd Justin Jutte, assistant professor, University of Nottingham, Faculty of Social Science

adding that "they should be deleted". Currently the compromise was enacted of both articles. The current article 15 known as the link tax is connected only to the publishers of press publications which use a special protection. They have the right for obtaining the renumeration for spreading their consent. More of the exemptions were enacted such us: hyperlinking, private or non-commercial usage by individual users, very short extract of the press publication. Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of the Directive. Recital 54 gives us the reasons of enacting the "link tax" as the wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue. Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments. The question about the very short extract was not answered yet. We can refer to the case Infopaq[21] where the Court of Justice stipulated the act of printing out an extract of 11 words, during a data capture process does not fulfil the condition of being transient and that process cannot be carried out without the consent of the relevant rightholders. The case was interpreting the Directive 2001/29/EC but still can be used as one of the criterions when considering the meaning of the expression "very short extract". The current article 17 stipulates general responsibility of the online platform for the content. The responsibility becomes primary. The directive stipulates and exemptions between which also starts up belong - "the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million". The exceptions also reflect the technical development and the imperfection of current status quo of the technical software such as upload filters. Wikipedia as a non-profit organization is also excluded. The other issue is the text and data mining (TDM - research technique to collect information from large amounts of digital data through automated software tools) as far any reproductions resulting in the creation of a copy of a protected work along the chain of TDM activities might trigger copyright infringement. Text and data mining make the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible. Such technologies benefit universities and other research organisations, as well as cultural heritage institutions since they could also carry out research in the context of their main activities. TDM might involve the reproduction, translation, adaptation, arrangement, and any other alteration of a database protected by copyright, which means the original selection and arrangement of the database's content. [22] The exception of quotation, criticism, review; use for the purpose of caricature, parody or pastiche was enacted too. Where no exception or limitation applies, an authorisation to undertake such acts is required from rightholders.

Artificial intelligence can be called another legal challenge for the future. Currently the development of artificial intelligence is heading forward very fast. The European Commission has put forward the European approach to this legal challenge in its

[21] Judgment of the Court in Case C-5/08 from 16. July 2009, Infopaq International A/S v Danske Dagblades Forening, EU:C:2009:465

[22] GEIGER, Ch., FROSIO, G., BULAYENKO, O: The exception for text and data mining (TDM) in the proposed directive on Copyright in the digital single market – Legal aspects, available file:///C:/Users/Daniela%20Je%C5%BEov%C3%A1/Downloads/SSRN-id3160586.pdf (02.02.2020)

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Communication[23] know as European Strategy on Artificial Intelligence. The Commission put emphasis on the investment in development of artificial intelligence under the research and innovation programme Horizon 2020. It will reach EUR 1.5 billion for the period 2018-2020. European Countries signed the declaration of cooperation in relating to the development and investment in artificial intelligence. A group of experts was set up by the Commission (Hight Level Group on Artificial Intelligence). The emphasis when developing the Artificial intelligence is given on ethical guidelines for Trustworthy Artificial Intelligence prepared by the group of experts. Artificial intelligence has become an area of strategic importance and a key driver of economic development. As legal challenges connected with the artificial intelligence is the liability. The European Parliament enacted the resolution with recommendations to the Commission on Civil Law Rules in Robotics[24] which tried to create a general definition of robot and AI while being flexible for innovation and tried to set up principles of the liability of robots. The Parliament set up following characteristics of a smart robot: a) the acquisition of autonomy through sensors and/or by exchanging data with its environment (inter-connectivity) and the trading and analysing of those data; b) self-learning from experience and by interaction (optional criterion); c) at least a minor physical support; d) the adaptation of its behaviour and actions to the environment; e) absence of life in the biological sense. Examples: Autonomous vehicles, drones, care robots, medical robots. Considers that the civil liability for damage caused by robots is a crucial issue which also needs to be analysed and addressed at Union level in order to ensure the same degree of efficiency, transparency and consistency in the implementation of legal certainty throughout the European Union for the benefit of citizens, consumers and businesses alike. Notes that development of robotics technology will require more understanding for the common ground needed around joint human-robot activity, which should be based on two core interdependent relationships, namely predictability and directability; points out that these two interdependent relationships are crucial for determining what information need to be shared between humans and robots and how a common basis between humans and robots can be achieved in order to enable smooth human-robot joint action. Considers that, in principle, once the parties bearing the ultimate responsibility have been identified, their liability should be proportional to the actual level of instructions given to the robot and of its degree of autonomy, so that the greater a robot's learning capability or autonomy, and the longer a robot's training, the greater the responsibility of its trainer should be.

The parliament recommends to the commission those possible legal solutions, such as: a) establishing a compulsory insurance scheme where relevant and necessary for specific categories of robots whereby, similarly to what already happens with cars, producers, or owners of robots would be required to take out insurance cover for the damage potentially caused by their robots; b) ensuring that a compensation fund would not only serve the purpose of guaranteeing compensation if the damage caused by a robot was not covered by insurance; c) allowing the manufacturer, the programmer, the owner or the user to benefit from limited liability if they contribute to a compensation fund, as well as if they jointly take out insurance to guarantee compensation where damage is caused by a robot; d) deciding whether to create a general fund for all smart autonomous robots or to create an individual fund for each and every robot category, and whether a contribution

[23] Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions - Artificial Intelligence for Europe, Brussels, 25.4.2018, COM(2018) 237 final

[24] Civil Law Rules on Robotics, European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law, Rules on Robotics (2015/2103(INL)), (2018/C 252/25)

should be paid as a one-off fee when placing the robot on the market or whether periodic contributions should be paid during the lifetime of the robot; e) ensuring that the link between a robot and its fund would be made visible by an individual registration number appearing in a specific Union register, which would allow anyone interacting with the robot to be informed about the nature of the fund, the limits of its liability in case of damage to property, the names and the functions of the contributors and all other relevant details; f) creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently.[25]

Expert Group on Liability and New Technologies[26] provided its finding about the liability for artificial intelligence where they recommended following rules: a) A person operating a permissible technology that nevertheless carries an increased risk of harm to others, for example AI-driven robots in public spaces, should be subject to strict liability for damage resulting from its operation. b) In situations where a service provider ensuring the necessary technical framework has a higher degree of control than the owner or user of an actual product or service equipped with AI, this should be taken into account in determining who primarily operates the technology. c) A person using a technology that does not pose an increased risk of harm to others should still be required to abide by duties to properly select, operate, monitor and maintain the technology in use and – failing that – should be liable for breach of such duties if at fault. d) A person using a technology which has a certain degree of autonomy should not be less accountable for ensuing harm than if said harm had been caused by a human auxiliary. e) Manufacturers of products or digital content incorporating emerging digital technology should be liable for damage caused by defects in their products, even if the defect was caused by changes made to the product under the producer's control after it had been placed on the market. f) For situations exposing third parties to an increased risk of harm, compulsory liability insurance could give victims better access to compensation and protect potential tortfeasors against the risk of liability. g) Where a particular technology increases the difficulties of proving the existence of an element of liability beyond what can be reasonably expected, victims should be entitled to facilitation of proof. h) Emerging digital technologies should come with logging features, where appropriate in the circumstances, and failure to log, or to provide reasonable access to logged data, should result in a reversal of the burden of proof in order not be to the detriment of the victim. i) The destruction of the victim's data should be regarded as damage, compensable under specific conditions. j) It is not necessary to give devices or autonomous systems a legal personality, as the harm these may cause can and should be attributable to existing persons or bodies.

3 CONCLUSION

Idea of Digital single market was a necessary move forward the development of the European Union. The development in the information technologies shall have its rules. On the other hand, it is challenging for law and lawmakers to provide rules in such a fast-changing area such us information technologies. The goal of the EU was to find a legal

[25] See further the Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions - Artificial Intelligence for Europe, Brussels, 25.4.2018, COM(2018) 237 final

[26] Report from the Expert Group on Liability and New Technologies – New Technologies Formation, EU 2019

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wording of the regulation and directives that will ensure the validity of them for a longer time period while mirroring the development of the technologies. Other legal challenge is to react on the requirement of the web providers as it was in controversial copyright reform in digital single market. The EU lawmakers had to face the public discussion and critic over the proposed wording of the legal measure. The legal challenge of the future are opened and highlighted legal questions connected with the current developing artificial intelligence, mostly the question of the responsibility and liability. When discussing the artificial intelligence and its liability more factors comes into consideration such us software defect, having proper updates, autonomous decision of the robots, hackers, other relevant factors. Those factors shall be taken into consideration when talking about the liability and based on my opinion the liability shall not be bound only to the owner or the person operating the artificial intelligence robot. Those are questions of future research and for further discussion.

Bibliography:

ALCÁCER, J., CANTWELL, J., PISCITELLO L., 2016. Internationalization in the information age: A new era for places, firms, and international business networks? Journal of Intenrational Business Studies, vol 47, p. 499-512

BAUMAN, Z.: Globalizácia – Dôsledky pre ľudstvo. 1st ed. Bratislava: Kallingram, 2000. 124 p. ISBN 80-7149-335-X

Bernd Justin Jutte, assistant professor, University of Nottingham, Faculty of Social Science

Civil Law Rules on Robotics, European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law, Rules on Robotics (2015/2103(INL)), (2018/C 252/25)

Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions - Artificial Intelligence for Europe, Brussels, 25.4.2018, COM(2018) 237 final

DÁVIDEKOVÁ, M., DÁVIDEKOVÁ, p. AND GREGUŠ, M. ml.: A Case, Study of the Application of Managerial Techniques of a Selected Team Manager in the Business Practice. Ad Alta: Journal of Interdisciplinary Research, 2015, vol. 5, no. 2, pp. 20-26

DÁVIDEKOVÁ, M., MJARTAN, M., GREGUŠ, M. ml.: Implementing Virtual Reality into Employee Education in Production Sector of Automotive Industry: Creating Worker Training for Assembling Car Dashboard In Virtual Reality. Ad Alta: Journal of Interdisciplinary Research, 2017, vol. 7, no. 1, pp. 185-190

DÁVIDEKOVA, S., GREGUŠ, M. 2017 "Case Study: Impacts of Globalization on Socio-Economic Domain of Employees In The Area Of Czech And Slovak Republic" In: AD ALTA: journal of interdisciplinary research, year 7, vol. 2, p. 46-52

Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA

Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives

96/9/EC and 2001/29/EC
Europe 2020 - A strategy for securing of a smart, sustainable and inclusive growth (COM (2010) 2020)
For further details see: JEŽOVÁ, D.: Data protection reform in the EU as a part of the forming digital single market, In: European studies : the review of European law, economics and politics : Vol. 5. - Olomouc, 2018. - p. 295-302, or JEŽOVÁ, D.: Data protection in virtual world, In: Právní rozpravy 2017. - Hradec Králové : Magnanimitas, 2017. - p. 62-70
GEIGER, Ch., FROSIO, G., BULAYENKO, O: The exception for text and data mining (TDM) in the proposed directive on Copyright in the digital single market – Legal aspects, available file:///C:/Users/Daniela%20Je%C5%BEov%C3%A1/Downloads/SSRN-id3160586.pdf (02.02.2020)
JEŽOVÁ, D.: EU Digital Single Market – Are We There Yet?, In: AD ALTA, Year 7, Issue: 2 (2017), p. 99-102
JEŽOVÁ, D.: GDPR – RESULT OF GLOBALIZATION?, In.: Globalization and its socio-economic consequences: proceedings. - Žilina : Žilinská univerzita, 2018. - p. 167-174. ISBN 978-80-8154-249-7
Judgment of the Court in Case C-5/08 from 16. July 2009, Infopaq International A/S v Danske Dagblades Forening, EU:C:2009:465
Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data
Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market
Regulation (EU) No. 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the union (recast)
Report from the Expert Group on Liability and New Technologies – New Technologies Formation, EU 2019
Slovak and Czech Wikipedia was close down on 21.03.2019, Italian Wikipedia was closed down on July 2018, Cologne protests on 16. February 2019 and 16. March 2019, Berlin protest on 02.03.2019 and other
Venice Declaration (Sept. 3, 2018), available on https://www.saa-authors.eu/file/475/download (02.02.2020).

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HARMONIZATION VS. REAL CONVERGENCE – CASE OF PUBLIC PROCUREMENT/ Ondrej Blažo

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The paper was prepared within project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context".

Abstract: *The paper considers opening national market in public procurement the focal point of transposition of the public directives, and therefore case law of the Court of Justice of the European Union is analysed. The question is, however, how far are the markets really opened, i.e. how successful opening of the market has been. For this purposes, quantitative data show mutual interpenetration of national markets of the EU Member States in the field of public procurement. The analysis showed that the outcomes of harmonization and real convergence varies. First of all, although having formally harmonized rules of public procurement, the evaluation of real performance shows substantial deficiencies. These deficiencies are much more dangerous in countries that face problems with excessive government deficits and/or public debt. The interpenetration of markets of public procurement across the EU is still low and the market is still rather fragmented than unified within the internal market.*
Key words: *public procurement, EU law, harmonization, real. convergence*

1 INTRODUCTION

The harmonization of laws is not a specific competence of the European Union (hereinafter "EU") but the measure to achieve its aims and objectives within the principle of conferral, subsidiarity and proportionality. The scope of harmonization of laws[1] under Art. 114 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") is limited and bound purely to Art. 26 thereof. The EU has no power to harmonize market conditions within the internal market, but it is allowed to "intervene to cure diversity between national laws only where that diversity is shown to be harmful to the achievement of the EU's internal market."[2] Indeed, this limited scope of harmonization powers of the EU does not diminish voluntarily harmonization and effects of mutual inspiration, and also exporting its regulation to the non-EU countries.[3] Public procurement and its harmonization across the EU is one of the outcomes of the broad application of Art. 114 TFEU. Due to the principle of subsidiarity, the decentralized model was selected and the onus for the functioning of internal market vis-à-vis actions of public authorities was shifted to the Member States.[4] Regulatory competition can act as an engine for legal and economic development, however national public procurement regimes can lead to different outcome and can hinder competition

[1] WEATHERILL, p. Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market. In: *From Single Market to Economic Union* [online]. Oxford University Press, 2012. DOI: 10.1093/acprof:oso/9780199695706.003.0010

[2] WEATHERILL, p. The Limits of Legislative Harmonization Ten Years after Tobacco Advertising : How the Court's Case Law has become a "Drafting Guide" . In: *German Law Journal* [online]. 2011, Vol. 12,No 3, p. 830. DOI: 10.1017/s2071832200017120

[3] See e.g. BRADFORD, A. The Brussels effect. In: *Northwestern University Law Review* [online]. 2012, Vol. 107,No 1. DOI: 10.1093/oso/9780190088583.003.0003

[4] BOVIS, C.H. *The Liberalisation of Public Procurement and its Effects on the Common Market*. Abington, Oxford, New York: Routledge, 2018, p. 15.

itself: the Member States can employ public procurement regime as a one of the measures of national industrial policy by favouring "national champions", and thus produce some positive welfare based on development of industry in issue, and in the same time they create barriers of entry to the market and lead to suboptimal allocation of sources[5].

The purpose of the Public Procurement Directive[6], as well as Utilities Sectors Procurement Directive[7] and Defence Procurement Directive[8], is linked to achieving objectives of the internal market, i.e. free movement of goods, freedom of establishment and the freedom to provide services. The link between awarding public contract within the compliance of the rules of internal market, and thus the scope and purpose of public procurement directives, is observance of principles of the internal market and principles stemming therefrom: equal treatment, non-discrimination, mutual recognition, proportionality and transparency.[9]

These principles as guiding set of rules of European public procurement regime shall be transformed into national legal orders[10] in order to secure principles of freedoms of internal market. However, preciseness of EU rules regarding these principles varies within the EU legal framework itself[11] as well as their implementation seems to be varying across the EU.[12]

This paper will show that the opening national market in public procurement shall be the focal point of transposition of the public directives, and therefore case law of the Court of Justice of the European Union (hereinafter "CJ EU") will be analysed. The question is, however, how far are the markets really opened, i.e. how successful opening of the market has been. For this purposes, quantitative data will show mutual interpenetration of national markets of the EU Member States in the field of public procurement.

2 PRINCIPLES EMBEDDED INTO THE PUBLIC PROCUREMENT DIRECTIVE IN THE CASE LAW OF THE CJ EU

Principles of equal treatment and non-discrimination are mutually interlinked and usually understood as the same principle. However, the principle of equal treatment appears to be much more straightforward with stronger imperative because it does not require to identify grounds for discrimination. On the other hand, principle of non-discrimination stresses one of the basic principles of the functioning of the internal market of the EU –

[5] BOVIS, The Liberalisation of Public Procurement and its Effects on the Common Market, p. 12-13.

[6] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65–242).

[7] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243–374).

[8] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76–136).

[9] Public Procurement Directive, Recital 1.

[10] KOVÁČIKOVÁ, H. Uplatňovanie európskych obstarávacích princípov v procese národného verejného obstarávania. In: *Acta Facultatis Iuridicae Universitatis Comenianae*. 2019, Vol. 38,No 2

[11] HALONEN, K.-M. Many faces of transparency in public procurement. Disclosure Within Public Procurement and During Contract Execution. In: HALONEN, K.-M., CARANTA, R., SANCHEZ-GRAELLS, A. eds. *Transparency in EU Procurements*. Cheltenham, Northampton: Edward Elgar Publishing, 2019, p. 8-9.

[12] KOVÁČIKOVÁ, H. Conflict of interest: Case of the public procurement in Slovakia. In: *Strani pravni zivot* [online]. 2019, Vol. 71,No 4. DOI: 10.5937/spz63-24010

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prohibition of discrimination on a basis of nationality and it points to the essence of free market, i.e. removal of internal barriers therewithin.

The CJ EU confirmed interconnection between maintaining of competitive space and free competition of tenderers with the principle of equal treatment in *eVigilo*: "Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions."[13] As it was noted, the prohibition of discrimination on the basis of nationality is the basic guideline for application internal market rules. In e.g. *Commission/Ireland* found a possible source of discrimination in the lack of transparency: "... the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but which are located in other Member States ...[…] Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC ..."[14]

The principle of transparency has been seen by the CJ EU as "securing" principle, i.e. principle that shall secure proper application of the principle of equal treatment and non-discrimination since it is "essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority"[15] "with respect to certain tenderers or certain tenders"[16] Thus, the principle of transparency shall protect tenderers against abusive behaviour of contracting authorities and in this way to protect free competition among undertakings. The CJ EU, however, in *Assitur* applied the principle of transparency vis-à-vis requirements of access to markets and weighed whether measures securing transparency and equal treatment are proportionate to that aim: "Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure."[17]

[13] Judgment of 12 March 2015, eVigilo, C-538/13, EU:C:2015:166, par. 33.
[14] Judgment of 13 November 2007, Commission/Ireland, C-507/03, EU:C:2007:676, par. 30-31.
[15] Judgment of the Court of 29 April 2004, Commission v CAS Succhi di Frutta, C-496/99 P, EU:C:2004:236, par. 111.
[16] eVigilo, par. 34.
[17] Judgment of of 19 May 2009, Assitur, C-538/07, EU:C:2009:317, operative part.

3 REACHING OBJECTIVES OF PUBLIC PROCUREMENT HARMONIZATION

The European Commission evaluates and scores[18] performance of the EU Member States in the area of public procurement based on twelve criteria.[19] The "unsatisfactory" score indicate serious ineffectiveness of public procurement in respective country due to lack of transparency, competitiveness, equal treatment and non-discrimination, as well as issues related to speed reliability of procedures. Poor performance and ineffectiveness of public procurement is much more dangerous in countries that have substantial problems with budgetary deficit or government debt since it can deepen deficit or debt as well as avoid introducing fiscal stability. This link is particularly apparent in the case of Greece, Italy, Spain and Portugal.

Chart 1: Debt, deficit and public procurement performance 2019

	General government gross debt	General government deficit/surplus	Public procurement performance score
AT	70,5	0,7	unsatisfactory
BE	98,1	-1,9	average
BG	20,2	1,9	average
CY	94	1,5	unsatisfactory
CZ	30,2	0,3	unsatisfactory
DE	59,6	1,5	average
DK	33,3	3,8	satisfactory
EE	8,4	0,1	satisfactory
ES	95,5	-2,9	unsatisfactory
FI	59,3	-1	satisfactory
FR	98,1	-3	average
GR	180,5	1,5	unsatisfactory
HR	72,8	0,4	satisfactory
HU	65,4	-2,1	average
IE	57,4	0,5	average

[18] European Commission, Single Market Scoreboard, Performance per policy area Public Procurement [online] https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm (visited 20.12.2020)

[19]

Criterion	Green zone (satisfactory)	Red zone (unsatisfactory)
Single bidder	≤ 10	> 20
No calls for bids	≤ 5	≥ 10
Publication rate	> 5	< 2.5
Cooperative procurement	≥ 10	< 10
Award criteria	≤ 80	> 80
Decision speed	≤ 120 days	> 120 days
SME contractors	> 60	< 45
SME bids	> 80	< 60
Procedures divided into lots	> 40	< 25
Missing calls for bids	≤ 3	> 3
Missing seller registration numbers	≤ 3	> 3
Missing buyer registration numbers	≤ 3	> 3

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IT	134,7	-1,6	unsatisfactory
LT	35,9	0,3	satisfactory
LU	22	2,4	average
LV	36,9	-0,6	satisfactory
MT	42,6	0,5	unsatisfactory
NL	48,7	1,7	average
PL	45,7	-0,7	average
PT	117,2	0,1	unsatisfactory
RO	35,3	-4,4	unsatisfactory
SE	35,1	0,5	satisfactory
SI	65,6	0,5	unsatisfactory
SK	48,5	-1,4	average
UK	85,4	-2,3	satisfactory

Sources: European Commission, Single Market Scoreboard, Eurostat[20]

The analysis of data within the Single Market Scoreboard shows that several countries have persistent deficiencies in effectiveness of public procurement. The Scoreboard considers unsatisfactory performance cases when there is more than 20 % of tenders with single bidder. Czechia, Greece, Hungary and Poland exceed this threshold more than twice (40 % and more) and overall increase of the portion of single-bidder tenders is apparent in all EEA countries, except Croatia, Cyprus, Luxembourg, Romania, Sweden, the United Kingdom, Iceland, and Liechtenstein. However, even though the number of single-bidder tenders is decreasing in Romania and the United Kingdom, it is still 30 % and more. Along the high ration of single-bidder open tenders, there is also significant instances of tenders without previous calls in Bulgaria, Cyprus, Romania and Slovenia (in Bulgaria, Cyprus and Slovenia over 20 %) and also critical in Czechia, Croatia, Estonia, Latvia, Hungary, Poland, Slovakia, Spain. Based on no-call tenders and single-bidder tenders, we can establish a composite figure of non-competitive tenders, in which is either no prior call for bids or there is only one bidder in the tender.[21] As Chart 2 shows, in Czechia, Cyprus, Poland and Romania, in half of the awards, the contractors have no competitor in tender and in Bulgaria, Greece, Italy, Latvia, Hungary and the United Kingdom, percentage of non-competitive tender is constantly above one third of all tenders.

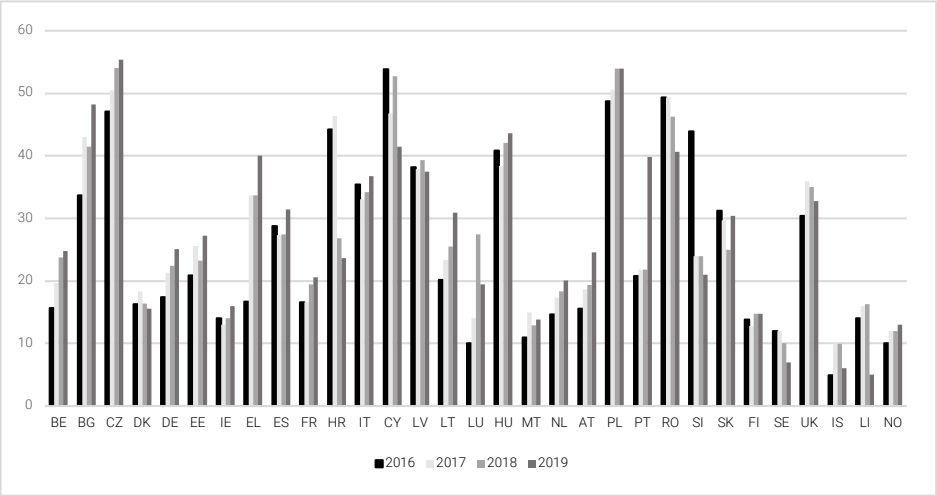
A link between design of tenders and its competitiveness seems not to be significant. Chart 3 shows that lower number of tenders with price as the only criterion (x-axis) does not lead to significant competitiveness of such tenders (i.e. lower number of single bidders) (y-axis). There is no apparent connection between tenders with price as the only criterion and SMEs as winning contractor (Chart 4), as well as link between instances of single bidders and SME/non-SME contractor (Chart 5).

Based on all aforementioned data, although we can identify certain "clusters" of state with similar behaviour or market conditions, it is definitely apparent that outcome of harmonized systems of public procurement is strikingly divergent. Moreover, it must be noted, that these data cover only award of public contracts s covered by the EU's regulation and does not involve data under thresholds stipulated by the public procurement directives as a threshold for application of the EU law.

[20] European Commission, Eurostat. Database. [online] https://ec.europa.eu/eurostat/data/database (visited 20.12.2020)

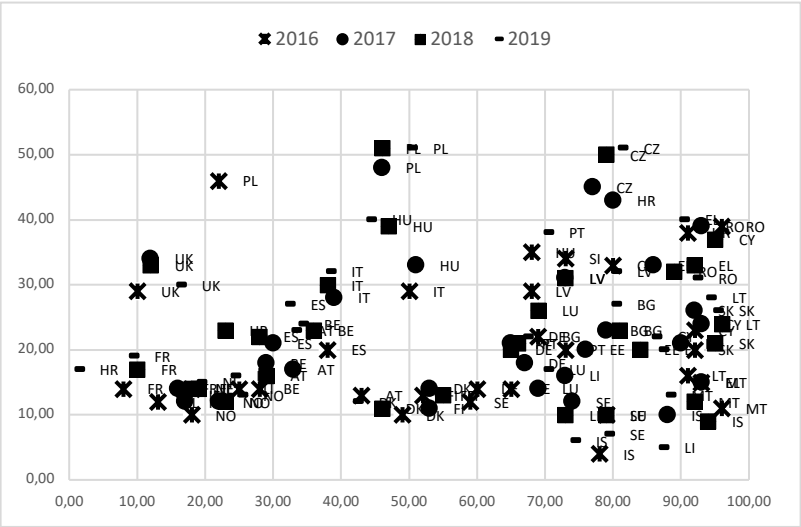
[21] Based on formula C=A+(100-A)*B, where A is no call for bids tenders and B is of tenders with single bidder, C is amount of non-competitive tenders

Chart 2: Non-competitive tenders in EEA



Sources: European Commission, Single Market Scoreboard, author's own calculations

Chart 3: Tenders with price as single criterion and tenders with single bidder



Sources: European Commission, Single Market Scoreboard, author's own calculations

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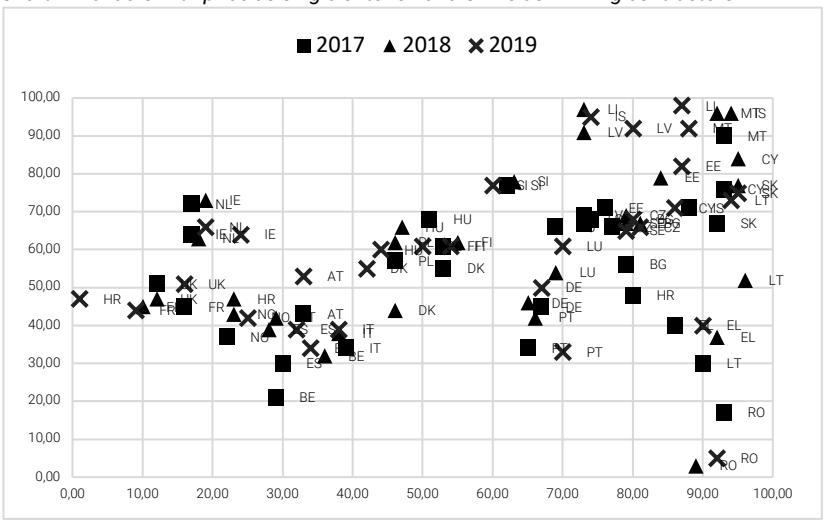
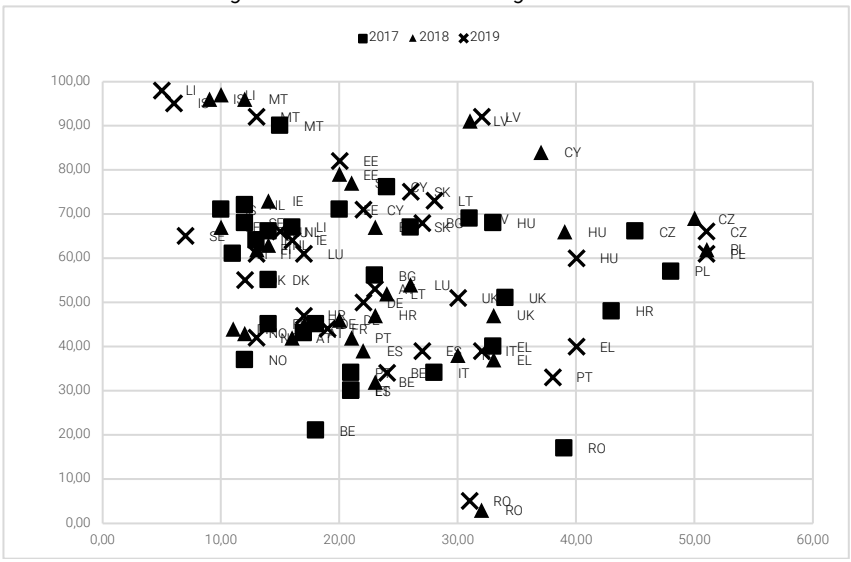
Chart 4: Tenders with price as single criterion and SMEs as winning contractors



Sources: European Commission, Single Market Scoreboard, author's own calculations

Chart 5: Tenders with single bidder and SMEs as winning contractors



Sources: European Commission, Single Market Scoreboard, author's own calculations

4 HARMONIZATION OF PUBLIC PROCUREMENT RULES AND UNIFICATION OF INTERNAL MARKET

Following part of this paper will analyse quantitative data on contract awarded in the EU Member States. The CVS datasets of the TED[22] provide source of information for analysis, although author is aware of possible errors and shortcoming of these databases provided by the European Commission.[23] The distribution of contracts[24] was analysed on the basis of two criteria: on the basis of number of awards and on the basis of the value of the contracts. Since contracting authorities may have different approach for setting the value of award of a framework agreement,[25] framework agreements are completely excluded from the analysis.

The EU "market of public procurement"[26] within the competence of the EU (i.e. above thresholds stipulated by the public procurement derives) is dominated by awards attributed to contracting authorities with the seat in Germany (Chart 6) on the buyers' side as well as by companies with their seat in Germany on the suppliers' side (Chart 7). Indeed, on the one hand, this analysis does not cover public procurement that is not covered by the directives. Moreover, on the other hand, the outcomes are deformed by methodology used in publication of awards as was mentioned above, as well as one awarded contract can span through several years and thus value of awarded contracts can exceed public spending in respective year. The distribution of estimated value of public procurement calculated as the sum of intermediate consumption, gross fixed capital formation and social transfers in kind via market producers (excluding utilities)[27] is shown in Chart 8.

Chart 6: Tenders awarded by contracting authorities in the EU Member States from 2016 (inner circle) to 2019 (outer circle) in percent of total value of contracts awarded

[22] Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs. Tenders Electronic Daily (TED) (csv subset) – public procurement notices. https://data.europa.eu/euodp/en/data/dataset/ted-csv. (visited on 6 December 2020)

[23] Advanced notes on methodology - Version 0.91 (04/06/2020) https://data.europa.eu/euodp/repository/ec/dg-grow/mapps/TED_advanced_notes.pdf (visited on 6 December 2020)

[24] It must be also noted that number of "awards" in CSV databases can vary from the exact numbers of tenders and contracts concluded on basis of awards because one tender can be split in several lots and several parts. On the other hand, if one "award" was split in several lots or it was won by consortium, this "award" was attributed to each winner, i.e. the total sum of awards to individual winners is higher than the total number of awards.

[25] The amount of the contracts is in some instances deformed by the different approach of contracting authorities in respective countries towards the value of framework agreements – income cases is the value 0, in some cases is the maximum value of the framework agreement or estimated value thereof.

[26] for this concept see KALESNÁ, K. Súťaž na trhoch verejného obstarávania. In: *Acta Facultatis Iuridicae Universitatis Comenianae*. 2020, Vol. 39,No 2

[27] OECD. *Government at a Glance 2019* [online]. OECD, 2019, p. 134. DOI: 10.1787/8ccf5c38-en

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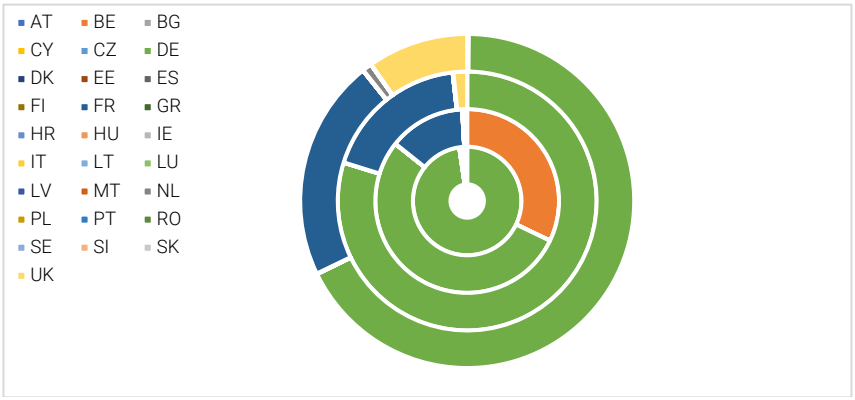
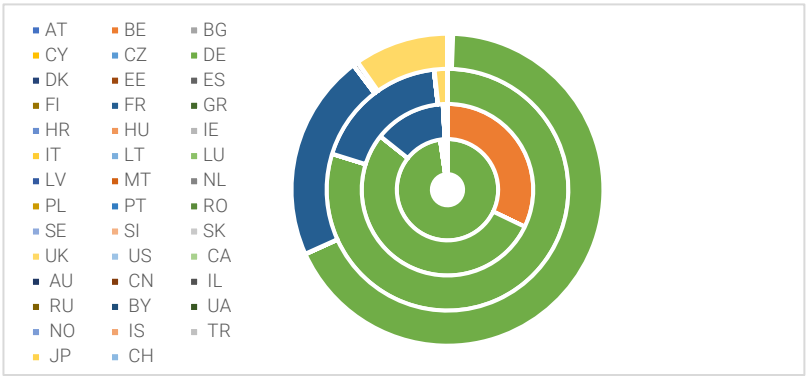


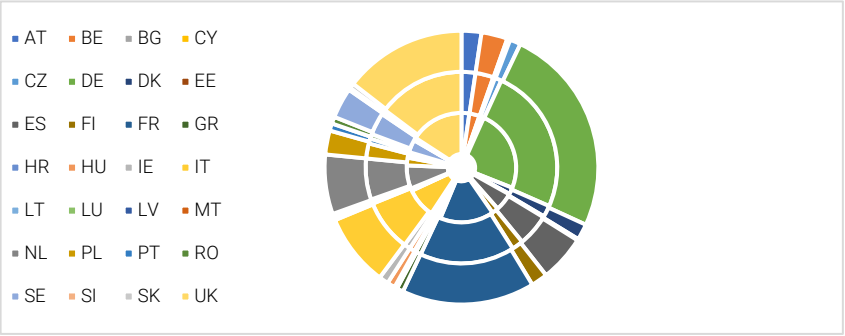
Sources: TED Database, author's own calculations

Chart 7: Seat of the winning bidder in tenders awarded by contracting authorities in all EU Member States from 2016 (inner circle) to 2019 (outer circle) in percent of total value of contracts awarded



Sources: TED Database, author's own calculations

Chart 8: Estimation of value of public procurement in all EU Member States from 2016 (inner circle) to 2018 (outer circle)



Sources: Eurostat, author's own calculations

Notwithstanding the respective ratio of "markets" of public procurement in respective Member States, evaluation of mutual interpenetration between origin of supply and demand will show level on intra-EU competition. Although abovementioned shortcomings of databases have not impact on evaluation of single EU Member States, another shortcoming will appear, because if the contract is awarded to economic operators from different countries, it is attributed in full both countries of origin.[28] However this shortcoming of calculation does not impede the evaluation of overall interpenetration.

Chart 9 shows the absolute prevalence of awarding contracts to domestic economic operators, or, at least, consortia comprising a domestic operator. The "residual" market, i.e. contracts awarded to non-domestic economic operators and consortia, in which domestic economic operators did not participate, varies across the EU Member States, is relevant only in smaller economies and substantial in the smallest EU Member States (Cyprus, Malta, Luxembourg), while in the biggest economies is almost non-existent (Chart 10). Usually, the substantial portion of the marked left to non-domestic operators is covered by economic operators originating from the country that occupied the second place among countries of origin of the winners of bids (based on value) (Chart 11).

Chart 9: Seat of the winning bidder in tenders awarded by contracting authorities in individual EU Member States from 2016 to 2019

Member State	2016		2017		2018		2019	
	Origin	Value %	Origin	Value %	Origin	Value %	Origin	Value %
AT	AT	95,9701	AT	95,4921	AT	95,8193	AT	95,9076
BE	BE	85,9503	BE	99,9966	BE	90,3648	BE	81,9621
BG	BG	95,9892	BG	98,8821	BG	95,2781	BG	95,5058
CY	CY	90,0499	CY	93,6576	CY	78,0350	CY	79,2093
CZ	CZ	96,0044	CZ	94,3250	CZ	97,5201	CZ	99,7971
DE	DE	99,9994	DE	99,9986	DE	99,9994	DE	99,9996

[28] E.g. if contract is awarded to consortium of German and French firms, the whole value is attributed to both – France and Germany.

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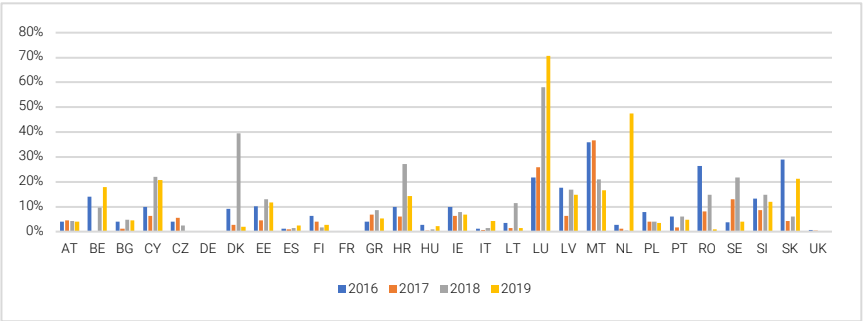
DK	DK	90,7234	DK	97,4009	DK	60,4016	DK	98,1133
EE	EE	89,8169	EE	95,5301	EE	87,0956	EE	88,1764
ES	ES	98,9183	ES	99,0277	ES	98,6271	ES	97,5925
FI	FI	93,5602	FI	96,0933	FI	98,3071	FI	97,3829
FR	FR	99,8999	FR	99,9917	FR	99,9957	FR	99,9990
GR	GR	96,0153	GR	93,2372	GR	91,3599	GR	94,7078
HR	HR	90,1956	HR	93,9386	HR	72,8733	HR	85,5817
HU	HU	97,1556	HU	99,4731	HU	98,9605	HU	97,9117
IE	IE	90,0069	IE	93,5792	IE	92,2170	IE	93,1718
IT	IT	98,7692	IT	99,2478	IT	98,6537	IT	95,6324
LT	LT	96,5855	LT	98,4371	LT	88,5639	LT	98,5876
LU	LU	78,2114	LU	74,2177	LU	41,9135	BE	68,8842
LV	LV	82,3645	LV	93,7036	LV	83,0846	LV	85,2556
MT	MT	64,0043	MT	63,3959	MT	79,0100	MT	83,4694
NL	NL	97,1796	NL	98,8967	NL	99,5325	NL	52,6180
PL	PL	92,2212	PL	95,9237	PL	96,0031	PL	96,5492
PT	PT	93,8135	PT	98,3053	PT	93,8038	PT	95,1551
RO	RO	73,5702	RO	91,8674	RO	85,1916	RO	99,0576
SE	SE	96,3705	SE	87,0481	SE	78,2734	SE	96,0058
SI	SI	86,6746	SI	91,4281	SI	85,2643	SI	87,9724
SK	SK	70,9745	SK	95,7547	SK	94,0217	SK	78,6542
UK	UK	99,2924	UK	99,4783	UK	99,9526	UK	99,9889

Sources: TED Database, author's own calculations

Chart 10: Value of contracts awarded to economic operators with seat in other country than the country of seat of contracting authority from 2016 to 2019



Sources: TED Database, author's own calculations

Chart 11: Countries and value of contracts awarded to economic operators with seat in other country than the country of seat of contracting authority from 2016 to 2019 (second place in order in total value of awards)

	2016		2017		2018		2019	
AT	DE	2,4887%	DE	2,6372%	DE	1,6515%	DE	2,1880%
BE	FR	6,3647%	DE	0,0020%	NL	4,2576%	FR	14,5167%
BG	HU	2,1999%	AT	0,5431%	PL	4,5763%	IT	16,7455%
CY	GR	4,2378%	GR	5,5541%	UK	11,1893%	DE	10,8898%
CZ	SK	2,5977%	SK	6,5590%	SK	4,7588%	IT	0,1407%
DE	AT	0,0003%	NL	0,0007%	AT	0,0003%	AT	0,0014%
DK	NL	4,9983%	NL	0,9044%	BE	23,0130%	DE	0,7677%
EE	SE	2,2231%	FI	7,6800%	PL	9,6581%	PT	3,1860%
ES	FI	0,2278%	FR	0,1780%	UK	0,5351%	EE	0,3462%
FI	IT	0,6777%	US	2,6363%	NL	1,2446%	NL	2,2640%
FR	BE	0,0543%	BE	0,0084%	IT	0,0033%	NL	0,0008%
GR	TR	0,1937%	IT	5,7850%	NO	5,7050%	IT	1,9875%
HR	SI	2,4026%	SI	3,5176%	CN	23,0003%	SI	9,3760%
HU	CH	1,5365%	AT	2,3463%	AT	4,7639%	CH	1,3970%
IE	UK	10,6483%	UK	4,2433%	UK	5,2149%	UK	7,8116%
IT	ES	0,1205%	ES	0,3349%	ES	0,3775%	US	1,0909%
LT	LV	1,0226%	PL	0,5297%	PL	3,5470%	LV	0,6932%
LU	BE	7,6791%	BE	10,9551%	NL	36,0564%	ES	67,8829%
LV	US	4,8964%	EE	0,9250%	LT	5,3865%	BE	15,5811%
MT	UK	9,6941%	IT	33,0973%	IT	13,3485%	IT	5,8950%
NL	BE	2,1716%	BE	0,3642%	DE	0,1427%	BE	47,3762%
PL	IT	2,9626%	US	1,6337%	TR	4,3638%	DE	1,2307%
PT	ES	2,0603%	ES	0,8043%	FR	2,7519%	ES	4,7263%
RO	ES	12,7759%	US	2,7760%	IT	8,5828%	PL	0,3041%
SE	IT	2,5178%	US	4,1717%	UK	18,5240%	ES	1,2606%
SI	CH	3,0556%	US	4,9359%	CH	9,6765%	GR	5,5649%
SK	UK	28,2293%	CZ	29,7650%	CZ	9,6354%	CZ	21,8688%
UK	PT	0,1151%	US	0,1421%	US	0,0120%	FR	0,0249%

Sources: TED Database, author's own calculations

Although the position of economic operators from other countries that country of the contracting authority, several patterns can be identifiable. There is apparent interpenetration within public procurement markets between countries with the same or similar language historical links between these countries, e.g. Ireland and the United Kingdom, the United Kingdom and the United States, Slovakia and Czechia, countries of BENELUX, Poland and Baltic countries, Croatia and Slovenia, Portugal and Spain (Chart 11 and Chart 12). Relative inflow and outflow awards. In respective EU Member States also corresponds to relative openness of the market of public procurement – minimal in France and Germany and imbalanced in small economies – higher inflow comparing tto outflow, e.g. Luxembourg, Malta, Croatia (Chart 13).

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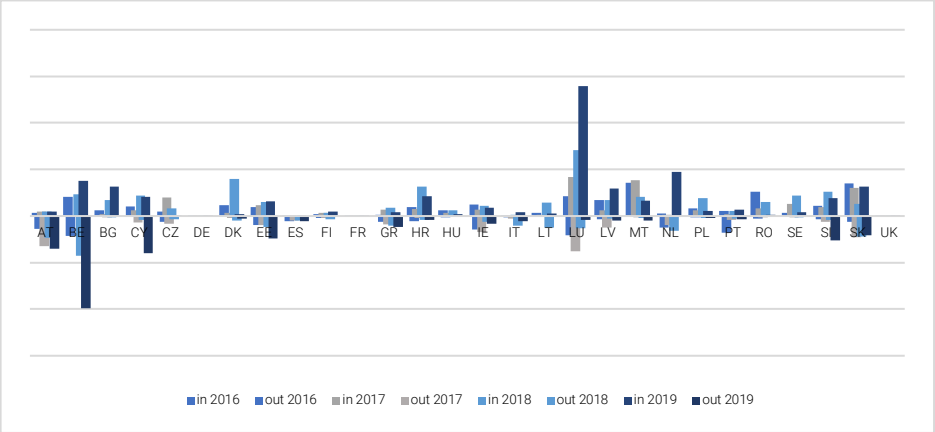
Chart 12: Countries of origin of economic operators with seat in other country than the country of seat of contracting authority from 2016 to 2019 (second to fifth place in order in total value of awards)

	2016	2017	2018	2019
AT	DE, CZ, ES, UK	DE, UK, IT, ES	DE, CH, UK, FI	DE, IT, NL, UK
BE	FR, LU, NL, UK	DE, NL, FR, LU	NL, DE, ES, FR	FR, NL, ES, DE
BG	HU, RU, US, PL	AT, FR, GR, PL	PL, ES, IT, TR	IT, ES, GR, RO
CY	GR, UK, ES, HR	GR, DE, IT, UK	UK, GR, US, IE	DE, GR, RU, UK
CZ	SK, DE, ES, PL	SK, DE, FR, AT	SK, PL, DE, NL	IT, SK, PL, BE
DE	AT, NL, DK, US	NL, AT, UK, CH	AT, BE, UK, NL	AT, CH, BE, FR
DK	NL, ES, IT, BE	NL, UK, FR, SE	BE, IT, UK, US	DE, NO, BE, SE
EE	SE, CZ, PL, LT	FI, NL, FR, SE	PL, FI, LT, NO	PT, BE, GR, GR
ES	FI, FR, IE, CH	FR, NL, US, CH	UK, DE, IT, PT	EE, FR, IT, PT
FI	IT, EE, SE, UK	US, SE, ES, CZ	NL, SE, DK, DE	NL, ES, SE, IE
FR	BE, IT, CH, DE	BE, DE, IT, NL	IT, DE, CH, ES	NL, IT, BE, CH
GR	TR, BG, NO, CY	IT, FR, CN, BG	NO, FR, CY, CA	IT, FR, CN, ES
HR	SI, IT, CA, DE	SI, AT, PL, NL	CN, SI, IL, NL	SI, DE, GR, AT
HU	CH, PL, DE, AT	AT, DE, RU, CZ	AT, DE, SK, CZ	CH, AT, NL, DE
IE	UK, NL, US, DE	UK, BE, FR, ES	UK, ES, NL, CH	UK, NL, FR, DE
IT	ES, FR, PL, AT	ES, FR, DE, UK	ES, FR, DE, IE	US, DE, PL, BE
LT	LV, DE, CZ, PL	PL, NO, LV, DE	PL, TR, LV, NL	LV, CZ, PL, EE
LU	BE, FR, DE, IT	BE, DE, GR, FR	NL, FR, DE, BE	ES, LU, DE, FR
LV	US, CZ, PL, DE	EE, BY, BE, FI	LT, CH, BE, IT	BE, CZ, ES, EE
MT	UK, IT, GR, FR	IT, LU, GR, BE	IT, IL, TR, GR	IT, TR, HR, UK
NL	BE, DE, UK, CH	BE, DE, IT, ES	DE, UK, CH, US	BE, DE, NO, DK
PL	IT, TR, US, ES	US, IT, ES, CH	TR, FR, IT, ES	DE, BE, UA, CN
PT	ES, US, RO, UK	ES, FR, AT, DE	FR, ES, IT, IE	ES, CN, BE, DE
RO	ES, DE, IT, US	US, DE, BE, IT	IT, ES, TR, UK	PL, TR, UK, IT
SE	IT, NL, NO, PL	US, FR, CH, NO	UK, US, DK, FI	ES, DK, NO, IT
SI	CH, DE, HR, AT	US, IT, DE, AT	CH, PL, AT, IT	GR, ES, RU, HR
SK	UK, CZ, DE, AT	CZ, RU, PL, HU	CZ, CH, IT, TR	CZ, CY, DE, FR
UK	PT, US, IE, NO	US, CH, ES, DE	US, ES, DE, IE	FR, NL, DE, CH

Sources: TED Database, author's own calculations

Chart 13: Comparison of values of contracts awarded to economic operators outside home country (percent of total awards to economic operators with seat in respective country; negative values) and values of contracts awarded to non-domestic operators (percent of the value of all awards in respective country; positive values) from 2016 to 2019



Sources: TED Database, author's own calculations

5 CONCLUSIONS

The EU established solid legal framework for harmonization of law on public procurement that is complemented by substantial body of case law of the CJ EU. The focal point of this harmonization can be seen in the principles of non-discrimination, equal treatment and transparency. Due to reference to Art. 114 TFEU, the legal purpose of public procurement legislation on the EU level is to remove obstacles to free movement of gods, services and to the freedom of establishment. The "secondary" or "horizontal" objectives can be found in support of SMEs, as well as protection of environment, human rights etc.

The paper focused on evaluation of the success of the directives to real convergence of application of public procurement rules and openness of public procurement markets of respective EU Member States (based on measuring mutual interpenetration). The analysis showed that the outcomes of harmonization and real convergence varies. First of all, although having formally harmonized rules of public procurement, the evaluation of real performance shows substantial deficiencies. These deficiencies are much more dangerous in countries that face problems with excessive government deficits and/or public debt. The interpenetration of markets of public procurement across the EU is still low and the market is still rather fragmented than unified within the internal market.

The Member States and their contracting authorities should therefore focus not only to adaptation of the EU rules on public procurement but also to opening their markets via pro-active policies in order to achieve more competitive outcomes. However, such policy can reach a glass ceiling of political consideration and public choice[29] and contracting

[29] WALLER, S.W. Public Choice Theory and the International Harmonization of Antitrust Law. In: *The Antitrust Bulletin* [online]. 2003, Vol. 48,No 2. DOI: 10.1177/0003603X0304800206; WECK-

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authorities can be reluctant to open public procurement procedures more than it is formally required by the directives.

Bibliography:

BOVIS, Christopher H. *The Liberalisation of Public Procurement and its Effects on the Common Market*. Abington, Oxford, New York: Routledge, 2018.
BRADFORD, Anu. The Brussels effect. In: *Northwestern University Law Review* [online]. 2012, Vol. 107,No 1, p. 1-68. ISSN 00293571. DOI: 10.1093/oso/9780190088583.003.0003
HALONEN, Kirsi-Maria. Many faces of transparency in public procurement. Disclosure Within Public Procurement and During Contract Execution. In: HALONEN, Kirsi-Maria, CARANTA, Roberto, SANCHEZ-GRAELLS, Albert. eds. *Transparency in EU Procurements*. Cheltenham, Northampton: Edward Elgar Publishing, 2019, p. 8-32. ISBN 978 1 78897 566 7.
KALESNÁ, Katarína. Súťaž na trhoch verejného obstarávania. In: *Acta Facultatis Iuridicae Universitatis Comenianae*. 2020, Vol. 39,No 2, p. 124-135.
KOVÁČIKOVÁ, Hana. Conflict of interest: Case of the public procurement in Slovakia. In: *Strani pravni zivot* [online]. 2019, Vol. 71,No 4, p. 41-51. ISSN 0039-2138. DOI: 10.5937/spz63-24010
KOVÁČIKOVÁ, Hana. Uplatňovanie európskych obstarávacích princípov v procese národného verejného obstarávania. In: *Acta Facultatis Iuridicae Universitatis Comenianae*. 2019, Vol. 38,No 2, p. 101-120.
OECD. *Government at a Glance 2019* [online]. OECD, 2019. Government at a Glance. ISBN 9789264351561. DOI: 10.1787/8ccf5c38-en
WALLER, Spencer Weber. Public Choice Theory and the International Harmonization of Antitrust Law. In: *The Antitrust Bulletin* [online]. 2003, Vol. 48,No 2, p. 427-438. ISSN 0003-603X. DOI: 10.1177/0003603X0304800206
WEATHERILL, Stephen. The Limits of Legislative Harmonization Ten Years after Tobacco Advertising : How the Court's Case Law has become a "Drafting Guide" . In: *German Law Journal* [online]. 2011, Vol. 12,No 3, p. 827-864. ISSN 2071-8322. DOI: 10.1017/s2071832200017120
WEATHERILL, Stephen. Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market. In: *From Single Market to Economic Union* [online]. Oxford University Press, 2012, p. 175-199. DOI: 10.1093/acprof:oso/9780199695706.003.0010
WECK-HANNEMANN, Hannelore. Globalization as a Challenge for Public Choice Theory. In: *Public Choice* [online]. 2001, Vol. 106,No 1/2, p. 77-92. ISSN 00485829, 15737101. Available on internet:http://www.jstor.org/stable/30026185

HANNEMANN, H. Globalization as a Challenge for Public Choice Theory. In: *Public Choice* [online]. 2001, Vol. 106,No 1/2. Available on internet:http://www.jstor.org/stable/30026185

WHAT IF A NEW CRISIS COMES? – IN OTHER WORDS, IS THE EMU PREPARED FOR ANOTHER POSSIBLE FINANCIAL CRISIS?/ György Marinkás

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Abstract: *The aim of the current article is to provide a brief introduction of the post-crisis institutional reform of the Economic and Monetary Union and to introduce its future prospects and possible policy options for its member states.*

Key words: *European Union, crisis, Economic and Monetary Union, Banking Union, SSM, SRM, ESM, Fiscal Compact, European Monetary Fund*

1 INTRODUCTION

The writing of the current article serves a two-fold purpose: *firstly*, to briefly introduce the reform of the institutional framework of the *Economic and Monetary Union* (hereafter: EMU)[1] after the crisis and to evaluate functioning of these reforms based on the reports of various EU institutions – e.g. the *European Court of Auditors* (hereafter: ECA) and the *European Central Bank* (hereafter: ECB) – and the case-law of the *Court of Justice of the European Union* (hereafter: CJEU). *Secondly*, to introduce the future prospects and possible policy options for the further development of the EMU, including the European Commission's proposal on the establishment of the *European Monetary Fund* (hereafter: EMF). In doing so, the author introduces both pro and contra arguments in order to facilitate the drawing of thorough conclusions on the readiness of the EMU to withstand another possible crisis.

2 A SUPERFICIAL OVERLOOK OF THE INSTITUTIONAL ANSWERS TO THE CRISIS: THE CREATION OF A SYSTEM OF SUPERVISION AND BANKING UNION

However already in October 2007, the Ecofin Council acknowledged – though not *expressis verbis* – that the then shaping crisis of the US finance sector could possibly affect

[1] The author of the current article has already elaborated the topic in his earlier writings, therefore dispenses with introducing this process in details again. For details see: MARINKÁS, Gy.: Some Remarks on the Functioning and the Future Prospects of the European Banking Union. *European Integration Studies,* Volume 15. Number 1. (2019) pp. 50-63; MARINKÁS, Gy.: How not to build a Monetary Union? – The structural weaknesses of the EMU in the light of the 2008 crisis and the institutional reforms for their correction. In: SZABÓ M. – LÁNCOS, P.L. – VARGA R. (eds.): *Hungarian Yearbook of International Law and European Law*, Volume 2018 (Year of publication: 2019), pp. 437-471; MARINKÁS, Gy.: Institutional Answers to the 2008 Crisis in the US and the EU: A Comparative Study. European Integration Studies, Volume 14. Number 1. (2018) pp. 55-65; MARINKÁS, Gy.: Changing economic theories: the applicability of the Keynesian theory to solve the economic depression of our times. BSc Thesis (Faculty of Economics, University of Miskolc) 2013, p. 105

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the single market and in conjunction with this, scholars,[2] think tanks[3] and – in 2009 the expert group chaired by *Jacques de Larosière*[4] – suggested that the EU should create some sort of community level supervisory system. Legislators and regulators of the EU was lagging behind,[5] however; it was not until 2011[6] when the EU – as a belated response to the crisis and in order to eliminate any possible threats, which could jeopardize the stability of the financial systems of the EMU –, established the *European System of Financial Supervision* (ESFS).

The change in the ECB's director seat in 2011 gave an impetus for the already ongoing policy changes: while *Jean-Claude Trichet* insisted that the restrictive dispositions of the TFEU – namely the 'no bailout,[7] no default[8] assumptions – shall be kept under all circumstances, the new president *Mario Draghi* made his 'whatever it takes' speech in 2012 giving the green light to the *Outright Market Transactions*[9] (hereafter: OMT) and other reforms, which saved the Eurozone. However, Draghi was praised for this revolutionary step – and not without a reason –, it is worth mentioning that despite the consistent denial of the *Banca D'Italia* – the Italian Central Bank –, it is probable that he played a serious role in

[2] *Dennis Kelleher* and his fellow co-authors wrote – though regarding the situation in the US and not in the EU –, that strong and prospering market economies need strict and consequent regulation. As *Marek Dabrowski* argued in conjunction with this, weak and recessing markets on the other hand need prompt and firm intervention of public authorities in order to avoid the total collapse of the financial system. – KELLEHER, D.M. et al., 'The Dodd-Frank Act is Working and Will Protect the American People If It Is Not Killed before Fully Implemented', *North Carolina Banking Institute*, Vol. 20, (2016), pp. 145-147; DABROWSKI, M, The Global Financial Crisis. Lessons for European Integration. *CASE Network Studies & Analyses.* No. 384/2009, pp. 17-18

[3] CEPS, 'Concrete Steps Towards More Integrated Financial Oversight. The EU's Policy Response to the Crisis', Rapporteur: *Lannoo, K.* Brussels, 2008, p. 59

[4] The High-Level Group On Financial Supervision In The EU: *De Larosiére Report*, 25/02/2009, Brussels. – Online available at: http://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf (15/02/2020)

[5] As *advocate general Gerard Hogan* wrote in his opinion in the *Landeskreditbank Baden-Württemberg v. ECB* case: '[…] legislators and regulators have struggled to come to terms with the enormity of this banking crisis and to understand how, in the face of what had previously seemed to be a perfectly adequate system of regulation, that system ultimately failed when it was put to the test in those dark days of 2008 onwards.' – C-450/17 P - *Landeskreditbank Baden-Württemberg v. ECB*, opinion of advocate general Gerard Hogan, 5 December 2018, para. 2

[6] To be more precise in 2010 – before establishing the ESFS – the Council – as a transitional solution – called the *European Financial Stabilisation Mechanism* (EFSM) into being. The aim of the creation of the EFSM was to grant credit to the member states, which struggle with problems. The *European Stability Mechanism* (ESM) started to function in 2012. The aim of its creation was to provide the EU with a lender of last resort (LLR), which – in case of necessity – could grant credits to the member states and financial institutions facing crisis. – Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12.5.2010, p. 1–4); Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism (OJ L 210, 7.8.2015, p. 1–2); ESM Treaty – Treaty Establishing the ESM (signed on 2 February 2012, entry into force: 27 September 2017); See also: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm_en (15/02/2020) and https://www.esm.europa.eu/financial-assistance (15/02/2020)

[7] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47-390, Article 125

[8] Ibid, Article 9

[9] See: CŒURÉ, B.: Outright Monetary Transactions. One Year On. Berlin, 2 September 2013. Online available on: https://www.ecb.europa.eu/press/key/date/2013/html/sp130902.en.html (15/02/2020)

the *forging* of Italian and Greek 'books' to secure the Eurozone entry of these countries.[10] – A machination that had serious long-run effects: that is to say the Eurozone came near to its end. *Tim Worstall* an economist of the *Adam Smith Institute* – and a stubborn euro-sceptic – believes that one of the main causes for keeping the Euro alive by the member states is that they cannot even estimate the costs of its possible wind up.[11]

In addition to the above mentioned, the European legislators created the *European Banking Union* (hereafter: EBU), which was proposed by several scholars years before. In accordance with the European Commission's proposal[12] the banking union was based on two pillars, namely the *Single Supervisory Mechanism*[13] (SSM) and the *Single Resolution Mechanism*[14] (SRM). As *Luigi Chiarella* pointed out,[15] the previous banking supervision and resolution framework – which was based on cooperation –, failed during the crisis, because domestic authorities were prone to either turn a blind eye, when it came to their *'national champions'* or to be reluctant to use public money for bailouts.

However, the creation of such a system was a huge step; one has to keep it in mind that the newly established measures and institutions – like the ESMA,[16] the OMT[17] and the ESM[18] – had to tackle one final obstacle: withstanding the supervision of the CJEU and they did well in this regard. It has to be noted that CJEU – taking into consideration the necessity

[10] See: JOHNSON, S.:, Mario Draghi and Goldman Sachs, Again. *The Baseline Scenario*, 17 March, 2010. – Online available at: https://baselinescenario.com/2010/03/17/mario-draghi-and-goldman-sachs-again/ (15/02/2020); KWAK, J.: Bank of Italy Defends Draghi. *The Baseline Scenario*, 19 February 2010. – Online available at: https://baselinescenario.com/2010/02/19/bank-of-italy-defends-draghi/ (15/02/2020); SMITH, Y.: Corruption, EuroStyle: ECB Chief Draghi Fudged Italy's Books to Secure Eurozone Entry, Italy Stuck With Derivative Losses. *Naked Capitalism*, 26 June 2013. – Online available at: https://www.nakedcapitalism.com/2013/06/corruption-eurostyle-mario-draghi-fudged-italys-books-to-secure-eurozone-entry-italy-stuck-with-derivative-losses.html (15/02/2020)

[11] WORSTALL, T.: 'Both Krugman And Friedman Said The Euro Was A Stupid Idea: But They Did It Anyway, Didn't They?' *Forbes*, 6 July 2015 – Online available at: https://www.forbes.com/sites/timworstall/2015/07/06/both-krugman-and-friedman-said-the-euro-was-a-stupid-idea-but-they-did-it-anyway-didnt-they/#5a3b9f520e81 (15/02/2020); See also: STIGLITZ, J.E.: 'Can the Euro be Saved?' *Project Syndicate*, 05 May 2010. – Online available at: https://www.project-syndicate.org/commentary/can-the-euro-be-saved?barrier=accesspaylog (15/02/2020)

[12] European Commission: *Communication from the Commission to the EP and the Council. A Roadmap towards a Banking Union.* Brussels, 12.9.2012, COM (2012) 510 final

[13] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, pp. 63-89) (*SSM Regulation*)

[14] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, pp. 1-90) (*SRM Regulation*)

[15] CHIARELLA, L.: 'The Single Supervisory Mechanism: the Building Pillar of the European Banking Union', *University of Bologna Law Review*, Vol. 1 (2016) Issue 1, ISSN 2531-6133, pp. 34-90, pp. 41-46, 85

[16] C-270/12, *United Kingdom v. Parliament and Council*, Judgment, 22 January 2014 (also known as the ESMA-case)

[17] C-62/14, Gauweiler and Others, Judgment, 16 June 2015

18 C-370/12, Thomas Pringle vs. Government of Ireland and Others, Judgment of the Court, 27 November 2012

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of these measures and institutions – exhibited an amicable attitude[19] towards them. So did the national constitutional courts.[20]

3 THE PRACTICE AND EVALUATION OF THE BANKING UNION

3.1 The main rules on the functioning of the SSM and the related case-law

While the *less significant credit institutions*[21] *fall under the supervision of the national authorities, the significant* ones[22] *are under the direct supervision of the ECB*.[23] – It has to be pointed out that *the notion of credit institution is a concept of the European Union Law*, which shall prevail.[24] – The ECB's *Framework Regulation*[25] for the SSM – alongside with the *Court of Justice's* (hereafter: CJ) *case-law* – further refined the rules on cooperation, [26] including: (i) the methodology for determining the quantitative criteria for classifying banks as significant or less significant; (ii) the exercise of powers; (iii) and the relations between domestic regulators and the ECB.[27] The General Court (hereafter: GC) too, contributed to the clarification of some definitions and how the court shall interpret some of the provisions.[28]

[19] As stated by Zoltán Angyal regarding the ESMA-case. See: ANGYAL, Z., 'Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről', Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica, Tomus XXXIII, 2015, pp. 129-143

[20] Austrian Constitutional Court on ESM Treaty (SV 2/12-18, Judgement of 16 March 2013) and the Fiscal Compact (SV1/2013-15, Judgement, 3 October 2013); French Constitutional Court on the Fiscal Compact (2012-653 DC, Judgement, 9 August 2012); German Constitutional Court on the ESM Treaty (2 BvR 1390/12, Judgement, 12 September 2012)

[21] The SSM Regulation does not contain the definition of credit institutions, instead it refers to Article 4 (1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council, which defines credit institutions as follows: 'credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.'

[22] The delimitation is to be made as contained Article 6 (4) of the SSM Regulation.

[23] The decisions of the ECB can directly affect individual credit institutions, which are subject to a two-fold system of review: an *internal administrative review* and an *external judicial review*. – CHIARELLA, p. 70

[24] Ibid, p. 48

[25] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (*SSM Framework Regulation*)

[26] C-450/17 P, *Landeskreditbank Baden-Württemberg* v ECB, Judgment, 8 May 2019; C-52/17, *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde*, Judgment 19 December 2018; C-219/17, *Berlusconi and Fininvest v. Banca d'Italia and IVASS*, Judgment, 19 December 2018; C-594/16, *Buccioni v. Banca d'Italia*, Judgment, 13 September 2018

[27] For a more detailed analysis please see: Marinkás, György, How not to build a Monetary Union? (Ibid footnote 1)

[28] T-122/15, *Landeskreditbank Baden-Württemberg - Förderbank v. ECB*, Judgment, 16 May 2017; T-712/15, *Crédit Mutuel Arkéa v. ECB*, Judgment, 13 December 2017; T-133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*, Judgment 24 April 2018; T-751/16, *Confédération nationale du Crédit mutuel v. ECB, Judgment*, 13 July 2018; T-745/16, *BPCE v. ECB*, Judgment, 13 July 2018; T-757/16, *Société générale v. ECB*, Judgment, 13 July 2018; T-758/16, *Crédit agricole SA v. ECB*, Judgment, 13 July 2018; T-768/16, *BNP Paribas v. ECB*, Judgment, 13 July 2018

Both the European Institutions – namely the European Commission[29] and the ECA[30] – and also the *German Federal Ministry of Finance*[31] valuated the first three years of the SSM as a success in their reports though indicated that there is still a room for further improvements. As an example it was a common and crucial point in both reports that the ECB should put further emphasis on maintaining a strict separation between the ECB's monetary policy functions and its supervisory tasks as demanded by the SSM Regulation. The *Bruegel*[32] in its 2016 report – while also hitting a positive tone – criticized the *black box nature*[33] of the SSM's decision making procedure. The Bruegel – just like the ECA[34] – suggested the streamlining of the decision making procedure and the delegation of decision making.[35] The SSM related case-law of the GC – each of the judgments[36] delivered after the Bruegel's report – supports these findings: the pleas in law presented by the financial institutions were mostly based on the insufficiency of the ECB's reasoning. – Alongside with the incorrect interpretation of the EU-law and the excess of power. The latter is still a source of debates: having regarded the latest CJ judgments and scholar reviews on the SSM Regulation and its implementation, one can argue that a scheme like the SSM requires a clear accountability relationship also between the ECB and the national competent authorities (NCAs), something that is not fully fledged in the current legal framework as pointed out by *Karagianni* and *Scholten*.[37]

3.2 The main rules on the functioning of the SRM and the related case-law

As mentioned in chapter one, the SRM covers the same scope as the SSM and the SRM Regulation's purpose is to provide a framework for failing banks within the banking union. The resolution is managed by the *Single Resolution Board* (SRB), a new agency of the EU, established in 2015. The SRB cooperates with the *national resolution authorities*[38] (NRAs). The resolution procedure is financed through a single resolution fund, which is

[29] European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation, COM(2017) 591 final, Brussels, 11.10.2017, pp. 18-19

[30] ECA, Single Supervisory Mechanism – Good start but further improvements needed. *Special Report No. 29* (2016) Doi:10.2865/023587

[31] Federal Ministry of Finance (Bundesministerium der Finanzen), The Single Supervisory Mechanism: Lessons learned after the first three years. January 2018, pp. 4-5 – Online available at: https://www.bundesfinanzministerium.de/Content/EN/Downloads/2018-01-26-SSM.pdf?__blob=publicationFile&v=2 (15/02/2020)

[32] European think tank that specialises in economics

[33] The lack of transparency was a key point of the Transparency International's report too: B. Braun, 'Two sides of the same coin? Independence and Accountability of the European Central Bank', Transparency International EU, 2017 – Online available at: https://transparency.eu/wp-content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf (15/02/2020)

[34] ECA, Special Report No. 29, Recommendation 1

[35] The Bruegel referred to the more transparent US system as an example to be followed. – Bruegel, European Banking Supervision: the First Eighteen Months (SCHOENMAKER, D. & VÉRON, N. (eds.)), *Bruegel Blueprint Series,* Vol. XXV (2016) ISBN: 978-9-07 8910-41-1, pp. 4-6

[36] T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*; T-712/15, *Crédit Mutuel Arkéa v. ECB*; T-133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*; T-733/16, *La Banque postale v. ECB*; T-745/16, *BPCE v. ECB*; T-751/16, *Confédération nationale du Crédit mutuel v. EC*B

[37] KARAGIANNI, A. – SCHOLTEN, M.: 2018. Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework. *Utrecht Journal of International and European Law*, Vol. 34 (2018) Issue 2, pp.185–194 DOI: http://doi.org/10.5334/ujiel.463

[38] For details of the Hungarian regulation and domestic supervision system please see: NAGY, Z. – CSISZÁR, A.: A hazai pénzügyi felügyeleti szabályozás a változások tükrében. *Publicationes Universitatis Miskolciensis,* Vol. XXXIV (2016), pp. 157-163

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financed by the bank sector. The purpose of the SRM is to ensure an orderly resolution of failing banks with minimal costs for taxpayers and to the real economy.

The case-law of the General Court – even if eight out of nine cases[39] have been dismissed so far[40] as inadmissible because of various reasons[41] – shows that the *financial institutions do not evaluate the procedure of the SRB as transparent:* in their applications,[42] they frequently claim that (i) the SRB should have notified them on their decisions – not only the NRAs – and that (ii) the SRB should have disclosed more details on the grounds of its decision.

Based on a 2018 special report[43] of the ECA, the first three years of the SRB's functioning showed a mixed picture:[44] e.g. its hesitation to order the liquidation of *Banca Popolare di Vicenza* and *Veneto Banca* only in 2017 instead of 2016 – when it should have been – cost the Italian taxpayers a significant amount as pointed out by *Nicolas Véron*,[45] an economist at the Bruegel. As *Martin Sandbu* noted – however not in connection with the above mentioned case – that the ECB started to use its recent empowerment half-hearted.[46]

Even the latest reports show that 'the SRB's trajectory is still at a very early stage.'[47] In accordance with this, the European Commission stated[48] that 'it is premature to design

[39] T-645/16, *Vorarlberger Landes- und Hypothekenbank v. SRB,* Order of the GC, 6 February 2017; T-661/16, *Credito Fondiario v. SRB*; Order of the GC, 19 November 2018; T-14/17*, Landesbank Baden-Württemberg v. SRB*, Order of the GC, 19 November 2018; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Order of the GC, 19 November 2018; T-494/17, *Iccrea Banca v. Commission and SRB*, Order of the GC, 19 November 2018; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, 18 September 2018; T-281/18, *ABLV Bank AS v. ECB*, Order of the GC, 6 May 2019, para. 49; T-283/18*, Bernis et al. v. ECB,* Order of the GC, 6 May 2019; T-158/18, *Scaloni and Figni v. Commission, EP, Council*, Order of the GC, 9 July 2019

[40] 15 February 2020

[41] T-661/16, *Credito Fondiario v. SRB*; order of the GC, paras.49, 55; T-14/17*, Landesbank Baden-Württemberg v. SRB*, Order of the GC, paras. 33, 51; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Order of the GC, paras. 24, 51; T-494/17, *Iccrea Banca v. Commission and SRB*, Order of the GC, paras 24-26, 69; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, Order of the GC, paras. 15, 23-27

[42] T-661/16, *Credito Fondiario v. SRB,* Application, 19/09/2016; T-14/17, *Landesbank Baden-Württemberg v. SRB,* Application, 12/01/2017; T-42/17, *VR-Bank Rhein-Sieg v. SRB,* Application, 25/01/2017; T-494/17, *Iccrea Banca v. Commission and SRB*, Application, 28/07/2017; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, Application, 08/09/2017

[42] T-661/16, Credito Fondiario v. SRB, Application, 19/09/2016; T-14/17, Landesbank Baden-Württemberg v. SRB, Application, 12/01/2017; T-42/17, VR-Bank Rhein-Sieg v. SRB, Application, 25/01/2017; T-494/17, Iccrea Banca v. Commission and SRB, Application, 28/07/2017; T-618/17, Activa Minoristas del Popular v. ECB and SRB, Application, 08/09/2017

[43] ECA, Special report No. 23/2017: Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go, p. 68

[44] On the negative side the agency was understaffed and resolution planning was not completed within the deadline. On the other hands these shortcomings were associated with the period of starting, which could be tackled in the future. – Ibid paras. 34, 55-56, 60, 63,64-68, 103, 114, 125, 141

[45] NICOLAS, V.: Bad News and Good News for the Single Resolution Board, Bruegel, 15 January 2018 – Online available at: http://bruegel.org/2018/01/bad-news-and-good-news-for-the-single-resolution-board/ (15/02/2020)

[46] SANDBU, M.: *Europe's Orphan. The Future of the Euro and the Politics of Debt*. Princeton University Press, Princeton NJ, 2015, p. 336, p. 313

[47] VÉRON, N.: Taking stock of the Single Resolution Board. Banking Union Scrutiny. *In-depth Analysis Requested by the ECON committee*. March 2019, p. 21

[48] European Commission, *The Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)*, Brussels, 30.4.2019, p. 12

and adopt legislative proposals at this stage.' While the reports made on behalf of the EU institutions or by the institutions themselves, seemed to hit a cautious tone, some scholars concluded[49] that the member states of the EBU had recognised prevalence of the ECB's rights. In their view the SRM regulation leaves no room for national resolution tools. Contrary to this optimistic evaluation, the author of the current article – after examining the case-law of the CJ and the GC[50] – concluded that the *national central banks* – quoting Chiarella's words –: *are still prone to protect the so called national champions by calling the SRM's competence into question.*

4 FUTURE PROSPECTS

4.1 The Commission's proposal on the establishment of the European Monetary Fund

In order to further enhance the institutional framework of the EMU, in 2017 the European Commission submitted its proposal[51] for a Council regulation on the establishment of the EMF. The Commission, while acknowledged that at the time of the submission of the proposal, the EU member states were experiencing a firm recovery, reminded that crisis revealed the structural weaknesses of the EMU, which were still waiting to be remedied despite all the achievements since 2010. In the Commissions words: 'One should always fix the roof when the sun is shining.'[52]

The Commission of course cited less rhetoric arguments too. As the proposal pointed out, with the withdrawal of the United Kingdom, 85% of the EU's total GDP will be represented by the euro area economies. This would mean that a strong and the firm euro area will be important for EU member states outside the euro area, as the euro zone's functioning will be closely connected to functioning of the single market. The Commission also pointed out that after the rush of the first years – which often resulted in the multiplication and the overlapping of measures and institutions – it was time to simplify the institutional framework of the EMU. In this regard the Commission also pointed out that the co-existence of the EU institutions and the permanent intergovernmental mechanism most probably will serve as a source of collisions of authority between institutions within and outside the EU framework. Furthermore it will the prevalence of principles of the EU law, like democratic accountability.[53]

In the proposal, the Commission stated that setting up such a body from scratch would be prohibitively cost-inefficient; thus the proposed EMF should rather incorporate and absorb the already existing ESM with its current objectives, functions and instruments. – This would guarantee that the new institution would pass the supervision of the CJ, since the ESM was already found to be in conformity with EU law from the aspect of subsidiarity and proportionality.[54] – As a further advantage of this solution, it would offer an ideal

[49] BUSCH, D. - RIJN, M. and LOUISSE, M.: *How Single is the Single Resolution Mechanism?* European Banking Institute Working Paper Series 2019 – No. 30 – Available at SSRN: https://ssrn.com/abstract=3309189 or http://dx.doi.org/10.2139/ssrn.3309189 (15/02/2020)

[50] For details see MARINKÁS: How not to build a Monetary Union? (Ibid footnote 1)

[51] European Commission, COM (2017) 827 final, Brussels, 6.12.2017.

[52] Ibid., p. 2

[53] For further details on the latter one please see: CAROCCIA, R, A Clash of Administrative Bodies: The Banking Union Case. In: Taranu A, (ed.)*: Development, Democracy and Society in the Contemporary Word*. Filodiritto International Proceedings, Bologna, 2018, pp. 106-112

[54] C-370/12, Thomas Pringle v Government of Ireland and Others, Judgment of the Court, 27 November 2012

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occasion for creating a common backstop to the SRB, which was already agreed back in 2013,[55] but has not been created ever since. [56]

Summarizing the features of the EMF based on the proposal of the Commission, the European Monetary Fund – once it becomes operative – will be a unique legal entity under Union law. It will be the successor of the European Stability Mechanism, inheriting its financial and institutional structures alongside with the membership of the EMS. Its tasks too, will be almost identical. It will provide financial stability support to Member States in need, raise funds by issuing capital market instruments and engage transactions on the money market.[57]

Although the Commission's proposal can be regarded as a logical step, it met with considerable opposition on the Council level, since several member states – including the so called *New Hanseatic League* – wishes to keep the ESM on the intergovernmental level in order to keep it on a short-leash. The ECB too, was against the proposal, mainly because the ECB has the exclusive right to use the term 'monetary' in the name of an institution. On the other hand the ECB was in favour of the backstop mechanism for the SRF.[58]

Scholars asked by the *Economic and Monetary Affairs Committee* – namely *Charles Wyplosz* from the Genevan *Graduate Institute* and *Daniel Gross* from the *Centre for European Policy Studies* – to elaborate their views on the topic *had homogenous opinions on the subject: they were against it.* The preceding argued that contrary to the wide-spread view the creation of the EMF is neither necessary nor desirable. Among others he argued[59] that the mere existence of the ESM is in *contradiction with the no-bailout rule* and that any insurance mechanism creates *moral hazard.*[60] The latter one too, argued against it, stating that there is no need to replicate the *International Monetary Fund* (hereafter: IMF). In his view the ESM – alongside with other EU institutions – already acts as a quasi EMF: these institutions perform both coordination and surveillance activities and providing backstop for sovereign, including program design.[61]

[55] Statement of Eurogroup and Economic and Financial Affairs Council Ministers on the Single Regulation Mechanism backstop, 18 December 2013.

[56] COM (2017) 827 final, p.4

[57] COM (2017) 827 final, p. 6

[58] EPRS, Establishment of a European Monetary Fund (EMF). PE 635.556/2019. Written by *Christian Scheinert.*

[59] WYPLOSZ, C.: A European Monetary Found? In-depth Analysis. Provided at the request of Economic and Monetary Affairs Committee, 2017

[60] For details see: Marinkás Gy.: Institutional Answers to the 2008 Crisis in the US and the EU (Ibid footnote 1)

[61] GROSS, D.: An Evolutionary Path Towards a European Monetary Fund. In-depth Analysis. Provided at the request of Economic and Monetary Affairs Committee, 2017, pp. 5, 19-22

4.2 Economists' predictions

Regarding the future prospects the literature is rather heterogeneous: it is portrayed either dark or thriving. *Joseph Stiglitz* – who predicted the fall of the EMU,[62] when the current crisis broke out – is still very sceptical regarding its chances to survive.[63] He argues that *the only way out is putting an end to the policy of austerity*: if the European policymakers emphasize growth instead of austerity, the chances of the EMU not to fall apart would grow. – The historic moment has arrived as the Franco-German tandem seems to be revived.[64] – On the other hand: in his view, it is still an open question whether it would ever retrieve its prosperity experienced in the first ten years of its experience.[65] One should not wonder that the member states, which have not strived to access earlier – because evaluating monetary sovereignty higher than the advantages of the common currency –, are less keen on adherence.[66] Moreover, in a recent article, *György Matolcsy* – the governor of the *Central Bank of Hungary* – sharing this scepticism, argues[67] that the introduction of the common currency was the result of a 'harmful dogma'; namely that the euro was the 'necessary' or 'normal' next step towards a unified Europe. In his view, neither of the two allegations were true. He argues that the introduction of the common currency was the outcome of some political considerations at the end of the 80s and the beginning of the 90s. He furthermore argues that the Eurozone still lacks most of the necessary pillars of a successful global currency e.g. a greater budget, a common finance minister and a ministry. He concludes that due to these shortcomings the whole Eurozone should be winded up. – In his words: 'the time has come to wake up from this a harmful and fruitless dream.' Most interestingly, while he does not mention the positive aspects of the Euro in his writing he seems to be less critical, when it comes to a possible common – and digital – Eurasian currency.[68] As a reply to the thoughts of the governor – and most probably as a measure aimed at calming the markets and the public opinion –, *Mihály Varga*, the current finance minister of Hungary stated that Euro-project is not hopeless and that Hungary will comply with her obligations arising from EU-membership, namely the introduction of the Euro.

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[62] STIGLITZ, J.E. 'Can the Euro be Saved?', Project Syndicate, 5 May 2010 – Online available at: https://www.project-syndicate.org/commentary/can-the-euro-be-saved?barrier=accesspaylog [04/02/2020]

[63] STIGLITZ, J.E.: *Can the euro be saved? An analysis of the future of the currency union*, Rome, May 2014 – Online available at: https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2014_Rome_euro_ppt.pdf (15/02/2020)

[64] The inauguration of *Emmanuel Macron* indicated the beginning of a new era, where France strives to become the equal partner of Germany again, which – since economic miracle of the 2000s – became the quasi single-handed leader of the EMU. – PŁÓCIENNIK, Sebastian, Recovery of the Eurozone and a New Dynamic in European Integration: Implications for Member States outside the Monetary Union. *The Polish Quarterly of International Affairs*, 26/2017, pp. 7-21, pp. 15-16

[65] STIGLITZ, J.E.: *The Euro. How a Common Currency Threatens the Future of Europe* (1st ed.), W.W. Norton & Company, New York, 2016, ISBN-10: 039325402X, p. 448, Part IV/9-10

[66] Sebastian Płóciennik argues that there are three main reasons for this reluctance: (i) the EMU was on the margin of disintegration for years; (ii) they [the non-members of the EMU] fear that losing their monetary sovereignty would impose them to a possible future asymmetric shock; and last (iii) so far they did not have to fear of being marginalized by two-speed integration as the UK gave serious weight to the non-euro platform. The Brexit will change the game however: both the platform's economic and political weight will shrink. – PŁÓCIENNIK 2017, pp. 8-10, 13-14

[67] MATOLCSY GY.: We need to admit the euro was a mistake. *Financial Times*, 3 November 2019 - Online available at: https://www.ft.com/content/35b27568-f734-11e9-bbe1-4db3476c5ff0 (15/02/2020)

[68] See: Adózóna.hu (15/02/2020): Matolcsy: Jön az eurázsiai digitális közös pénz. - Online available at:

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István Dobozi – a former lead economist of the *World Bank* – while agrees with some of Matolcsy's statements and conclusions in his response, holds that the governor misdiagnosed the reason for the failure. In Dobozi's view the latter one is not to be found in the lack of a common state or a common fiscal ministry: instead it is attributable to *the failure of the internally fixed-exchange regime of the Eurozone* – which has not succeeded in eliminating the exchange rate risk – and to the *lack of fiscal co-ordination*.

While some appear to bury the Euro already – with an ill-concealed joy –, others argue that the fall of the EMU would jeopardise the future of the integration. In *Angela Merkel's* words: 'If the Euro falls, Europe falls.'[69] *Annamária Artner* and *Péter Róna* also share this view.[70] There are more optimistic authors, however; *Fred Bergsten* argues that the EMU and the EU will emerge even stronger once the crisis is over. He based his point of view on the history of the European project, which already survived several gross crises during its half-century long history.[71]

The survival of the Eurozone depends on the future path of the integration selected by the member states: based on the 2017 White Paper of the European Commission[72] there are five scenarios. Two out of the five – namely scenarios No. 3: 'Those who want more do more' and No. 5; 'Doing much more together' – suggest closer cooperation and would practically result in the creation of a 'two- or multi-tier integration structure. While there is a visible demand for such solutions in the political and academic debates, *János Martonyi* – the former foreign minister of Hungary – identifies any 'two- or multi-tier integration structure' as a threat. He argues[73] that there is not a single geographical, political or cultural borderline, which would legitimize and make an integration built on different levels functional. While he acknowledges that some of the recent developments – e.g. the banking union – was necessary, he warns that a situation, where the Eurozone would mean the European Union itself – a union within the union – shall be avoided. After the Brexit, however, when the 19 Eurozone countries will make up for more than 85% of the total GDP of the European Union, the realization of such a scenario shall be taken into account as a probable threat.

Last, but not least, it has to be mentioned that the ECB has a new president in the person of *Christine Lagarde,*[74] which can be evaluated as a new possibility to leave behind

https://adozona.hu/altalanos/Matolcsy_jon_az_eurazsiai_digitalis_kozos_p_6DPJY3 (15/02/2020); See also: Political Capital (15/02/2020), Orbán-Putin meeting: lots of symbolism, no major development. – Online available at: https://politicalcapital.hu/hireink.php?article_read=1&article_id=2465 (15/02/2020)

[69] As *Angela Merkel* stated: 'If the Euro falls, Europe falls' – See: SPIEGEL, Peter, 'If the euro falls, Europe falls' Financial Times, 15 May 2014. - Online available at: https://www.ft.com/content/b4e2e140-d9c3-11e3-920f-00144feabdc0 (15/02/2020)

[70] ARTNER, A. – RÓNA, P.: Eurosz(k)epszis: Az optimális valutaövezet elmélete és az euró gyakorlata. *Közgazdaság* 2012/1, pp. 83-102, p. 100

[71] BERGSTEN, F., Why the Euro Will Survive: Completing the Continent's Half-Built House. *Foreign Affairs*, Vol. 91, Issue 5, 2012, pp. 16-22

[72] European Commission: White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025. COM (2017) 2025 of 1 March 2017

[73] MARTONYI J., Differentiation or Disintegration. In: SZABÓ M. – LÁNCOS P.L. – VARGA R. (eds.), *Hungarian Yearbook of International and European Law 2018*, Eleven Publishing, The Hague, 2019, pp. 3-18, p. 18

[74] European Council Press Release (18 October 2019) Christine Lagarde appointed President of the European Central Bank. – Online available at: https://www.consilium.europa.eu/en/press/press-releases/2019/10/18/christine-lagarde-appointed-president-of-the-european-central-bank/ (15/02/2020)

some caveats of *Draghi's legacy*, e.g. *the negative interest rates*, which induced serious tensions between the ECB and the *Deutsche Bundesbank* – the central bank of the Federal Republic of Germany –, since these dry up the savings of the German citizens.[75] – It has to be noted that in recent time, other governors too, expressed their concerns.[76] – Another and even greater problem is that, while the negative interest rates proved to be effective during the darkest years of the latest crisis, as a result of their long-term application 'the monetary policy is almost out of ammunition' as *Olivier Blanchard* – a former chief economist at the IMF – stated.[77] That is to say the ECB is left without effective tools in case of a new crisis.[78] The latter one seems to be a rather probable possibility, even Draghi indicated it as a serious threat during his last press conference as the president of the ECB.[79] Regarding the first question – namely the tension with the Deutsche Bundesbank –, Lagarde seemed to steady down the nerves and induce a return to normalcy: the German government's decision to nominate *Isabel Schnabel* for the succession of ECB Executive Board member *Sabine Lautenschläger* indicated conciliatory attitude on the German side.[80] In sharp contrast with this however; Lagarde received sharp criticism from *Jens Weidmann*, the governor of the Deutsche Bundesbank, even before she had the opportunity to sit into the presidential chair. Weidmann expressed his concerns[81] regarding Lagarde's plans to make environmental considerations part of the ECB's decision making process and policies e.g. favouring the purchase of the so called green bonds. – Not to mention that Lagarde – just like Draghi – has some shady spots in her past,[82] which could induce further attacks against the newly inaugurated president of the ECB.

5 SUMMARY AND CONCLUSIONS

The purpose of the article was to examine the institutional reforms of the EU – which sought to remedy the innate structural weaknesses of the EMU – and their functioning in practice. Although the EMU remained asymmetrical – that is to say the fiscal policy remained in the hand of the member states – a proper system of supervision has been created in the form of the ESFS and the EBU consisting of the SSM and the SRM. The

[75] CARREL, P.: Count Draghila is sucking our accounts dry', says Germany's Bild. *Retuters*, 13 September 2019. – Online available: https://www.reuters.com/article/us-ecb-policy-germany/count-draghila-is-sucking-our-accounts-dry-says-germanys-bild-idUSKCN1VY0MN (15/02/2020)

[76] CLINCH, M.: European Central Bank members voice concern over its negative rate policy. CNBC, 18 October 2019. – Online available at: https://www.cnbc.com/2019/10/18/ecb-members-voice-concern-over-its-negative-rate-policy.html (15/02/2020)

[77] ARNOLD, MARTIN, What will Christine Lagarde's ECB look like? Financial Times, 27 October 2019 – Online available at: https://www.ft.com/content/1683ea12-f4f7-11e9-a79c-bc9acae3b654 (15/02/2020)

[78] MOGHADAM, R.: The ECB must make negative interest rate policy effective, Financial Times, 24 July, 2019. – Online available at: https://www.ft.com/content/2eca3b2a-ac8c-11e9-b3e2-4fdf846f48f5 (15/02/2020)

[79] Press Conference, Frankfurt am Main, 24 October 2019 – Online available at: https://www.ecb.europa.eu/press/pressconf/2019/html/ecb.is191024~78a5550bc1.en.html (15/02/2020)

[80] BRZESKI, C.: ECB: The Good German. *ING Snaps*, 22 October 2019. - Online available at: https://think.ing.com/snaps/ecb-the-good-german/?utm_campaign=October-22_ecb-the-good-german&utm_medium=email&utm_source=emailing_snap (15/02/2020)

[81] ARNOLD, M. – STORBECK, O.: Weidmann opposes using monetary policy to fight climate change. *Financial Times*, 29 October 2019. – Online available at: https://www.ft.com/content/60d9832c-fa3f-11e9-a354-36acbbb0d9b6 (15/02/2020)

[82] BBC (20/12/2016), Christine Lagarde: IMF Chief Convicted over Payout. – Online available at: https://www.bbc.com/news/world-europe-38369822 (15/02/2020)

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ECB gained authority to supervise the functioning of the EMU: amongst others, it became empowered in 2014 to liquidate the so called 'ill enterprises' within the SRM. – It has to be noted that the latter opportunity is not used properly by the ECB as some authors argue. – Nevertheless, these systems endured the difficulties of practice and the supervision of the CJEU. What is more, the CJEU showed willingness to protect the achievements of the reforms as it is clear from judgment delivered in the ESMA and OMT (Gauweiler) cases.

Regarding the future prospects of the EU, the author of the current article introduced both optimistic and pessimistic opinions. This very chapter provides space for the author to express his own opinion regarding future prospects: the author argues that instead of winding-up the EMU – as some authors suggested –, the EMU members shall strive to achieve closer cooperation and the non-members shall strive to access to the EMU. The author does not understand why the builders shall pull down everything they built so far and go home instead of finishing the 'half-built[83] house'? Similarly, he does not understand what hinders us from reaching a closer cooperation e.g. to create a greater budget and a common finance ministry? If one accepts that the European integration is built on the *spill-over effects* of the *ever-closer union*, any step back will induce unforeseen consequences. Here should be the thoughts of Worstall brought to our minds, namely that the costs of a possible winding up cannot even be estimated. – Even if the Eurosceptic Worstall used it as a counterargument against the EMU.

Summarizing the above mentioned, the author of the current article argues that the maintaining of the common currency – or its introduction in case of the non-EMU states – is the only workable way even despite the well-known drawbacks of the EMU. In conjunction with these thoughts, the author also firmly believes – in accordance with Martonyi's thoughts – that a two- or multi-tier integration would be detrimental for the future of the integration. Furthermore, the author thinks that we are already lagging behind in preventing this scenario with or omission, namely that we haven't accessed so far and do not really strive to access to the EMU.

Bibliography:

ANGYAL, Z.: 'Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről', Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica, Tomus XXXIII, 2015, pp. 129-143

ARTNER, A. – RÓNA, P.: Eurosz(k)epszis: Az optimális valutaövezet elmélete és az euró gyakorlata. *Közgazdaság* 2012/1, pp. 83-102, p. 100

BERGSTEN, F.: Why the Euro Will Survive: Completing the Continent's Half-Built House. *Foreign Affairs*, Vol. 91, Issue 5, 2012, pp. 16-22

Bruegel, European Banking Supervision: the First Eighteen Months (SCHOENMAKER, D. & VÉRON, N. (eds.)), *Bruegel Blueprint Series,* Vol. XXV (2016) ISBN: 978-9-07 8910-41-1

BUSCH D. - RIJN, M. AND LOUISSE, M.: *How Single is the Single Resolution Mechanism?* European Banking Institute Working Paper Series 2019 – No. 30 – Available at SSRN: https://ssrn.com/abstract=3309189 or http://dx.doi.org/10.2139/ssrn.3309189 (15/02/2020)

[83] The expression borrowed from Bergsten (2012); See also: KIRÁLY, M.: From the Treaty of Rome to the Rome Declaration. Scenarios for the European Union's Future. In: SZABÓ M. – LÁNCOS P. L. – VARGA R. (eds.), *Hungarian Yearbook of International and European Law 2018*, Eleven Publishing, The Hague, 2019, pp. 19-30

CAROCCIA, R, A Clash of Administrative Bodies: The Banking Union Case. In: Taranu A, (ed.): Development, Democracy and Society in the Contemporary Word. Filodiritto International Proceedings, Bologna, 2018, pp. 106-112
CHIARELLA, L.: 'The Single Supervisory Mechanism: the Building Pillar of the European Banking Union', *University of Bologna Law Review*, Vol. 1 (2016) Issue 1, ISSN 2531-6133, pp. 34-90, pp. 41-46, 85
DABROWSKI, M.: The Global Financial Crisis. Lessons for European Integration. *CASE Network Studies & Analyses.* No. 384/2009, pp. 17-18
ECA, Special report No. 23/2017: Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go
GROSS, D.: An Evolutionary Path Towards a European Monetary Fund. In-depth Analysis. Provided at the request of Economic and Monetary Affairs Committee, 2017, pp. 5, 19-22
KARAGIANNI, A. – SCHOLTEN, M.: 2018. Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework. *Utrecht Journal of International and European Law*, Vol. 34 (2018) Issue 2, pp.185–194 DOI: http://doi.org/10.5334/ujiel.463
KELLEHER, D.M. et al., 'The Dodd-Frank Act is Working and Will Protect the American People If It Is Not Killed before Fully Implemented', *North Carolina Banking Institute*, Vol. 20, (2016), pp. 145-147;
KIRÁLY, M.: From the Treaty of Rome to the Rome Declaration. Scenarios for the European Union's Future. In: SZABÓ Marcel – LÁNCOS Petra Lea – VARGA Réka (eds.), *Hungarian Yearbook of International and European Law 2018*, Eleven Publishing, The Hague, 2019, pp. 19-30
MARINKÁS, GY.: Changing economic theories: the applicability of the Keynesian theory to solve the economic depression of our times. BSc Thesis (Faculty of Economics, University of Miskolc) 2013, p. 105
MARINKÁS, GY.: How not to build a Monetary Union? – The structural weaknesses of the EMU in the light of the 2008 crisis and the institutional reforms for their correction. In: SZABÓ M. – LÁNCOS, P.L. – VARGA R. (eds.): *Hungarian Yearbook of International Law and European Law*, Volume 2018 (Year of publication: 2019), pp. 437-471
MARINKÁS, GY.: Institutional Answers to the 2008 Crisis in the US and the EU: A Comparative Study. European Integration Studies, Volume 14. Number 1. (2018) pp. 55-65
MARINKÁS, GY.: Some Remarks on the Functioning and the Future Prospects of the European Banking Union. *European Integration Studies,* Volume 15. Number 1. (2019) pp. 50-63
MARTONYI J.: Differentiation or Disintegration. In: SZABÓ MARCEL – LÁNCOS PETRA LEA – VARGA RÉKA (eds.), *Hungarian Yearbook of International and European Law 2018*, Eleven Publishing, The Hague, 2019, pp. 3-18, p. 18
MATOLCSY GY.: We need to admit the euro was a mistake. *Financial Times*, 3 November 2019 - Online available at: https://www.ft.com/content/35b27568-f734-11e9-bbe1-4db3476c5ff0 (15/02/2020)
NAGY, Z. – CSISZÁR, A., A hazai pénzügyi felügyeleti szabályozás a változások tükrében. *Publicationes Universitatis Miskolciensis,* Vol. XXXIV (2016), pp. 157-163
NICOLAS, V.: Bad News and Good News for the Single Resolution Board, Bruegel, 15 January 2018 – Online available at: http://bruegel.org/2018/01/bad-news-and-good-news-for-the-single-resolution-board/ (15/02/2020)
PŁÓCIENNIK, S.: Recovery of the Eurozone and a New Dynamic in European Integration: Implications for Member States outside the Monetary Union. *The Polish Quarterly of International Affairs*, 26/2017, pp. 7-21, pp. 15-16
SANDBU, M.: *Europe's Orphan. The Future of the Euro and the Politics of Debt*. Princeton University Press, Princeton NJ, 2015, p. 336

ISBN 978-80-7160-573-7

STIGLITZ, J.E. 'Can the Euro be Saved?', Project Syndicate, 5 May 2010 – Online available at: https://www.project-syndicate.org/commentary/can-the-euro-be-saved?barrier=accesspaylog [04/02/2020]
STIGLITZ, J.E.: *Can the euro be saved? An analysis of the future of the currency union*, Rome, May 2014 – Online available at: https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2014_Rome_euro_ppt.pdf (15/02/2020)
STIGLITZ, J.E.: *The Euro. How a Common Currency Threatens the Future of Europe* (1st ed.), W.W. Norton & Company, New York, 2016, ISBN-10: 039325402X, p. 448, Part IV/9-10
STIGLITZ, J.E: 'Can the Euro be Saved?' *Project Syndicate*, 05 May 2010. – Online available at: https://www.project-syndicate.org/commentary/can-the-euro-be-saved?barrier=accesspaylog (15/02/2020)
VÉRON, N.: Taking stock of the Single Resolution Board. Banking Union Scrutiny. *In-depth Analysis Requested by the ECON committee*. March 2019, p. 21
WYPLOSZ, C.: A European Monetary Found? In-depth Analysis. Provided at the request of Economic and Monetary Affairs Committee, 2017
WORSTALL, T.: 'Both Krugman And Friedman Said The Euro Was A Stupid Idea: But They Did It Anyway, Didn't They?' *Forbes*, 6 July 2015 – Online available at: https://www.forbes.com/sites/timworstall/2015/07/06/both-krugman-and-friedman-said-the-euro-was-a-stupid-idea-but-they-did-it-anyway-didnt-they/#5a3b9f520e81 (15/02/2020)

THE MOST RECENT ECJ RULING ABOUT THE BANKING UNION: THE CREDIT MUTUEL ARKEA CASE/ Raffaele Caroccia

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Abstract: *This paper analyzes the contents of the recent sentences ruled by the European Courts about the Credit Mutuel Arkéa case. The case law here summarized is important because it gives us the chance of focusing both on the types of legal reasoning used by the EU Courts when they judge about the Banking Union and, above all, on how national law can be interpreted and punt in force by EU institutions as far as credit vigilance is concerned.*

Key words: *Banking Union, European Court of Justice, Single Resolution Mechanism, case law*

1 INTRODUCTION

The making of the BU (Banking Union) is the most consistent part in the EU response to the sovereign debt crisis that started in 2011[1]. Its most notable feature is the stability which creates a big difference with the other tools employed in the aftermath of the credit crunch, whose main character is temporarity. As a result, the BU can be a big step forward in the process of creating a wider and deeper EU institutional setting, as the most important and influential part of the entire governance of the credit system is thought to be now operated at an inter-national stage, letting apart local Authorities.

Given this fact, it is important to assess the way this new policy has been put in force, bearing in mind that it can maybe have altered the original functioning of the EU. In fact, EU institutions have always had an approach to policies according to which national Authorities were entitled to pursue the goals set in Bruxelles, that had a limited operational role. Thus according to a functionalist view. This time, instead, EU institutions occupy the first line on the stage. As a result, they can also apply national law, which is quite a new distinctive feature and consists in an alteration of the traditional way of working of the EU institutions.

In this paper a recent ruling of the ECJ (European Court of Justice), that has dealt with this problem, will be analyzed.

2 THE SSM IN BRIEF

The first element of the BU (and the one relevant for the case law we are going to discuss here) is the so called Single Supervisory Mechanism (SSM); this policy was the first (it became operational on November 2014) and the easiest to be implemented, as it firstly consisted in setting common legal standards towards best practices and in collecting data about banks and their health status. In it the ECB (European Central Bank) has a prominent

[1] MARINKAS G., Some remarks on the functioning and the future prospects of the European Banking Union, in European Integration Studies, 15, 2019, 50-63.

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role[2], to be enforced through a Supervisory Committee, while national control Authorities are tools of the first one. The ECB has a set of inspecting, information request and ordering powers in strict cooperation with national Authorities; so the whole mechanism results in a web of interconnected bodies with the ECB at its centre.

The ECB now has a direct control on significant banks[3], gives to every bank – no matter what its dimensions are, according to "one size fits all" rule – authorization to operate, decides on qualifying participations in their capital and has power of intervention in resolution procedures (putting thus in question proportionality rule). The less relevant banks are, instead, invigilated via local Authorities (mainly national State Banks). So the competences are split between the center and the Member States according to either subjective or objective criteria; this division enables supervision on ground to be made by clerks who know well the environment where financial institutions work and stimulates at the same time a share on information set about single countries situation.

The significance of a credit entity is appreciated according to both quantitative (mainly size) and qualitative (mainly cross border activity) criteria, whose explanation relies on a simple matter of fact: big banks can pose a systemic risk to all euro currency area. As a result, the 85% of banking entities is under ECB vigilance.

The system is quite original and implies a variety of forms of coordination between the administrative bodies, which take part in it with various roles. As for as these competencies are concerned, for the first time an EU institution is entitled with powers that must be put in action according to the national law of a member State. This is a relevant innovation: in fact, we are familiar with a scheme in which national entities must follow and give application to EU regulation. In this sector, it happens just the opposite.

The ECB operates in a internal separation regime in order to avoid conflict of interests: the part of the institution which supervises credit is blind in respect of the other part of the same institution which control money through interest rate. Also administrative remedies[4] are part of the BU and they can be used to add more depth on vigilance decision, which has proved to be less perspicuous in Courts due to their deference towards the ECB. Anyway, we must note that it is still possible to start a jurisdictional remedy.

The legal basis of the SSM is art. 127 (6) of the Treaty on the Functioning of the European Union, according to which the Council can transfer to the ECB specific tasks on prudential supervision on credit institutions. The content of the regulation about the SSM was implemented by the ECB itself, which defined a SSM Framework Regulation in 2014, notably disciplining the relationship between itself and the NCAs (National Competent Authorities).

The governance of the SSM is made by a Supervisory board, which is composed by a representative of each NCA and six representatives of the ECB (the Chair and vice Chair, who are proposed by the ECB among the members of the Executive Board of the ECB and appointed by the EU Council after the approval of the EU Parliament and four members directly appointed by the Governing Council). A representative of the Commission may, if invited, attend the meetings as an observer, but he cannot vote and cannot access confidential information without previous consent. Inside the Board there is a steering committee, made of no more than 10 members; an adequate rotation and balance between national supervisors must be assured. It has broad preparatory tasks. This composition

[2] According to Regulations 1024/13 e 806/14.
[3] These financial institutions are the only ones which operate on a continental scale.
[4] CLARICH M., Il riesame amministrativo delle decisioni della Banca Centrale Europea, in Riv. trim. dir. pubbl., 6/15, pag. 1513.

finds a parallel in the one of the Governing Council, which is composed by an Executive Board and by members appointed by NCAs and is a way to ensure the separation between the supervisory functions and the interest rate control, which must be carried on at a separate stage according to art. 25. It has to be stressed that the separation takes place not only at a top level but also at an organizational and staff level, as new offices were introduced to comply with the new tasks.

As for functioning of the SSM is concerned, it must be added that every decision must be taken by the Governing Council; so a non rejection procedure has been designed. If a draft decision by the Supervisory Board is not objected in 10 days or in 48 hours in case of emergency by the Governing Council, it can be adopted. If there is an objection, the Supervisory Board must submit a new draft decision; in this case, it is possible to build up a Mediation Panel if a NCA asks for it in order to solve contrasts among NCA regarding objections made by the Governing Council. Obviously, the members of the Supervisory Board should act according to the independency and accountability principles. This means that members, whose mandate lasts 8 years and is not renewable, cannot take instructions from their government and the Supervisory Board must submit an annual report to the EU Parliament and to the Council. Even national Parliaments can submit questions to the Supervisory Board as for supervision is concerned. This is a provision which aims at trying to make the SSM more compliant to the democratic principle. There is also an administrative revision procedure about any decision taken, which can be started either by an individual or a legal entity in front of a special commission, named Administrative Board of Review made of five independent members. In broader terms, it must be stressed that every decisions by ECB must be taken in compliance with general principles of administrative procedures, such as motivation, right to be heard and to access documents. Sanctions can be judicially reviewed by ECJ, which has full jurisdiction, or at a national level.

Independency is a key element for SSM action: this characterization is grounded on the idea that independent institutions – such vigilance authorities - are needed in order to protect market from governments.

Inside the SSM ECB has the following competencies:

- ensure compliance with prudential regulation for significant banks through procedures such as SREP;

- ensure compliance with governance, information disclosure and risk management regulation for significant banks;

- carry out stress tests for significant banks;

- release or withdraw authorization for credit activity or for acquisition of a certain amount of capital (qualifying holdings) for all kind of banks.

The first three tasks are made indirectly by NCAs as far as less significant banks are concerned. Anyway, the same NCAs have support and report role on the behalf of ECB as for significant banks are concerned.

However ECB can start a direct vigilance over less significant bank at any time and has an advisory role towards NCAs.

This configuration is thought to be compliant with the proportionality principle and again mirrors the structure of the monetary policy, which is build around a centralized control and decentralized operational framework. Some Authors[5] have stressed that there is a clear difference between these two fields of activity: implementation of monetary policy is without discretional spaces, that can be instead found in supervision activity. So this

[5] BAGLIONI A., The Banking Union. A critical Assessment, Palgrave Mcmillan, 2016.

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parallel is not sound. It has also been suggested that an unique vigilance by the ECB should be more effective, as NCA could be biased by favor for local financial institutions.

The supervision activity on significant banks is materially made by a joint supervisory team whose main task is to conduct recurrent stress tests.

SSM is a compromise model. The choice of the ECB was the one at best hand: this institution had proved to be particularly effective in tackling inflation and had a wide recognized technical expertise and so had a great credit among EU policy makers.

It has been noted that the SSM follows the United States Federal Bank model and that, differently from what happens in EU competition sector, the system is vertical. The first dimension (horizontal) is typical of open texture systems, the second one of rigid ones. In the USA there is a division between state-chartered and federally-chartered banks. A big difference is that each banking institutions is subject to multiple controls, both by chartering authority and by at least one federal primary regulator, as far as prudential purposes and federal banking law are concerned, and by Federal Deposit Insurance Corporation6.

Finally, it is to be noted that the whole system is built around a clear division: micro vigilance activities are deferred to the ECB, while macro vigilance still pertains to NCAs in contrast with De Larosiere report suggestions.

3 THE ARKEA CASE

3.1 The proceedings in front of the Tribunal

As said in the introduction, European Courts have recently judged a case when European Institutions had to apply national law in credit vigilance. It deals with a French bank (Credit Mutuel Arkéa, from now on Arkéa). The relevant rulings in first instance are T-712/15 e T-52/16, whose ratio decidendi is quite similar.

In order to have a proper comprehension of the cases, it is in a preliminary way needed to focus on the peculiar nature of French cooperative banking system. It is made of a first level (where single mutual banks can be located), of a regional level (where confederated mutual banks can be located) and of a central/national one (where a confederation of confederated mutual banks can be found). This last stage is where the central legal entity of this complex web is located. Two relevant features can be added: the national confederation is not a credit enterprise and at the central level there is also a Central Casse, which is instead a bank itself.

The main legal question is if a confederation of mutual banks can be assessed, as far as the SSM is concerned, as an autonomous bank or in a compulsory manner as part of the national legal complex.

So the central question in the case is the application of the exception posed in art. 10 EU Regulation 575/13, according to which there could be a different vigilance for banking entities part of group, whose central body gives to its components full warranties, has a comprehensive balance sheet, has steering powers. The investigation about these elements must be made according only to national law.

It is to be added that:

- in the circumstances under scrutiny there was a conflict of interest between the regional confederation (Arkéa, the resultant of previous merger procedures between regional banks) and the national confederation, which were parts of some national controversies.

[6] BRESCIA MORRA C., From the Single Supervisory Mechanism to the Banking Union. The role of the ECB and the EBA, LUISS Working Paper 2/2014.

- before the birth of the SSM, there was a comprehensive vigilance on the national confederation by the national Authority, whose legitimacy had been stated by French administrative judges.

If this is the national legal environment where the cases can be set, we can now summarize the facts which were relevant in the judgments before the EU Tribunal.

Arkéa in 2014 sent a letter to the ECB, in which it stated the result of its analysis, according to which the bank can be invigilated as an independent entity. After an enquiry about Arkéa request, the ECB sent a draft decision to the national confederation, according to which Arkéa had to be invigilated as part of the cooperative system as a whole. As a result, the capital requirements (CET1) of the bank were set at an higher level (11%) than the minimum (8%), because of fact that there were taken into account some weaknesses of the mutual banking system and - above all - the risks deriving from the legal contrasts between Arkéa and the national confederation. These elements resulted in a so called add on, which is a prudential and preemptive measure. After this draft decision, the dialogue between the ECB and the national banks continued: at the beginning of 2015, there was a final decision, in which the capital requirements were not the same of the draft one. In fact, some remarks of Arkéa were accepted and as a result its CET1 was set at 10,75%. Nevertheless, the bank started the remedy procedure, which is allowed in the SSM. The Administrative Board of Review judged the legitimacy of the ECB decision. During this administrative remedy, Arkéa observed that the national confederation was not a bank; as a result, there could not be found a group of banks, requiring common vigilance; anyway, the capital requirements were set at a level higher than necessary. All the grounds were dismissed by the Administrative Board of Review: accordingly to a previous decisions by the ECB and the Central Committee of Central Banks (an organ which was in force before the birth of the Banking Union), the national confederation was identified as a group, no matter if it was or not a banking entity. It can be added that this view had constantly been held also by the national French vigilance Authority and by the Conseil d'Etat, according to French banking law. In particular, the fact that the national federation was not a bank was not relevant due to i) the steering and guarantee powers it had on its components; ii) the fact that its balance sheets were built as a whole; iii) and finally that the capital requirements were not set at an irrational level as the litigations between Arkéa and the national federation were identified as sources of potential risks to be faced with adjunctive financial means. In October 2015 the ECB adopted another comprehensive decision, whose contents were the same of July; in December 2015 there was another decision, in which CET1 requirements were again set at 10,75%. Both these two measures were contested by Arkéa in front of the Tribunal.

As far as the first act, its annihilation was requested in the T-712/15 case, while the second act was contested in the T-52/16 case. The Commission took part to the process, whose scrutiny was set in front of an integrated section of the Tribunal.

After some preliminary exceptions, one of which assumed that Arkéa could contest the decision only as far as its capital requirements were concerned and which were all dismissed by the Tribunal, the judicial plea by Arkéa was scrutinized in all its grounds. The Tribunal at first identified that Arkéa has an interest to recur as a single bank and not only as part of a national mutual system. To summarize the grounds that were analyzed in the case, we can say that Arkéa manly wanted to be invigilated as a single banking entity, even if it agreed to be invigilated by the ECB (in this point we can find a difference with the case T-122/15). The Tribunal decisions deeply relied on the Administrative Board of Review's conclusions, but the core and the importance of the cases is the identification of the limits of credit vigilance on coordinated companies and groups, that is a novelty. Their dimensions can be found in secondary law about the SSM, which is interpreted with a great deal of

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attention. The Tribunal identifies the aim of the field legal discipline in preemption of credit risks at a group level: the dimension of syndicated banking entities poses a threat to systemic stability, thus justifying a comprehensive vigilance. This is the finalistic *ratio* of unique and comprehensive vigilance and capital requirements setting. So there is no space for a single vigilance, which can be started only after a discretionary decision by the ECB and not by a simple request (this part is coherent with case law T-122/15). The fact that, according to the French law, the national confederation has some coordination powers on its components is the main ground to justify the existence of a credit group, even if the national confederation itself is not a bank. Another argument used in Tribunal reasoning is that a not comprehensive vigilance could split this activity in two levels (national and European one or national confederation and regional confederation one): this outcome is contrary to the aims of the BU. Instead, setting different capital requirements inside the same group is judged coherent with risk preemption goal. It is interesting to note that: a) the Tribunal identifies this regulation as wide discretionary and, a result, it can be scrutinized only *ab extrinseco*; b) capital requirements setting is only a part of the ECB powers; c) it can be used only as far as banking entities are concerned, but this fact doesn't make not possible common vigilance on group whose central body is not a bank. So, as a consequence, it is not irrational nor illegal to set different capital requirements in a banking group. Instead, the correct individuation of this requisite must take into account risks deriving from being part of as group, which creates its balance sheet as a sum of the ones of its components.

In the Tribunal verdicts, another pledge by Arkéa is dismissed; it referred to national legislation according to which there was not national confederation liability for the obligations of its components. The legal reasoning of the Tribunal mixed the use of national law with secondary EU law to judge the case; according to the latter, the simple chance of fund transfer to face liquidity stress situation is sufficient to find a common liability between the common entity and its parts. The very same existence of mutuality relationship – that had already been recognized by French judges - can be identified as a sufficient basis for common vigilance, Furthermore, the legal statute of national confederation contains some administrative measures (like removal) on the components of the cooperative banking system and gives the central entity a steering power on them. As a result, there are all the elements that can justify a group vigilance.

As far as the concrete capital requirements, the Tribunal makes a fast scrutiny. It identifies a wide discretionary power to ECB to set these measures. In the case judged, add on can be justified to preempt the risks of Arkéa exiting the national confederation; there is no space for the unlikelihood of this event to justify less strict capital requirements. The ECB in fact must take into account all the risks, even if they are quite remote. They are relevant because of the legal contrasts between the bank and group and it could be translated in higher funding costs, which require more capital to potentially absorb them. Finally, setting higher capital requirements is not a sanction and this measure has been set for proper reasons.

3.2 The proceeding in front of the ECJ

The decisions of the Tribunal were appealed by Arkéa. We can immediately note the appeal was dismissed with a *ratio decidendi* quite close to first instance verdicts, so the analysis is going to look only at the elements of novelty.

Let us start from the opinion by the Advocate General.

The most important part of the opinion, which is in full agreement with the Tribunal sentences, is the one about the correct interpretation of art. 127, (6) of the Treaty on

Functioning of the European Union. This article – as said - is the legal basis of the whole Banking Union and enables the Council to give the ECB prudential vigilance powers over banking institutions and other financial entities.

In the opinion, the argument used by Arkéa in its appeal is dismissed according to the following consideration: it is not possible to avoid group vigilance as a consequence of the main organ not being a bank, given the fact that:

- art. 127 has a systemic importance;
- the scope of vigilance is to grant financial stability both of invigilated entities and of the general system;
- to fulfill this goal it was necessary to give the ECB new powers at a continental level;
- one of the main premises of financial turmoil is the existence of groups, whose dimension can pose a threat to the overall stability;
- this risk can be used to establish a vigilance over non banking entities parts of a banking group;
- as a result, art. 127 must be interpreted in an extensive way.

Consequently, the scrutiny about the conditions posed by art. 10 Reg. 1024/2013 can be set apart as being not compulsory.

Another interesting part is the one concerning the part of the appeal concerning the fact that a non banking entity can be invigilated but not sanctioned, as sanction powers can be exerted only against banking enterprises. The Advocate General stresses that the sanction power is not a condition for vigilance. Furthermore, he points out that the ECB can ask national Authorities to adopt sanctions against this kind of subjects and that sanction powers against financial entities are enough to assure a properly working vigilance.

We can now move to the sentence ruled in October 2019 by the ECJ, which joined the appeals by Arkéa (cases C.152/18 P and C-153/18 P).

As an introductory point, we can note that it is quite interesting how the ECJ has reached its conclusion. The legal reasoning is quite complex and results in a mix of methods: it starts from a teleological perspective, and then moves to a literally and a comparative interpretation of legal texts. No matter the method used, the result is however a green light to the ECB decision; this attitude is quite often to be found in case law about the BU, thus letting some scholars note an amicable view by the EU Courts on this law field[7].

In its verdict, the Court stresses at first the notion of systemic vigilance: given the fact the whole mechanism of the BU was born to prevent risks, it can be used also if a group central entity is not a banking one if there is a danger of potential instability. According to the Court, however, the Treaty cannot literally be interpreted as forbidding group vigilance above a central entity which is not a bank. This argument is not so persuasive, while the first one – that deeply relies on the opinion by the Advocate General – seems to be more correct.

Let us now move to the comparative perspective: the Court deeply analyzes one ground of appeal, according to which the first decision is thought to be wrong as French legal environment cannot be interpreted as source of a general liability for the national confederation in advantage of its components. The Tribunal has reached – as said - this conclusion relying on French administrative jurisprudence. In particular, the Conseil d'Etat has interpreted French banking law as giving the national confederation a control of financial and juridical nature and a sanction power above its components; it doesn't matter if the decisions were taken after the creation of the BU. The Court, in confirming first

[7] ZOLTAN A., Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről. Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica, Tomus XXXIII (2015), pp. 129-143.

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instance sentence, adds that these powers can result in a compulsory merger, which is even more intrusive than a fund transfer. So even from a comparative perspective, the decision by the ECB is confirmed with an "hook" on national law.

4 CONCLUSIONS

Once again, the ECJ has stated the legitimacy of an hierarchical construction of credit vigilance, which is deemed to be needed in order to avoid a new upcoming credit crisis. Still, there are some open problems. Comprehensive outlook at credit cannot work with a proper and clear administrative regulation: SSM has not reached a full completion. Case law is filling its gaps, using in its legal reasoning the peculiarity of national laws to enforce the BU goals. The inversion in the use of national law, whose application is left to a super-national Authority, has in fact became a tool to implement the SSM itself. This creates problems – apart from the political ones – in the logic of the EU integration, even if EU Courts try to limit the riskiness of the process relying on national juridical interpretation, however stretched. Furthermore, the guarantee of judicial review of administrative provisions typical of the Rule of law is now set at a super national stage: even if there is a risk of creating a legal playing field only for affluent enterprises, a cross fertilization between legal environments could create homogenous interpretation over banking activity also for smaller entities. If this happens, it seems that BU requires and could result in a deeper integration between Member States and EU legal environments.

Bibliography:

BAGLIONI A., The Banking Union. A critical Assessment, Palgrave Mcmillan, 2016;
BRESCIA MORRA C., From the Single Supervisory Mechanism to the Banking Union. The role of the ECB and the EBA, LUISS Working Paper 2/2014;
CLARICH M., Il riesame amministrativo delle decisioni della Banca Centrale Europea, in Riv. trim. dir. pubbl., 6/15, pag. 1513;
MARINKAS G., Some remarks on the functioning and the future prospects of the European Banking Union, in European Integration Studies, 15, 2019, 50-63;
ZOLTAN A., Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről. Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica, Tomus XXXIII (2015), pp. 129-143.

RECENT AND NEW CHALLENGES OF THE EUROPEAN COMMISSION IN CONSUMER PROTECTION /

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Abstract: *European Commission is one of the most influencing institutions in the consumer protection legislation framework within the European Union. Paper briefly deals with the European Union acquis in the consumer protection agenda and its recent development. The consumer protection area is one on which the different socio-economical and technical aspects have enormous influence, although the legislation seems not to be that flexible, reflecting the real needs of consumers and assuring them proper protection. The new European Commission (2019 – 2024) will have to face one of the most complicated term, dealing with Brexit, economical and health issues, increasing usage of a shared economy, internet of things products, artificial intelligence-based products and services, consumer's informational and educational decrease, and last but not least, environmental issues, which all have their influence on consumer protection legal framework.*

Key words: *Consumer Protection, European Commission, New Deal for Consumers, Brexit, Environment, Shared Economy, Artificial Intelligence, COVID-19*

1 INTRODUCTION

Consumer protection within the European Union embodies one of the most visible European Union's agenda, balancing between the member states and the European Commission, as well as between the private and the public law, yet having an influence on a day-to-day life of all the member states citizens. Consumers and thus the consumer protection itself has been in the attention of the European Union for many years so far in the different variations bearing in mind that it is indispensable for the growth of the single market, given the strength of the consumers and the 54,3% share of consumer spending on the European Union's gross domestic product in 2018.[1]

Consumer protection is not the invention of recent years but has its history within the whole existence of the European Union, preceded by the European Communities. The Consumer protection legal framework was challenged in the previous decade by the different socio-economical struggles that led European Commissions to take some actions, most of them resulting in a revision of the consumer protection policies based among the others on the European Commission vision "Europe 2020"[2] and afterwards on the Regulation on the consumer programme.[3]

[1] Eurostat: Household consumption by purpose. 2019. Available at: https://ec.europa.eu/eurostat/statistics-explained/pdfscache/49480.pdf. (Accessed: 15 February 2020)

[2] COM(2010) 2020 - Communication from the Commission – Europe 2020 A strategy for smart, sustainable and inclusive growth of 03 March 2010

[3] Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision No 1926/2006/EC, OJ L 84, 20.3.2014, p. 42–56

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Even though it may seem that all of the crucial changes have been done for now by the previous European Commissions, the opposite is exact and the consumer protection will face the changes in the forthcoming future that may have no parallel in the history, but will create many challenges for the new European Commission (EC). The paper is therefore devoted to presenting the few activities and results of the previous European Commission and their influence on the consumer protection and to naming next steps or mostly challenges to become that the new European Commission might or will have to face in the future.

2 CONSUMER PROTECTION ACQUIS

As the Rome, the Consumer protection acquis was not built in a day and has its influence in many other European Union acquis, up to date, comprises hundreds of different regulations, directives or other acts, papers, etc. The most significant parts of the acquis on consumer protection shall be divided into the next three parts:

- safety for the consumers (i. e. products safety, food safety, GMO regulation, drugs safety, etc.),[4]
- information for the consumers (i. e. food and products labelling)[5] and
- protection of the consumer's economic and legal interests (i. e. defective products liability, unfair contractual terms, unfair commercial practices, services requirements, financial services regulation, e-commerce regulation).[6]

Before getting to the new European Commission challenges, few quick notes on the contribution of the previous European Commission to the acquis on consumer protection have to be made.

2.1 Previous European Commission Results

In 2012 the former European Commission adopted the European consumer agenda,[7] that identified the key measures needed to empower consumers and to maximize their participation in the single market. The agenda outlines the strategic vision on consumer policy with 62 action points grouped around four pillars (promoting consumer safety, enhancing knowledge of consumer rights, strengthening the enforcement of consumer rules, integrating consumer interests into key sectoral policies) that created basis

[4] e. g. Directive 2001/95/EC on general product safety (OJ L 11, 15.1.2002, p. 4–17), Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs (OJ L 343, 14.12.2012, p. 1–29), Regulation (EC) No 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms (OJ L 268, 18.10.2003, p. 24–28), Regulation (EC) No 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ L 136, 30.4.2004, p. 1–33), and many others.

[5] e. g. Regulation (EU) No 1169/2011 on the provision of food information to consumers (OJ L 304, 22.11.2011, p. 18–63), etc.

[6] e. g. Directive 85/374/EEC concerning liability for defective products (OJ L 210, 7.8.1985, p. 29–33), Directive 93/13/EEC on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29–34), Directive 2011/83/EU on consumer rights (OJ L 304, 22.11.2011), Directive 2000/31/EC on electronic commerce (OJ L 178, 17.7.2000, p. 1–16), Directive (EU) 2015/2302 on package travel (OJ L 326, 11.12.2015, p. 1–33), Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (OJ L 60, 28.2.2014, p. 34–85) and many others.

[7] COM (2012) 225 - Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions A European Consumer Agenda - Boosting confidence and growth

for previous European Commission work. As was already mentioned above, the previous EC interest was to update and prepare the consumer protection legal framework for challenges to come.

In respect of the main title of the paper, the most important achievements in the consumer protection agenda to mention would be at least these three results of previous European Commission:

- Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004,[8] which shall apply and already applies from 17 January 2020.[9]
- Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules[10] or so-called *"New Deal for Consumers"* that should be enforced by the member states by 28 May 2022.[11]
- Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC,[12] that should be part of the New Deal for Consumers package.[13]

3 CHALLENGES FOR THE NEW EUROPEAN COMMISSION

Quite surprising realization is that the new president of the European Commission Ursula von der Leyen had no once mentioned words "consumer" or "consumer protection" in her political manifesto "A Union that strives for more - My agenda for Europe"[14] as well

[8] OJ L 345, 27.12.2017, p. 1–26

[9] Slovak republic failed to implement the regulation on time. The implementation should be carried out by a separate new Act on supervision in the consumer protection that had as a main aim to regulate general rules for the supervision of the sale and supply of products and electronic content to the consumer in the internal market according to special regulations and to ensure the proper application of the regulation, by strengthening the effectiveness and efficiency of consumer protection supervision, so the supervisory bodies have at least the minimum scope of powers required by the Regulation and also to unify its performance so that supervisors can cooperate more quickly and effectively at national level, but also with the competent authorities of other Member States. The mentioned act was not enacted due to the political and social circumstances in Slovakia.

[10] OJ L 328, 18.12.2019, p. 7–28

[11] The new deal for consumers created quite a fuzz among the member states and was considered almost not possible to get adopted in the resting election period of the old European parliament and EC, but the deadline was tightly met. The main aim of the New deal for consumers is to enhance harmonisation and streamlining of some of the criteria used to determine the level of penalties for infringements of EU consumer law, stipulate a right to individual remedies for consumers, enhance transparency in online transactions, impose the extended obligation of online marketplaces to inform consumers, protect consumers in respect of "free" digital services (consumer do not pay but provide personal data, i. e. cloud storage, social media and email accounts), and clarify on the way misleading marketing of "dual quality" products.

[12] COM/2018/0184 final

[13] see point 3.1.

[14] von der Leyen, U.: *A Union that strives for more My agenda for Europe. Political Guidelines for the Next European Commission 2019 – 2024.* 2019. Available at: https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (Accessed: 15 February 2020).

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as word "consumer" has been removed from the title of *"Commissioner For Justice"*, now chaired by Commissioner Didier Reynders,[15] formerly called „Commissioner for Justice, Consumers and Gender Equality" held by Commissioner Věra Jourová. Those implications may suggest that everything in the consumer protection agenda has been already done by previous ECs and acquis in particular matters is sufficient. The opposite is unfortunately exact, and we can find some clues for the future development in the mission letter from the president Ursula von der Leyen to the Commissioner for Justice Didier Reynders where, regarding the consumer protection, she mentions notably cross-border and online transactions, informed choices of consumers and green and digital transitions.[16]

In the next paragraphs, based on previous vague instructions and other relevant socio-economical and technical developments, the paper briefly presents possible challenges that will, may or may not, come in the future for the new European Commission in the forthcoming five years in regard of consumer protection.

3.1 Collective Interests of Consumers and the New Deal for Consumers

Protecting collective interests of consumers was one of the tasks mainly of the previous European Commission, among other preconditions, based on so-called Diesel-gate affair,[17] that led to the modernization of the consumer protection framework not only in collective redress and representative actions aspects[18] but as well in the above mentioned New Deal for Consumers.[19]

Unlike already enacted the New Deal for Consumers, the Directive on representative actions is still in the legislative process within European parliament and Council of the European Union, thus not under the European Commission authority anymore. On the other hand, the task for the new European Commission would be to oversee the process, and if enacted, to seek the guarantee for the effective enforcement of EU rules and create a robust, efficient and effective enforcement system to ensure that member states will fully apply, implement and enforce the EU law and provide adequate redress for consumers. After its implementation, the Directive on representative actions will supplement the consumer rights enforcement legal framework.[20] The similar applies in regard to the New Deal for Consumers which should be implemented by member states by 28 November 2021 (applicable from 28 May 2022).

[15] see Responsibilities of Commissioner for Justice on the web page of European Commission: https://ec.europa.eu/commission/commissioners/2019-2024/reynders_en

[16] see Mission Letter by Ursula von der Leyen, President-elect of the European Commission to Didier Reynders, Commissioner-designate for Justice of 10 September 2019, Available at: https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-didier-reynders-2019_enpdf.pdf (Accessed: 15 February 2020).

[17] see KRIŽAN, M.: *Vybrané aspekty kolektívneho uplatňovania niektorých nárokov z pohľadu emisného škandálu spoločnosti Volkswagen.* In: Kolektívne uplatňovanie nárokov. Bratislava: Univerzita Komenského, Právnická fakulta, 2016., p. 44 et al.

[18] COM/2018/0184 final

[19] Directive (EU) 2019/2161 of 27 November 2019, OJ L 328, 18.12.2019, p. 7–28

[20] i. e. Directive 2013/11/EU on consumer ADR (OJ L 165, 18.6.2013, p. 63–79), Regulation (EU) No 524/2013 on consumer ODR (OJ L 165, 18.6.2013, p. 1–12), newly amended Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1–22) and others.

3.2 Brexit

The story began with the Treaty of Lisbon which introduced, in Article 50 of the Treaty on European Union,[21] for the very first time the explicit right of withdrawal of member state from the European Union, that entered into effect in 2009.[22] The story has continued with the Brexit referendum on 23 June 2016[23] in which voters decided to exit the European Union.[24] Much time and a lot of negotiations and extensions have passed since the referendum, until the United Kingdom of Great Britain and Northern Ireland as a member state exited the European Union after all on 01 February 2020.[25] Given the grim state of negotiations on the future agreement between the United Kingdom and the European Union[26] at present, it is still not yet clear what scenario Brexit will take, and therefore whether the agreement will be concluded, or the United Kingdom will leave the European Union without the agreement.[27]

The apparent impact of Brexit on the various policies of the European Union will affect, inter alia, the new arrangements for the free movement of persons, goods, and services, thus the consumer protection as well. Since its accession to the European Communities in 1972, the United Kingdom has been involved in drafting consumer protection rules, while implementing and transposing them into its national legislation. In the case of Brexit, therefore, it can be assumed that the United Kingdom will want to remain at the current level of consumer protection, and therefore, at least in the short term, significant changes are unlikely.

On the other hand, a significant threat to the current or even more favourable level of consumer protection might be the event of severe post-Brexit economic consequences (possibly not related only to Brexit) that may weaken the present degree of consumer protection for specific products or services in order to simplify the requirements for producers and providers. The House of Lords has already raised some concerns regarding the assuring of the status quo of consumer protection in the United Kingdom.[28]

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[21] Art. 50 TEU: *„Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."*

[22] For analysis of the withdrawal right see CIRCOLO, A, HAMULAK, O., BLAZO, O.: *Article 50 of the Treaty on European Union: How to Understand the 'Right' of the Member State to Withdraw the European Union?* in: TROITINO, R. (eds.): Brexit. History, Reasoning and Perspectives. Springer International Publishing. 2018., p. 199 et al.

[23] Brexit referendum was based on *"An Act to make provision for the holding of a referendum in the United Kingdom and Gibraltar on whether the United Kingdom should remain a member of the European Union"*, 2015, c 36. Available at: http://www.legislation.gov.uk/ukpga/2015/36 (Accessed: 15 February 2020).

[24] Complex results on the Brexit referendum are available at: http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information

[25] Exit day, thus Brexit day, was 31 January 2020 at 11.00 p.m. GMT based on *"An Act to Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU, 2018 c. 16"* available at: http://www.legislation.gov.uk/ukpga/2018/16 (Accessed: 15 February 2020)

[26] The previous internal political struggles led ultimately to *"An Act to implement, and make other provision in connection with, the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU"* available at: http://www.legislation.gov.uk/ukpga/2020/1 (Accessed: 15 February 2020)

[27] see EMERSON, M.: *Which Model for Brexit?* In: After Brexit: Consequences for the European Union Lisbon: Palgrave Macmillan. 2017. p. 167 et al.

[28] House of Lords, European Union Committee: *9th Report of Session 2017–19 Brexit: will consumers be*

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The questions arising from the Brexit, for which the new European Commission, specifically Head of Task Force for Relations with the United Kingdom,[29] will have to find a deal or answers are not only those on the distribution of the United Kingdom's products and services in the European Union area, customs checks, import duties and other indirect taxes but also those closely influencing the consumer protection itself. The crucial questions on that point will be the jurisdiction of the Court of Justice of the European Union,[30] enforcement of EU member states courts judgments, Alternative dispute resolution, quality and safety of products and services, unfair contract terms and commercial practices and many others. Despite the fact that consumer protection represents one of the most important European Union "pillars", this is not reflected in the current state of negotiations between the European Union and the United Kingdom. The lack of importance is given to the matter also by organizations dealing with consumer protection, as well as scholars or others, so one of the challenges of the new European Commission is crystal clear and seems inevitable.

3.3 Environmental Questions Related to the Consumer Protection

The relatively widely discussed agenda of the previous months or years is anything concerned with the environmental aspects, consumer protection not excluding, although the environmental politics was not created in last few days,[31] even in the consumer protection aspects.[32] Nevertheless, having in mind recent environmental public awakening,[33] it is highly expected that the new European Commission (maybe not only to please the voters but also convinced on the importance of the agenda) will take steps in the protection of the environment,[34] but as well encourage the consumer protection in an environmentally more complying way.

One of the most promising areas combining both the consumer and environmental protection is making a consumer-friendly transition to a resource-efficient and safe circular economy.[35] The first steps should be already seen (drafted by previous EC) by already adopted delegated regulations laying down the new eco-design requirements based on

protected?. Available at: https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/51/51.pdf (Accessed: 15 February 2020)

[29] For more information on Brexit development see https://ec.europa.eu/info/departments/task-force-relations-united-kingdom_en

[30] see BERRY, E. et al.: *Complete EU Law: Text, Cases, and Materials*. Oxford University Press, 2019. p. 308

[31] Greta Thunberg who started the environmental movement was chosen as a Person of the year 2019 by the Times. Available at: https://time.com/person-of-the-year-2019-greta-thunberg/. (Accessed: 15 February 2020)

[32] see WILHELMSSON, T.: *Consumer Law and the Environment: From Consumer to Citizen.* In: Journal of Consumer Policy 21. 1998. p. 45 et al.

[33] Based on Gretha Thunberg protest, the whole movement arose creating so called "Fridays for future" protests. Available at: https://www.fridaysforfuture.org/ (Accessed: 15 February 2020)

[34] European Commission president, Ursula von der Leyen several times mentioned environmental issues and protection in her political manifesto: A Union that strives for more My agenda for Europe. Political Guidelines for the Next European Commission 2019 – 2024. Available at: https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (Accessed: 15 February 2020).

[35] see MAZEIKA, R.: *Consumer Protection in the Circular Economy in Europe – Legal Initiatives and Challenges – The Commission's View.* In: KIERSBLICK, B. (eds): Consumer Protection in a Circular Economy. Cambridge. Intersentia. 2019. p. 11 et al.

Directive on eco-design requirements,[36] for example, regulation on refrigerating appliances,[37] or others like delegated regulation on dishwashers,[38] etc., which shall apply from 1 March 2021. The European parliament also reflects the environmental movements[39] and with the goal of reducing electronic waste, empower consumers to make sustainable choices, and allow them to fully participate in an efficient and well-functioning internal market, starting with a common charger for mobile telephones and other compatible devices[40] calls on the EC to take action to introduce the binding rules on common chargers by adopting a legislative measure by July 2020,[41] which new European Commission would have to take into consideration.

New European Commission will have to take into account also many other environmental questions which have a direct or indirect impact on consumers (European Union citizens) health, for example, an environment without pollution and products not creating considerable amounts of pollution or use of chemicals (having in mind above mentioned Diesel-gate and related implications, but many others aspects as well), effective product labels, promoting healthy food, as well as preventing dual products (food) quality (which has been already adopted as an unfair commercial practice within New Deal for Consumers),[42] drugs policies and many others.

3.4 Shared Economy and Fin-Tech Regulation in the Consumer Protection Perspective

The next one quite general struggle for the new European Commission will come as a part of the changes in the society. The terms such as "Shared economy" and "Fintech" are more than present in recent years changing from the ground up consumers behaviour. Shared economy and Fintech do not only represent a number of improvements for the consumers (financial consumers), user-friendly, visually and financially compelling solutions, applications, new services, but also represent the dangers of protecting consumers from FinTech or Shared economy-wide range of risks. Shared economy, as well as technology-based financial services innovations, fundamentally change consumer habits, while changing the business environment in which there is a competition between traditional service providers (taxi drivers, banks, and others) and new technology companies (start-up's) or shared economy platforms. Shared economy and FinTech is, therefore, a challenge not only for the players involved in the creation of its content but also for

[36] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L 285 of 31 October 2009, p. 10–35

[37] Commission Delegated Regulation (EU) 2019/2024 of 1 October 2019 laying down ecodesign requirements for refrigerating appliances with a direct sales function pursuant to Directive 2009/125/EC of the European Parliament and of the Council, OJ L 315, 5.12.2019, p. 313–334

[38] Commission Delegated Regulation (EU) 2019/2017 of 11 March 2019 supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of household dishwashers and repealing Commission Delegated Regulation (EU) No 1059/2010, OJ L 315, 5.12.2019, p. 134–154

[39] European Parliament resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP))

[40] European Parliament resolution of 30 January 2020 on a common charger for mobile radio equipment (2019/2983(RSP))

[41] By supplementing the Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, OJ L 153, 22.5.2014, p. 62

[42] Recital (52) Directive (EU) 2019/2161

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legislators, European Commission not excluding, who need to regulate the sector subject to the rapid change in the consumer's (but not only) interests.[43]

Undoubtedly, regarding the consumer protection and regulation of contractual relations between subjects of Shared economy, most of the relevant legislation should be in the respective members states competence, but the European Commission should have a word in implementing new rules, having in mind the mostly global aspects of shared economy providers not only in the single market or taxation perspective, in order to guarantee the full consumers rights and protection in the whole new part of the economy on the same level.

3.5 Artificial Intelligence and IoT as the Consumer Protection Threat

New technologies also bring many new and at the moment unknown consumer protection challenges which the new European Commission will have to deal with, the most appropriate in the cooperation with the member states. As was mentioned above on the topic of the shared economy, also the Artificial Intelligence (AI) powered products and services as well as Internet of Things (IoT) devices will tremendously influence the internal market of the European Union and consumers behaviour. AI and IoT can bring many benefits to consumers, such as increasing efficiency and convenience of usage, and feasibly also more safety and protection of consumers themselves, but at the same time, AI and IoT can bring many practical and legal problems and questions.

European Commission has already recognised the necessity of dealing with the new part of the economy and started to reconsider possible affects of AI and IoT, namely economic ones.[44] Statements on consumer protection related to AI and IoT by EC are mostly proclamatory requiring maintaining the high level of consumer protection. The AI and IoT are subject to rapid change and European Commission (as well as all member states) willing to be up to date will have to reflect on that in order to guarantee the consumer protection in its broadest sense.

Considerable challenges are based on proper definitions of AI and IoT itself. Some of IoT devices, as well as AI products or services, are already partially in use without any specific statutes different from the regular products or services.

The immense requirement, in regard with the specificity of AI and IoT products and services (subjects to frequent and instant changes), will be defining ethical and product safety standards in order to guarantee consumers safety (in all possible meanings of harm) and thus to comply with at least current status quo of consumer protection. AI and IoT products and services are already subject to European Union general legislation on fundamental rights (e.g. data protection, privacy, non-discrimination), consumer protection, and product safety and liability rules, but those are not reflecting specific risks of the industry. The European Commission has recognised the necessity of such ethical aspects of AI in recent White Paper On Artificial Intelligence,[45] in which the EC envisages to create a

[43] see KOOPMAN, Ch., MITCHELL, M., THIERER, A.: *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*. In: The Journal of Business, Entrepreneurship & the Law. Vol. 8. 2015. Available at: https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1130&context=jbel. (Accessed: 15 February 2020).

[44] COM(2018) 237 final – Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions Artificial Intelligence for Europe

[45] COM(2020) 65 final – White Paper On Artificial Intelligence - A European approach to excellence and trust

unique "ecosystem of trust" between consumers and AI, IoT providers for creating the future basis for the regulatory framework and to enhance the use of such products hence inventions. EC should create not only ethical guidelines for such AI and IoT or big data use but also adopt different guarantees for consumers and their protection in various ways by amending instruments such as Consumers Rights Directive[46] or Directive on Unfair Commercial Practices,[47] and many others. EC already vaguely acknowledged such necessary changes.[48]

The liability issues and different compensation rights are in general the part of the civil law of the member states without any European Commission influences, nevertheless in such specific developments such as AI and IoT would be at least helpful to cooperate on level of European Commission working groups having in regard that the most significant number of AI and IoT products and services will be delivered in globalization economy under the same conditions and specifics within the whole European Union. High levels of safety for products services and systems integrating new digital technologies and robust mechanisms remedying occurred damage (i.e. the liability framework) contribute to better protection of consumers, but they will require updated regulations regarding the responsibility of AI and IoT providers. In general, the common product safety requirements, that all consumer products have to be safe[49], as well as those products regulated by the European Union specific legislation, e.g. in the automotive sector[50], that also applies on all AI and IoT products. Responsibility of such AI and IoT providers or developers has been recently also part of the European Commission broad interest: *"A clear safety and liability framework is particularly important when new technologies like AI, the IoT and robotics emerge, both with a view to ensure consumer protection and legal certainty for businesses."*[51]

AI and IoT will bring many other subjects to the discussion, more or less connected to consumer protection, like cybersecurity and liability for failing in its securing, human rights and personal data protection, Big Data handling, possibilities (or necessity of possibility) of human intervention in decisions taken by AI or IoT devices or human explanation of decisions, processes and algorithms of AI an IoT, and last but not least supervisory questions (mechanism not only to supervise the final products and services but

[46] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ L 304, 22.11.2011, p. 64–88*

[47] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), *OJ L 149, 11.6.2005, p. 22–39*

[48] p. 13 of WHITE PAPER On Artificial Intelligence - A European approach to excellence and trust COM(2020) 65 final

[49] Directive 2001/95/EC the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4–17).

[50] Directive 2007/46/EC — approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, and Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC

[51] COM(2020) 64 final – Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics;

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to ensure also algorithmic control), that should also be dealt by the new European Commission.

3.6 Informing and Educating the Consumers

New Deal for Consumers[52] in regard of information on consumer rights states that the EC *"shall ensure that citizens seeking information on their consumer rights or on out-of-court dispute resolution benefit from an online entry point, through the single digital gateway enabling them to: (a) access up-to-date information about their Union consumer rights in a clear, understandable and easily accessible manner; and (b) submit a complaint through the online dispute resolution platform and to the competent centre of the European Consumer Centres Network, depending on the parties involved."*

Education and informing consumers are not really related to the legal issues of consumer protection but fulfilling the information need for consumers is vital for successful consumer protection. The recent PISA testing's and other relevant inputs declared considerable decrease not only in financial literacy but as well in the knowledge of consumer rights amongst consumers themselves. Even though the education is not matter of legislation and lawyers, nor academics, it should be in the centre of public interest, requiring more considerable attention of public institutions and other relevant partners in society - European Commission not excluding. The lousy information of consumers leads those consumers into bad choices, causing financial or other damages that may results also in severe threats (within the most vulnerable and marginalized groups even more).

3.7 COVID-19 (coronavirus) and plausible economic struggles

European Union has surpassed several various crises in the previous decade (economic,[53] migration,[54] real Brexit[55]) that are still quite a big challenge for the European Commission as well leading to a discussion on reforms and their nature in European Union. In the time of finalization of this paper, the European Union area was hit by the most severe health crisis in its history. The virus COVID-19, or so-called coronavirus, since January 2020 gradually affected all the member states.[56] In such pandemic circumstances, the new European Commission will have to act promptly to prevent not only casualties (mostly in member states health systems competences) but also the unpredictable economic losses. In the perspective of consumer protection, those losses (if very distinctive) may influence (temporarily) level of consumer protection as well as may simplify procedures related to preparation and testing of relevant drugs and vaccines.

4 CONCLUSION

In conclusion, the challenges for the new European Commission are tremendous, regarding the above-mentioned development in different socio-economical or technological

[52] Article (5) Directive (EU) 2019/2161

[53] Economical struggles started with Financial crisis in 2008 leading to Greece economic problems and possible Grexit.

[54] European migrant crisis (2015-2019), also called the refugee crisis, is a major political-social crisis that fully arose in 2015 when hundreds of thousands of refugees as well as economic migrants began to flow into the European Union through the Balkans and the Mediterranean migration paths. See https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en

[55] see point 3.2

[56] see updates of the European Centre for Disease Prevention and Control. Available at: https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases

aspects, as well as the current crises, that have an immense influence on the consumer protection. Facing crisis needs quick and decisively acts. The new European Commission should therefore not rest on one's laurels (meaning previous ECs achievements). It shall promptly continue at its work in consumers protection agenda in order to prevent possible harm and to ensure consumers proper protection while preserving the current level of consumer protection at least.

Bibliography:

BERRY, E. et al.: Complete EU Law: Text, Cases, and Materials, Oxford University Press, 2019. 760 pages. ISBN 978-0-19-257321-6.

CABRAL, N. da C. And others: After Brexit: Consequences for the European Union. Lisbon: Palgrave Macmillan. 2017. 425 p. ISBN 978-3-319-66669-3.

KIERSBLICK, B., TERRYN, E. (eds): Consumer Protection in a Circular Economy. Cambridge: Intersentia. 2019. 347 p. ISBN 978-1-78068-657-8.

KRIŽAN, M.: Vybrané aspekty kolektívneho uplatňovania niektorých nárokov z pohľadu emisného škandálu spoločnosti Volkswagen. In: Kolektívne uplatňovanie nárokov. Bratislava: Univerzita Komenského, Právnická fakulta, 2016. p. 44-54. ISBN 978-80-7160-429-7.

KOOPMAN, Ch., MITCHELL, M., THIERER, A.: *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change.* In: The Journal of Business, Entrepreneurship & the Law. Vol. 8. 2015.

REICH, N. et al.: European Consumer Law. 2nd edition. Cambridge: Itersentia. 2014. 421 p. ISBN 978-1-78068-086-6.

TROITINO, R. (eds.): Brexit. History, Reasoning and Perspectives. Springer International Publishing, 2018. 283p. ISBN 978-3-319-73413-2.

WILHELMSSON, T.: Consumer Law and the Environment: From Consumer to Citizen., Journal of Consumer Policy 21, 1998, p. 45–70. ISSN: 0168-7034.

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EFFICIENCY OF JUSTICE SYSTEM AS THE PRINCIPLE APPLIED IN THE RULE OF LAW FRAMEWORK IN THE EUROPEAN UNION/

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Abstract: *The paper is focused on the efficiency of justice system as one of 17 principles applied within the Rule of Law Framework in the European Union. The research reflects Eurobarometer survey findings on rule of law principle in the member states, as well as the proposed contributions from different stakeholders (member states and EU institutions) within the context of quantitative findings about the efficiency of justice system in member states through EU Justice Scoreboard 2019 and 2020. The main aim is to identify tools for promotion, prevention and response to findings of individual Member States in the context of goals stated in the EU Rule of Law Framework identified by the European Commission.*

Key words: *courts' independence, efficiency, rule of law, European Union, EU Justice Scoreboard*

1 INTRODUCTION

"*Respecting the Rule of Law and abiding by Court decisions are not optional*" (Juncker, 2018, p. 11)[1].

The Rule of Law forms the cornerstone of liberal democracies. As the Lord Chief Justice explained already in [1765] ***Entick v Carrington***[2], it is a principle so fundamental that without it "*no man could endure to live in this country*". "In the European Union, adherence to

[1] Juncker, J.-C.: State of the Union 2018. The Hour of European Sovereignty. Address delivered before the European Parliament on 12 September 2018. Available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf (Accessed on 20 February 2020)

[2] Decision of England and Wales High Court (King´s Bench Division) of 2 November 1765 in John Entick v Nathan Carrington and Three Others, 19 St Tr 1030, [1765] EWHC KB J98 , available at: https://www.bailii.org/ew/cases/EWHC/KB/1765/J98.html (Accessed on 20 February 2020)

the rule of law ensures ideological continuity, fosters a sense of belonging among the Member States and is a sine qua non for its legitimacy. The EU endorses a substantive and not merely a procedural notion of the rule of law."[3] Rule of Law alongside with Human Rights and Democracy are therefore understood by all Member States as **core values of the European Union**, confirmed in article 2 of the Treaty on European Union (hereinafter as "TEU").

As other aspects of law, even principle of Rule of Law has developed. In 1986 judgment in ***Les Verts***[4] ECJ emphasized that the European [Economic] Community is a community based by the rule of law, because "*neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter – the Treaty." However,* the integration project and the EU law itself has undergone defining changes. Konstadinides (2017, p. vi) calls it a **process of formalisation**, which is evidenced by the express enshrinement of rights in constitutional texts, culminating in granting the Charter of Fundamental Rights of the European Union (hereinafter only "Charter") binding force, the adoption of comprehensive legislation in areas such as equality and data protection, the articulation of Human Rights policies in the external field and a more forceful articulation of a Rule of Law agenda by the Commission.

To effectively implement the Rule of Law internally, European Commission announced in 2019 the new strategic document: ***Strengthening the rule of law within the Union***. ***A blueprint for action***.[5] A key objective of this document is that „strengthening the rule of law in the Union is, and must remain, a key objective for all. To approach this goal, the Commission has set out concrete actions. These vary from strengthening of the Union's capacity to promote and uphold the rule of law, through promotion of a common rule of law culture, prevention of rule of law problems and an effective response. In particular, the Commission has established a Rule of Law Review Cycle and called on the EU institutions for a coordinated approach."[6]

In further text, authors focus on one aspect of Rule of Law concept – an effective judicial system. Authors chose this agenda with regards to the findings of the Commission in above mentioned document (p. 3), that more than 80% of Europeans call for improvements particularly in terms of effective judicial protection, legality and avoiding arbitrary decisions.

Doctrinal analysis, comparation, deduction and synthesis were used to find and answer to the question **what should be done to improve the effectivity of judicial protection within the EU?**

2 EFFECTIVE JUDICIAL SYSTEM

"The independence, quality and efficiency, as the essential elements of effective justice systems, are crucial for upholding the rule of law and the values upon which the EU is founded. Effective justice systems are essential for the implementation of EU law.

[3] Konstadinides, T.: The rule of law in the European Union. Bloomsbury: Hart Publishing, 2017, p. v

[4] 294/83 Parti écologiste Les Verts v European Parliament, judgement of 23 April 1986, ECLI: ECLI:EU:C:1986:166, para. 23

[5] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening the rule of law within the Union. A blueprint for action. COM/2019/343 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN (Accessed on 20 February 2020)

[6] European Commission: Initiative to strengthen the rule of law in the EU. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en (Accessed on 20 February 2020)

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National courts act as EU courts when applying EU law. It is national courts in the first place that ensure that the rights and obligations provided under EU law are enforced effectively."[7] As we can deduct from the Court of Justice of the European Union´s (hereinafter only "CJEU") judgement in ***Associação Sindical dos Juízes Portugueses***,[8] the very existence of effective judicial protection by independent courts is the essence of the rule of law.

The EU therefore monitors justice reforms and their impact in Member States since 2013, using the **EU Justice Scoreboard** (hereinafter only 'the Scoreboard'). It presents an annual and comparative overview of indicators with relevance for the (i) independence, (ii) quality and (iii) efficiency of justice, i. e. essential parameters of an effective justice system.

The Communication on ***Further strengthening the Rule of Law within the Union – State of play and possible next steps***[9], adopted on 3 April 2019, formally identifies the Scoreboard as part of the EU's toolbox to strengthen the rule of law by contributing in promoting judicial reform and standards on the rule of law. It also reminded that respect for the rule of law, including the independence of justice systems, has a significant impact on investment decisions and on attracting businesses. Where judicial systems guarantee the enforcement of rights, creditors are more likely to lend, businesses are dissuaded from opportunistic behaviour, transaction costs are reducted and innovative businesses are more likely to invest.[10] For this reason, improving the effectiveness of national justice systems is a priority of the European Semester.

The 2019 Scoreboard edition further develops the indicators on all three above mentioned essential elements (efficiency, quality and independece) and, for the first time, presents indicators on:

- the detailed spending of financial resources in each justice system;
- the standards applied to improve the quality of judgments in highest courts;
- the management powers over the national prosecution services, and the appointment and dismissal of national prosecutors;
- the authorities involved in disciplinary proceedings regarding judges;
- the standards and practices on managing caseloads and backlogs in courts.

The 2020 Scoreboard[11] then analyses, how developments in 2019 justice reforms have proceeded.

2.1 Monitoring of justice reforms

In the 2018 European Semester, based on a proposal from the Commission, the Council addressed country-specific findings to five Member States relating to their justice system.

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[7] Article 19 TEU

[8] Judgment of the Court (Grand Chamber) of 27 February 2018, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, ECLI:EU:C:2018:117, para 36.

[9] Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of play and possible next steps COM (2019) 163 final

[10] European Commission: The 2019 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Com(2019) 198/2. Publication Office of the European Union, Luxembourg, 2019, doi:10.2838/569, ISBN: 978-92-76-03165-9., p. 4. Available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf (Accessed on 21 February 2020)

[11] Available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf (Accessed on 15 October 2020)

Croatia´s problems lied in lengthy court proceedings and sizeable backlogs which continue to weigh on the quality and efficiency of the justice system and consequently the business environment. Also, electronic communication in litigation and insolvency proceedings remains underused.[12]

The efficiency of **Italy**'s justice system had improved only slightly in the past years, and the length of proceedings remains a source of concern, especially at higher instances. The backlog continued to increase at the Court of Cassation, where it remains among the largest in the Union per capita. An important enabling law streamlining civil procedural rules and introducing stronger deterrence against vexatious litigation had been pending in Italy's Parliament for two years. In addition, among the measures adopted to contain litigation and strengthen procedural discipline, the simplified proceeding had not become the default one in appeal courts and use of the inadmissibility filter for appeals remains inconsistent and limited in second instance, thereby failing to bring the expected reduction in incoming cases. An increasing share of Cassation appeals was declared inadmissible in 2016, confirming a recent upward trend. The Court of Cassation's ability to deal with its case inflow was adversely affected in the context of a marked rise in its non-criminal incoming cases primarily due to tax cases (which could undermine its role). Adequate enforcement of procedural rules, including against the misuse of litigation, therefore could contribute to the sound and efficient administration of justice.[13]

Cyprus dealt with inefficiencies in the justice system which continued to affect contract enforcement and the swift resolution of civil and commercial cases. Cumbersome civil procedures and weak enforcement of court decisions weighed on banks' incentives to use the insolvency and foreclosure frameworks to reduce their stock of non-performing loans. The most critical problems in the justice system were found also in particular low digitalisation of courts, and the lack of lifelong training for judges.[14]

Even though the **Portuguese** justice system continued to improve its efficiency, the length of proceedings in administrative courts remained a challenge. Moreover, corruption and lack of transparency were still perceived by businesses as areas of concern. While progress had continued as regards prosecuting corruption, efforts to improve the culture of integrity in public institutions had not so far shown sufficient results.[15]

Slovakia should improve the effectiveness of the justice system. Concerns about the independence of the judiciary persisted, including the appointment processes for judges at all levels of the judiciary.[16]

In addition to those Member States that received country specific recommendations, a further 11 Member States faced specific challenges as regards their justice systems, including the rule of law and the independence of justice, which are being monitored by the Commission.These countries were Belgium, Bulgaria, Ireland, Greece, Spain, Latvia, Hungary, Malta, Poland, Romania and Slovenia.

[12] Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Croatia and delivering a Council opinion on the 2018 Convergence Programme of Croatia, para 18. (2018/C 320/10).

[13] Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Italy and delivering a Council opinion on the 2018 Stability Programme of Italy, para 14. (2018/C 320/11).

[14] Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Cyprus and delivering a Council opinion on the 2018 Stability Programme of Cyprus, para. 11. (2018/C 320/12).

[15] Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Portugal and delivering a Council opinion on the 2018 Stability Programme of Portugal, para. 19. (2018/C 320/21).

[16] Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Slovakia and delivering a Council opinion on the 2018 Stability Programme of Slovakia, para. 21. (2018/C 320/24).

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The further progress of Member States with recommended justice reforms is illustrated in the Table 1 below.

Table 1: Legislative and regulatory activity concerning justice systems in 2019 and 2020

	Procedural reforms		Promotion of ADR methods		Legal aid		ICT develop-ment		Optimising the judicial map		Court fees		Administra-tion of courts		Judges		Council for the Judiciary		Court specializa-tion		Legal professio-nals	
	2018	2019	2018	2019	2018	2019	2018	2019	2018	2019	2018	2019	2018	2019	2018	2019	2018	2019	2018	2019	2018	2019
AT	a, un	a, un					a, un	a, un	a		a, un	a				a					un	a
BE	a, un	a	a		un	a	a, un	a	a		un	a	un	un	un	a, un	un	a	a	a	un	a
BG	a	a, un		un	a		a		a	a	a				a	a	a	a			a	
CY	a, un	a, un	a, un	un			un	un					un	un		a, un			un	a, un		
CZ	a, un	a, un			a, un		a, un	un			a					un					a	
DE																						
DK	a, un						a									a			un	a		
EE	un	un					un							un	un	a						un
EL	a, un	a, un	a	a, un	a	a			un				un		a	a			un		un	a
ES	a, un	a	a, un	a, un	a	un			a				a, un		un	a			a		un	un
FI	a, un	a, un		un	a, un	un	un	un	a	a			un					a				
FR	un	a	un	a	a, un	a	un	a	un	a			un	a, un	un		un	un	un	a, un		
HR	a, un	un	un	un	un	a	a, un		a, un	a	a, un	a	a, un	a	a, un	a	a, un	a		a	a, un	a
HU	a, un	a, un	a		a	a	a				a		a, un		a				a	a	a, un	a
IE	a	a, un	a												un	a, un	un	a	un			
IT	a, un	a, un	un	un		un	a, un	un	un	un				un	a, un	un		un		un	a	
LT	a	a, un	a, un	a, un	a	a		un			a	a		a	un	a	un	a				a, un
LU		a, un	un	a, un		a, un		a, un		a, un		a, un		a, un	a	a, un		a, un	a	a, un	un	a, un
LV	a, un	a, un			a		un	un	a						un	a	a, un		un	a, un	a, un	a
MT	a	un		a	un		a	a	a				a	a	a				a		a	
NL	un		un		un		a								a, un		un		un		un	
PL	a, un	a, un		a	a, un	a		un		un		a, un	a	a	a	a		a		a, un	a, un	a, un
PT		a	un	a		un		un	a, un	a		a		a	un	a	un		a	a	a	
RO	a, un	a, un	a	a		a			a			un	a, un	a, un	a	a	a	a, un	a		a, un	a, un
SE	a, un	a	un		a		a	un							a						a	
SI		a, un										un			un		un				un	a
SK	a	a, un					un				un				a, un	un	un				un	a, un
UK																						

**a = adopted measures, un = initiatives under negotiation per Member State*

Source: authors, EU Justice Scoreboards 2019, 2020.

It can be concluded, that reforms of procedural law continued to be an area of particular focus in large number of Member States with a significant amount of ongoing or planned legislative activity. However, reforming proces is not easy and takes a long time.

2.2 Judicial independence

There are various instruments the EU is using with a view to enforce the respect of judicial independence in Member States in order to protect the functioning of the Union. The main goal of that instruments is to address systematic threats to the rule of law and protect EU values as stated in the Article 2 TEU. The instruments used are stated in the Rule of Law

Framework, started with the (a) **multi-stage dialogue** between the Commission and the EU Member State concerned. If the dialogue is not sucessful, than follows the (b) **infringement proceeding** under the article 7 TEU.

Ad a) In the above mentioned Blueprint for action, Commission introduced the measures it intends to adopt in order to reinforce the implementation of rule of law within the Union. The Rule of Law Framework set, according to general principle of international law, the first stage of the peaceful settlement of disputes, by three phases:

(1) Commission assessment
(2) Commission opinion and recommendation
(3) Monitoring of the follow-up to the Commission's recommendation

The most important new procedure is an **annual monitoring cycle** to review rule of law developments in Member States, resulting in an annual rule of law report. The improper implementation of the recommendations or non-reflection of the Commission's opinion is transferred to Commission's warning. If the Member State is not implementing the EU law and EU values, including the rule of law properly, the Commission is actively legitimate to invoke of the Article 7 and the connected infringement proceeding to enforce the Member State obligation in the practice.

Ad b) Although the Commission's competence is quite new, there had been already invoked Article 7 TEU for initating the proceeding for the breach of the rule of law framework. "Article 7 of the TEU supplements the protection of values inscribed in Article 2 of the TEU by providing a procedure whereby their breach to a sufficiently serious degree may lead to the imposition of sanctions on the offending Member State."[17] The original goal of the Article 7 TEU is to use it as an exceptional measure and the last resort instrument to prevent or resolve a serious breach of the rule of law in an EU Member State. This mechanism may be activated by Parliament, Commission or 1/3 of Member States, based on the determination by the European Council of a breach of Article 2 values, with the decision of by the Council with a possibility of far-reaching sanctions, including the suspension of voting rights in the Council. The judicial proceeding has the character of the infringement proceeding, in the form of three-staged process between the Commission as the plaintiff and the EU Member State(s), deciding by the Court of Justice. In the history of the European Union and incorporation of the Article 7 TEU to the EU law, we have reached one judgement by today.

In ***Commission v Poland***[18] the Commission has brought an infringement proceedings against the Republic of Poland under Article 258 of the TFEU for failing to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) of the TEU[19] and Article 47 of the Charter of Fundamental Rights of the European Union[20], on the grounds that, firstly, national measures lowering the retirement age of the judges of

[17] Mokrá, L.: European values and the challenges of EU membership: Croatia in comparative perspective. - : 1.ed. ISBN 978-953-48428-3-6. - Zagreb: Centre for Democracy and Law Miko Tripalo, 2020. - pp. 35-59

[18] Judgement of the Court (Grand Chamber) of 24 June 2019 in case European Commission v Republic of Poland, C-619/18, ECLI:EU:C:2019:531

[19] *„Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."*

[20] *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

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the Supreme Court appointed to that court before 3 April 2018 infringe on the principle of irrevocability of judges, and secondly, national measures granting the President of the Republic discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age infringe on the principle of judicial independence.

The Court of Justice of the EU ruled, that Member States are obliged to provide remedies that are sufficient to ensure effective legal protection within the meaning of Article 47 of the Charter, in the fields covered by EU law. More specifically, every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, may be called upon to rule on questions concerning the application or interpretation of that law, meet the requirements of effective judicial protection, which in the present case applied to the Polish Supreme Court. In addition, the Court stated that, in order to ensure that that court is in a position to offer such protection, **maintenance of its independence is essential**, as confirmed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. The requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. When assessing the guarantees of independence and impartiality, aspects such as the composition of the bodies concerned, appointment, length of service and ground for abstention, rejection and dismissal of the members of which they consist must be taken into consideration. As the Court further explained (para. 76), **principle of irremovability** requires, in particular, that judges can remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. In the Polish case the Court found that the reform being challenged results in judges in post within the Supreme Court prematurely ceasing to carry out their judicial functions and that it can therefore be acceptable only if it is justified by a legitimate objective, if it is proportionate in the light of that objective and inasmuch as it is not such as to give rise, in the minds of individuals, to reasonable doubts such as those mentioned above. However, the Court held that the application of the measure lowering the retirement age of Supreme Court judges to the judges in post within that court did not meet those conditions because, in particular, it is not justified by a legitimate objective. Accordingly, the Court ruled that that application undermined the principle of the irremovability of judges, which is essential to their independence.

On those grounds, the Court decided, that Poland has failed to fulfil its obligation to ensure effective legal protection in the fields covered by Union law.

In the second case, the judgement was not adopted yet. The European Parliament in respect of Hungary had invoked Article 7 TEU due the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [21].

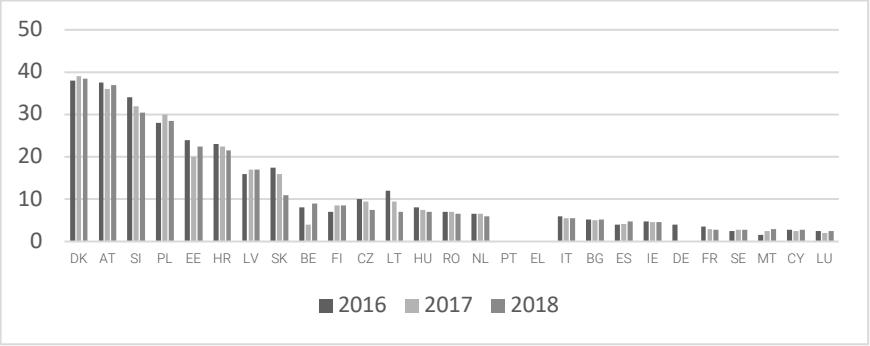
[21] European Parliament resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

2.3 Efficiency of judicial proceedings

The European Commision uses to incorporate the evaluation of data on national judicial systems into the monitoring and evaluation of the rule of law. As mentioned earlier, through the Scoreboard it provides comparable data on the independence, quality and efficiency of national justice systems. Under the used methodology, this category includes all civil and commercial litigious and non-litigious cases, non-litigious land and business registry cases, other registry cases, other non-litigious cases, administrative law cases and other non-criminal cases. Methodology is modified in some Member States and some figures, according to the organisation and administration of the judicial system in the country and availability of data.

In general, the efficiency of judicical proceedings is based on evaluation of three criteria: length of proceedings, clearance rate and number of pending cases, as standard indicators.[22]

Figure 1: Number of incoming civil, commercial, administrative and other cases, 2016-2018



1st instance/per 100 inhabitants
Source: European Commission, 2020 EU Justice Scoreboard, p. 6

Based on the data in the EU Justice Scoreboard 2020, we consider as interesting the **number of civil law cases** (Figure 2)**,** which had increased in countries as Denmark, Finland, Bulgaria, Spain, Latvia and Malta. However, in other countries we can see decreasing tendency especially since 2016 (up to 2018).

Figure 2:

[22] Methodology based on standards indicators, elaborated within CEPEJ. Online: [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp]

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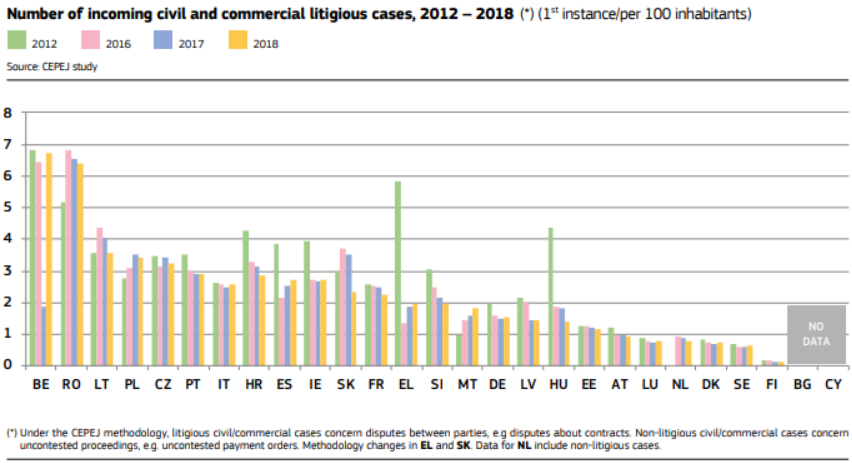
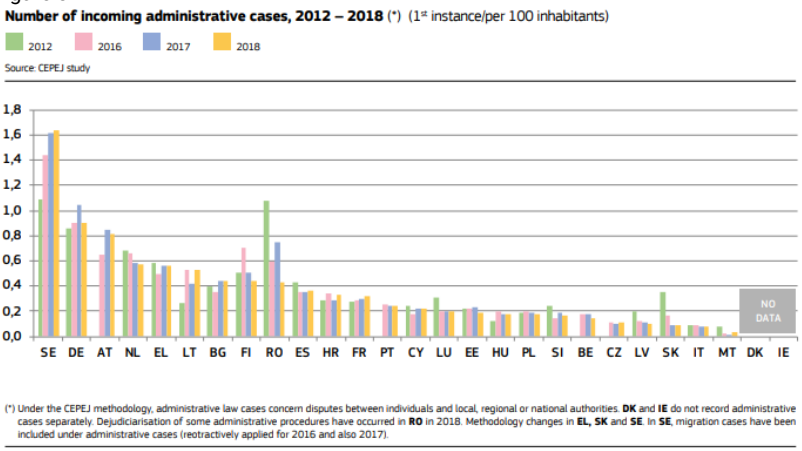


Source: The EU Justice Scoreboard 2020, p. 7

The situation is different in **case of administrative law** (Figure 3) – in countries as Sweden, Germany, Romania, Austria, Estonia, Bulgaria, Cyprus, the number of cases had increased especially since 2017.

Figure 3:

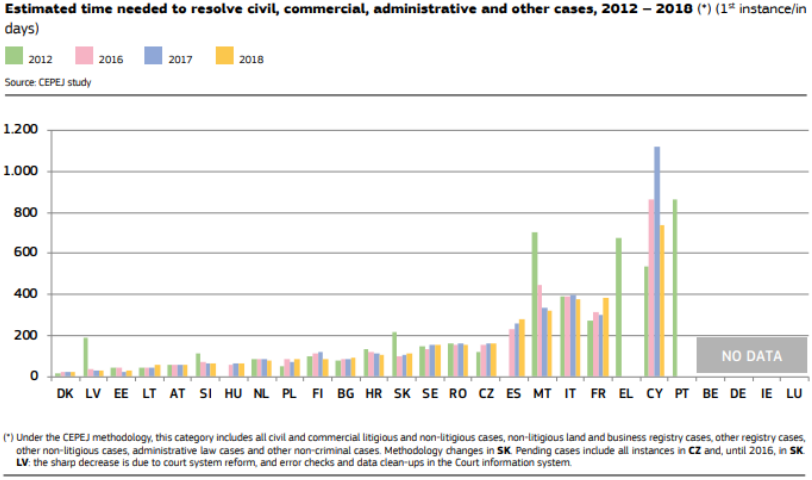


Source: The EU Justice Scoreboard 2020, p. 7

As to the **length of procedure** (Figure 4), understood as time needed to resolve civil, commercial and administrative cases, is in 16 Member States the period less then 200 days. In four other Member States the length of procedure is shorter then one year, however

time needed to deal with litigious cases is prolonged – mainly on the 2nd and 3rd instance courts (figure 7, EU Justice Scoreboard 2019). The time spend in the proceeding in the appelate level is longer than in the 1st instance hearing, which prolong the overal process and contributes to doubts about the access to justice. It also pointed out to the structure of courts, its administration and personal capacities in the Member States.

Figure 4:



Source: The EU Justice Scoreboard 2020, p. 8

The **clearance rate** is the ratio of the number of resolved cases over the number of incoming cases. Romania, Hungary, Luxembourg, Latvia, Bulgaria, Finland, Sweden, Malta, Spain, Ireland are EU Member States having the problem with the workload and according data in EU Justice Scoreboard 2020, are not able to close at least number of cases common to those incoming. Although the general clearance rate in other states is over 97% and pretty close to 100%, the existed backlog in the mentioned countries decrease the clearance rate and contribute to the inadequate efficiency of the judicial proceeding. (Figure 5).

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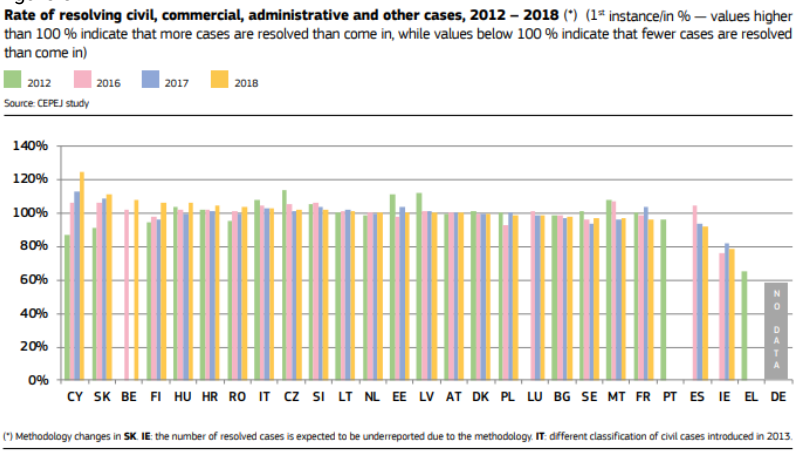
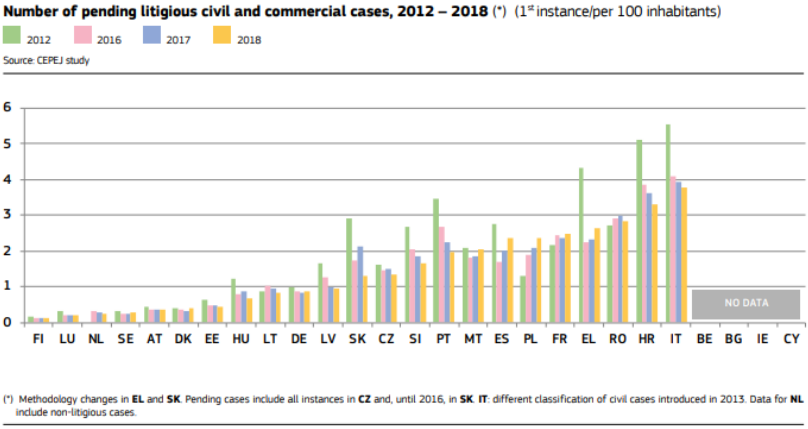
Figure 5:



Source: The EU Justice Scoreboard 2020, p. 11

As to the existed **number of pending cases,** the general tendency is since 2015 quite stable – majority of Member States have sustained numbers of pending cases at the end of the year. The number of pending cases is important indicator, as it refers also to the disposition time for new cases submitted. Although the general tendency is to work on the efficient justice, in some states the number of pending cases is increasing – such as in the Czech republic, Hungary, Latvia, Malta, Spain, Poland, Slovakia, Greece and Romania. Although the highest number of pending cases is in Italy, Croatia and France, in these countries we can see decreasing tendency since 2015 ongoing (Figure 6).

Figure 6:



Source: The EU Justice Scoreboard 2020, p. 13

3 CONCLUSION

We may conclude, that there is no specific distinction as to the efficiency of the judicial system, between so called old and new Member States. The judicial systems of Member States evaluating for development in years 2018 and 2019 in the EU Justice Scoreboard 2019 and 2020, have resulted to following evaluation:

a) as to the length of the procedure: Italy, Spain and France. In France the situation is different than in Italy and Spain, as the length of the proceeding is not prolonged so far to previous year. In case of Spain and Italy, the length of the proceeding almost doubled. This situation should raise the attention of the Commission.
b) as to the clearance rate: Malta, Spain, Ireland have the lowest clearance rate. The worries should be slightly raised in case of Malta and Spain, as their trend from previous year is the decrease of the clearance rate. Situation in Ireland is different, although it is the Member State with the lowest clearance rate at all. In this country, the clearance rate after two years of the stable level under 80% slightly increase over this per cent. As such, the positive attitude should be under monitoring and supported.
c) as to the number of pending cases: the highest number of pending cases' increase is visible in Slovakia, Spain and Poland. All three countries are under the monitoring of Commission since 2018 and the set of recommendations had been issued not only by the Commission itself, but also in other international organisations due the length of the process, access to justice and interrogation to right for fair trial. In case of Poland it was also connected with the reform and decrease of judges' number as discussed above.

The efficiency of the judicial system in the Member State, at least its quantitative understanding in the three mentioned criteria, clearly reflect the notification of the potential deficiences in the system. The monitoring mechanisms in the Rule of Law Framework, provides the instrument to be aware of the development and to initiate from the beginning the dialogue and further steps to prevent the infrigement and enforcement of the Member State obligation as to rule of law. The small deficiences of the Member State judicial system may grow to the breach, even serious breach of the rule of law, as one of the EU fundamental value. They may also have consequences interlinked and connected with investment, innovations, business environment, competition and even public procurement. If the enforcment of the law is weak, it has direct effect to public sources (e.g. lack of effective judicial protection in public procurement mayl lead to ineffective use of public funds, occurrence of bid rigging and distortion of competition environment).

The Rule of Law Framework is therefore based on the grounds of promotion, prevention and response to findings of individual Member States. The interconnection with the annual reports on the development of the judicial system and its efficiency based on the EU Justice Scoreboard criteria may help to improve the overall monitoring and enforcement mechanism in the earlier stage and prevent potential damages, not only in the judicial system, but to the democracy in the Member State as well as in the Union.

Bibliography:

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening the rule of law within the Union. A blueprint for action. COM/2019/343 final. Online: [https://eur-lex.europa.eu/legal-

ISBN 978-80-7160-573-7

content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN]
Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of play and possible next steps COM (2019) 163 final

Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Croatia and delivering a Council opinion on the 2018 Convergence Programme of Croatia (2018/C 320/10)

Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Italy and delivering a Council opinion on the 2018 Stability Programme of Italy, (2018/C 320/11)

Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Cyprus and delivering a Council opinion on the 2018 Stability Programme of Cyprus, (2018/C 320/12)

Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Portugal and delivering a Council opinion on the 2018 Stability Programme of Portugal, (2018/C 320/21)

Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Slovakia and delivering a Council opinion on the 2018 Stability Programme of Slovakia, (2018/C 320/24)

Decision of England and Wales High Court (King´s Bench Division) of 2 November 1765 in John Entick v Nathan Carrington and Three Others, 19 St Tr 1030, [1765] EWHC KB J98

European Commission: Initiative to strengthen the rule of law in the EU. Online: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en]

European Commission: The 2019 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Com(2019) 198/2. Publication Office of the European Union, Luxembourg, 2019, doi:10.2838/569, ISBN: 978-92-76-03165-9. Available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

European Commission: The 2020 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Com(2020) 306. Publication Office of the European Union, Luxembourg, 2020, doi:10.2838/71558, ISBN: 978-92-76-20394-0. Available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf

European Parliament resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

Judgement of the Court (Grand Chamber) of 27 February 2018 in case Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, ECLI:EU:C:2018:117.

Judgement of the Court (Grand Chamber) of 24 June 2019 in case European Commission v Republic of Poland, C-619/18, ECLI:EU:C:2019:531

Judgement of the Court of 23 April 1986 in case Parti écologiste Les Verts v European Parliament, 294/83, ECLI: ECLI:EU:C:1986:166

JUNCKER, J.-C.: State of the Union 2018. The Hour of European Sovereignty. Address delivered before the European Parliament on 12 September 2018. Available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf

KONSTADINIDES, T.: The rule of law in the European Union. Bloomsbury: Hart Publishing,

2017, p. v
Methodology based on standards indicators, elaborated within CEPEJ. Online: [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp]
MOKRÁ, L.: European values and the challenges of EU membership: Croatia in comparative perspective. - : 1.ed. ISBN 978-953-48428-3-6. - Zagreb: Centre for Democracy and Law Miko Tripalo, 2020. - pp. 35-59
TREATY ON EUROPEAN UNION. Consolidated version. OJ C 326, 26.10.2012, pp. 13–390
TREATY ON FUNCTIONING EUROPEAN UNION. Consolidated version. OJ C 326, 26.10.2012, p. 47–390

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HOW TO BUILD COMMON FEATURES OF THE JUSTICE SYSTEMS IN CANDIDATE COUNTRIES AND EU MEMBER STATES / Marina Matić Bošković, Jelena Kostić

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Abstract: *The rule of law (Chapters 23 and 24 of the Acquis) is at the heart of the EU accession process. Given recent experience with backsliding on rule of law, the European Commission has firm expectations of countries that aspire to EU membership when it comes to compliance with EU principles relating to the judiciary, fundamental rights, and the rule of law. Areas of focus include improving judicial independence, both conceptually and functionally, and strengthening accountability and efficiency of judiciary. Judicial independence and integrity are under threat in several EU member states, including Hungary and Poland. Judicial crises in the EU jeopardize essential principle of mutual recognition in judicial matters and free movement of goods, services, people and capital. The recent decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice system, re-confirms the relevance of the rule of law for the EU. These recent experiences will shape the future Commission approach to accession countries and how strict they should be in the implementation of EU acquis and standards.*

Key words: *the rule of law, common features, judiciary systems, Candidate Countries and EU Member States*

1 INTRODUCTION

The Rule of Law is at the core of the EU system. It means and requires the respect of legality, the equality of citizens, the legal certainty, the independence of the judiciary, the accountability of the decision-makers and the protection of human rights.

The rule of law is incorporated in the EU founding treaties and case law of EU Court of Justice. According to Article 2 of the Treaty of European Union, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Mentioned values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The European Commission, together with all other EU institutions is responsible under the Treaties for guaranteeing the respect of the rule of law as a fundamental value of our Union and making sure that EU law, values and principles are respected. The rule of law means that all members of a society – governments and parliaments included - are equally subject to the law, under the control of independent courts irrespective of political majorities.

According to article 47 paragraph 2 the Chapter of fundamental rights of the EU everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

The rule of law, chapters 23 and 24 of the acquis is at the heart of the European accession process. European Commission expectations of candidate countries are compliance with EU principles relating to the Rule of Law, Judiciary, Fundamental Rights and the Anti-Corruption. Areas of focus of Chapter 23 of accession negotiations are improving judicial independence, both conceptually and functionally, and strengthening impartiality, accountability, professionalism and efficiency of judiciary.

Since 2015, the Polish authorities have enacted a series of judicial reforms including the creation of new disciplinary procedures and oversight body for judges that have dramatically increased political oversight of the judiciary. Already in 2016 the European Commission triggered mechanism under the EU Framework to strengthen the Rule of Law to prevent further negative influence on rule of law in Poland and adopted 1st Rule of law recommendation 2016/1374.[1] In addition, judgement of the EU Court of Justice in Case C/216 PPU regarding the decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice system, re-confirms the relevance of the rule of law for the EU. Same mechanism was triggered against Hungary in 2017 for concerns about the functioning of the country's institutions, including problems with the electoral systems, independence of the judiciary and the respect for citizens' rights and freedoms.[2] One of the problems in Hungary was the fact that the competences of the Hungarian Constitutional Court were limited as a result of the constitutional reform, including with regard to a budgetary matters, the abolition of the

[1] Commission Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, 2017 O.J . (L 17/50), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0103&from=EN.

[2] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL). According to article 7(1) of the Treaty on European Union in a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. According to Article 7(2) of TEU the European Union Council acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member States of the values referred to in Article 2., after inviting the Member State in question to submit its observations. In situations when a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.

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action popularis and other important issues. The Venice Commission expressed concerns about mentioned limitations and the procedure for the appointment of judges. Mentioned Commission made recommendations to the Hungarian authorities to ensure the necessary checks and balances in its Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted on 19 June 2012 and in its Opinion on the Fourth Amendment to the Fundamental Law on Hungary adopted on 17 June 2013. During the 2018. The UN Human Rights Committee expressed concerns that the current constitutional complaint procedure affords more limited access to the Constitutional Court, does not provide for a time limit for the exercise of constitutional review and does not have a suspensive effect on challenged legislation.[3]

The Venice Commission in its Opinion of Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted on 19 June 2012. Reports on 2015 made by GRECO urged the Hungarian authorities to take additional steps to prevent abuse and increase the independence of the prosecution service by removing the possibility for the Prosecutor General to be re-elected. In addition GRECO called for disciplinary proceedings against ordinary prosecutors to be made more transparent and for decision to move cases from one prosecutor to another to be guided by strict legal criteria and justifications.[4]

Noticed problems in Hungary was also regarded the conflict of interests and corruption. During the 2016 the Open Government Partnership Steering Committee received a letter from the Government of Hungary announcing its withdrawal from the partnerships. The Government of Hungary had been under review by Open Government Partnership since July 2015 for concerns raised by civil society organisations, in particular regarding their space to operate in Hungary. According to the Global Competitiveness Report 2017-2018, published by the World Economic Forum, the high level of the corruption was one of the most problematic factors for doing business in Hungary.[5] The problems was also identified in the following areas: privacy and data protection, freedom of expression, academic freedom, freedom of religion, freedom of association, right to equal treatment, rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities, fundamental rights of migrants, asylum seekers and refugees and economic and social rights. Regarding the above mentioned issues the Council adopted the decision where proclaims that in Hungary exists a clear risk of a serious breach of the values on which the Union is founded and recommended that Hungary must take a necessary actions within the three months of the notification of Council Decision.

In its Resolution from January 16, 2020, the European Parliament note that EU's discussion with Poland and Hungary have not yet led these countries to realign with the EU's funding values, indicating that "the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1)".[6] These recent experience with EU member states and challenges in the negotiation process with candidate countries shaped a New methodology for the accession negotiations that was adopted on February 5, 2020. However, the application of the methodology will depend on rule of law progress in the member states

[3] Recital (8) and (9) of the European Parliament resolution of 12 September 2018.
[4] *Ibid.* Recital (19).
[5] *Ibid.* Recitals (22) and (24).
[6] European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP).

and genuine delivery of reforms in candidate countries to ensure irreversibility of the process.

2 THE PRINCIPLE OF MUTURAL RECOGNITION IN JUDICIAL MATTERS AND ITS ROLE IN JUDICIAL REFORMS

The strongest EU mechanism for the rule of law protection is described in the document *A new EU Framework to strengthen the Rule of Law*[7] from 2014. The Framework is used for future treats to the rule of law in the members states, before creation of conditions for activation of mechanisms envisaged in the Article 7 of the EU Treaty. It will be applied in the situation of systematic and negative influence on the integrity, stability and proper function of institution and protection mechanisms that guarantees rule of law. Based on this document, in the crisis European Commission has right to evaluate, provide recommendations and monitor member states. From the EU Framework to strengthen the Rule of Law it is clear that the European Commission refers to standards of the Council of Europe and Venice Commission, and content of the principles and standards of the EU Court of Justice, European Court of Human Rights and Council of Europe documents.[8] In parallel, during the procedure of assessment of existence of negative influence on the rule of law to the issuing of the Commission Opinion, this body continues dialogue with member state, Venice Commission, judicial councils, European Network of Judicial Councils, etc.[9] The method of functioning of this mechanism could be seen in reasoned opinion of the Commission in relation to the treats of violation of judiciary independence in Poland.[10]

European union is specially interested in the reform of judiciary, including reform of prosecution system, to ensure trust among the member states so that EU instrument of mutual recognition could be applied in each state, including new members. Mutual recognition is not fully new concept in the international cooperation, but in the EU it was developed to the different concept in which differences between legal systems do not present barrier for recognition. Mutual recognition is understood as concept of cooperation established on mutual trust and mutual understanding that rules and legal protection in all members states are at the same level.[11]

European Commission in its Communication COM (2000) 495 from 2000 on mutual recognition of final decisions in criminal matters stated that mutual recognition is "principle that is widely understood as being based on the thought that will another state may not deal with a certain matter in the same or even a similar way as one's state, the results will be such that they are accepted as equivalent to decisions by one's own state".

Mutual recognition in the context of criminal cooperation is mentioned for the first time at the European Council in Cardiff in 1998.[12] Council presidency adopted Conclusions and in point 39 emphasised relevance of the efficient judicial cooperation as part of fight against cross border

[7] A new EU Framework to strengthen the Rule of Law, Communication from the European Commission to the European Parliament and the Council, COM(2014) 158 final.

[8] *Ibid*., 4. At the same page the rule of law goals are listed: legal certainty, prohibition of arbitrariness of executive, independent and impartial courts, effective legal control, including respect of fundamental human rights, equality before courts.

[9] See: Annex 1 to 2 to the Communication from the European Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law.

[10] Reasoned Opinion to Poland regarding the Polish law on the Ordinary Courts Organisation.

[11] KLIP, A.: European Criminal Law – An integrative Approach, Intersentia, 2012, 362.

[12] SATZGER, H., ZIMMERMANN, F.: From traditional models of judicial assistance to the principle of mutual recognition: new developmnets of the actual paradigm of European cooperation in penal matters", In: BASSIOUNNI, C., MILITELLO V., SATZGER, H. (eds.), European Cooperation in Penal Matters: issues and perspectives, CEDAM, 2008, pp. 337–361.

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crime. While at the European Council in Tampere in 1999 it was agreed that mutual recognition will be corner stone of the judicial cooperation in civil and criminal matters. Mutual recognition presents basic concept of area of freedom, security and justice, since that is the only method to overcome challenges that are raised between national judicial systems. For development of mutual recognition necessary precondition is existence of high level of mutual trust among member states that are based on strict respect of high standards of individual rights protection in each of the member states.[13]

Purpose of these measures is improvement of efficiency and length of judicial cooperation, improvement of principle of mutual recognition among judicial systems of member states, as well as enabling cross border investigations and indictments through direct contacts among member states judges and prosecutors.

To understand concept of mutual recognition it is necessary to have in mind that principle of mutual recognition in criminal matters is accepted in order to avoid issue of criminal law harmonization within the EU.[14] Mutual recognition enables efficient cooperation among judicial systems despite differences in substantive and procedural legislation and ensures that members states keep sovereignty in this area. Based on this principle, EU was adopted program of measures that enable adoption of documents such as: Framework decision from 13 June 2002 on European arrest warrant.

The significance of the justice reform and organization of judiciary is also confirmed in the EU Court of Justice decision from June 2019 in the case Commission against Poland.[15] Although the Government of Poland insisted that organization of judiciary is exclusive jurisdiction of the member state and that EU institutions, including the Court of Justice, cannot questioned judiciary reform against EU standards, Court of Justice conclude that Poland took obligation to follow "common values from article 2 of the EU Treaty", including the rule of law. Court of Justice also stated that "although the organization of judiciary is within the member states jurisdiction", that does not mean that member states can violate EU acquis. When it comes to the Government of Poland argument that EU principle of the independence of judiciary can be applied only on situation that are regulated by the EU acquis, the Court of Justice referred to the previous decision of the Court[16] that national authorities must respect principle of the independence of judiciary also in the situation when national reforms of judiciary is not related to the application of the EU acquis. Article 19.1. of the EU Treaty relates to the national courts that may adopt decisions "on issues that relates to the application and interpretation of the EU acquis", which in line with the Court of Justice interpretation means that each national measures that influence on independence of judiciary is within the scope of application of the EU acquis.

In addition, on April 3, 2019, the European Commission announced an infringement procedure related to the judicial disciplinary reforms and concluded that the current disciplinary regime undermines judicial independence and did not meet EU standards.[17] On November 19, the EU Court of Justice released preliminary procedure decision regarding the independence of the

[13] OUWERKERK. J.: Mutual trust in the area of criminal law, in: BATTIES, H. BROUWER E., DE MOREE, P., OUWERKERK, J. (eds.), The principle of mutual trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights, Utrecht,: Forum, 2011, pp. 38-48.

[14] SUOMINEN, A.: The Principle of Mutual Recognition in Cooperation in Criminal Matters, Intersentia, 2011. p. 51.

[15] Case C-619/18.

[16] Case C-64/16 *Associação Sindical dos Juízes Portugueses*

[17] European Commission Press Release IP/19/1957, Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control (April 2, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957.

National Council of Judiciary and Disciplinary Chamber of the Supreme Court.[18] Although it made no authoritative conclusion on the independence of either of these bodies, instead choosing to send it to Polish Supreme Court to decide, it stressed that cases that fall within the exclusive jurisdiction of a "court which is not an independent and impartial tribunal" are precluded under the Charter of Fundamental Right of the European Union.

According to recital 10 of the Framework Decision 2002/584 the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) Treaty of the European Union. In compliance with above mentioned article the European Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 december 2000, as adapted at Strasbourg, on 12 december 2007.

The high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the requirements of effective judicial protection, which include, in particulat, the independence and impartiality of those courts.

The existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph od Article 47 of the Charter of Fundamental rights is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effecto to that European arrest warrant, on the basis of Article 1 (3) of Framework Decision 2002/584.[19]

Bearing in mind the above mentioned the Irish court requested a Court of Justice of the European Union for a preliminary ruling in connection with the execution in Ireland, of European arrest warrants issued by Polish courts against the suspected drugs traficker.

On 2012 and 2013 Polish courts issued three European arrest warrants against the person concerned in order for him to be arrested and surrendered to those courts for the purpose of conducting criminal prosecutions, for trafficking in narcotic drugs and psyhotropic substances. During 2017 suspected person was arrested in Ireland on the basis ot European arrest warrant and brought before the referring court the High Court in Ireland. Than, he informed that court that he did not consent to his surrender to the Polish judicial authorities and was placed in custody pending a decision on his surrender to them.[20] The judge concerned that extradition of person concerned would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Chapter of Human Rights. He contends, that the recent legislative reforms of the system of justice in the

[18] Court of Justice of the European Union Press Release No. 145/19 (November 19, 2019), https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190145en.pdf.

[19] According to article 1 (3) of the Framework Decision 2002/584 mentioned decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

[20] Paragraphs 14 and 15 of the Judgement of the Court of Justice of the European Union in Case C-216/18 PPU.

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Republic of Poland deny him his right to a fair trial.[21] Those situation changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority. That calling the operation of the European arrest warrant mechanism into question.[22] That Case ilustrates the impact of the judicial crisis in one Member States on muttual recognition in criminal law matters.[23]

3 EU ACCEESSION PROCESS AND REFORM OF JUDICIARY

EU member states, as well as EU accession countries, are facing with challenges to introduce European standards in organization of judiciary. As a result of these efforts the judicial reforms are implemented in line with EU acquis. Mechanisms of influence on organization of judiciary were more efficient in candidate countries through the negotiation procedure and monitoring of reform implementation. However, spreading of populist and authoritarian tendencies and jeopardizing of independence of judiciary had as a result that the EU institutions can apply specific mechanisms of influence on the EU member states when reforms they are implementing are violating European standards of independence and accountability of judiciary.

[21] According to Article 6 of the European Chapter of Human Rights, everyone has a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. That article also prescribed that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law and has the following minimum rights: to be informed promptly in a language he understands and in detail, of the nature and cause of the accusation against him, to have adequate time and facilities for the preparation of his defence, to defend himself in person or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require, to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[22] Paragraph 16 of the Judgement of the Court of Justice of the European Union in Case C-21618 PPU.

[23] The Judgment of the Court of the European Union was only the step in the action peding before the national court. In this case Court ruled that *„where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) Treaty on European Union, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph od Article 47 of the Chapter of Fundamental Rights of the European Union, on acount of systemic or generalised deficiencies so far as concerns the independence of the issuing Memer State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for whish he is being prosecuted and the factual contect that form the basis on the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds believing that that person will run such a risk if he is surrendered to that State."* According to above mentioned article of the Framework Decision the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information.

EU enlargement is more than territorial increase. Enlargement incentivise creation of new politics, institutional organization of EU and influence on legal acts, both in EU member states and candidate countries.[24]

Organization of judiciary is part of EU negotiation process, specifically part of Chapters 23 and 24 of the negotiation.[25] Implementation of the EU acquis in these areas is requirement of accession negotiation and got central role during 2004, 2007 and 2013 enlargement, while judicial cooperation in civil and criminal matters is one of the requirements.

Characteristic of EU accession process is strong role of the EU that transposes EU acquis to third countries.[26] States that aspire to become EU members states are in obligation to adopt and implement EU acquis. Conditionality is methodology that is applied during accession process to ensure that new member states can absorb requirements incorporated in the EU acquis and implement obligations from the membership.[27]

During the EU enlargement to the East, the EU faced with the situation that countries in the transition, with different economic, political and social environment, are aspiring to become members. To address this challenge, the EU develop approach that was wider that simple requirement to harmonize national legislation with EU acquis.[28] European Council adopted in 1993 the Copenhagen criteria that included, among other requirement, stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minority rights, and functioning market economy and the ability to cope with competitive pressure and market forces within the EU. Copenhagen criteria were gradually developed and extended. As a result European Council organized 1995 in Madrid adopted conclusions where is stated that it is not sufficient condition to have political commitment of the candidate countries to adopted EU acquis, but they have to adjust administrative structures to guarantee efficient application of the EU acquis. When it comes to the rule of law, the EU policy developed over time. Countries that intends to join to the EU during negotiation process have to make sure that their judiciary is independent and impartial, which includes guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners, while laws are clear, publicised, stabile, fair and protect human rights. In addition, candidate country government and its officials need to be accountable under the law and take a clear attitude against corruption.

Accession criteria existed in parallel with specific requirement that during accession process national legislation should be harmonized with EU acquis. These requirements were

[24] HILLION, C.: EU Enlargement, In: CRAIG, P., DE BURCA, G., (eds.), The Evolution of EU Law, Oxford, 2011. pp. 187–217.

[25] Chapter 23 relates to judiciary and fundamental rights. European standards in the Chapter 23 include strengthening independence, impartiality and professionalism in judiciary, enforcement of measures of prevention and fight against corruption and maintenance of high standards of protection of human and minority rights. Chapter 24 relates to justice, freedom and security. European standards include 11 areas thematic areas: external borders and Schengen system of migration, asylum, visa, police cooperation, fight against organize crime, fight against human trafficking, fight against terrorism, fight against drug, judicial cooperation in civil and criminal matters and custom cooperation.

[26] CREMONA, M.: The Union as a Global Actor: Roles, Models and Identity, In: Common Market Law Review, Vol. 41, 2004. pp. 555–573.

[27] SMITH, K. E.: Evolution and Application of the EU Membership Conditionality, In: CREMONA, M. (ed.), The Enlargement of the European Union, Oxford: University Press, Oxford 2003. pp.105–140.

[28] See: MATIĆ BOŠKOVIĆ, M.: Obaveza usklađivanja sa pravnim tekovinama Evropske unije, In:. ŠKULIĆ, M,, ILIĆ, G. MATIĆ BOŠKOVIĆ, M. (eds.), Unapređenje Zakonika o krivičnom postupku: de lege ferenda predlozi, Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca, 2015. pp. 149-158.

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used for evaluation of candidate countries to assess progress in implementation of EU standards.[29]

Countries that joined EU in 2004, faced with numerous challenges during '90s of XX century. The biggest challenge was the character of the EU acquis that was called "moving target". During '90s of the XX century the EU adopted significant number of EU acquis in the area of criminal law and judiciary. After terrorist attack from 11 September 2001 EU put criminal matters and judicial cooperation in this area as a priority, including application of mutual recognition and mutual trust among member states.[30]

However, shortcomings that existed in states that joined EU in 2004, influenced on the decision that new member states cannot automatically join to Schengen system. Intergovernmental mechanism was used for decision on full membership status to the Schengen system, which requires unanimously decision of all member states that new members fulfil membership conditions.[31] The article 39 of the Act on accession contained protection clause to include potential shortcomings in the application of the EU instruments in the area of mutual recognition in criminal matters in the new member states. The protection clause envisaged possibility for the Commission to temporary suspend provisions on judicial cooperation in criminal matters in case of shortcomings or risk. Period of validity of protection clause was three years and it has never been used.

Also during the next EU enlargement in 2007, when Bulgaria and Romania became member states, progress in the area of judiciary and internal affairs were closely followed and monitored.[32] European Commission Progress reports emphasized shortcomings of the progress in the area of judiciary and internal affairs, including lack of institutional capacities. The European Commission even questioned if countries would become members in 2007 as it was planned.[33]

European Commission emphasized in the reports on Bulgaria and Romania challenges in the area of judiciary and fight against corruption. To enable that these states become members in the planned timeframe, European Commission proposed additional security mechanism. In addition to protection clause in the Act on accession, the special mechanism to verify progress after accession was introduced. Two decision on establishment of mechanism of cooperation and verification of progress were adopted (OJ L 354, 14 December 2006) that introduce benchmarks in the area of judiciary reforms and fight against corruption.

Assessment of defined benchmarks for Bulgaria and Rumania reveals the method of EU influence on legislative amendments and institutional framework in these countries in the area of organization of judiciary. Rumania were obliged to ensure transparent and efficient court procedure, while Bulgaria needed to ensure guarantees of independence of judiciary through

[29] European Commission, White Paper – Preparation of the Associated Countries of Central and Eastern Europe for integration into the internal market of the Union, COM (95) 163 final.

[30] MITSILEGAS, V.: EU Criminal Law, Hart Publishing, 1st Edition, 2009. p. 284.

[31] MONAR, J.: Enlargement-Related Diversity in EU Justice and Home Affairs: Challenges, Dimension and Management Instruments, Dutch Scientific Council for Government Policy, Working Document W 112, The Hague 2000,
www.wrr.nl/fileadmin/nl/publicaties/DVD_WRR_publicaties_1972-2004/W112_Enlargement-related_diversity_in_EU_justice.pdf.

[32] BOZHILOVA, D.: Measuring Success and Failure of EU: Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria, In: European Journal of Law Reform, Vol. 9, 2007, pp. 285–319.

[33] European Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 final, Brussels, 26 September 2006.

constitutional amendments and removal of ambiguity in relation to independence and accountability of judiciary system.[34]

Bulgaria and Rumania were obliged by Article 1 of the Act on establishment of mechanism of coordination and verification to report annually to the European Commission on progress in achieving benchmarks. The Commission had possibility to apply protective clause, including suspension of the member states obligation to recognize and enforce court decisions from Bulgaria and Romania if these two countries do not achieve defined benchmarks (article 7 of Preamble). However, the European Commission as a control and protection mechanism in case of Bulgaria and Romania used suspension of EU funds.[35]

Establishment of the verification mechanism, as *ex post* control after accession to the EU, represent the exception and requires extensive engagement of the European Commission. Experience with Bulgaria and Rumania in which significant shortcomings remain after accession to the EU, influence on the amendments of the Commission approach and introduction of practice that negotiation on Chapters 23 and 24 are open the first and close at the end of the negotiation process. This approach was used for the first time with Croatia that became EU member state in 2013. The same practice was applied in the case of Montenegro that opened accession negotiation in 2012 and Serbia that opened two years later.

The method of influence of the accession process on organization of judiciary in candidate countries, could be identified through the recommendations included in the Screening reports for Chapters 23 and 24, [36] as well as from the Action plans for these two chapters.[37] Screening report assessed the area of judiciary through four dimensions: independence of judiciary; impartiality and accountability; professionalism, competence and efficiency; and area of war crimes. For each of four dimensions the Screening report provides overview of legislative and institutional framework and compare it with the European standards. The Screening report contains recommendations to take additional activities to ensure complete independence of judiciary, impartiality and better efficiency.

The Screening report for Chapter 23 for Serbia listed following recommendations that influence on the organization of judiciary in Serbia: amendments of Constitution to improve independence and accountability of judiciary, including selection, promotion and dismissal of judges and public prosecutors, appointment of court presidents and introduction of mechanism for prevention of political influences; role of National assembly in the appointment of members of the High Judicial Council and State Prosecutorial Council could be only declaratory and composition of the Councils should be pluralistic. The Screening report recommendations influence on the constitutional position of judiciary, organization of public prosecution, hierarchical structure, procedure for selection of judges and prosecutors, relation between judiciary, executive and legislative branch, administration of judiciary and prosecution system and management over resources, etc. Republic of Serbia, specifically Ministry of Justice follows implementation of the Action plan for Chapter 23 and submits reports, while European

[34] TRAUNER, F.: *Post-accession compliance with EU law in Bulgaria and Romania – a comparative perspective*, European Integration online Papers (EIoP), Special Issue 2, Vol. 13, article 21, 2009. http://eiop.or.at/eiop/texte/2009-021a.htm.

[35] Commission report on the Management of EU Funds in Bulgaria, COM (2008) 496 final, Brussels, 23. July 2008.

[36] See: *Vodič kroz Izveštaj o skriningu za poglavlje 23 – pravosuđe i osnovna prava,* Beogradski centar za bezbednosnu politiku i Beogradski centar za ljudska prava, Beograd, 2015.

[37] Action plan for Chapter 23 is available at:
https://www.mpravde.gov.rs/tekst/9849/finalna-verzija-akcionog-plana-za-pregovaranje-poglavlja-23-koja-je-usaglasena-sa-poslednjim-preporukama-i-potvrdjena-od-strane-evropske-komisije-u-briselu-.php

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Commission prepares bi-annual reports: Annual progress reports on progress (each April) and Non-papers on Chapters 23 and 24 (each November).

The EU revised enlargement methodology from February 2020 is putting an even stronger focus on the core role of fundamental reforms essential for the EU path. Within this methodology the rule of law will become even more central in the accession negotiations, while progress on the fundamental reforms will determine the overall pace of negotiations.[38] It has to be seen how this revised enlargement methodology will be applied in the practice. Although the negotiation procedure has become stricter over the time, existing mechanisms were not sufficient to track real progress in the justice reforms. Most of the activities were focus on ticking the box and amendments of legislation, while independence and accountability of judiciary remain the problems in all candidate countries. In addition, countries that are members for more than decade are facing with reversible processes and violation of rule of law.

4 CONCLUSIONS

The rule of Law is very important for the functioning of the European Union and incorporated in the its founding treaties and Case Law of EU courts. That principle means the respect of legality, equality of citizens, legal certainty, the independence of judiciary, accountability of the decision-makers and the protection of human rights.

During the negotiations process candidate countries have to make sure that their judiciary is independent and impartial, which includes guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners, while laws are clear and fair and protect human rights. Sometimes EU principles relating to the Rule of Law can be breach by member states. During the 2015 the Polish authorities have enacted a judicial reform including the creation of new disciplinary procedures and oversight body for judges that have increased political oversight of the judiciary. One year later the European Commission triggered mechanism to strengthen the Rule of Law in order to prevent further negative influence on the rule of law and adopted the Rule of law recommendation. The problems about the functioning of the country' s institutions, including problems with the electoral systems, independence of the judiciary and the respect for citizen' s rights have been noticed in Hungary in 2017. One year later European Parliament established a resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. However, two years later in Resolution from January 2020 the European Parliament note that the EU's discussion with Poland and Hungary have not yet led these to realign with the EU's funding values, indicating that the situation has deteriorated since the triggering of Article 7(1) of the Treaty on European Union. The crisis of judiciary systems in one country can jeopardize the principle of mutual recognition in judicial matters. That was a subject of the EU Court of Justice regarding the decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice systems. The rule of law is also relevant for the free movement of goods, services and capital investments. Breach of the principles relating to the Rule of Law, Judiciary, Fundamental Rights and Anti-Corruption can have a negative impact on potential investments. Therefore,

[38] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process - A credible EU perspective for the Western Balkans, Brussels, 5.2.2020, COM(2020) 57 final, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf

for each Member State of the European Union and Candidate Countries, strengthening and improving the mentioned principles is very important.

The judicial crises in few EU Countries had a great impact on revision of enlargement methodology in February 2020 which is putting a stronger focus on the core role of fundamental reforms essential for the EU path. It seems that the rule of law will become even more central in the accession negotiations and progress on the fundamental reforms will determine the overall pace of negotiations. We are sure that the future Commission approach to accession countries in the implementation of EU acquis will be stricter than before. In addition, for the Member States should be more than before important the compliance with the EU principles relating to the rule of law. That's not a supranational interest but interests of each Member State and its citizens.

Bibliography:

Action plan for Chapter 23 is available at: https://www.mpravde.gov.rs/tekst/9849/finalna-verzija-akcionog-plana-za-pregovaranje-poglavlja-23-koja-je-usaglasena-sa-poslednjim-preporukama-i-potvrdjena-od-strane-evropske-komisije-u-briselu-.php.

A new EU Framework to strengthen the Rule of Law, Communication from the European Commission to the European Parliament and the Council, COM(2014) 158 final.

Annex 1 to 2 to the Communication from the European Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law.

BOZHILOVA, D.: Measuring Success and Failure of EU: Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria, In: European Journal of Law Reform, Vol. 9, 2007, pp. 285–319.

Case C-64/16 *Associação Sindical dos Juízes Portugueses.*

Case C-619/18.

Commission Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, 2017 O.J. (L 17/50), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0103&from=EN.

Commission report on the Management of EU Funds in Bulgaria, COM (2008) 496 final, Brussels, 23. July 2008.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process - A credible EU perspective for the Western Balkans, Brussels, 5.2.2020, COM(2020) 57 final, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdfCourt of Justice of the European Union Press Release No. 145/19 (November 19, 2019), https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190145en.pdf.

CREMONA, M.: The Union as a Global Actor: Roles, Models and Identity, in: Common Market Law Review, 2004, Vol. 41, pp. 555–573.

European Commission Press Release IP/19/1957, Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control (April 2, 2019).

European Commission, White Paper – Preparation of the Associated Countries of Central and Eastern Europe for integration into the internal market of the Union, COM (95) 163 final.

European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a

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clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL).

European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP).

HILION, C.: EU Enlargement, In: CRAIG, P. DE BURCA, G. (eds.), The Evolution of EU Law, Oxford, 2011. pp. 187–217. ISBN 9780199592968

KLIP, A.: European Criminal Law – An integrative Approach, Intersentia, 2012, 362 pages, ISBN 9781780682709.

MATIĆ BOŠKOVIĆ, M. Obaveza usklađivanja sa pravnim tekovinama Evropske unije, In: ŠKULIĆ, M. ILIĆ, G., MATIĆ BOŠKOVIĆ, M. (eds.), Unapređenje Zakonika o krivičnom postupku: de lege ferenda predlozi, Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca, 2015. pp. 149-158. ISBN 978-86-6383036-3.

MITSILEGAS V. Mitsilegas, *EU Criminal Law*, Hart Publishing, 1st Edition, 2009, pages 366, ISBN 97818411.

MONAR, J.: Enlargement-Related Diversity in EU Justice and Home Affairs: Challenges, Dimension and Management Instruments, Dutch Scientific Council for Government Policy, Working Document W 112, The Hague 2000,
www.wrr.nl/fileadmin/nl/publicaties/DVD_WRR_publicaties_1972-2004/W112_Enlargement-related_diversity_in_EU_justice.pdf35854.

OUWERKERK, J.: Mutual trust in the area of criminal law, in: BATTIES, H., BROWER, E., DE MORREE, P., OUWERKERK, J. (eds.), The principle of mutual trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights, Utrecht: Forum, 2011. pp. 38-48.

TRAUNER, F.: Post-accession compliance with EU law in Bulgaria and Romania – a comparative perspective, European Integration online Papers (EIoP), Special Issue 2, Vol. 13, article 21, 2009. http://eiop.or.at/eiop/texte/2009-021a.htm

TURKALJ, K. *et al.*: Vodič kroz Izveštaj o skriningu za poglavlje 23 – pravosuđe i osnovna prava, Beograd: Beogradski centar za bezbednosnu politiku i Beogradski centar za ljudska prava, 2015. 132 Pages, ISBN 978-86-87737-98-3.

SATZGER, H. ZiMMERMANN, F.; From traditional models of judicial assistance to the principle of mutual recognition: new developmnets of the actual paradigm of European cooperation in penal matters, in: BASSIOUNI C., MILITELLO, V., SATZGER, H. (eds.), European Cooperation in Penal Matters: issues and perspectives, CEDAM, 2008, 337–361. ISBN 9788813281137

SMITH, K. E.: The Evolution and Application of the EU Membership Conditionality, in: CREMONA, M. (ed.), The Enlargement of the European Union, Oxford: Oxford University Press, 2003. pp. 105–140.

SUOMINEN, A.: The Principle of Mutual Recognition in Cooperation in Criminal Matters, 1st edition, Intersentia, Vol 1. 2011. pages 416, ISBN 9781780680095.

SPEED-UP INFRINGEMENT PROCEDURE /

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The paper was prepared within project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context".

Abstract: *The infringement procedure is an important tool for forcing a Member State to be in line with EU law. One of the frequent infringements committed by Member States is a wrong or belated implementation of directives. Implemented directives cover significant part of national law, such as public procurement or consumer protection. The Lisbon Treaty introduced a possibility for a shorten procedure in Article 260(3) TFEU. This possibility was recently interpreted and applied for the first time in the case C-543/17 Commission v Belgium. This contribution analyses the case and it explores the possible impact that the speed-up procedure may have on the implementation of directives.*

Key words: *Article 260(3) TFEU, infringement procedure, C-543/17 Commission versus Belgium, speed-up procedure*

1 INTRODUCTION

The proceedings before the CJEU can be characterized as *numerus clausus*. One of these few proceedings which are allowed before the Luxembourg court is the infringement procedure. The infringement procedure enables European Commission or a Member State to bring an action against another Member State. The core of the action is the alleged infringement[1] of EU law by the Member State. The action is admissible after certain pre-litigation steps are taken. If the Court of Justice finds out that there is an infringement of Union law indeed, it will issue a declaratory judgement confirming that the Member State has infringed EU law. There are instances when this is not enough in order to compel the Member State to get in line with EU law. That is why the Maastricht Treaty[2] has introduced the possibility to impose financial sanctions on the Member State. The sanctions are imposed by second judgement of the Court of Justice based on (second) action of the Commission.

That has not been the last update of the infringement procedure. The respective provisions of the founding Treaties were changed by the Lisbon Treaty, by which a new "speed-up" procedure was introduced. This procedure may be identified in Article 260 para. 3 TFEU. There has been a founded debate among scholars what might be the aim of this procedure and under which conditions it may be applicable, particularly due to the fact that so many terms in the provision are ambiguous. Although the Lisbon Treaty came into effect in 2009, the first judgement of the Court of Justice based on this provision was issued as late as in 2019 – case C-543/17 *Commission versus Belgium* [2019] (hereinafter referred to also as the "***Case C-543/17***").

The main aim of this paper is to analyze the provision Article 260 para. 3 TFEU before the judgement in the Case C-543/17 was issued. The predominant issues related to the provision are identified, following which the judgement in the Case C-543/17 is brought

[1] The term "infringement" is interpreted quite broadly. It may cover even national courts' decisions. See TABOROWSKI M.: Infringement Proceedings and Non-Compliant National Courts, p. 1885.
[2] SLAŠŤAN, M. In: SIMAN, M., SLAŠŤAN, M.: Súdny system Európskej únie, p.348.

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into discussion, in order to see what impact might this judgement have on future application of the speed-up infringement procedure.

Thus, the paper is organized as follows: first, the infringement procedure in its regular form is presented. Second the accelerated form of this procedure is outlined, in light of scholars' opinion, view of the Commission and opinion of AG Szpunar in the Case C-543/17. Third, he Case C-543/17 is characterized in relation to the judgement itself. Main findings and the possible impact of the Case C-543/17 *pro futuro* are gathered in the conclusion.

2 REGULAR INFRINGEMENT PROCEDURE

The infringement procedure is regulated by Articles 258-260 TFEU. It has been applied in substantial amount of cases, as Member States of the EU constantly infringe EU law. Although this paper does not aim to the regular form of infringement procedure, it is necessary to present the basic elements of this procedure in order to identify what are the specialties of the infringement procedure. It is also important for proper understanding of the speed-up infringement procedure.

Article 258 TFEU reads as follows: "*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

Therefore, there are several steps to be taken before the case is brought before the Court of Justice. First, after the Commission receives a complaint, the initial screening is conducted by the Commission. This is followed by EU Pilot which should serve for informal settlement of the case. If EU Pilot does not help, the Commission issues a letter of formal notice. This letter indicates what is the subject matter of the Commission's investigation. The letter of formal notice also indicates the commencement of the formal part of the infringement procedure. The Member State may react to this letter and presents its arguments. If the Commission retains its position, it may issue a reasoned opinion. The Member State is once again entitled to react on the matter. If the disputed is not settled by this time, the Commission is entitled to bring the case before the Court of Justice.[3]

The Commission is not the only entity having legal standing. Article 259 TFEU reads as follows: "*A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.*

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court."

Hence, another Member State may also submit an action against a Member State for the infringement of EU law. None the less, this procedure is scarcely used. It may be

[3] CHALMERS, D., DAVIES G., MONTI G.: European Union Law, p. 357.

employed if the Commission does not consider that the Member State is at odds with EU law. A recent example is the case Austria versus Germany[4].

One way or another, once the case is before the Court of Justice, it may be established by the judgement that the Member State did indeed infringe EU law. This is provided for in Article 260 para. 1 TFEU: "*If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment* of the Court."

This provision imposes a secondary obligation on the Member State, as it was obliged to be compliant with EU law in first place, yet, if this was infringed, the Member State would be obliged to be compliant with the judgement of the Court of Justice. It is important to note that this confirmation of the Court of Justice is important especially when the Member State is not certain whether it is or it is not in line with EU law. After the judgement is delivered, its legal position is clear and not open to questions.

Yet, it may well happen that the Member State is not satisfied with the judgement of the Court of Justice, meaning that it will not be keen on fulfilment of the obligation. This situation is also taken care of in the founding Treaties. Article 260 para. 2 TFEU stipulates: "*If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.*

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259."

Hence, in the case of continuous incompliance with EU law, the Commission may bring the Member State before the Court of Justice for the second time. This time, it may also propose financial sanctions to be imposed on the Member State. It is possible to ask for both penalty payments and lump sum, as each of them serves to a different sanction.[5]

Therefore, we may conclude that the regular infringement procedure is capable of bringing the change in the Member State's actions or omissions. Put differently, the financial sanctions will possibly be a good reason for the Member State to get in line with EU law. However, one can imagine how long such procedure may take.[6] In order to get the second judgement, the Commission must exchange their arguments at least twice within the first stage and there is another set of exchange within the second stage.[7] Moreover, the procedure before the Court of Justice will take some time.

3 SPEED-UP INFRINGEMENT PROCEDURE

By the Lisbon Treaty, the infringement procedure was enriched by another provision. Article 260 contains para. 3 which states: "*When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.*

[4] Case C-591/17 *Austria versus Germany* [2019].

[5] C-304/02 *Commission versus France (Fishing nets)* [2005].

[6] CHALMERS, D., DAVIES G., MONTI G.: European Union Law, p. 373.

[7] However, the obligation to issue a reasoned opinion is no longer necessary after the Lisbon Treaty. CRAIG, P., DE BÚRCA G.: EU Law. Text, Cases and Materials, p. 455.

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If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment." Let us analyze the provision in further detail

3.1 The aim of the speed-up infringement procedure

Although the provision may seem clear, it opens a room for discussion regarding several points.[8] First, one may wonder what is the purpose of this provision. There are two possible answers. On the one hand, the provision may aim to financially sanction the infringement of the primary obligation, i.e. the obligation to be in line with EU law. This may be supported by the reference to Article 258 TFEU in the provision. On the other hand, the aim of the provision may be to sanction the non-compliance with the Court of Justice's decision finding the primary infringement. This interpretation is supported by the fact that the provision is inserted in Article 260 TFEU which deals with non-compliance with a judgement of the Court of Justice.[9]

Nonetheless, what is the point of discussion on this issue? Does it have any particular significance? There seems to be at least one important consequence of the proper definition of the aim – the commencement date of the sanctions. In my view, if the former interpretation was correct, the Court of Justice may impose the sanctions straight away. However, if the latter interpretation was the right one, it would mean that the Member State should be given a grace period, during which the Member State should repair the infringement of EU law. Only if the Member State does not benefit from the grace period, financial sanction will be automatically imposed on the Member State.

3.2 When is the speed-up infringement procedure applicable?

Let us return to the wording of the provision itself. Several notions seem dubious. First and foremost, what does it mean a failure to fulfil the Member State's obligation to notify measures transposing a directive? The very notion of the failure is open to discussion. A failure may, in theory, signify a complete failure as well as a partial failure. But what does it notify in practice? One may argue that it actually refers to the former case only, as a partial notification is some form of notification.[10] Yet, the Commission notice is rather in favor of the latter interpretation.[11]

Second, what does it mean to notify measures transposing a directive? It is apt to note that there is no provision in primary law which would refer to such obligation. However, directives regularly contain a provision which states that the Member States shall notify the Commission the measures implementing these directives.[12]

If such obligation is incorporated in a directive, Member States shall notify the Commission accordingly. Various problems may appear. Actually, every situation but the one when Member States notify the Commission about implementing measures in full and

[8] CRAIG, P., DE BÚRCA G.: EU Law. Text, Cases and Materials, p. 455; SIKORA A.: Financial penalties for non-execution of the judgment of the Court of Justice of the EU, p. 8.

[9] Opinion of AG Szpunar in Case C-543/17, p. 37, 38; RADIVOJEVIĆ, Z., RAIČEVIĆ, N.: Financial Sanctions against Member States for Infringement of EU Law, p. 175

[10] This seem to be supported by the preparatory works to the provision. GÁSPÁR-SZILÁGYI S.: What Constitutes 'Failure to Notify' National Measures?, p. 5.

[11] Communication from the Commission — Implementation of Article 260(3) of the Treaty, 2011/C 12/01, p. 19.

[12] RADIVOJEVIĆ, Z., RAIČEVIĆ, N.: Financial Sanctions against Member States for Infringement of EU Law, p. 176.

flawless manner is problematic. Let us start from the worst case scenario. The Member State concerned has not implemented the directive at all. It means that no implementing measures have been adopted and, consequently, no implementing measures have been announced to the Commission. This seems to be in line with the wording of Article 260 para 3 TFEU.

Then, it is possible that the Member State failed to implement the directive completely, however, in order to prevent Article 260 para 3 to be applicable, it notified some measures. This behavior of the Member States is definitely at odds with the principle of sincere cooperation, therefore, it seems acceptable that such situation is covered by Article 260 para 3 TFEU.[13]

Furthermore, the Member State may not have implemented the directive in its fullness, e.g. omitting certain articles. Therefore, even if the Member State notifies the Commission, the notification will be only partial. This scenario is likewise applicable if the Member State does not cover its whole territory by the implementing measures. Whether this situation is covered or not depends on the interpretation of the notion "failure" described above. In the Commission's view, this should be covered.[14]

Next, it may also occur that the Member State will implement the directive completely, yet, certain provisions will not be interpreted correctly. This is often referred to as incorrect, as oppose to incomplete, implementation. Pursuant to the Commission notice, incorrect implementation should not be covered by Article 260 para 3. To quote the Commission: "[a]*ny dispute regarding the sufficiency of the transposition measures notified or the rules of law existing in national law will be dealt with under the normal procedure on the correct transposition of the directive, under Article 258 of the Treaty*."[15] This approach is explained by the speed-up character of the procedure pursuant to Article 260 para 3, which should be used in obvious failures of Member States. Incorrect implementation may not be obvious at all.[16]

None the less, there seems to be a thin line between incorrect and incomplete implementation.[17]

Last but not least, it may as well occur that the Member State has implemented the directive in a right manner, but it forgets to notify the implementing measures. Formally, this seems to be covered by the wording of Article 260 para 3. However, one may object that such purely formal omission of the Member State should be hardly open to financial sanctions.[18]

4 C-543/17 COMMISSION VERSUS BELGIUM

After presenting a more academic view on the provision at stake, let us now proceed to the first judgement of the Court of Justice which has been issued based on the provision. The case was concerned with Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic

[13] This seems to be supported also by Opinion of AG Szpunar in Case C-543/17, p. 80, 81.

[14] Communication from the Commission — Implementation of Article 260(3) of the Treaty, 2011/C 12/01, p. 19.

[15] Communication from the Commission — Implementation of Article 260(3) of the Treaty, 2011/C 12/01, p. 19, in fine.

[16] There are also voices calling for application of Article 260 para. 3 TFEU for both incomplete and incorrect implementation. See WENNERÅS, P.: Making effective use of Article 260 TFEU, p. 11

[17] Opinion of AG Szpunar in Case C-543/17, p. 72 et seq.; SIKORA A.: Financial penalties for non-execution of the judgment of the Court of Justice of the EU, p. 9.

[18] To this end, see RADIVOJEVIĆ, Z., RAIČEVIĆ, N.: Financial Sanctions against Member States for Infringement of EU Law, p. 177.

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communications networks (OJ 2014 L 155, p. 1) (hereinafter referred to also as the "***Directive***"). The Commission claimed that Belgium had failed to adopt, by the date prescribed in the Directive, i.e. by 1 January 2016, the laws, regulations and administrative provisions necessary to comply with the Directive. Plus, the Commission claimed that, in any event, Belgium had not notified the Commission of those provisions. Due to this reasons, Belgium shall pay 6 071.04 EUR from the day of delivery of the judgment.

4.1 Factual background

Let us see the chronological development of the case[19]:

- 1 January 2016 – Member States were obliged to adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2016. They were also obliged to inform the Commission thereof. This obligation was imposed by Article 13 of the Directive;
- 23 March 2016 – the Commission sent a letter of formal notice;
- 17 July 2016 – Belgium replied, by which it became clear that the transposition measures were merely being drawn up;
- 30 September 2016 – the Commission sent a reasoned opinion, giving Belgium two months to comply with the requirements of the Directive;
- 28 February 2017 – lapse of the extended period provided for in the reason opinion;
- 21 February 2017 and 28 March 2017 – Belgium informs the Commission on the adopted measures;
- 13 July 2017 – the Commission decided to bring an action;
- 10 August 2017, 25 August 2017 and 12 September 2018 – Belgium informed the Commission on legislative measures designed to implement the Directive. However, the Commission insisted on the Directive not to be implemented in its fullness and throughout the Member State's territory.

4.2 The view of the Court of Justice

The Court of Justice noted that the failure to fulfil the Member State's obligation must have been assessed referring to the status quo at the end of the period laid down by the Commission's reasoned opinion, 28 February 2017 in this case. The Court of Justice found no difficulty in stating that, on that date, Belgium had neither adopted the measures transposing the Directive, nor it notified the measures transposing the Directive. Therefore, the infringement based on Article 258 TFEU was well-established.[20]

Subsequently, the Court of Justice discussed whether the conditions for application of Article 260 para. 3 TFEU were met. The Court of Justice stated that the principle of sincere cooperation, laid down in Article 4 para 3 TEU, required that Member State would facilitate the Commission's task to control whether directives are implemented. Thus, the notification shall contain sufficiently clear and precise information so the Commission can ascertain that the Member State has implemented the directive in full.[21]

Regarding the aim of the provision, the Court of Justice ruled that it was to induce Member States to put to an end as soon as possible a breach of obligations; and to simplify and speed up the procedure for imposing pecuniary sanctions for failures to comply with the obligation to notify a national measure transposing a directive through a legislative procedure. The Court of Justice noted that, prior to the introduction of such a system, it might have been years before a pecuniary sanction had been imposed on Member States

[19] Case C-543/17, paras 6-17.
[20] C-543/17, paras 23-26.
[21] C-543/17, para 51.

failing to comply timely with an earlier judgment of the Court and failing to respect their obligations to transpose a directive.[22]

By defining the aim of Article 260 para. 3 TFEU in such manner, the Court of Justice continued in its argumentation by stating that such aim would have been comprised had the Commission been able to trigger the provision only in a case of complete failure to notify any measure transposing a directive. The Luxembourg court followed the differentiation between "non-communication and non-transposition" from "incorrect transposition". The speed-up procedure should not be applicable to the latter.[23]

To sum it up, the Court of Justice interpreted the expression "obligation to notify measures transposing a directive" as referring to the obligation of the Member States to provide sufficiently clear and precise information on the measures transposing a directive. "*In order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of that directive in full throughout its territory, the Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition. Once notified, where relevant in addition to a correlation table, it is for the Commission to establish, for the purposes of seeking the financial penalty to be imposed on the Member State in question laid down in that provision, whether certain transposing measures are clearly lacking or do not cover all of the territory of the Member State in question, bearing in mind that it is not for the Court, in court proceedings brought under Article 260(3) TFEU, to examine whether the national measures notified to the Commission ensure a correct transposition of the provisions of the directive in question*."[24]

Similar to Article 260 para. 2 TFEU, the Luxembourg court pointed out that the penalty payments under both paragraphs of Article 260 sought to achieve the same objective, namely inducing a Member State to put to an end as soon as possible the breach of obligations which, in the absence of such a measure, would tend to persist. The case-law on Article 260 para 2 TFEU is applicable *mutatis mutandis*. Hence, it was necessary to establish whether the failure which the Commission alleged against Belgium, continued up to the time of the Court's examination of the facts. This proved to be the case.[25]

In relation to the penalties and their calculation, the Court of Justice applied the rules already established for Article 260 para 2 TFEU. The criteria to be taken into account are: the duration and seriousness of the infringement and the Member State's ability to pay. Since Belgium showed progress towards a full transposition, yet the Directive was still not transposed into national law in respect of a part of the territory of Belgium. The penalty proposed by the Commission in the amount of 6 071.04 EUR per day was decreased to 5 000 EUR per day.[26]

Last but not least, the Court of Justice needed to set the date on which the obligation to pay takes effect. It considered it appropriate that the date from which the penalty payment be calculated began on the date of delivery of the present judgment, unless the failure to fulfil obligations did not persist on the date of delivery of the judgment.[27]

Before moving to the concluding remarks of this paper, let us emphasize that, in AG Szunar's opinion, a different conclusion was drawn. However, the main points were incorporated into the third part of this paper. Hence, they are not elaborated on in further detail.

[22] C-543/17, para 52.
[23] C-543/17, paras 53- 56.
[24] C-543/17, para 59.
[25] C-543/17, paras 61-68.
[26] C-543/17, paras 78, 84, 86, 89
[27] C-543/17, paras 82, 91, 92.

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5 CONCLUSION

The Lisbon Treaty brought various amendments into the founding treaties. One of them is the introduction of third paragraph to Article 260 TFEU regulating the infringement procedure. The provision provides the Commission with a possibility to specify the amount of the lump sum or penalty payment to be paid by the Member State already in the action pursuant to Article 258 TFEU.

After its adoption, the new provision trigged a debate on what shall be covered by Article 260 para. 3 TFEU. The Commission issued a communication by which it indicated quite extensive approach towards the provision. Whether this approach was to be the correct one remained open for eight years.

However, last year, the Court of Justice was given the opportunity to issue its very first judgement based on the provision. It appears that the Court of Justice adopted the view of the Commission and that the notion "failure to notify" will be interpreted extensively. The Luxembourg court applied by analogy many concepts already known from the regular infringement procedure, the method of calculation of financial sanctions included.

Nevertheless, not all the ambiguities of the provision have been erased by the judgement in the Case C-543/17. There seems to be a room for clarification regarding the difference between incorrect and incomplete implementation. It also remains to be seen what will happen in situations of pure failure to notify, provided that the directive concerned was duly implemented (however, if the Commission will ever bring such case before the Court of Justice).

Judgement in the Case C-543/17 is of paramount significance for the understanding of Article 260 para. 3 TFEU. Since it took ten years for a judgement to appear, one may wonder whether this provision is that usable at all. It may be claimed that, precisely because of the favorable approach the Court of Justice adopted towards the Commission, the provision may be regularly used in the future. Hopefully, this will lead to a better implementation practice of the Member States.

Bibliiography:

CHALMERS D., DAVIES G., MONTI G.: European Union Law. 3th edition, reprinted. Cambridge: Cambridge University Press, 2015. 1114 pages. ISBN 978-1-107-66434-0.

CRAIG, P., DE BÚRCA G.: EU Law. Text, Cases and Materials. 6th edition. Oxford: Oxford University Press, 2015. 1380 pages. ISBN 9780198714927.

GÁSPÁR-SZILÁGYI S.: What Constitutes 'Failure to Notify' National Measures? Available at < https://www.duo.uio.no/bitstream/handle/10852/50517/4/What-constitutes-failure-to-notify.pdf>, 2020-02-19.

RADIVOJEVIĆ, Z., RAIČEVIĆ, N.: Financial Sanctions against Member States for Infringement of EU Law. Available at < https://www.researchgate.net/publication/316845960_FINANCIAL_SANCTIONS_AGAINST_MEMBER_STATES_FOR_INFRINGEMENT_OF_EU_LAW>, 2020-02-19.

SIKORA A.: Financial penalties for non-execution of the judgment of the Court of Justice of the EU. Available at <http://ssrn.com/abstract=2494323>, 2020-02-05.

SLAŠŤAN, M. In: SIMAN, M., SLAŠŤAN, M.: Súdny system Európskej únie. 2nd edition. Žilina: Poradca podnikateľa, 2008. 736 pages. ISBN 978-80-89363-02-5.

TABOROWSKI M.: Infringement Proceedings and Non-Compliant National Courts. In: Common Market Law Review, 2012, vol 49, No. 6, pp. 1881-1914.

WENNERÅS, P.: Making effective use of Article 260 TFEU. Available at <http://ssrn.com/abstract=2821032 >, 2020-02-05.

ONE OF THE KEY CHALLENGES TO THE EUROPEAN COMMISSION - THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AS AN EFFECTIVE TOOL TO FIGHT AGAINST CRIMES AFFECTING THE FINANCIAL INTERESTS OF THE EU / Dominika Becková

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This paper was created within the project APVV-18-0421 The European Public Prosecutor´s Office in Connections of the Constitutional Order of the Slovak Republic as Strengthening of the European Integration through Law.

Abstract: *The European Public Prosecutor's Office (EPPO) was established by Council Regulation 2017/1939, which entered into force on 20 November 2017, under enhanced cooperation to fight against crimes affecting the European union budget. Since this day, the pre-set phase, with the aim to prepare the EPPO to become functional as soon as possible, has started. One of the most important institution in the set-up phase is the European Commission, responsible for the establishment and initial administrative operation of the EPPO. One of the most important decisions, which the European Commission will have to adopt, is the decision setting the exact date on which the EPPO will assume the investigative and prosecutorial tasks. This article outlines the importance of establishment of the EPPO, its basis constitutional principles, preconditions set by the EPPO regulation on its organizational and administrative structure and its fulfilling in the set-up phase.*

Key words: *European Public Prosecutor's Office (EPPO), EPPO regulation, set-up phase, European Commission*

1 INTRODUCTION

The European Union is one of the fastest growing international organisations and has gone through many important transformations in recent years, including also changes in the area of criminal law. One of the most significant changes in the Union criminal law came during the year 2017, when two acts of importance have been past. The first one, was Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (*„PIF Directive"*)[1], and the second one, was Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (*„the EPPO Regulation"*)[2]. PIF Directive in connection with EPPO Regulation are of an high importance for protection of the Union's financial interests and budget. The importance can be seen in fact, that PIF Directive provides common minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the EU's financial interest, and the EPPO Regulation establishes the European Public Prosecutor's Office (*„the EPPO"*) as the new Union's body responsible for investigating and prosecuting criminal offences provided in PIF Directive.

[1] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law.

[2] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

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The establishment of the European prosecution office with the competence to fight crimes against the financial interests of the European Union has been the subject of discussions for many years.[3] Long discussions, few unsuccessful proposals and the need to find an effective tool to fight crimes against the financial interests of the EU had come to the end on 20 November 2017, when the Regulation establishing the EPPO under enhanced cooperation entered into force, in accordance with a procedure provided by Art. 86 of the Treaty on the Functioning of the European Union („*TFEU*"). From this date, the set-up phase with the aim to prepare the EPPO to become functional, has started. The establishment of the EPPO has opened a completely new chapter in the Union criminal law, as well as it has brought a new subject and questions to the Union constitutional law. The author in the first part of the paper presents the key aspects of the EPPO, its constitutional issues, competence and basic principles. The second part of the paper focuses on preconditions set by the EPPO regulation on organizational and administrative structure of the EPPO, on the review of the set-up phase of the EPPO and the European Commission preparatory steps in this process, as it is the institution responsible for establishment and initial administrative operation of the EPPO.

2 EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND ITS CONSTITUTIONAL ISSUES

With the entry into force of the Lisbon Treaty, the European Area of Freedom, Security and Justice is moving toward a new phase in combating crimes affecting the Union's financial interest in a more effective manner.[4] The Lisbon Treaty opens a new way for the establishment of the European Public Prosecutor's Office on the basis of Art. 86 TFEU.[5] For the first time, the European Commission took the opportunity provided by Art. 86 TFEU in 2013, when issued a proposal for regulation on establishment of a new European prosecution office[6]. This Commission attempt to establish an independent European prosecution office became in a short time unsuccessful and Member States requested the European Commission to review this proposal, especially questions of the EPPO competences and structure. After more than four years of negations, a draft of the new EPPO Regulation was prepared. The EPPO Regulation had to be adopted on the basis of Art. 86 TFEU under enhanced cooperation, as the unanimity was not reached. The Regulation establishing the European Public Prosecutor's Office under enhanced cooperation was adopted on 12 October 2017 and entered into force on 20 November 2017. Nowadays, there are 22 Member States[7] participating in this enhanced cooperation. The establishment of the

[3] CSONKA, P.–JUSZCZAK, A.–SASON, E.: The establishment of the European Public Prosecutor's Office. The Road from Vision to Reality. p. 125.

[4] CONINSX, M.: The European Commission's Legislative Proposal: An Overview of Its Main Characteristics. p. 22.

[5] The very first attempt to establish the European Public Prosecutor's Office happened more than twenty years ago by the *Corpus iuris* project. The concept presented in the Corpus iuris remain controversial for a large number of Member States. The new way of establishment of the EPPO was found in creation of Art. 86 TFEU.

[6] Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office. COM (2013) 534 final – 2013/0255 (APP).

[7] At the time of adoption of the EPPO Regulation, there were 20 participating Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain. The 21st participating Member State is Netherlands (confirmed by the Commission on 1 August 2018) and the 22nd is Malta (confirmed by the Commission on 7 August 2018).

EPPO through enhanced cooperation raises concerns about the added value of creating such a supranational prosecutorial authority.[8]

3.1 The need for the EPPO

The establishment of the EPPO represents a symbolic move towards a European criminal jurisdiction and strives to pave the way for a new era of criminal justice in the EU.[9] Based on art. 3 of the EPPO Regulation is the EPPO a new body of the EU and shall have a legal personality. The EPPO, as presented and set-up in the EPPO Regulation, will not only be a new actor in the Union's judicial landscape, but it will also bring an entirely new and different approach in fighting crimes in the European Union.[10] The EPPO will complete and strength an existing mechanisms in criminal matters, which are held by the European Anti-Fraud Office (OLAF) and The European Union Agency for Criminal Justice Cooperation (Eurojust). The need for the new independent prosecution office stemmed from the lack of efficiency of this European Anti-fraud mechanism. The European Anti-Fraud Office as the EU body is mandated to detect, investigate and stop fraud with EU funds, and fulfils its mission by carrying out independent external and internal administrative investigations.[11] The European Union Agency for Criminal Justice Cooperation supports and strengthens coordination and cooperation between national investigating and prosecuting authorities, e.g. assist prosecutors and other investigators from EU Member States in cases of serious crimes, which affect two or more Member States.[12] Instead of OLAF and Eurojust, is the EPPO the first body of the European Union, which will undertake its own investigations of criminal offences affecting the financial interests of the EU, carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States.[13] The task of the EPPO, as set in the EPPO Regulation, opens a new door in investigations and prosecutions of the criminal offences affecting the Union's financial interests, whereas the EU will be able to investigate and prosecute these criminal offences itself by its own body. Due to the way of the EU financing, establishment of the EPPO and criminal law protection of the financial interests of the EU, the protection of the national financial interests of the Member States is actually enhanced.[14]

3.2 Shared competence

The main reason why the EPPO was established and exist nowadays is connected with the need of the EU body, which will be responsible for investigating, prosecuting and bringing to judgement the perpetrators of, and accomplices to, criminal offences affecting the financial interest of the Union which are provided for in PIF Directive and determined by

[8] MAESA, C.D.F.: Repercussions of the Establishment of the EPPO via Enhanced Cooperation. P. 156.
[9] LIGETI, K.-WEYEMBERG, A.: The European Public Prosecutor's Office: Certain Constitutional Issues. p.54.
[10] CSONKA, P.–JUSZCZAK, A.–SASON, E.: The establishment of the European Public Prosecutor's Office. The Road from Vision to Reality. p. 126.
[11] Regulation (EU, EURATOM) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.
[12] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 114 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA.
[13] Art. 4 of the EPPO Regulation
[14] TROŠIĆ, S.J. – KOSTIĆ, J.: Establishing the European Public Prosecutor's Office and Suppression of the Criminal Offenses Against the EU Financial Interests. p.686.

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the EPPO Regulation. For the EPPO, with the aim to efficiently perform the entrusted tasks and its function, it was necessary to find a political friendly, correct and effective solution about EPPO's competence. The model of exclusive competence of the EPPO for criminal offences affecting the Union's financial interests was for the Member States unacceptable[15], and that is why nowadays the EPPO Regulation provides for a system of shared competence between the EPPO and national authorities over these crimes.

The material competence of the EPPO is regulated by art. 22 of the EPPO Regulation. Based on this article, the EPPO will be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in PIF Directive[16], as well as for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA. Moreover, the EPPO will be also competent for any other criminal offences inextricably linked to a criminal offence provided for in PIF Directive. The EPPO Regulation also defines that the EPPO will not be, in any case, competent for criminal offences in respect of national direct taxes and offences inextricably linked to them.

3.3 Basic principles

The basic principles of the EPPO activities are enshrined in art. 5 of the EPPO Regulation and they underpin the task of the EPPO. In all its activities, the EPPO will be bound be the Charter of the Fundamental Rights of the European Union.[17] According to the task of the EPPO and its competences we can assume, that the most commonly used provisions of the Charter will be those contained in the chapter VI. of the Charter, entitled Justice (Articles 47 - 50). The EPPO will be also bound in all its activities, by the principle of rule of law and principle of proportionality.[18]

The legal framework for the investigations and prosecutions on behalf of the EPPO shall be the EPPO Regulation, as a partly harmonised criminal procedure law, and national laws of Member States shall apply only in cases, when a matter is not regulated by the EPPO Regulation. Where a matter is governed by both – national law and the EPPO Regulation, the EPPO regulation shall prevail.[19] The EPPO's investigations will have to be conduct in an impartial manner, with the obligation to seek for all relevant evidence, both inculpatory and exculpatory. The investigations of the EPPO shall be open and conduct without undue delay.[20] This principle of the EPPO means, that the EPPO is obligated to initiate a criminal investigation where there are sufficient grounds for it.

The EPPO cannot work properly and in effective way, when there will not be a necessary cooperation with national authorities. Even the relation between the EPPO and Member States, especially their national authorities involved in the criminal matters, is governed by the principle of sincere cooperation. The principle of sincere cooperation, as a key constitutional principle of the European Union, is enshrined in art. 4 of the Treaty on European Union (*'TEU'*). In general, the principle of sincere cooperation includes a mutual

[15] This model of exclusive competence of the EPPO was proposed in Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office. COM (2013) 534 final, – 2013/0255 (APP) and was one of the main reasons why these Proposal for a Council Regulation was unsuccessful.

[16] Criminal offences with regard to fraud affecting the Union's financial interests and other criminal offences affecting the Union's financial interest are listed in art. 3 and 4 of PIF Regulation.

[17] Art. 5 paragraph 1 of the EPPO Regulation

[18] Art. 5 paragraph 2 of the EPPO Regulation

[19] Art. 5 paragraph 3 of the EPPO Regulation

[20] Art. 5 paragraph 4 and paragraph 5 of the EPPO Regulation

legal obligation for the EU and its Member States to assist each other in carrying out the tasks which flow from the Treaties (TEU and TFEU). The EPPO Regulation specified the general principle of sincere cooperation for needs of an effective work of the EPPO in a way, that the competent national authorities shall actively assist and support the investigations and prosecutions of the EPPO, mainly support and inform each other about relevant cases affecting the financial interests of the European Union.

Since the idea of creation and establishment of the European Public Prosecutor's Office exist, there has been general consensus that the new prosecutorial body should be independent, both from national governments and from EU institutions. In order to accompany the independence of the EPPO, it has also been accepted that it will be necessary to provide for an effective mechanism of accountability, namely legal and political accountability.[21] The principles of independence and accountability, are both as general principles of the EPPO, laid down in art. 6 of the EPPO Regulation. A general provision stressing the independence of the EPPO[22] sets, that EPPO's members shall act in the interest of the Union as a whole and shall neither seek nor take instructions from any person external to the EPPO, any Member State or any institution, body, office or agency of the Union, while the latter shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks. In addition, it should be stressed that the independence of the EPPO staff at different positions will also be guaranteed by their selection and appointment procedure.[23] The EPPO shall be accountable to the European Parliament, the Council and the Commission for its general activities, and shall issue annual reports of its general activities to the European Parliament and to the national parliaments, as well as to the Council and the Commission. Moreover, the European Chief Prosecutor shall appear once a year before the European Parliament and the Council to give account of the EPPO's general activities.

4 STRUCTURE OF THE EPPO

The European Public Prosecutor's Office is an independent and indivisible Union body, operating as one single Office with a decentralised structure. The EPPO consist of two levels – central level and decentralised level. The central level of the EPPO, located at the EPPO's seat in Luxembourg, consists of the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the Permanent Chambers, the College and the Administrative Director. The decentralised level of the EPPO consists of the European Delegated Prosecutors, located in each participating Member State.[24]

4.1 Central level of the EPPO

The College is the management body of the EPPO. It consists of the European Chief Prosecutor and the European Prosecutors (one per Member State). The Chair of the College's meetings is the European Chief Prosecutor. The task of the College in the EPPO

[21] WEYEMBERGH, A. – BRIERE, Ch.: Towards a European Public Prosecutor's Office (EPPO). Study for the Libe Committee. p. 16 – 17.

[22] Art. 6 paragraph 1 of the EPPO Regulation

[23] The European Chief Prosecutor shall be appointed by common accord of the European Parliament and the Council for a non-renewable term of 7 years. One of the prescribed conditions of eligibility for candidates for the position of the European Chief Prosecutor is, that candidates independence is beyond doubt. (Art. 14 of the EPPO Regulation.) The same condition about candidate's independence– candidate whose independence is beyond doubt – is required for the European Prosecutor (Art. 16 of the EPPO Regulation) and the European Delegated Prosecutors (Art. 17 of the EPPO Regulation).

[24] Art. 8 of the EPPO Regulation

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structure is the responsibility for the general oversight of the EPPO's activities. To fulfil its task, the College shall take decisions on strategic matters and on general issues arising from individual case, so as to ensure coherence, efficiency and consistency in the prosecution policy.[25] The College has no operational power in individual cases. The important role of the College is significant in the set-up phase of the EPPO, as the College will set up Permanent Chambers[26], adopt the internal rules of procedure of the EPPO[27], and appoint the European Delegated Prosecutors[28].

The head of the EPPO is the European Chief Prosecutor whose task is to organise EPPO's work, direct its activities and take decisions, as well as represent the EPPO externally in relation to the other EU institutions, Member States and third countries. In the set-up phase the European Delegated Prosecutor will approve the number of the European Delegated Prosecutors as well as the functional and territorial division of competences among them[29].

The task of the Permanent Chambers is to monitor and direct investigations and prosecutions conducted in the Member States by the European Delegated Prosecutors, as well as they are empowered to ensure the coordination of investigations and prosecutions in cross-border cases.[30] Each Permanent Chamber shall have three members – its chair and two permanent members. The Permanent Chambers are thought to be the beating heart of the EPPO, since they will adopt the most relevant operational decisions in each single case of investigated and prosecuted criminal offences according to the PIF Directive.[31] The Permanent Chambers are the integral part of the EPPO with wide range of decision-making powers during the investigations and prosecutions. The Permanent Chambers will closely cooperating with the European Delegated Prosecutors on single cases, and in that connection, they have a power to decide about bringing a case to judgement, dismissing a case, applying a simplified prosecution procedure, referring a case to the national authorities or reopening an investigation.[32] The European Delegated Prosecutors should be also instructed be the Permanent Chambers to initiate an investigation or exercise the right of evocation.

The European Prosecutors shall supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case in their Member State of origin are responsible.[33] The rule about the number of the European Prosecutors is one European Prosecutor per each Member State. Due to the European Prosecutors, their position and role, the close connection between the Permanent Chambers and the European Delegated Prosecutors is guaranteed. The European Prosecutors will be the direct link between the Permanent Chambers and the handling European Delegated Prosecutors, functioning as a lesion and informational channel, giving the Chamber's instructions to the European Delegated Prosecutors and monitoring their implementation.[34]

[25] Art. 9 paragraphs 1 and 2 of the EPPO Regulation
[26] Art. 9 paragraph 3 of the EPPO Regulation
[27] Art. 9 paragraph 4 of the EPPO Regulation
[28] Art. 17 paragraph 1 of the EPPO Regulation
[29] Art. 13 paragraph 2 of the EPPO Regulation
[30] Art. 10 paragraph 2 of the EPPO Regulation
[31] CIUFFRIDA, F.: The European Public Prosecutor's Office: King without Kingdom? Research Report. Thinking ahead for Europe. p.15.
[32] Art. 10 paragraph 3 of the EPPO Regulation
[33] Art. 12 paragraph 1 of the EPPO Regulation
[34] Art. 12 paragraph 5 of the EPPO Regulation

4.2 Decentralised level or European Delegated Prosecutors

The decentralised level of the EPPO consists of the European Delegated Prosecutors located in all Member States participating in this enhanced cooperation. According to the EPPO Regulation, there shall be at least two European Delegated Prosecutors in each participating Member State. European Delegated Prosecutors are actually prosecutors at the national level of participating Member States, who are simultaneously members of the EPPO. As a consequence, when they will not be dealing with crimes within the competence of the EPPO, they will continue to carry out their ordinary tasks as national prosecutors. This status of the European Delegated Prosecutors is usually referred to as 'double hat'.[35]

The European Delegated Prosecutors are key players, as they are responsible for investigations and prosecutions of criminal offences against the Union's financial interest, and also for bringing these cases to judgement. In particular, they will have the power to present trial pleas, participate in taking evidence and exercise the available remedies in accordance with national law. The concrete case, relation to criminal offence according to PIF Directive, shall be initiated and handled by the European Delegated Prosecutor who is from the Member State where the focus of criminal activity lies or in which the bulk of offences has been committed.

Even if it seems, that European Delegated Prosecutors will have a wide range of autonomy, it's not entirely true. During the investigations and prosecutions of the criminal offences in competence of the EPPO, the European Delegated Prosecutors will have to follow the directions and instructions of the Permanent Chamber and of the supervising European Prosecutor.[36] The supervising European Prosecutor shall be from the same Member State as the European Delegated Prosecutor handling the case. The benefit of such a link between the European Prosecutor and the European Delegated Prosecutor can be seen in the fact, that both of them know and are experienced in the legal system where the case is being investigated.[37] Easily said, the European Delegated Prosecutors will play a key and irreplaceable role in the EPPO structure and its practice, as they will carry out investigations of the EU criminal offences in their Member States, but the investigations will be carried out under the direction and supervision of the central Office of the EPPO. European Delegated Prosecutors will have to apply the decision taken at the EU level by the Permanent Chamber in their Member States. The national link between the decentralised and central levels remains close, with a significant effect in the decision-making centre of the EPPO towards a national one.

5 THE SET-UP PHASE AND ITS ACTUAL SITUATION

The EPPO will assume the investigative and prosecutorial tasks on a date, which will be determined by the Commission's decision, on a proposal of the European Chief Prosecutor, once the EPPO is set up.[38] According to the EPPO Regulation the date set up by the European Commission cannot be earlier than 3 years after the date of entry into force of the EPPO Regulation, exactly 20 November 2020. The responsibility for establishment and initial administrative operations of the EPPO lays on the European Commission.[39] Until

[35] CIUFFRIDA, F.: The European Public Prosecutor's Office: King without Kingdom? Research Report. Thinking ahead for Europe. p.14.

[36] Art. 13 paragraph 1 of the EPPO Regulation

[37] CSONKA, P. – JUSZCZAK, A. – SASON, E.: The establishment of the European Public Prosecutor's Office. The Road from Vision to Reality. p.127.

[38] Art. 120 paragraph 2 of the EPPO Regulation

[39] Art. 20 of the EPPO Regulation

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today, the Commission, by itself or in a close cooperation with the Council and the Parliament, has taken a wide range of preparatory steps toward setting-up phase of the EPPO, in close consultation with a group of experts composed of representatives of Member States. The preparatory works are related to various areas as recruitment of the EPPO staff, mainly the European Chief Prosecutor, the European Prosecutors and the European Delegated Prosecutors, development of the EPPO case management system, preparation of the EPPO budget and other legal and operational rules.[40]

One of the first and extremely important step in the pre-set phase of preparing the EPPO to become functional, is an appointment of the key staff of the European Public Prosecutor's Office, both at the central and decentralised level. Based on the EPPO Regulation, important subject in the appointment process of the European Chief Prosecutor and the European Prosecutors, is the Selection panel[41], which shall review the applications for the position of European Chief Prosecutor and for the positions of European Prosecutors with regard to requirements set out in the EPPO Regulation, respectively, including whether the candidates' independence is beyond doubt. At the end, the Selection panel shall draw up a shortlist of qualified candidates for the position of European Chief Prosecutor[42] and to provide a reasoned opinion on the qualification of candidates for the position of European Prosecutors[43]. Twelve members of the Selection panel were appointed on September 2018[44] and the Selection panel has started to fulfil its task[45].

The Selection panel started the procedure od the appointment of the European Chief Prosecutor, drawn up a shortlist of qualified candidates on March 2019 and passed this shortlist to the European Parliament and the Council. The first European Chief Prosecutor was appointed on 14 October 2019 by a common accord of the European Parliament and the Council.[46] As next, the Selection panel has started to focus on candidates for the position of European Prosecutors, as the Member States had an obligation to nominate three candidates for this position. Nowadays is the Council dealing with the question of appointing the European Prosecutors, on the basis of a reasoned opinion on the qualification of candidates provided by the Selection panel. If the EPPO have to become functional at the end of year 2020, the Council will have to adopt the decision appointing the European Prosecutors in the nearest days. This Council's decision is currently the missing piece of well going setting-up phase.

Once the European Prosecutors will be appointed, the next chapter of setting-up process at the central level will start, as the College of the EPPO will be functional and able to appoint the European Delegated Prosecutors and the Administrative Director of the EPPO. The important issue will be adaptation of the internal rules of procedure of the EPPO. The Commission service has started the discussion about internal rules of the EPPO and

[40] European Commission, Directorate-General Justice and Consumers, The European Anti-Fraud Office. Agenda: Meetings of the EPPO Expert Group.

[41] Art. 14 paragraph 3 of the EPPO Regulation

[42] Ibid.

[43] Art. 16 paragraph 2 of the EPPO Regulation

[44] Council Decision (EU) 2018/1275 of 18 September 2018 appointing the members of the selection panel provided for in Article 14 (3) of Regulation (EU) 2017/1939.

[45] The operating rules of the Selection panel were established by Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14 (3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

[46] Decision 2019/1798 of the European Parliament and the Council of 14 October 2019 appointing the European Chief Prosecutor of the European Public Prosecutor's Office.

prepared its draft. This draft of EPPO's internal rules of procedure was presented and discussed by the EPPO Expert Group few times, last on October 2019.[47] The internal rules of procedure of the EPPO shall be adopted by the College on a proposal of the European Chief Prosecutor once the EPPO has been set-up.[48]

For the EPPO to become functional at the end of year 2020 is also necessary that all Member States participating in this enhanced cooperation and their national authorities has started to fulfil obligations steaming from the EU law, mainly form the EPPO Regulation and PIF Directive. National authorities have to respect the EPPO's independence, ensure necessary cooperation and ensure for the European Prosecutors and the European Delegated Prosecutors needed competences and powers to carry out investigations and prosecutions under the EPPO Regulation.

6 CONCLUSION

In actual phase of setting – up process of the European Public Prosecutor's Office, it seems very likely, that the EPPO will become functional at the end of this year (2020) on the basis of the Commission decision. From the constitutional point of view is seems, that the EPPO have all preconditions to be an effective tool to fight against crimes affecting the financial interests of the European Union. The EPPO as the first Union body is empowered to carry out cross border criminal investigations and prosecutions against crimes affecting the financial interests of the EU, mainly the Union budget, including fraud, corruption, money laundering and serious VAT carrousels, and will bring more consistency and coherence into these investigations and prosecutions. The EPPO offers added value because, due to its direct power of investigation and prosecution, it will likely increase the number of prosecutions of criminal offences affecting the financial interests of the Union, increase the deterrent effect for potential perpetrators and solve the problems related to different applicable criminal rules.[49] As the new Union body, the European Public Prosecutor's Office will, without doubt, face challenges and will have to find its place in the existing judicial landscape of the EU.

Bibliography:

CONINSX, M.: The European Commission's Legislative Proposal: An Overview of Its Main Characteristics. In ERKELENS, L.H.–MEIJ, A.W.H.–PAWLIK, M. (eds.): The European Public Prosecutor's Office. An extended Arm or a Two-Headed Dragon? Haque: Asser Press, 2015. pp. 21 – 28. ISBN 978-94-6265-034-3.

CSONKA,P. – JUSZCZAK, A. – SASON, E.: The establishment of the European Public Prosecutor's Office. The Road from Vision to Reality. In: EUCRIM, 2017, issue 3. pp. 125 – 135. DOI: https://doi.org/10.30709/eucrim-2017-012.

CIUFFRIDA, F.: The European Public Prosecutor's Office: King without Kingdom? Research Report. Thinking ahead for Europe. February 2017, no.2017/03. 47p. Online: https://www.ceps.eu/system/files/RR2017-03_EPPO.pdf

LIGETI, K.-WEYEMBERG, A.: The European Public Prosecutor's Office: Certain Constitutional Issues. In The European Public Prosecutor's Office. An extended Arm or a Two-Headed Dragon? Haque: Asser Press, 2015. pp. 51 – 78. ISBN 978-94-6265-034-3.

[47] Agenda: Meeting of the EPPO Expert Group, 14 October 2019. Point 4: Internal Rules of Procedure of the EPPO – presentation by the Commission of the revised version and discussion with a particular emphasis on language arrangements, selection of European Deputy Chief Prosecutors etc.

[48] Art. 21 paragraph 2 of the EPPO

[49] MAESA, C.D.F.: Repercussions of the Establishment of the EPPO via Enhanced Cooperation. P. 156.

MAESA, C.D.F.: Repercussions of the Establishment of the EPPO via Enhanced Cooperation. In: EUCRIM, 2017, issue 3. pp. 156 – 160. DOI: https://doi.org/10.30709/eucrim-2017-016 .
RAFARACI, T.: Brief Notes on the European Public Prosecutor's Office: Ideas, Project and Fulfilment. In RAFACI, T – BELFIORE, R.: EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public. Springer, 2019. . pp. 157 – 163. ISBN 978-3-319-97318-0.
TROŠIĆ, S.J. – KOSTIĆ, J.: Establishing the European Public Prosecutor's Office and Suppression of the Criminal Offences Against the EU Financial Interests. In: EU and Comparative Law Issues and Challenges Series (ECLIC): EU and Member States – Legal and Economic Issues [online]. Osijek: Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2019, vol. 3. ISSN 2459-9425. pp. 684 – 704. DOI: https://doi.org/10.25234/eclic/9026
WEYEMBERGH, A. – BRIERE, Ch.: Towards a European Public Prosecutor's Office (EPPO). Study for the Libe Committee. European Union: Directorate general for Internal Policies of the Union, Policy Department for Citizen's Rights and Constitutional Affairs, European Criminal Law Academic Network (ECLAN), Université Libre de Bruxelles, 2016. 57p. ISBN 978-92-846-0332-9. DOI: 10.2861/874675 (https://op.europa.eu/publication/doi/10.2861/874675)

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.
Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law.
Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office. COM (2013) 534 final – 2013/0255 (APP).
Regulation (EU, EURATOM) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.
Regulation (EU) 2018/1727 of the European Parliament and of the Council of 114 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA.
Decision 2019/1798 of the European Parliament and the Council of 14 October 2019 appointing the European Chief Prosecutor of the European Public Prosecutor's Office.
Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14 (3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.
European Commission, Directorate-General Justice and Consumers, The European Anti-Fraud Office. Agenda: Meetings of the EPPO Expert Group.

JURISDICTION UNDER THE RECENT DEVELOPMENTS OF JURISPRUDENCE ON RULE OF LAW AND JUDICIAL INDEPENDENCE / Adam Máčaj

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The paper was prepared within project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context".

Abstract: *This paper aims to analyze the impact of recent jurisprudence of the Court of Justice of the European Union on Member States of the EU. In particular, it focuses on the impact of recent preliminary rulings dealing with rule of law and independence of the judiciary. Apart from addressing the judicial independence itself, various related consequences and conclusions can be inferred from the reasonings of Court of Justice. The current case-law in this area signals various routes for future development, and the potential ramifications for organization of judiciary require further consideration. Interestingly, these implications may weigh heavily on the jurisdiction of courts in Member States, a matter that may, among other problems, bring further complications to the protection of rule of law itself.*

Key words: *rule of law, judicial independence, Court of Justice of the European Union, preliminary rulings, jurisdiction*

1 INTRODUCTION

Present attacks on the rule of law are persistent problem in certain Member States of the EU. One of many such threats concern judicial systems and pressure put on them by the executive, and accordingly threat to the protection of judicial independence. Such actions and attempts destabilizing judiciary are a well-recognized threat not only to rule of law, but also human rights of individuals, EU law, its principles and values, and legal order of the EU as a whole.

The aim of this article is not only to assess the actions taken to combat the situation and their results, but more specifically challenges arising from the current attacks on judicial independence in Poland. The European Commission is attempting to tackle the situation through infringement proceedings, however impetus to remedy the problems stems also from Member State courts, utilizing preliminary reference procedures. The question assessed further is therefore what place does preliminary reference have in protection of rule of law, what benefits does it bring, but also whether specificities of preliminary ruling procedure pose risks to the overall system of rule of law protection in the EU.

2 RULE OF LAW, JUDICIAL INDEPENDENCE, AND EUROPEAN UNION

Rule of law itself in European legal culture can hardly be assessed in isolation from a plethora of legal principles forming foundations of modern law itself. It has been in fact acknowledged that in German legal system alone, rule of law (*Rechtsstaat*) is formed of principles that total over 140 distinct legal concepts.[1] Among those, various aspects and components of rule of law are intertwined with judiciary and court proceedings, such as requirement of effective remedies before courts that decide disputes between parties, treating them on an equal basis, in a manner that is not arbitrary.[2] The requirement of such

[1] European Commission for Democracy through Law. The Rule of Law in European Jurisprudence, p. 3.
[2] DICEY, A. V.: Introduction to the Study of the Law of the Constitution, pp. 110-117.

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courts being independent and impartial, therefore capable of delivering a fair trial, has been similarly identified as one of these facets incorporated within the rule of law.[3]

The rule of law, and independence of judiciary in particular as its component part, are simultaneously well-recognized guarantees of human rights. Absence of rule of law has been established as a significant violation of human rights of individuals themselves.[4] European Court of Human Rights (ECtHR) found rule of law to be a concept exceeding rhetorical appeals in the text of the European Convention on Human Rights (ECHR), but in fact ascribed rule of law an interpretive value when establishing precise content of human rights.[5]

At the same time, the Council of Europe (CoE) identified rule of law components by referring to the very jurisprudence of the ECtHR directly, establishing state obligations under human rights convention stemming from it as aspects directly determinative as to the content of rule of law itself.[6] The ECtHR view on the rule of law as interpretive guidance as to the content of human rights is then apparently turned around according to the position of the Committee of Ministers. On the contrary, it incorporates *precisely* obligations under human rights provisions, established in jurisprudence, as vital elements of the rule of law itself. In a certain sense, it can be questionable then that the ECtHR invokes rule of law as a lens through which its determination of human rights obligations should take place, if other CoE bodies derive the content of rule of law from jurisprudence of the very same ECtHR. It might seem, in substance, that human rights and rule of law are then identical concepts according to CoE interpretation, both confined to interpretation placed at the hands of ECtHR. While compliance with international human rights norms is certainly an important aim or component of rule of law,[7] it certainly should not be viewed purely as mutually dependent, or even identical notions.

Rule of law is similarly recognized as vital even in the EU law, the current normative recognition and embodiment of it being the Treaty on the European Union (TEU), referring to rule of law as one of a plethora of EU values.[8] The value is repeatedly referenced, in isolation or combined with others, throughout the founding treaties, as well as Charter of Fundamental Rights of the European Union (Charter).[9] Much like international law and legal doctrine, EU law similarly places great importance and strong link on the rule of law in relation to protection of fundamental rights, referring to both in an inseparable manner throughout the primary law.

Importance of such principles, and protection of human rights in particular, has been however recognized long before such norms were implemented *expressis verbis*, and due to jurisprudence of the Court of Justice of the European Union (CJEU), such obligations were incumbent on the EU even in the absence of primary law framework.[10] The value of rule of law was also recognized by the CJEU, much like protection of human rights, as

[3] RAWLS, J.: A Theory of Justice. Revised Edition, pp. 208-210.
[4] World Conference on Human Rights. Vienna Declaration and Programme of Action, ch. I, para. 30.
[5] European Court of Human Rights. Golder v. the United Kingdom, para. 34.
[6] See, for example: Council of Europe Committee of Ministers. The Council of Europe and the Rule of Law – An Overview, paras. 48-58.
[7] United Nations. The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies. Report of the Secretary-General, para. 6.
[8] Treaty on European Union, Art. 2.
[9] Charter of Fundamental Rights of the European Union, preamble.
[10] SCHIMMELFENNIG, F.: Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union, In: Journal of European Public Policy, Vol. 13(8), 2006, p. 1247.

cornerstone of the EU.[11] Finally, the CJEU jurisprudence followed impetus on international level and similarly acknowledged the inherent link between rule of law and human rights.[12]

In the context of EU law, the CJEU referred in particular to other international instruments and human rights treaties to delimit the protection of human rights and rule of law obligations. Such special importance was attributed namely to the ECHR in particular,[13] which has been later established as a human rights treaty that establishes minimum scope of human rights protection guaranteed under the EU law.[14]

In this regard, the question then remains whether the reference to human rights and the ECHR implies also that EU is to follow the relationship between rule of law and human rights as viewed by the ECtHR, or more notoriously other CoE bodies. The risk of such approach is possible development under which only human rights bodies or jurisprudence is regarded as developing the notions associated not only human rights, but also the rule of law. Such approach could weigh heavily on organizations that are not focused exclusively on human rights. Their developments on the field of rule of law would be confined to adhering to jurisprudence or standards of other organizations, dealing with human rights-oriented matters only. Consequently, the potential for progress in the field of rule of law may remain undeveloped or underdeveloped.

Overall then, the problem in defining rule of law more precisely leads to many international organizations approaching the problem through the prism of obligations stemming from it, and securing their fulfilment, instead of attempts to define the term itself. One of such obligations is the requirement of judicial independence, a particular aspect of human right to a fair trial, which is in turn recognized as central to the requirements of rule of law, under the doctrine of separation of powers.[15] The protection of such judicial independence presupposes many guarantees, *inter alia* that judicial selection shall safeguard against judicial appointments for improper motives,[16] judges have security of tenure guaranteed by the law.[17]

3 RECENT CHALLENGES TO THE RULE OF LAW AND RESPONSE OF THE UNION

Faced with a variety of recent interferences with judicial independence, the European Commission acknowledged that many mechanisms are required to be taken into consideration when taking countermeasures against such attacks. Apart from other options, the Commission highlights judicial proceedings before the CJEU as such a countermeasure purported to halt violations of judicial independence in Member States of the EU. In particular, apart from infringement proceedings under Art. 258 *et seq.* of the TFEU, preliminary rulings pose an additional possibility for the CJEU to get involved in the pertinent disputes. The Commission recognized increasing value such rulings may bring for the development of rule of law enforcement in the European Union.[18]

The rising importance of these judicial proceedings were presented as an important step to be undertaken as a preventive measure before launching the so-called nuclear

[11] Court of Justice of the European Union, Parti écologiste "Les Verts" v European Parliament, § 23.
[12] Court of Justice of the European Union, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, § 17.
[13] Court of Justice of the European Union, ERT, § 41.
[14] Charter of Fundamental Rights of the European Union, art. 52(3).
[15] SCHABAS, W.A.: The European Convention on Human Rights. A Commentary. p. 294.
[16] United Nations. Basic Principles on the Independence of the Judiciary, principle 10.
[17] Ibid, principle 11.
[18] European Commission. Further strengthening the Rule of Law within the Union. State of play and possible next steps, pp. 2-6.

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option of a procedure via Art. 7 of the TEU. Interestingly enough however, in the case of Poland, the judicial proceedings with such preventive aspect were initiated only after Art. 7 procedure was already underway.[19] While the objective of making such procedure an act *ultima ratio* is therefore apparent, the practice in those very few cases where Art. 7 of the TEU was triggered does not suggest such judicial proceedings were condition precedent to its triggering. Accordingly, the view that procedure under Art. 7 is subsidiary to less sensitive and damning measures is not properly supported by actual practice of the EU institutions.

Moreover, the EFTA Surveillance Authority (EFTA SA) participated in the preliminary ruling procedure that is the subject-matter of this article, concerning disciplinary regime of judges in Poland.[20] It used power to submit written submissions before the CJEU in preliminary ruling on the basis of CJEU Statute[21] to supplements opinion of the Commission on the matter. It did so in spite of the fact that neither EFTA nor the EEA refer to rule of law explicitly in their constitutive treaties. It is apparent then that position of the EFTA SA strongly inclines towards such rule of law guarantees and is willing to actively promote them even when its duties are not strictly delimited and its powers are only discretionary, such as in the case of A. K. and others, which is the specific object of this research, as it deals not only with the rule of law and judicial independence, but also the third limb of this article, namely the jurisdiction.

A. K. and others was a CJEU Grand Chamber judgement rendered on 19.11.2019 concerning judicial reforms in Poland and lowering the retirement age more broadly, but that was merely broader legal context which gave rise to particular question concerning independence of the judiciary. The cases related to employment disputes resulting from lowering of the said retirement age were heard by the Labour and Social Insurance Chamber, since the Disciplinary Chamber had not yet been formed.[22] Therefore, an opportunity arose for this chamber to question the independence of the chamber that in fact should have ruled on the cases themselves. The question was therefore referred before the CJEU, in which the referring court questioned the nominating process of judges of the Disciplinary Chamber, which was entirely at the hands of National Council of the Judiciary, whose members verbally attacked judges which cooperated with the EU, or appointed members and nominees of the executive into the Disciplinary Chamber, or candidates that did not satisfy the statutory criteria.[23] CJEU seized the dispute on the grounds of age discrimination, due to lowering the retirement age, a matter resolved under Art. 258 of the TFEU several months before ruling on the matter of Disciplinary Chamber,[24] referred by the Polish judges. Through creativity of the referring court, the CJEU was called upon this time to assess "procedural" part of ongoing interference with judicial independence in Poland – the independence of Disciplinary Chamber – instead of the retirement age itself.

The judgment recognized that in cases of age discrimination, EU law provides right to an effective remedy, which encompasses independence of body dealing with legal challenges to such discrimination.[25] It then reiterated that particular application of these principles stemming from EU law rests with the referring courts.[26] At the same time, CJEU

[19] European Commission. Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control.
[20] Court of Justice of the European Union. A. K., CP and DO.
[21] Protocol (No 3) on the Statute of the Court of Justice of the European Union, art. 23(3).
[22] Court of Justice of the European Union. A. K., CP and DO, para. 39.
[23] Ibid, paras. 44-45.
[24] Court of Justice of the European Union. Commission v. Poland (Indépendance de la Cour suprême).
[25] Court of Justice of the European Union. A. K., CP and DO, paras. 115-119.
[26] Ibid, para. 132.

nevertheless provided rather detailed assessment of particular situation in Poland, as well as analysis of principles established by the ECtHR regarding judicial independence.[27]

Finally, central to the issue of jurisdiction at hand, the CJEU recalled several circumstances of the Disciplinary Chamber's creation, namely the issue of exclusive jurisdiction, lowering of the retirement age, and limitation of appointment to judges newly appointed and not those already serving. Taken in conjunction, the CJEU indicated it is open to possibility of regarding the Disciplinary Chamber as not independent.[28] Finally, drawing on the well-established case-law, the CJEU established that should the referring court regard this non-independence as present, it had to disapply provisions reserving exclusive jurisdiction for employment disputes for such body.

4 IMPLICATIONS OF THE CJEU JURISPRUDENCE FOR JURISDICTION UNDER NATIONAL LAW

The judgment in case of A. K. and others is heavily inspired by jurisprudence of the ECtHR in determining the criteria for a court to be independent. In this regard, it is obvious emphasis placed by the CJEU on an interplay between rule of law and protection of human rights, as was already indicated above. On the other hand, it is notable that CJEU did not merely refer to independence as a principle which the Polish court is required to apply, in accordance with ECHR and EU law. Instead, it provided a detailed, even meticulous, summary of very specific circumstances and factors that weigh heavily on such determination. It will be interesting to assess to what extent will the A. K. and others decision later influence the conclusions and reasoning of the CJEU in the infringement proceedings[29] similarly concerning the new disciplinary regime in Poland.

Finally, regarding the issue of jurisdiction, there is an abundant jurisprudence concerning obligation of national courts to disapply provisions contrary to EU law. Initially, the principle was referring to setting aside provisions in the area of internal market that conflicted with EU law.[30] Since then, progress of the EU in protecting rule of law and fundamental rights has been significant, as described above, not least of all by adopting the Charter. Accordingly, such obligation now applies to provisions conflicting with the most fundamental principles related to organization of judiciary, and as CJEU pointed out in relation to Disciplinary Chamber in Poland, even provisions establishing exclusive jurisdiction for specific subject-matter of disputes. In such cases, the jurisdiction should therefore remain with the general courts where additional circumstances, outlined above, indicate doubts as to the independence of such specialized body. Certain implications may then arise for quasi-judicial bodies created in order to allow for specialization or technical expertise of the authorities ruling on cases. Often, these bodies have a single chamber, sitting in full composition, unlike the Polish Supreme Court, in which two entirely different chambers were directly involved. These specialized bodies, contrary to courts of general or exclusive jurisdiction, have also very few members, all of which may be appointed by the executive, e. g. like Council of Public Procurement in Slovakia.[31] In this setting, it is naturally impossible to appoint members of such body from one chamber into other, as suggested by the CJEU with the Disciplinary Chamber. Any appointed member will be a new person sitting in the body that has exclusive jurisdiction over certain disputes. Applying reasoning

[27] Ibid, paras. 133-146.
[28] Ibid, paras. 147-153.
[29] Court of Justice of the European Union. Commission v. Poland. C-791/19.
[30] See, e. g. Court of Justice of the European Union. Amministrazione delle Finanze dello Stato v Simmenthal SpA.
[31] Act no. 343/2015 Coll. on public procurement, art. 143.

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of the CJEU in the A. K. and others on these cases may therefore in the future well result in findings that certain members, or bodies of this quasi-judicial nature, are not independent to hear cases within their respective jurisdiction.

However, such finding would mean at the same time, under the A. K. and others, that the technical issues reserved to exclusive jurisdiction could be in principle heard by any court of general jurisdiction, provided a case is brought before it and parties raise question of such independence (or general courts raise it of their own motion). In such situation, being bound by the obligation articulated in Simmenthal and many other judgments, once the court finds that the quasi-judicial body does not guarantee independence of its members, the general courts would be obliged to set aside the provisions on exclusive jurisdiction and rule on the subject-matter of the dispute which the courts may be ill-equipped to deal with.

On the other hand, and perhaps even more pertinent to the current attacks on rule of law, this situation may become also source of potential abuse and further attacks on judiciary in member states. Should the situation in Poland be turned upside down and executive-controlled or influenced chambers with general jurisdiction, the judgment A. K. and others, seeking to protect rule of law and judicial independence, may well become its newest threat. Such general courts controlled by government, or acting with other ulterior motives, might question the independence of such specialized body (albeit arbitrarily, if need be) and use it to assert jurisdiction and undermine bodies which are specialized in nature. Potentially, the existing jurisprudence could therefore be abused to undermine independent courts, even though the purpose and ruling in the A. K. and others judgment combats precisely such interferences through *prima facie* essential obligation to disapply provisions challenging such independence.

5 CONCLUSIONS

Rule of law, protection of human rights, and intersecting necessity of judicial independence are all well recognized fundamental requirements for any legal order, including EU law. It is a welcome development that not only EU institutions or international organizations are dedicated to its protection, but even courts themselves threatened are attempting to protect interferences with their own independence.

On the other hand, the results seem insufficient so far to eliminate broader threat to rule of law. Indeed, it seems that the obligation to set aside national law conferring jurisdiction to non-independent court cannot be effectively challenged nationwide merely by setting aside the national law. In Poland, the Disciplinary Chamber therefore nevertheless operates alongside with the rest of Supreme Court, it is itself acting much like one would expect of a court influenced by politics. For example, to hamper implementation of the A.K. and others judgment, the Disciplinary Chamber sought Constitutional Tribunal of Poland to intervene and prohibit other chambers of the Supreme Court from ruling whether appointment of new judges at the Supreme Court is lawful.[32] At the same time, the legislature made a move to penalize any judge questioning legitimacy of his or her colleagues, once they have been appointed by president of Poland.[33] The question then remains whether in the foreseeable future such politicized courts shall exploit the possibility to set aside national laws on jurisdiction the same way. In such cases, they could provide

[32] ZONTEK, W.: You Can't Forbid Judges to Think.

[33] European Commission for Democracy through Law, Directorate General of Human Rights and Rule of Law of the Council of Europe. Joint Urgent Opinion on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and Some Other Laws, para. 19.

bogus references to their obligations stemming from EU law in order to circumvent other courts that are not yet controlled or threatened by other branches of government. Therefore, the greatest weapon currently placed at the disposal of Polish courts – panic button in the form of ignoring Disciplinary Chamber's jurisdiction – could well turn against the very same courts in the future, to the detriment of rule of law once again.

Bibliography:

International treaties, European and national law

Treaty on European Union (consolidated version), 26.10.2012, OJ C 326, p. 13-390.
Treaty on the Functioning of the European Union (consolidated version), 26.10.2012, OJ C 326, p. 47-390.
Charter of Fundamental Rights of the European Union, 26.10.2012, OJ C 326, p. 391-407.
Protocol (No 3) on the Statute of the Court of Justice of the European Union, 7.6.2016, OJ C 202, p. 210-229.
Act no. 343/2015 Coll. on public procurement (Slovakia).

Academic literature

DICEY, A. V.: Introduction to the Study of the Law of the Constitution. 8th edition. Indianapolis: Liberty Classics, 1982, 435 p. ISBN 0-86597-002-5.
RAWLS, J.: A Theory of Justice. Revised Edition. Cambridge: Harvard University Press, 1999, 538 p. ISBN 0-674-00078-1.
SCHABAS, W.A.: The European Convention on Human Rights. A Commentary. Oxford: Oxford University Press, 2015, 1308 p. ISBN 978-0-19-959406-1.
SCHIMMELFENNIG, F.: Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union. In: Journal of European Public Policy, Vol. 13(8), 2006, p. 1247-1264.

Online sources

ZONTEK, W.: You Can't Forbid Judges to Think. 5.2.2020. Verfassungsblog, available online, URL: https://verfassungsblog.de/you-cant-forbid-judges-to-think/?fbclid=IwAR2Pjdf0Kw7nx8vRFlC2dp4xBCTjXju45LzugJ0bBb1_HkOrJNXmlZbat9k (accessed 26.2.2020).

International organizations

Council of Europe Committee of Ministers. The Council of Europe and the Rule of Law – An Overview, 2008, CM(2008)170.
European Commission. Further strengthening the Rule of Law within the Union. State of play and possible next steps, 2019, COM(2019) 163 final.
European Commission. Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control, press release, 10.10.2019, available online, URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6033 (last access 10.12.2019).
European Commission for Democracy through Law. The Rule of Law in European Jurisprudence. 2009, CDL-DEM(2009)006.
European Commission for Democracy through Law, Directorate General of Human Rights and Rule of Law of the Council of Europe. Joint Urgent Opinion on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and Some Other Laws. 2020, CDL-PI(2020)002.

ISBN 978-80-7160-573-7

United Nations. The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies. Report of the Secretary-General. 2004, UN Doc. S/2004/616.
United Nations. Basic Principles on the Independence of the Judiciary. 1985, G. A. Res. 40/32.
World Conference on Human Rights. Vienna Declaration and Programme of Action. 1993.

International and European case-law

Court of Justice of the European Union. Amministrazione delle Finanze dello Stato v Simmenthal SpA, judgment of 9.3.1978 case no. 106/77.
Court of Justice of the European Union. Parti écologiste "Les Verts" v European Parliament, judgment of 23.4.1986, case no. 294/83.
Court of Justice of the European Union. Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, judgment of 13.7.1989, case no. 5/88.
Court of Justice of the European Union. Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT), judgment of 18.6.1991, case no. C-260/89.
Court of Justice of the European Union. Commission v. Poland (Indépendance de la Cour suprême), judgment of 24 June 2019, case no. C-619/18
Court of Justice of the European Union. A. K., CP and DO, judgment of 19.11.2019, joined cases no. C-585/18, C-624/18 a C-625/18.
Court of Justice of the European Union. Commission v. Poland, case no. C-791/19.
European Court of Human Rights. Golder v. the United Kingdom, judgment of 21 February 1975, app. no. 4451/70.

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